INTRODUCTION

It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention, in an essentially political contest be dressed up in the abstract phrases of the law.1

Article one, Section four of the United States Constitution gives states the responsibility of fashioning their own voting districts.2 The United States Supreme Court has consistently recognized this right of the states while at the same time drawing federal courts into the process.3 In Upham v. Seamon,4 the Supreme Court held that district courts are not free to disregard the political program of state legislatures when fashioning reapportionment plans.5 Since Upham, courts have had to determine which circumstances require legislative deference.6

In Abrams v. Johnson,7 the United States Supreme Court considered the validity of a court drawn reapportionment plan.8 The Court in Abrams upheld a court drawn redistricting plan which contained one majority-minority district.9 The Georgia Legislature, with the assistance of the Department of Justice, had attempted to redistrict by creating two majority black districts.10 The Supreme Court recognized that a court faced with redistricting should follow the policies of the state legislature.11 The Court also held that Upham did not require a redistricting court to look to state legislative policy when the policy is based on an "overriding concern with race."12

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3. See infra notes 120-278 and accompanying text.
10. Id. at 1935.
11. Id. at 1933.
12. Id. at 1934. The Court stated that "[i]t is not Justice Department interference per se that is the concern, but rather the fact that Justice Department pressure led the State to act based on an overriding concern with race." Id.
This Note will first carefully scrutinize the Supreme Court's holding in *Abrams*. Next, this Note will examine previous decisions of the Supreme Court concerning legislative redistricting policies. Finally, this Note will criticize the Court in *Abrams* for (1) invading the political province of state legislatures, (2) eviscerating Department of Justice approval in reapportionment cases, (3) applying strict scrutiny and, therefore, negating the use of race as a factor in reapportionment, and (4) creating legislative confusion in the area of reapportionment.

FACTS AND HOLDING

Due to Georgia's discriminatory history and in order to secure minority access to voting institutions Congress, in 1965, declared Georgia a covered jurisdiction under the Voting Rights Act of 1965 ("VRA"). A covered jurisdiction under VRA must obtain either administrative preclearance from the Attorney General or approval by the United States District Court for the District of Columbia of any alteration in voting process made after November 1, 1964. Preclearance is required when congressional redistricting plans are created. The requirement for obtaining preclearance is that the planned change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."

The 1990 Census revealed that Georgia was entitled to an additional United States congressional district. Due to the addition of a district, Georgia began reformatting its congressional districts during

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13. See infra notes 16-119 and accompanying text.
14. See infra notes 136-278 and accompanying text.
15. See infra notes 279-422 and accompanying text.
   Whenever a State . . . shall enact or seek to administer any voting qualification or prerequisite voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State may institute an action in the United States District Court for the District of Columbia for a declaratory judgement that such qualification . . . does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . Provided, That[sic] such qualification . . . has been submitted . . . to the Attorney General."
the 1991 session of the Georgia General Assembly.\textsuperscript{21} In order to define the drafting process, the Georgia Senate and House adopted redistricting guidelines to aid the General Assembly.\textsuperscript{22} The guidelines included an allowance for submission of plans by third parties, the requirement of public hearings and a list of drafting criteria.\textsuperscript{23} One of the third party drafting plans submitted to the legislature in 1991 ("Max-Black Plan"), provided for three majority-minority districts; the Second, the Fifth, and the Eleventh.\textsuperscript{24} Majority-minority districts are "districts in which a majority of the population is a member of a specific minority group."\textsuperscript{25} The already existing congressional plan contained only one majority-minority district: the Fifth.\textsuperscript{26}

In October of 1991, the General Assembly submitted a congressional redistricting plan to the Attorney General of the United States through the Department of Justice ("DOJ") for preclearance.\textsuperscript{27} The plan provided for two majority-minority districts: the Fifth and the Eleventh.\textsuperscript{28} On January 21, 1992, the DOJ rejected the plan.\textsuperscript{29} The DOJ referred to versions of the Max-Black Plan, arguing that three majority-minority districts could be created.\textsuperscript{30} The letter from the DOJ expressed apprehension that legislative leadership was attempting to "limit black voting potential to two majority-minority districts."\textsuperscript{31} Although the submitted plan correctly exercised black voting potential in two districts, it did not account for minority concentrations in Southwest Georgia.\textsuperscript{32} The DOJ concluded that the two-district majority-minority plan "had the purpose or will have the effect of denying or abridging the right to vote on account of race."\textsuperscript{33}

On March 3, 1992, the General Assembly submitted another plan to the DOJ.\textsuperscript{34} This submission increased black voting strength consid-

\begin{itemize}
\item \textsuperscript{21} Miller, 864 F. Supp. at 1360.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id. (stating the drafting criteria included: "single-member districts only, equality of population among districts, contiguous geography, avoiding dilution of minority voting strength, following precinct lines where possible, and compliance with § 2 and § 5 of the VRA . . . ").
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Voinovich v. Quilter, 507 U.S. 146, 149 (1993).
\item \textsuperscript{26} Abrams, 117 S. Ct. at 1930.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} Miller, 864 F. Supp. at 1363. The Court stated that "the plan also provided for a third district, the Second, where blacks comprised an influential but sub-majority percentage of the voting age public." Id.  
\item \textsuperscript{29} Miller, 864 F. Supp. at 1363.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id. See also Miller v. Johnson, 515 U.S. 900 (1995) (stating "that the proposed plan did not 'recognize' certain minority populations by placing them in a majority black district").
\item \textsuperscript{32} Miller, 864 F. Supp. at 1364.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Id.
erably in districts Two, Five and Eleven. The plan still had only two majority-minority districts. The DOJ rejected the plan, stating that, although the voting strength of the Second District black population had been increased, the district remained no more than a sway district.

On April 2, 1992, the DOJ finally granted a letter of preclearance for the legislature's third plan. The accepted redistricting plan contained three majority-minority districts. The plan as a whole split twenty-six counties, including the city of Savannah. The Eleventh District itself covered 6784.2 square miles, split eight counties, and divided five municipalities. The densely populated areas were tied with sparsely populated areas by narrow land bridges.

Elections were held under the new plan on November 4, 1992. All three majority-minority districts elected black candidates. On January 13, 1994, five white voters from the Eleventh District sued various state officials alleging racial gerrymandering. A three-judge panel of the United States District Court for the Southern District of Georgia determined that the redistricting plan violated Equal Protection principles. The panel reasoned that the United States Supreme Court's holding in Shaw v. Reno rendered the Eleventh District invalid.

The district court interpreted Shaw as holding that whenever race is the overriding predominant force in the redistricting process, strict scrutiny is required. The court held that the plan did not sur-
vive strict scrutiny because, even though compliance with VRA is a compelling interest, VRA did not require three majority-minority districts. As required by statute, state officials appealed directly to the United States Supreme Court.

The United States Supreme Court held the Eleventh District as drawn was unconstitutional. Justice Anthony M. Kennedy, writing for the majority, reasoned that race was the overriding factor in drawing the Eleventh District. As a result, the Supreme Court viewed the redistricting plan under strict scrutiny. The Court explained that although there is a "significant state interest in eradicating the effects of past racial discrimination," Georgia was not attempting to remedy these effects in creating the Eleventh District. Rather, according to the Court, Georgia was attempting to satisfy the DOJ's preclearance requirements. The Court explained that a state does not have a compelling interest in satisfying whatever preclearance mandates the DOJ issues. The Supreme Court, therefore, remanded the case to the United States District Court for the Southern District of Georgia.

On remand, the district court faced redrawing the congressional districts. Due to the "contorted" shape of the Eleventh District, it was not probable that the district could be redrawn without effecting several of Georgia's other congressional districts. Additionally, at this time, the complaint was amended to challenge the Second District on grounds of racial gerrymandering. The district court held that the Second District was also improperly drawn.

The district court deferred to Georgia's legislature to draw a new plan. The legislature could not reach a decision. The court then drew its own plan which contained only one majority-minority dis-

50. Id. at 910.
51. Id. See also 42 U.S.C. § 1973 (b)(5) (1994) (stating that an appeal is to be taken directly to the United States Supreme Court).
52. Abrams, 117 S. Ct. at 1927.
53. Miller, 515 U.S. at 920.
54. Id.
55. Id. at 920 (citing Shaw v. Reno, 113 S. Ct. 2831 (1993)).
56. Id. at 921.
57. Id. at 922.
58. Id. at 909, 928.
60. Id.
61. Id.
63. Abrams, 117 S.Ct at 1929.
64. Id.
The 1996 general elections were held under it. Subsequent to the election, Abrams and several other black voters appealed to the United States Supreme Court arguing that the district court's redistricting plan did not adequately consider Georgia's black population.

On appeal, the Supreme Court affirmed the decision of the district court. Justice Anthony M. Kennedy, writing for the majority, held that the trial court acted within its discretion in determining that it could not fashion more than one majority black district without engaging in racial gerrymandering. The Court also held that the remedial plan did not violate the VRA. The Court based this conclusion on the fact that the black population was not adequately compact for a second majority-minority district. The Court decided that the plan did not violate Section five of the VRA because court ordered plans are not required to obtain preclearance. Finally, the Court held that the court ordered plan did not violate the one person-one vote guarantee of the Constitution. The district court's plan, according to the Court, had the lowest population deviation of any plan presented and, therefore, satisfied the de minimis variation requirement.

The Supreme Court held that, although as a rule courts faced with the task of drawing district lines should follow the policies of the state legislature, in this case, racial considerations tainted the 1991 plan. The Court noted that the Georgia legislature was forced by the DOJ to adopt an unconstitutional districting plan. The Court explained that a court's duty is not to follow unconstitutional plans, but rather, correct them. According to the Court, if the district court had used the precleared plan as a benchmark for remediying the plan, it would have validated the very plan that was to be avoided as uncon-
The Court then stated that because a large geographic area of Georgia was affected by the districting, the district court had acted appropriately by making substantial alterations to the existing plan.\(^7\)

The Court then addressed the effect of the DOJ's influence on the 1991 plan.\(^8\) The Court reasoned that although the 1991 plan, which contained two majority black districts, "was not perceived as a 'racial gerrymander'", the fact that the DOJ caused the State to base its reapportionment on an overriding concern with race was problematic.\(^9\) The Court held that a second majority-minority district could not be drawn without race predominating over traditional districting principles.\(^10\) Thus, the Court ruled that the district court acted within its discretion when it determined that it could not draw two majority-minority districts without engaging in racial gerrymandering.\(^11\)

The Court next set out the framework for establishing a VRA Section two claim against single member districts.\(^12\) The Court noted that under its prior holding in \textit{Thornburg v. Gingles},\(^13\) a plaintiff bringing an action under Section two of the VRA must show that (1) the minority group is large and concentrated enough to constitute a majority in a single member district, (2) that the minority group is "politically cohesive", and (3) that the majority vote is sufficient to block the minority's preferred candidate.\(^14\) Once a plaintiff has met the burden of proof, the court then determines whether minorities have not been provided an equal opportunity to take part in the political process based upon the totality of circumstances.\(^15\)

In \textit{Abrams}, the Court held that none of the \textit{Gingles} factors were satisfied.\(^16\) The Court held that the black population was not ade-

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\(^7\) \textit{Abrams}, 117 S. Ct. at 1933.
\(^8\) \textit{Id.}
\(^9\) \textit{Id.} at 1933-34.
\(^10\) \textit{Id.} at 1934 (citing Brief for Appellants, Miller v. Johnson, 515 U.S 900 (1994) (No. 94-631)).
\(^11\) \textit{Abrams}, 117 S. Ct. at 1934.
\(^12\) \textit{Id.} at 1935. The court stated "[i]nterference by the Justice Department, leading the state legislature to act based on an overriding concern with race, disturbed any sound basis to defer to the 1991 unprecleared plan." \textit{Id.}
\(^13\) \textit{Abrams}, 117 S. Ct. at 1935-36 (citing Growe v. Emison, 507 U.S. 25 (1993)). Section 2 of V.R.A. is violated when a political procedure leading to election in a state or political subdivision is unequally open to participation by members of a racial minority. \textit{Id.} at 1935. The Black voters in Abrams argued that the court ordered plan, containing only one majority black district, resulted in impermissible vote dilution of majority votes. \textit{Id.} at 1935.
\(^14\) 478 U.S. 30 (1986).
\(^15\) \textit{Abrams}, 117 S. Ct. at 1936 (quoting Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986)).
\(^16\) \textit{Id.} at 1936.
quately compact to warrant a second majority black district. The Court then reasoned that, due to the large degree of crossover voting in Georgia, there was no evidence of bloc voting present. The Court considered evidence of crossover voting when it concluded that the minority group was not politically cohesive.

The Court then held that the remedial plan did not violate Section five of the VRA. A Section five violation occurs when a covered jurisdiction fails to obtain preclearance from the DOJ or approval from the United States District Court for the District of Columbia. The Court reasoned that a decree of a district court is not of such a nature that it must be precleared. The Court explained that the exception for district court decrees applies to court created judicial plans fashioned without interference of the state legislature. In this case, the Court noted that the district court indisputably fashioned an independent plan.

Finally, the Court held that the district court’s plan did not violate the Constitutional guarantee of one person-one vote. Noting that the Constitution requires that congressional districts achieve population equality as much as feasible, the Court held that slight deviations are tolerable where there are exigent circumstances. The

89. Id. at 1936. See generally Johnson v. De Grandy, 512 U.S. 997, 1022 (1994) (holding that section 2 of the VRA does not require a state to create a district that is not sufficiently compact on predominately racial lines).
90. Abrams, 117 S. Ct. at 1936. The Court stated that “the average percentage of whites voting for black candidates across Georgia ranged from 22% to 38%, and the average percentage of blacks voting for white candidates ranged from 20% to 23%.” (citations omitted) Id. A multimember District is a large district which elects several representatives. Binny Miller, Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics and the Voting Rights Act, 102 YALE L.J. 105, 153 (1992).
92. Id. at 1939.
93. Id. at 1938 (citing 42 U.S.C. § 1973(c)).
94. Id.
95. Id.
96. Id. (citing McDaniel v. Sanchez, 452 U.S. 130, 148-52 (1981) (holding that “[t]he exception applies to judicial plans, devised by the court itself, not to plans submitted to the court by the legislature of a covered jurisdiction in response to a determination of unconstitutionality”).
97. Id. at 1939-40. One person, one vote is the imperative that equal legislation representation is given to all citizens of all places. Reynolds v. Sims, 377 U.S. 533, 568 (1963), reh’g denied, 379 U.S. 870 (1964). See also Gray v. Sanders, 372 U.S. 368, 379-80 (1963) (stating that “[o]nce the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in the geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.”).
Court reasoned that due to state policies and conditions the slight deviations in this case were justifiable.\textsuperscript{99} The Court based this conclusion on "Georgia's strong historical preference for not splitting counties outside the Atlanta area and for not splitting precincts . . . including maintaining core districts and communities of interest."\textsuperscript{100} The Court concluded that reapportionment is best accomplished by state legislatures which are more capable than the courts of fashioning legitimate districting policies.\textsuperscript{101}

Justice Stephen Breyer, joined by Justice John Paul Stevens, Justice David Souter and Justice Ruth Bader Ginsburg, dissented.\textsuperscript{102} The dissent argued that the majority "created a legal doctrine that will unreasonably restrict legislators' use of race," in redistricting plans even for the most antidiscriminatory purposes.\textsuperscript{103} The dissent also reasoned that the majority's doctrine would entangle the Court in an area of legislative responsibility.\textsuperscript{104}

The dissent asserted that the Georgia legislature made obvious its preference for a two majority-minority district plan.\textsuperscript{105} The district court was not free to disregard this preference if the two-district plan was constitutional.\textsuperscript{106} The dissent argued that Upham v. Seamon,\textsuperscript{107} which held that a court is not free to disregard legislative policies when involved in the task of reapportionment, should govern the present case.\textsuperscript{108} The dissent argued that the district court's conclusion that the Georgia legislature did not prefer a two majority-districting plan was wrong as a matter of fact and of law.\textsuperscript{109}

The dissent first noted that the pressure of the DOJ was not unusual and it probably reflected the DOJ's concern with Georgia's discriminatory history.\textsuperscript{110} The dissent explained that the majority was

\begin{itemize}
  \item \textsuperscript{99} Id. at 1939-40.
  \item \textsuperscript{100} Id. at 1940.
  \item \textsuperscript{101} Id. at 1941.
  \item \textsuperscript{102} Id. at 1943 (Breyer, J., dissenting).
  \item \textsuperscript{103} Id. at 1951 (Breyer, J., dissenting).
  \item \textsuperscript{104} Id. (Breyer, J., dissenting).
  \item \textsuperscript{105} Id. at 1943 (Breyer, J., dissenting).
  \item \textsuperscript{106} Id. (Breyer, J., dissenting).
  \item \textsuperscript{107} 456 U.S. 37 (1982).
  \item \textsuperscript{108} Abrams, 117 S. Ct. at 1943 (Breyer, J., dissenting).
  \item \textsuperscript{109} Id. at 1944 (Breyer, J., dissenting).
  \item \textsuperscript{110} Id. See Rogers v. Lodge, 458 U.S. 613, 622-623 (1982) (holding that the at-large electoral system in Burke County, Georgia was being maintained for the invidious purpose of diluting voting strength), reh'g denied, 459 U.S. 899 (1982); Busbee v. Smith, 549 F. Supp. 494, 499-500 (D.D.C. 1982) (holding that historical discrimination, overt racial statements, conscious minimization of black voting strength, and an absence of legitimate non racial reasons for adopting a congressional reapportionment plan which split a large and contiguous black population between districts mandated that Georgia's Reapportionment Act had a discriminatory purpose in violation of the Voting Rights Act.) aff'd, 459 U.S. 1166 (1983).
\end{itemize}
factualy wrong in ignoring that Georgia twice submitted a plan that contained two majority-minority districts, thus evincing a preference for such a reapportionment plan regardless of the DOJ's involvement. The dissent argued that the majority was legally wrong due to the fact that Upham requires a court to fashion a state's reapportionment plan by looking to the proposed plans of the state legislature. The dissent noted that the court is not entitled to examine political pressures that might have influenced legislatures in their decisions. The dissent stated that the political pressures are part of the legislative process and should therefore be denied consideration.

The dissent concluded by arguing that the majority's "predominant racial motive" test will prove to be impracticable. It argued that the test removes the redistricting authority from the legislatures to the courts and prevents the use of race as a political factor in redistricting. The dissent noted that the majority neglected to state the situations in which race is not a criterion. Due to this omission, the court will become increasingly entangled in redistricting, a task that inherently belongs to legislatures. The dissent predicted that the majority's test forbidding the overt use of race as a consideration will lead to significant litigation.

BACKGROUND

THE CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

Article one, Section four of the United States Constitution gives states the responsibility of fashioning their own voting districts.

Article one, Section four states "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations. . . ." This
The Voting Rights Act of 1965 is an example of Congress' ability to place qualifications on the states' right to determine voting practices and procedures. A long history of discrimination, present in many Southern States, led to the enactment of the Voting Rights Act of 1965. Georgia's first Constitution denied blacks the right to vote altogether. Georgia also employed various means in order to exclude large numbers of blacks from the voting process. Between 1970 and 1990, litigation alleging discriminatory voting processes resulted in apportionment changes in seventeen counties.

The Voting Rights Act of 1965 ("VRA") was enacted to supplement the Fifteenth Amendment by proscribing all tests and devices utilized as a voting prerequisite. Section two of VRA provides that a challenged practice is unlawful if it "results" in minority voters having "less opportunity than other members of the electorate to participate in the political process and to elect representative of their choice." Section two of VRA provides in part:

No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .

Section five of the VRA requires covered jurisdictions to submit any proposed change in voting practice to the Department of Justice ("DOJ") or the United States District Court for the District of Columbia for preclearance. The VRA thus requires a state such as Georgia to submit any proposed changes to the Department of Justice (DOJ) or the United States District Court for the District of Columbia for preclearance. The VRA thus requires a state such as Georgia to submit any proposed changes to the Department of Justice (DOJ) or the United States District Court for the District of Columbia for preclearance.
Georgia to submit any change in electoral practice or procedure to the DOJ for preclearance.\(^{132}\) Preclearance by the DOJ will only be granted if the proposed change does not result in a denial of the right to vote on account of race or color.\(^{133}\) When interpreting the VRA, the United States Supreme Court has had to compromise between the requirement that race not be a predominant factor in the redistricting process and preserving valid state objectives.\(^{134}\) The Court's handling of these factors is demonstrated by the evolution of case law concerning both reapportionment and the VRA.\(^{135}\)

**Reapportionment as a Political Issue**

Over thirty years before the enactment of the VRA, the Supreme Court recognized that it lacked jurisdiction over reapportionment issues.\(^{136}\) In *Wood v. Broom*,\(^{137}\) the United States Supreme Court held that where Congress has chosen not to reenact provisions of a reapportionment plan, the Court will not imply reenactment.\(^{138}\) In *Wood*, a voter brought suit against Mississippi State Officials in the United States District Court for the Southern District of Mississippi.\(^{139}\) The voter alleged that Mississippi's Redistricting Act of 1929 violated the Constitution and the Reapportionment Act of 1911.\(^{140}\) A three judge panel granted a permanent injunction holding that the new districts created by the Redistricting Act of 1929 failed to comply with the Reapportionment Act of 1911 by failing to provide for compact and contiguous districts.\(^{141}\)

State officials appealed to the United States Supreme Court as provided by statute.\(^{142}\) The Supreme Court reversed the district court's decision, holding that provisions of the Reapportionment Plan of 1911 that were not specifically carried over to the Reapportionment

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134. *Bush*, 116 S. Ct. at 1954. The Court states the factors as being: preserving neighborhood communities, following already existing political boundaries, and protecting incumbents. *Id.* at 1953-54.
135. *See infra* notes 136-278 and accompanying text.
137. 287 U.S. 1 (1932).
140. *Id.* at 4, 6. The Act of 1911 required reapportionment of congressional districts to be made with attention to compactness, contiguity, and equality in population. *Id.* at 6. The Act of 1929 omitted these requirements. *Id.*
141. *Wood*, 287 U.S. at 5. The court found specifically “that the new districts... were not composed of compact and contiguous territory, having as nearly as practicable the same number of inhabitants, and hence failed to comply with the mandatory requirements of section 3 of the [Reapportionment] Act of August 8, 1911.” *Id.*
Plan of 1929 no longer applied. The Court reasoned that, although there was no express repeal of the 1911 Act, the requirements expired of their own limitation. The Court stated that Congress' failure to pass the 1929 Act including the 1911 provision made clear that the omission was in fact deliberate. The Court later concluded that the Wood Court must have been compelled to enforce the will of Congress in redistricting matters.

The Supreme Court adhered to their respect of Congress' independent role in reapportionment when considering another challenge to the Reapportionment Act of 1929. In Colegrove v. Green, the United States Supreme Court held that where a wrong is suffered by a polity, federal courts may not intervene in the controversy. In Colegrove, Illinois voters brought suit against Illinois state officials in the United States District Court for the Northern District of Illinois alleging the Illinois law governing congressional districts was unconstitutional in violation of the Reapportionment Act of 1929. The voters asserted that, due to changes in population, the existing congressional districts lacked equality of population and territorial compactness. A three judge panel dismissed the complaint, reasoning that the matter was decided in Wood.

The voters appealed to the United States Supreme Court, which affirmed, holding that Wood controlled the case at hand. The Court restated the holding of Wood, reasoning that nothing had occurred subsequent to Wood that would lead to an overruling. The Court then went on to hold that the Federal Declaratory Judgement Act did not grant the Court competence to order an injunction in matters of a political nature. The Court reasoned that in essence, the voters were requesting that the federal courts overhaul the voting process of
The Court held that although there are evils that may exist in the current Illinois plan, Congress alone is vested with the authority for dealing with them. The Court concluded by noting that to sustain the action would penetrate deeply into the very essence of Congress.

The United States Supreme Court reiterated this holding when considering a Fourteenth Amendment challenge to Georgia's County Unit Vote System. In *South v. Peters*, the United States Supreme Court held that federal courts must not exercise jurisdiction over political issues. In *Peters*, Georgia voters brought suit against Georgia State Officials in the United States District Court for the Northern District of Georgia alleging that Georgia's County Unit Vote System unfairly discriminated against them in violation of the Fourteenth and Seventeenth Amendments. A three-judge panel dismissed the complaint. The voters appealed to the United States Supreme Court. The Supreme Court affirmed, holding that courts lack jurisdiction in cases in which they are asked to use their equity powers to resolve political issues.

While the Court adhered to this distancing philosophy for twenty years, the VRA forced courts to take a role in the political process of redistricting. In *Upham v. Seamon*, the United States Supreme Court held that district courts are not free to disregard the political program of state legislatures when fashioning reapportionment plans. In *Upham*, voters brought suit against the Governor of Texas in the United States District Court for the Eastern District of Texas alleging racial gerrymandering. A three-judge panel found for the voters after the DOJ refused to preclear the reapportionment

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156. Id. at 552.
157. Id. at 554. The Court stated that “[t]he short of it is that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to House determination whether States have fulfilled their responsibility.” Id.
158. Colegrove, 328 U.S. at 556. The Court stated that “[c]ourts ought not to enter this political thicket.” Id.
162. Id.
163. Id.
164. Id.
165. Id. (citing MacDougall v. Green, 335 U.S. 281 (1948); Colegrove v. Green, 328 U.S. 549 (1946); Wood v. Broom, 287 U.S. 1 (1932)).
plan finding it to be discriminatory in effect and purpose. The district court reasoned that the DOJ's objection made the plan unenforceable. The court then took submissions from the parties and refashioned the districts.

State officials appealed to the United States Supreme Court arguing that the district court erred in excluding the reapportionment preferences of the legislature when devising a plan. In a per curiam decision, the Supreme Court vacated the decision of the district court. The Court held that the district court was not at liberty to ignore the political program of the Texas State Legislature in the absence of a finding that the reapportionment plan was unconstitutional or in violation of the VRA. The Court reasoned that legislative reapportionment is primarily the job of state legislatures. According to the Court, judicial intervention is required only when a legislative reapportionment plan fails to meet constitutional requirements.

The Court declared that state policies should be honored by the district court as long as doing so does not detract from the United States Constitution. The Court recognized the difficulty district courts face when attempting to reconcile constitutional requirements and state policy goals. However, the Court reasoned that a district court, limiting modifications to that necessary to solve constitutional or VRA requirements, could reconcile these factors. Therefore, the Court held that courts must give deference to legislative policies when fashioning reapportionment plans.

The United States Supreme Court later considered the extent of deference owed by a federal court to a state court when both are con-

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170. Id. at 38, 40.
171. Id. at 38.
172. Id.
173. Id. at 40.
174. Id. at 38, 44.
175. Id. at 40-41. The Court noted that "in the absence of any finding of a constitutional or statutory violation with respect to those districts, a court must defer to the legislative judgments the plans reflect, even under circumstances in which a court order is required to effect an interim legislative apportionment plan." Id.
176. Upham, 456 U.S. at 41 (quoting White v. Weiser, 412 U.S. 783, 794-95 (1973)).
177. Id. at 41.
178. Id. at 41. The Court stated that "whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment." Id.
179. Upham, 456 U.S. at 41-43.
180. Id. at 43.
181. Id. at 40-41.
sidering reapportionment issues. In Growe v. Emison, the United States Supreme Court held that federal courts must defer to state courts' assessment of congressional reapportionment proceedings. In Growe, a group of Minnesota voters filed an action in Hennepin County District Court against the Minnesota Secretary of State and various state officials, claiming malapportionment of state congressional and legislative districts. The voters requested that the court declare the existing districts unlawful due to the significant change in population distribution revealed by the 1990 Census. The parties agreed that the challenged districts were now unconstitutional and a Special Redistricting Panel was formed.

While the suit in state court was pending, a second group of voters brought suit in the United States District Court for the District of Minnesota against the Minnesota Secretary of State challenging the congressional and legislative districts in the same manner. The federal court suit also included a claim that the legislative districts violated Section two of the VRA. The voters sought continuing federal jurisdiction over any reapportionment attempts by the state legislature, as well as declaratory relief.

During pendency of the suits, the Minnesota Legislature adopted a new legislative redistricting plan. The new legislative redistricting plan contained many errors for which the legislature prepared curative legislation, but the legislature recessed before acting upon the curative legislation. A three-judge panel of the district court granted the Secretary of State's motion to defer further proceedings until the Minnesota Legislature took action. The district court denied the Secretary's motion to grant the state court primary review.

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186. Growe, 507 U.S. at 27.
187. Id. at 27-28. The Panel was composed of a single appellate judge and two district court judges. Id. at 28.
188. Growe, 507 U.S. at 28-29.
189. Id. at 28.
190. Id.
191. Id. The Court noted that "[w]hile the federal and state actions were getting under way, the Minnesota legislature was holding public hearings on, and designing, new legislative districts." Id.
192. Growe, 507 U.S. at 28. The errors included incorrect compass directions, mistaken street names, nonbordering districts, and a few cases of double representation. Id.
over any legislative redistricting action or inaction.\textsuperscript{194} In the interim, the state court found the redistricting plan unconstitutional as a racial gerrymander and ordered parties to submit alternative plans.\textsuperscript{195}

The district court granted an injunction to stay all state court proceedings.\textsuperscript{196} The state court subsequently issued an order containing its legislative plan.\textsuperscript{197} The United States Supreme Court vacated the district court's injunction.\textsuperscript{198} The legislature reconvened and passed correction to their redistricting plan, but the Governor vetoed it.\textsuperscript{199} The district court then issued an order adopting its own districting plan and permanently enjoining state interference with implementation of the federal plan, finding that the state courts plan violated Section two of the VRA.\textsuperscript{200} The Secretary of State appealed the district court's decision to the United States Supreme Court.\textsuperscript{201}

The Supreme Court reversed the decision of the district court, holding that federal courts must defer deliberation of disputes where the state has itself begun to consider the highly political task.\textsuperscript{202} The Court reasoned that due to the constitutional mandate that leaves states with the primary responsibility for apportionment of legislative districts, a federal court may not obstruct or impede state action to perform its constitutional duty.\textsuperscript{203} The Court also held that in the absence of statistical data, the district court erred in concluding that vote dilution existed.\textsuperscript{204}

\begin{itemize}
  \item[194.] Id.
  \item[195.] Id.
  \item[196.] Id. at 30.
  \item[197.] Id. at 29.
  \item[198.] Id. at 30.
  \item[199.] Id.
  \item[200.] Id. at 31.
  \item[201.] Id.
  \item[202.] Id. at 32-33. The Court stated that "[f]ederal courts and state courts often find themselves exercising concurrent jurisdiction over the same subject matter, and when that happens a federal court generally need neither abdicate...nor defer to the state proceedings.... In rare circumstances, however, principles of federalism and comity dictate otherwise." Id. at 32.
  \item[203.] Growe, 507 U.S. at 34.
  \item[204.] Id. at 41-42. The Court then held that factors set forth in Thornburg v. Gingles apply to single member as well as multimember districting. Id. at 40. The Gingles factors require a plaintiff to prove three elements. Holder v. Hall, 512 U.S. 874, 880-81 (1994). First, that the minority group is geographically compact and sufficiently large to constitute a majority; second, that the group is politically cohesive; and third, the presence of white majority bloc voting. Growe, 507 U.S. at 40. The Court reasoned that multimember districting plans pose a greater threat to minority participation than single member districts. Id. Thus, it is illogical to require a greater threshold showing of vote dilution to single member district than to multimember districts. Id. The Court concluded that the district court erred when ignoring the Gingles factors. Id. at 42.
\end{itemize}
TEST FOR DETERMINING THE VALIDITY OF REAPPORTIONMENT PLANS

The Court, in *Thornburg v. Gingles*,\(^{205}\) attempted to clarify the factors necessary to prove a VRA violation.\(^{206}\) In *Gingles*, the Supreme Court held that a multimember districting plan violated the VRA where it was shown that a bloc voting majority will frequently defeat minority choice representatives.\(^{207}\) In *Gingles*, a legislative redistricting plan for North Carolina's State Senate and House of Representatives was enacted by the State's General Assembly.\(^{208}\) Several black registered voters brought suit against North Carolina State Officials challenging the redistricting plan on grounds of violating Section two of the VRA and the Fourteenth Amendment of the Constitution.\(^{209}\) Pending trial, Congress revised Section two of the VRA.\(^{210}\) The revision made clear that to show a violation of Section two, proof of discriminatory effect alone would suffice.\(^{211}\) A three-judge panel of the United States District Court for the Eastern District of North Carolina held that the redistricting scheme was in violation of Section two.\(^{212}\) The district court reasoned that the scheme resulted in black citizen vote dilution in all challenged districts.\(^{213}\)

North Carolina State Officials appealed the decision of the district court to the United States Supreme Court.\(^{214}\) The Supreme Court affirmed the district court's decision with respect to all but one district.\(^{215}\) The Court reasoned that a Section two violation must be assessed in terms of the impact of the disputed rule on minority electoral opportunities.\(^{216}\) The Court then noted that there are limitations

\(^{205}\) 478 U.S. 30 (1986).
\(^{207}\) *Gingles*, 478 U.S. at 48-49.
\(^{208}\) Id. at 34-35.
\(^{209}\) Id. at 35.
\(^{210}\) Id. 42 U.S.C. § 1973 (a)(b). The revised statute reads in pertinent part: (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . . (b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens. . . .
\(^{211}\) *Gingles*, 478 U.S. at 35-36.
\(^{212}\) Id. at 34, 38.
\(^{213}\) Id. at 38.
\(^{214}\) Id. at 42.
\(^{215}\) Id.
\(^{216}\) Id. at 44. The Court gave deference to the Senate Report in identifying the factors which typically may be relevant to § 2 claim: the history of voting related discrimination in the State or political subdivision; the extent to which
on the manner in which a Section two violation may be proven.\textsuperscript{217} First, plaintiffs must show that under the totality of circumstances, the electoral devices at issue fail to provide equal access to the electoral procedure.\textsuperscript{218} Second, the combination of professedly dilutive electoral devices and the insufficiency of proportional representation alone do not constitute a violation.\textsuperscript{219} Finally, plaintiffs must prove that racial bloc voting exists.\textsuperscript{220}

The Court held that when examining multimember districts for evidence of discrimination, the test is whether the bloc voting majority can frequently defeat candidates supported by politically cohesive, geographically insular minority groups.\textsuperscript{221} The Court then reasoned that the degree of racial bloc voting was severely notable in this situation.\textsuperscript{222} The bloc voting was so extreme that the results of all but two of the last fifty-three elections would have been different.\textsuperscript{223}

The fact that this voting practice extended over a period of time was greater evidence than a claim arising out of a single election.\textsuperscript{224} The Court found that black candidates were overwhelmingly supported by black voters in almost every election.\textsuperscript{225} The Court also found that white crossover voting was almost nonexistent.\textsuperscript{226} The Court reasoned the nonexistence of white crossover voting is enough to establish that the black voters were politically cohesive.\textsuperscript{227} The Court held that the sporadic success of some black candidates does not foreclose a Section two claim, because intermittent successes do not overcome a system that generally works to dilute minority votes.\textsuperscript{228} When there is sustained success, special circumstances must be evalu-
ated in determining whether a Section two violation is nonetheless present.229 The Court later applied the Gingles test to a case in which the very existence of majority-minority districts was challenged.230 In Voinovich v. Quilter,231 the United States Supreme Court held that Section two of VRA does not prohibit the creation of majority-minority districts.232 In Voinovich, Ohio’s apportionment board adopted an apportionment plan, which created several majority-minority districts.233 two Democratic members of the board brought suit against the Governor of Ohio in the United States District Court for the Northern District of Ohio.234 The Democratic members claimed that the plan violated Section two of VRA by packing black voters into districts where they would comprise a disproportionately large majority.235 A three judge panel of the district court found for the Democratic board members holding that Section two prohibits the creation of majority-minority districts unless it can be shown as necessary to rectify a Section two violation.236 The court reasoned that in order to justify creation of majority-minority district the board need demonstrate racial bloc voting, the inability of black voters to elect representatives of their choice, and the inability of blacks to elect representative of their choice over a prolonged period of time.237 The court held that the board had failed to justify the creation of majority-minority districts.238

The governor appealed to the United States Supreme Court.239 The Supreme Court reversed the judgement of the district court, holding that the mere existence of an electoral device is not a per se violation of Section two.240 The Court reasoned that Section two relates solely to the consequences of an apportionment plan.241 In order for a violation of Section two to exist, the apportionment plan must have the effect of denying a minority the chance to elect their chosen representative.242 The Court noted that in the present case, the district court made no finding as to the effect of the majority-minority district-
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ing plan. Instead, the district court determined that the majority-minority districting plan was per se invalid. According to the Court, this assumption regarding majority-minority districts has nothing to do with a Section two analysis.

The holding in Voinovich requires a court to examine the effects of a reapportionment plan, rather than merely making a facial evaluation. This holding, however, was essentially weakened by a holding occurring in the same Supreme Court session. In Shaw v. Reno, the United States Supreme Court held that a North Carolina redistricting plan was so irregular on its face that the only rational explanation lay in racial segregation for voting purposes. In Shaw, the North Carolina General Assembly enacted a reapportionment plan in response to the 1990 Census. The reapportionment plan contained only one majority-minority district. The General Assembly submitted the plan to the DOJ for preclearance. The DOJ objected to the plan, contending that the General Assembly could have fashioned a second majority-minority district. The General Assembly enacted a revised plan, which included a second majority-minority district. The DOJ did not object to the revised plan.

Voters in the contested district filed suit against the Attorney General and various North Carolina State Officials in the United States District Court for the Eastern District of North Carolina claiming that the redistricting plan violated the Equal Protection Clause of the Fourteenth Amendment. A three judge panel of the district court dismissed the complaint against all parties, holding that there was no constitutional violation. The district court reasoned that a majority-minority district has a discriminatory effect only when it acts

243. Id.
244. Id. The Court stated that “[t]he practice challenged here, the creation of majority-minority districts, does not invariably minimize or maximize minority voting strength. Instead, it can have either effect or neither.” Id. at 154.
246. Id.
249. Shaw, 509 U.S. at 642.
250. Id. at 633.
251. Id.
252. Id. at 634. The Court noted that “[f]orty of North Carolina’s one hundred counties are covered by §5 of the Voting Rights Act of 1965 which prohibits a jurisdiction subject to its provisions from implementing changes in a ‘standard, practice, or procedure with respect to voting’ without federal authorization...” Id.
253. Shaw, 509 U.S. at 635.
254. Id. at 635.
255. Id. at 636.
256. Id. at 637-38. Specifically, the voters alleged that the redistricting plan constituted a racial gerrymander. Id. at 636.
257. Shaw, 509 U.S. at 638.
to unfairly dilute white voting power.\textsuperscript{258} The district court held that North Carolina's purpose was to comply with the VRA, and the plan did not lead to statewide underepresentation of the white vote; therefore the majority-minority district did not violate the Equal Protection Clause.\textsuperscript{259}

The voters appealed to the United States Supreme Court.\textsuperscript{260} The Supreme Court reversed the decision of the district court dismissing the claim.\textsuperscript{261} The majority held that a valid Equal Protection claim existed where the legislation, though seemingly race neutral, can only be understood as an attempt to separate voters into race based districts without justification.\textsuperscript{262} The Court recognized that the states have a strong interest in complying with the VRA.\textsuperscript{263} However, when considering a challenge to the Fourteenth Amendment, courts must differentiate between what the law allows and what it requires.\textsuperscript{264} The Court concluded, stating that a reapportionment plan may satisfy the provisions of the VRA, but still be unconstitutional.\textsuperscript{265} The Court thus held that a court determining the validity of a reapportionment plan must consider both the constitutionality of the plan under the Fourteenth Amendment and compliance with the provisions of the VRA.\textsuperscript{266}

Three years later, in \textit{Bush v. Vera}\textsuperscript{267} the United States Supreme Court considered another Fourteenth Amendment challenge.\textsuperscript{268} In \textit{Bush}, Texas voters brought suit against Texas State Officials claiming that twenty-four of Texas' thirty newly formed districts violated the Fourteenth Amendment.\textsuperscript{269} The suit was brought before a three-judge panel in the United States District Court for the Southern District of Texas.\textsuperscript{270} A three judge panel of the district court found for the voters holding three of the districts to be unconstitutional as racial gerrymanders.\textsuperscript{271} The district court reasoned that strict scrutiny applied due to state subordination of traditional districting practices to predominately racial concerns.\textsuperscript{272} The district court explained that

\begin{itemize}
\item \textsuperscript{258} Id.
\item \textsuperscript{259} Id. at 638-39.
\item \textsuperscript{260} Id. at 636, 639.
\item \textsuperscript{261} Id. at 658.
\item \textsuperscript{262} Id. at 649.
\item \textsuperscript{263} Id. at 653-54.
\item \textsuperscript{264} Id. at 654.
\item \textsuperscript{265} Id.
\item \textsuperscript{266} Id. at 653-54.
\item \textsuperscript{267} 116 S. Ct. 1941 (1996).
\item \textsuperscript{268} Bush v. Vera, 116 S. Ct. 1941, 1951 (1996).
\item \textsuperscript{269} Bush, 116 S. Ct. at 1951.
\item \textsuperscript{270} Id.
\item \textsuperscript{271} Id.
\item \textsuperscript{272} Id. at 1951-52.
\end{itemize}
the racial classifications were not narrowly tailored to achieve a compelling governmental interest because the district did not have the least achievable amount of district shape irregularity.\textsuperscript{273}

The state officials appealed the district court's decision to the United States Supreme Court.\textsuperscript{274} The Court held that strict scrutiny applies where district lines are drawn with race as the primary motive.\textsuperscript{275} The Court also held that states attempting to comply with Section two of the VRA may only subordinate traditional districting goals to race to a reasonably necessary degree.\textsuperscript{276} Finally, the Court held that correcting the effects of past discrimination is not a compelling interest unless the discrimination is specific and identifiable.\textsuperscript{277} In so concluding, the Court made clear that states attempting to fashion redistricting plans must not only comply with the VRA, but also comport with the Fourteenth Amendment.\textsuperscript{278}

ANALYSIS

In \textit{Abrams v. Johnson},\textsuperscript{279} the United States Supreme Court held that federal courts faced with fashioning redistricting schemes need not defer to Department of Justice ("DOJ") determinations or legislative policy if these policies are predominately motivated by racial considerations.\textsuperscript{280} Though the Supreme Court characterized the decision as consistent with precedent in which the Court considered court fashioned redistricting plans, a review of prior precedent illustrates that the decision in \textit{Abrams} undermines the VRA in several ways.\textsuperscript{281} First, the decision allows judicial invasion in the political province of legislatures.\textsuperscript{282} Second, the Court has permitted a method for avoiding compliance with the Voting Rights Act ("VRA") by eviscerating DOJ approvals.\textsuperscript{283} Third, by applying strict scrutiny, all voting districts created with race as a factor are potentially invalid.\textsuperscript{284} Finally, the Court’s holding creates legislative confusion in the realm of reapportionment thus inviting litigation.\textsuperscript{285}

\begin{itemize}
\item [273.] \textit{Id.} at 1960.
\item [274.] \textit{Id.} at 1951.
\item [275.] \textit{Id.} at 1948 (citing Miller v. Johnson, 515 U.S. 900, 919 (1995)).
\item [276.] \textit{Id.} at 1961.
\item [277.] \textit{Id.} at 1962.
\item [278.] \textit{Id.} at 1950, 1964.
\item [279.] 117 S. Ct. 1925 (1997).
\item [281.] \textit{See infra} notes 286-422 and accompanying text.
\item [282.] \textit{See infra} notes 286-320 and accompanying text.
\item [283.] \textit{See infra} notes 321-61 and accompanying text.
\item [284.] \textit{See infra} notes 362-80 and accompanying text.
\item [285.] \textit{See infra} notes 381-422 and accompanying text.
\end{itemize}
DEFERENCE TO STATE LEGISLATURES

In Abrams, the Supreme Court held that a district court may disregard legislative policy choices when these policies are tainted with considerations of race. In Abrams, the Supreme Court specifically noted that, although as a general rule, district courts should be guided by legislative preferences, when these preferences are based entirely on a racially motivated approach to redistricting, the preferences need not be followed. In so holding, the Court failed to acknowledge previous holdings which recognized the importance of deferring to state legislatures in matters of reapportionment.

Prior to Abrams, the United States Supreme Court consistently held that the Constitution gives Congress the authority to make laws regarding the apportionment of Representatives. In Wood v. Broom, the Supreme Court recognized that courts lacked jurisdiction over reapportionment issues. In Wood, the Court refused to impose its judicial interpretation on a congressional act concerning reapportionment. In Colegrove v. Green, the Supreme Court recognized that judicial interference with the important political function served by Congress in requiring reapportionment is unwarranted. Similarly, in South v. Peters, the Court reiterated the holding that federal courts uniformly refuse to use their equity powers where political concerns are at issue.

The Supreme Court has held that federal courts must give deference to state courts that are involved in redistricting. In Growe v. Emison, the Court held that the district court "should have stayed

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286. Abrams, 117 S. Ct. at 1933-34.
287. Id. at 1933-34.
288. See supra notes 139-204 and accompanying text.
289. See Colegrove v. Green, 328 U.S. 549, 554 (1946) (stating that: We are of opinion that the appellants ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about 'jurisdiction.' It must be resolved by consideration on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet[sic] for judicial determination.")
Colegrove, 328 U.S. at 552; See supra notes 136-204 and accompanying text.
290. 287 U.S. 1 (1932).
293. 328 U.S. 549 (1946).
its hand” when considering reapportionment issues. The district court in Growe held that it had a duty to enjoin state court proceedings, although the state legislature was attempting to cure the defects of the reapportionment plan. The Supreme Court recognized in Growe that all levels of state involvement by the judicial and legislative branches, trumped the authority of a federal district court when addressing matters of reapportionment.

However in Abrams, the Court failed to consider the inherently political nature of redistricting. In Abrams, the Court held that a district court faced with redistricting is free to disregard the preferences of the legislature if the preferences are tainted with racial concerns. Because of this holding, the Court seems to have granted courts faced with redistricting carte blanche to fashion their own plans, thus leaving state legislatures with little influence in an area that is inherently political.

The holding in Abrams contradicts previous Court recognition of state power and authority in reapportionment. In Abrams, the Supreme Court held that the Georgia district court could create a reapportionment plan without regard to the preferences of the Georgia State Legislature. Although reapportionment is a political matter, the court in Abrams held that a court engaged in reapportionment may disregard racially influenced policies of the legislature. In so holding, the Court intrudes upon a political area in a bifurcated manner. As a result of the holding in Abrams, a court may both create its own redistricting plan and disregard the policies of the state legislature. This involvement is an unwarranted intrusion into the political realm.

Intrusion by the judiciary is unwarranted because a court is not subject to the political pressures that must be taken into account by

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300. Id. at 30-31.
301. Id. at 33. The Court reprimanded the district court stating “that the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch has begun to address the highly political task itself.” Id. (emphasis in original).
302. See infra notes 306-24 and accompanying text.
307. Id.
308. See infra notes 309-10 and accompanying text.
310. Id. at 1949 (Breyer, J., dissenting) (citations omitted).
legislatures when fashioning these districts. Similarly, in Colegrove the Court recognized that federal courts are not subject to the political pressures inherent in the districting process. Therefore, the fundamental goal of a democratic process is not served when courts create reapportionment plans without considering state policies.

The Abrams decision held that courts may at times disregard the policies of state legislature when fashioning redistricting plans. This holding is inconsistent with prior Court decisions. In Upham v. Seamon, the Court held that a district court fashioning a redistricting plan must adhere to state policies whenever the policy does not conflict with the requirements of the Constitution. The Upham Court further noted that a district court should not preempt the task of the legislature in choosing among plans. In Abrams, this conclusion is eviscerated. When a court fashioning a redistricting plan ignores the will of the state legislature, there is an unnecessary intrusion into the politics of the state legislature.

THE RELEVANCE OF DOJ INVOLVEMENT

In Abrams, the legislature submitted three plans to the Attorney General through the Department of Justice ("DOJ"). Two of the three plans contained two majority-minority districts. However, the Supreme Court held that these plans did not evince a legislative preference for two majority-minority districts. Rather, the Court held that because the DOJ was involved, the legislature created the districts due to an overriding concern with race. The Court failed to recognize that almost any DOJ involvement would lead a legislature to act with an overriding concern with race.

The Court recognized that courts faced with redistricting should follow the policies of the state legislature. However, the Court rea-
soned that by following the suggestions of the DOJ, any legislative preference became tainted with racial considerations. In so reasoning, the Court failed to realize that the legislative preferences had not been deemed unconstitutional. If the legislative preference had not been deemed unconstitutional, the district court would have been bound to utilize it by the holding in Upham.

In direct contrast to Abrams, the Court acknowledged in Upham that state policies should be honored as long as doing so does not violate the Constitution. In Upham, the Court held that a court faced with redistricting must adhere to state legislative policy so as not to preempt the legislative task. In Abrams, the 1991 plan, which contained two majority-minority districts, "was not perceived as a 'racial gerrymander'" by the district court. This being the case, the redistricting court was not free to disregard this preference evinced by the Georgia Legislature.

In Abrams, the Court stated that the DOJ forced Georgia to act based on overriding concern with race. Georgia is a covered jurisdiction under the VRA. The VRA allows for the state of Georgia to submit any proposed plan effecting the right to vote to the DOJ for preclearance. The DOJ must then pass judgment on the plan, deciding whether the proposed plan "results in a denial or abridgment of the right . . . to vote on account of race or color. . . ."

The DOJ refused to preclear the 1991 plan because the plan contained only two majority-minority districts, where, in reality, three majority-minority districts could have been created in furtherance of the VRA. Thus, the problem with the 1991 plan was not one of racial gerrymandering, rather, simply a deficiency of majority-minority districts. The creation of another majority-minority district was, therefore, ordered by the DOJ. The plan with three majority-minority districts was the fruit of the DOJ's pressure. However,

327. Id. at 1934.
328. Id. at 1943 (Breyer, J., dissenting).
331. Upham, 456 U.S. at 41.
333. Id. at 1944 (Breyer, J., dissenting).
334. Id. (Breyer, J., dissenting).
338. Abrams, 117 S.Ct at 1933-34.
339. Id. at 1931.
340. Id.
the first plan submitted to the DOJ contained only two majority-minority districts.\textsuperscript{342} This plan should have served as a benchmark for the district court when it created the reapportionment plan.\textsuperscript{343}

Congress explicitly granted DOJ jurisdiction to conduct plenary review of reapportionment plans.\textsuperscript{344} DOJ involvement is present in virtually every reapportionment attempt in a covered jurisdiction.\textsuperscript{345} Therefore, every reapportionment plan created in a covered jurisdiction will likely be subject to DOJ preclearance.\textsuperscript{346} However, in Abrams, the Court made clear that DOJ preclearance would not insulate a state from litigation concerning reapportionment.\textsuperscript{347} If the precleared plan is not satisfactory to some voters, under Abrams, they are able to bring action against the state to have a federal court do what the DOJ refused to do, and what the legislature could not.\textsuperscript{348} This results in an unacceptable usurpation of legislative authority.\textsuperscript{349}

The holding in Abrams allows circumvention of DOJ approval and is contrary to congressional intent.\textsuperscript{350} One commentator argued that "Congress intended to preclude all judicial review of the Attorney General's exercise of discretion or failure to act."\textsuperscript{351} Bush v. Vera\textsuperscript{352} illustrates that in a situation where the DOJ has precleared a districting change, an aggrieved voter may still bring a judicial challenge under the VRA.\textsuperscript{353} Again, the key issue is the validity of the challenged electoral practice, not the correctness of the DOJ determination.\textsuperscript{354}

In Abrams, the Court failed to recognize that DOJ recommendations are a political influence.\textsuperscript{355} Congress granted the DOJ the power to review and judge the validity of reapportionment acts created by covered jurisdictions.\textsuperscript{356} A covered jurisdiction ordinarily may not implement any reapportionment plan without the DOJ's approval.\textsuperscript{357} The DOJ being aware of Georgia's past history of voting discrimina-

\textsuperscript{342.} Id. at 1930.
\textsuperscript{343.} Id. at 1946 (Breyer, J., dissenting).
\textsuperscript{345.} Holder v. Hall, 512 U.S. 874, 882 (1994).
\textsuperscript{346.} Holder, 512 U.S. at 882.
\textsuperscript{347.} Abrams, 117 S. Ct. at 1934-35.
\textsuperscript{348.} See supra notes 321-47 and accompanying text.
\textsuperscript{349.} Upham, 456 U.S. at 42-44 & 43 n.7.
\textsuperscript{351.} McDonald, 1 Mich. J. Race & L. at 154. See also Johnson v. Miller, 864 F. Supp. 1354, 1383 n.32 (S.D. Ga 1994) (stating that "decisions of the Attorney General are not reviewable by this Court.").
\textsuperscript{352.} 116 S. Ct. 1941 (1996).
\textsuperscript{354.} McDonald, 1 Mich. J. Race & L. at 155.
\textsuperscript{355.} See infra notes 356-61 and accompanying text.
\textsuperscript{357.} Holder, 512 U.S. at 882-83.
tion, is well suited to reviewing reapportionment plans. The involvement of the DOJ in the 1991 reapportionment did not constitute undue pressure, and should have been accorded greater deference. The holding in Abrams allows a court to pass judgment upon a plan whether or not it has obtained clearance from the DOJ. This constitutes express interference with the will of Congress concerning the duty of reapportionment.

THE APPLICATION OF STRICT SCRUTINY AND THE VOTING RIGHTS ACT

The Court in Abrams held that an objection to a redistricting plan that is race based is inherently suspect. One commentator stated, "If so, then virtually every objection by the Attorney General would be presumptively unconstitutional." In Abrams, Georgia's chief demographer who had fashioned hundreds of redistricting plans during the past two decades at the federal, state, and local level, "acknowledged that she had 'never drawn a redistricting plan . . . that didn't take race into account' and that 'if taking into account race were unlawful . . . there is not a districting plan in the state of Georgia that would be valid.'"  

In Bush, the Court held that correcting the effects of past discrimination is not a compelling interest unless the discrimination is specific and identifiable. In Abrams, the district court found that "the history of discrimination in voting and other areas 'against black people in the State of Georgia need not be presented for purposes of this case.'" The court took judicial notice that the state's history involving voting rights included discrimination against black citizens. In his brief, Abrams stated that "[f]rom the state's first Constitution which barred blacks from voting altogether through recent times the state has employed various means of destroying or diluting black voting strength." However, the Supreme Court in Abrams held that the Georgia Legislature was not attempting to ameliorate the effects of past discrimination, rather the legislature was yielding to the pres-

359. Id.
360. See supra notes 92-96 and accompanying text.
361. See supra notes 322-61 and accompanying text.
363. McDonald, 1 MICH. J. RACE & L. at 156.
364. Id. at 143 n.176.
366. NAACP Brief for Appellants at 15, Abrams, (No.95-1425) (citations omitted).
367. Id. at 15.
368. Id. Literacy tests were employed as late as 1958. Property requirements as a prerequisite to voting, and white primaries were all methods employed to prevent blacks from voting at the state and county levels. Id.
Applying race as a consideration when a legislature attempts to invigorate black voting power, race is an "overriding predominate factor" that is used impermissibly.\(^{370}\)

The Court in Abrams confused the holding in Bush because the discrimination in Abrams is arguably specific and identifiable.\(^{371}\) Black voters have been traditionally and continually denied equal voter representation in Georgia.\(^{372}\) The Court's holding in Abrams fails to take into account "an 'understanding' between the leadership in the legislature and the [voters]" to fashion a reapportionment plan containing majority-minority districts.\(^{373}\) In denying discriminatory history as a valid basis for apportioning, the Abrams Court counteracted the purpose of VRA.\(^{374}\)

In Voinovich v. Quilter,\(^{375}\) the United States Supreme Court held that Section Two of VRA does not prohibit the creation of majority-minority districts.\(^{376}\) The Court in Voinovich reasoned that the creation of majority-minority districts does not invariably minimize or maximize minority voting strength, because voting strength is diluted either by wide dispersal resulting in ineffective voting power, or by super concentration of voters resulting in wasted voting power.\(^{377}\) In Abrams, the Court forbid the use of race as a factor in reapportioning districts.\(^{378}\) It is impossible to create majority-minority districts without race being a factor.\(^{379}\) Thus, the holding of Abrams calls into question the validity of creating majority-minority districts which have been held constitutional in the past.\(^{380}\)

CONTRIBUTING TO LEGISLATIVE CONFUSION IN REAPPORTIONMENT

In Abrams, the Court held that the use of race as a predominate factor in redistricting necessarily leads to the invalidation of a reapportionment plan.\(^{381}\) The holding will likely be an unworkable tool for
legislatures attempting to redistrict. The Court's misapplication of prior precedent merely exacerbates the confusion regarding redistricting.

In Shaw v. Reno, the Supreme Court held that a challenge to a voting district will invoke strict scrutiny when a plaintiff establishes three elements. The elements require: (1) that the challenged plan must be irrational or bizarre on its face, (2) that the plan is inexplicable on grounds other than race, and (3) that the plan can only be explained as intentional segregation for voting purposes.

The Court in Abrams failed to take into account these factors in determining whether the district courts plan violated the VRA. In Abrams, the Court held that although none of the Shaw factors was present, "predominate racial motive" sufficed to render a reapportionment plan unconstitutional. This holding does not give legislatures much direction concerning the application of the law regarding reapportionment challenges.

In addition, the Court also confused the factors utilized in Thornburg v. Gingles, in which the Supreme Court held that a multimember districting plan violated the VRA where it was shown that a bloc voting majority will frequently defeat minority choice representatives. The Court held that when examining multimember districts for evidence of discrimination, the test is whether the bloc voting majority can frequently defeat candidates supported by geographically insular, politically cohesive minority groups. In Abrams, the Court misapplied this test to the district court's findings as well as the reapportionment plan at issue, because the Court ignored statistical data.

Evidence of bloc voting is apparent in Georgia. Experts studied more than 300 elections spanning a twenty-year period in Georgia. The experts found that "[i]n five of the six statewide contests in the Eleventh District, at least 89% of blacks voted for black candi-

382. Id. at 1949-50 (Breyer, J., dissenting).
383. id.
388. Abrams, 117 S. Ct. at 1933.
389. Id. at 1950 (Breyer, J., dissenting).
392. Gingles, 478 U.S. at 48-49.
394. Id. at 1947.
395. NAACP Brief for Appellants at 16, Abrams (No. 95-1425).
dates and at least 74% of whites voted for white candidates.\textsuperscript{396} Georgia has never elected a black candidate to a statewide office, except when running as incumbents in a judicial election after having first been appointed rather than elected.\textsuperscript{397} An expert for the state found that a black candidate had less than a 50% chance of winning an election unless the district was comprised of more than 50% black registered voters.\textsuperscript{398}

In a district by district analysis, it becomes apparent that polarization is alive and well in Georgia.\textsuperscript{399} From 1984 to 1990, minority candidates received only 1% of white citizens votes within the Second District in statewide elections.\textsuperscript{400} A review of the Eleventh District illustrated that only 4% of white voters in the Eleventh District engaged in cross-over voting.\textsuperscript{401} The percentage of black voters amenable to voting for white candidates in the Eleventh District varied from 3 to 11%.\textsuperscript{402}

The district court in Abrams itself found that a certain degree of vote polarization existed.\textsuperscript{403} The majority in Abrams, however, held that the statistical evidence was generally inconclusive.\textsuperscript{404} Considering the above statistics, the Court clearly created confusion about the factors set forth in Gingles.\textsuperscript{405} In Abrams, the Supreme Court dismissed application of the test put forth in Gingles in one short page.\textsuperscript{406} The Court held that none of the Gingles factors were violated by the court ordered plan.\textsuperscript{407} In so holding, the Court created legislative mystification as to what will satisfy the Gingles factors in light of the statistical data available.\textsuperscript{408} Legislatures and courts alike faced with application of the Gingles factors will be faced with confusing standards in identifying a system in which bloc voting is present.\textsuperscript{409}

Georgia serves as a good example of legislative confusion.\textsuperscript{410} Upon remand in Abrams I, the district court deferred to the Georgia

\begin{thebibliography}{99}
\bibitem{396} Id. at 16-17.
\bibitem{397} Id. at 17.
\bibitem{398} Id. at 18.
\bibitem{399} Abrams, 117 S. Ct. at 1947 (Breyer, J., dissenting).
\bibitem{401} Id.
\bibitem{402} Abrams, 117 S. Ct. at 1947 (Breyer, J., dissenting).
\bibitem{403} Id. (Breyer, J., dissenting).
\bibitem{404} Id. at 1936. (Breyer, J., dissenting).
\bibitem{405} Id. at 1948-49 (Breyer, J., dissenting).
\bibitem{407} Abrams, 117 S. Ct. at 1936.
\bibitem{408} Id. at 1949 (Breyer, J., dissenting).
\bibitem{409} Id.
\bibitem{410} See infra notes 411-21 and accompanying text.
\end{thebibliography}
Legislature to fashion a reapportionment plan. The legislature could not reach a decision. The Senate Reapportionment Committee Chair stated that "we have heard from five different attorneys and we have received five different interpretations." The Chair admitted, "nobody knows what they are doing."

The district court then requested proposals from Georgia voters and the Georgia Legislature. Georgia State Officials did not submit or sponsor a plan after the Supreme Court's decision in Abrams I because the legislature did "not know what the Constitution now requires in terms of remedy." The Georgia representatives claimed that they did not have a belief of what plan might fulfill the particular criteria required by the Court's orders. The Georgia legislature itself was unaware what is required of it when attempting to reapportion.

In extending the application of the "predominate racial motive" test in Abrams the Supreme Court failed to provide state legislatures with sufficient guidance to apply the test. The absence of a clear rule under which legislatures may reapportion will pave the way to litigation. In the words of one commentator, the Court is acting "terribly irresponsibly." The Court has offered no safe harbor, "there is nothing you can do in redistricting now that can keep you from getting sued."

CONCLUSION

In Abrams v. Johnson, the United States Supreme Court held that federal courts faced with fashioning redistricting schemes need not defer to legislative policy if these policies are predominately motivated by racial considerations. The Court's holding is flawed because 1) the decision allows judicial invasion in the political province of legislatures; 2) the Court has allowed a way of avoiding compliance with the VRA by eviscerating DOJ approvals; 3) by applying strict

412. Id. at 1931-32.
413. McDonald, 1 Mich. J. Race & L. at 149 (citations omitted).
414. Id.
416. NAACP Brief for Appellants at 6, Abrams (No. 95-1425).
417. Id.
420. Id. at 1950 (Breyer, J., dissenting).
422. Id.
scrupingly all voting districts created with race as a factor are potentially invalid; and 4) the Court's holding creates legislative confusion in the realm of reapportionment thus inviting litigation.

First, the Court has embarked upon a path that will lead the judiciary to be increasingly entangled in reapportionment, an area that is inherently political. By allowing a court to fashion its own reapportionment plan, the Supreme Court has negated the tradition of respect and honor paid to the legislature in matters of reapportionment. The holding in Abrams contradicts sixty-five years of judicial restraint in matters of reapportionment. Such judicial involvement could not have been in the minds of the Congress that enacted the Voting Rights Act of 1965.

Second, the Court's holding in Abrams "calls into question the present Court's essential commitment to continued enforcement of the Voting Rights Act." The Voting Rights Act of 1965 was enacted by Congress in order to further the opportunity of minorities to participate in the electoral process. By holding that a district court can determine the validity of an apportionment plan already deemed to be constitutional by the Department of Justice, the Court allows what Congress intended to preclude: the judicial review of the DOJ's actions.

Third, the Abrams Court held that when use of race predominates strict scrutiny applies. Under this holding, almost any state attempting to remedy the effects of past discrimination by creating some race based districts will be forced to stifle this forward step. Application of strict scrutiny is death to an ameliorative redistricting plan. This is directly contrary to congressional intention in creating the Voting Rights Act of 1965.

Finally, the holding in Abrams is confusing to legislatures and courts alike. It is not clear when race can be a factor in reapportioning and when it is forbidden. Due to this confusion, legislatures will be wary to act. The courts will increasingly be called upon not only to interpret the holding in Abrams, but to fashion districting plans without the aid of legislative policies.

The most troubling aspect of the Court's decision is its effects on racial relations. Commentators have been quick to criticize the color-blind attitude of the Court. One commentator noted that "five Supreme Court justices have done to African Americans . . .what no hooded Ku Klux Klan mobs were able to do in [a] decade -- remove an

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African-American from Congress." Another commentator predicted that "Black America faces a new Jim Crow era." Regardless of the validity of the ominous predictions, the Court itself will have to face the inconsistencies of the Abrams doctrine.

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427. Pildes, 106 YALE L. J. at 256 n.71 (citations omitted).