Gingles versus Shaw: Why the Sweet Spot Between Thornburg v. Gingles and Shaw v. Reno Calls for an Amended § 2

Timothy L. O’Hair, Pepperdine University
GITNGLES VERSUS SHAW:  
WHY THE SWEET SPOT BETWEEN THORNBURG V. GINGLES AND SHAW V. RENO CALLS FOR AN AMENDED §2

By Timothy L. O’Hair*

INTRODUCTION

Voting has long been a central tenant of democracy, but what does it actually mean to vote? On the one hand, when somebody casts a vote it could be presumed that the person was equally able to participate in the political process. But some may argue that a vote cast means nothing if that vote cannot affect the outcome of the election. This is amplified when the person that cannot affect an election is also deeply entrenched in a community and that community votes in unison, yet that community is consistently unable to win an election. Taking this one step further, imagine that this community is large enough to constitute a majority in a congressional district, yet this group still cannot elect the candidate of its choice because the district lines are drawn in such a way that this group is split into several districts, effecting a dilution. In such a circumstance, it may be too hasty to assume the right to vote is satisfied by merely granting access to the polls. On the other hand, must this group win the election because they vote in unison and are large enough to constitute a
majority? Redistricters have several considerations to make in drawing districts. Must they drop every other consideration to ensure district lines are drawn to encompass this underrepresented community so that it may elect its choice of candidate? Surely this would infringe on the voting power of other groups. These are the questions the Legislature and courts have grappled with over the past 150 years.

The history of legislative action to enfranchise minorities, countered by racially motivated measures to preclude the minority vote is lengthy. Black disenfranchisement of the pre-Civil War era was countered by the Fifteenth Amendment in the Reconstruction Era. The Fifteenth Amendment was countered by Jim Crow laws such as poll taxes and literacy-tests specifically designed to prevent Black voters from reaching the polls. These laws were countered by the Voting Rights Act (VRA), which subsequently resulted in back and forth jurisprudence and legislation aimed at creating colorblind elections, all without infringing on other groups’ rights.

After a brief contextual analysis, this paper focuses on this back and forth battle from 1982 and on. The 1982 amendments to the VRA, and the subsequent interpretation of the VRA in *Thornburg v. Gingles*, established a standard that forced the hand
of redistricters should minority groups show that their vote was
diluted by racial gerrymandering.\(^1\) The later case of *Shaw v. Reno*
was the counterbalance that provided majority voters with an
EPC (Equal Protection Clause) claim should too much deference
be given to minority voters at the expense of the majority.\(^2\) After
these cases, hitting the sweet spot of *Gingles* and *Shaw* has been a
nuanced task but has tended to defer to *Shaw* at the expense of
*Gingles*.

This paper argues that the *Gingles-Shaw* sweet spot has
frustrated the purpose of the 1982 Amendments to the VRA.\(^3\)
Consequently, this paper advocates for relaxing the compactness

\[^3\] This paper frequently refers to the sweet spot, which is a reference to the room
between the competing standards of *Gingles* and *Shaw*. The sweet spot is a
term borrowed from Chief Justice John Roberts from the arguments in Alabama
Legislative Black Caucus v. Alabama, No. 13-895 (argued Nov. 12, 2014): *see
generally*, Maria Coyle, *Alabama Redistricting Case Divides Supreme Court*,
THE NATIONAL LAW JOURNAL (Feb. 21, 2015, 10:28 AM),
http://www.nationallawjournal.com/id=1202676230105/Alabama-Redistricting-
Case-Divides-Supreme-Court?slreturn=20150121125750

\*2016 JD Candidate at Pepperdine University SOL. I would like to especially
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prong of *Gingles* and targeting proportionality when the *Gingles* test is otherwise satisfied. It argues that compactness allows too much judicial discretion to fulfill *Gingles*’ intent and it has been consistently exploited by the *Shaw*-line of cases. Due to the *Shaw*-line of cases, a showing that the 1982 VRA amendments have been violated calls for a nearly insurmountable burden for the minority-group to achieve equal participation in the political process. Consequently, the VRA as amended in 1982 and as interpreted in *Gingles* prevents minority-groups from full participation in the political process and thus should be updated to effectively counter-balance *Shaw*.

Section I is a brief history of the back and forth nature of the legislation and jurisprudence aimed at minority enfranchisement since the Reconstruction Era. After the brief examination as to how Congress arrived at the 1982 Amendments, the paper will broadly describe the interpretation and the limitations of the 1982 Amendments up to the current state of the law, which will more clearly illustrate the aforementioned sweet spot. Section II aims to unpack this sweet spot—it examines how Supreme Court cases have hit the sweet spot under the current state of the law. From this Section I find that the Court (and lower courts) avoid the sweet spot altogether
by claiming a subjective and perhaps unnecessary element is not present to satisfy *Gingles*' compactness. I conclude that compactness should be significantly relaxed and proportionality should become the target standard when the other prongs of *Gingles* are satisfied. This standard is required nowhere in the Constitution and has been repeatedly refused by both Congress and the courts. However, my conclusion is based on the analysis of the sweet spot that was not factored into the 1982 Amendments and has not been given adequate attention by the courts. While *Gingles* sought to interpret the 1982 Amendment’s attempt to repair the harm done by racist voting practices and laws, *Shaw* has made it obsolete and is holding minority groups back from equal participation in the American political process.

## I. MINORITY ENFRANCHISEMENT IN THE US SINCE THE RECONSTRUCTION ERA

### A. From Reconstruction to 1982

The VRA was originally enacted “to enforce the Fifteenth Amendment to the Constitution of the United States.” However, from the Reconstruction Era to 1965, the Fifteenth Amendment

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proved to be insufficient on its own to overcome deep racial prejudices in Southern states aimed at disenfranchising the Black vote. For instance, many Southern states enacted laws that forced voters to pass a myriad of qualifications before voting; these laws were specifically aimed at disqualifying potential Black voters from reaching the polls.\(^6\) Consequently the VRA was enacted, which as the House Report on §2 explained, “grant[ed] . . . a right to be free from enactment or enforcement of voting qualifications . . . or practices which deny or abridge the right to vote on account of race or color.”\(^7\) Section 2 abolished voting qualifications with the purpose of abridging votes on the bases of race or color while § 5 required jurisdictions that engaged in prior voter discrimination (prescribed by § 4) to be pre-cleared by either the US Attorney General or the District Court for the District of

\(^6\) See, e.g., State of S.C. v. Katzenbach, 383 U.S. 301, 310 (1966). The Court particularly focused on Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia as states that used literacy tests, “grandfather clauses, property qualifications, ‘good character’ tests, [or] the requirement that registrants ‘understand’ or ‘interpret’ certain matter” as a requirement to vote. These laws, purported to not violate the 15th Amendment, were enacted specifically to disenfranchise Black voters and thus prompted the VRA.

Columbia anytime that jurisdiction sought a change to its voting practices. Some of the ambiguities of the VRA were to be hashed out immediately in the Supreme Court.

The Court held the act to be constitutional in initial post-VRA jurisprudence: in Katzenbach the Court said,

[after enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshaled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively. Many of the areas directly affected by this development have indicated their willingness to abide by any restraints legitimately imposed upon them. We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment.]

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8 Voting Rights Act of 1965, supra note 5.

9 Katzenbach, 383 U.S. 301, 337 (1966); see also, Harper v. Virginia State Board of Elections, 383 U.S. 663, 668 (1966) (using the EPC as a vehicle to enforce § 2—in Harper, the Court struck down poll-taxes in Virginia because, “[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process.”).
Validated by judicial approval, the VRA “signaled an end to both de jure and de facto barriers to minority voting” and “supplanted the seemingly impenetrable ‘political armor of Jim Crow.’” The Fifteenth Amendment appeared to finally be armed with the enforcement tools needed to carry out its intent.

Between 1965 and 1982, the Court tried to pin down answers to many other questions that the VRA left open—for example, were voter discrimination claims to be based on the intent of voting laws or the effect these laws created? The Court initially provided this answer in *White v. Regester*. In that case, the plaintiffs were comprised of minority groups consolidated from four cases that brought § 2 claims against a Texas redistricting plan. The plan contained 79 single-member and 11 multimember districts that comprised the 150-member Texas House of Representatives—at issue were the two multimember districts in Dallas and Bexar counties. The Court did not strike down the combination of multimember districts and single-member districts as a per se violation of the Constitution, but

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12 *Id.*

13 *Id.* at 765.
did hold that if the districts prevented minorities’ equal participation in the political process, it violated § 2 of the VRA.  

Factoring in the long history of racial discrimination in Texas, the Court held that in these two districts, minority “members had less opportunity than did other residents in the district to . . . elect legislators of their choice[,]” and therefore the districts in effect diluted the Black and Mexican-American vote. Thus, the Court affirmed the notion that § 2 of the VRA protected minorities from both discriminative intent and discriminative effect, and by recognizing a right to elect the candidate of a minority voter’s choice, White extended the VRA to group-based claims rather than merely ensuring an individual right to vote.

14 Id. at 766.

15 Id.


The momentum minority-groups gained in *White* was abruptly halted by 1980 in *City of Mobile, Ala. v. Bolden*.\(^\text{18}\) In that case, Black citizens as a class alleged that at-large municipal elections violated both the VRA and the Fifteenth Amendment because they were unable to elect the candidate of their choice.\(^\text{19}\) Just seven years after *White* was decided, the Court departed from the group-protection interpretation of the VRA and held that the VRA and the Fifteenth Amendment were protections of the individual’s right to vote, which had not “been denied or abridged by anyone” solely by employing at-large elections—minorities were still free to cast a vote of course, just not one for a candidate who had a chance to win.\(^\text{20}\) A second allegation, that at-large elections denied Black voters the equal protection of the law, was also rejected on the basis that the Constitution “does not require proportional representation as an imperative of political organization.”\(^\text{21}\) Thus, *Bolden* foreclosed a race-based voter dilution claim based solely on the effect of a voting practice and instead required some showing of invidious intent.\(^\text{22}\)

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\(^\text{19}\) *Id.*

\(^\text{20}\) *Id.* at 65.

\(^\text{21}\) *Id.* at 75-76.

\(^\text{22}\) *Id.* at 62.
limitation infuriated the civil rights community, which led to the 1982 amendments to the VRA—the § 2 portion of the amendments was a direct response to the *Bolden* holding.23

In Congress, H.R. 311224 sought to broaden the scope of voter discrimination claims by adding the clause “in a manner which results in a denial or abridgement of the right [to vote, based on race or color]” to § 2 of the VRA.25 If passed, this would create an effects-based cause of action for § 2 claims, but the bill was approached cautiously in the House subcommittee because of the natural tendency to focus an effects-based claim on population proportionality.26 As H.R. 3112 passed through the subcommittee and was in Committee debates, the Edwards-Fish-Sessenbrenner amendments helped relieve this apprehension: these amendments to the bill explicitly ensured that a lack of minority representation in proportion to the population would not alone be sufficient to state a cause of action.27 Eventually, after several failed attempts by other members of Congress to amend H.R. 3112, it passed a

23 See Hamilton, *supra* note 17 at 1529; see also Boyd, *supra* note 4 at 1355.

24 The codification of the House of Representative’s proposed amendments to the VRA in 1982.


26 See Boyd *supra* note 4, at 1360.

27 Id. at 1373.
floor vote in the House, 389-24. Senator Kennedy failed to fast track H.R. 3112 directly to the Senate Floor, so an identical Senate Bill, S. 1992, was brought to the Senate Subcommittee on the Constitution for debate. Senator Mathias focused on the § 2 effects-based claims change and advocated for a totality of the circumstances analysis, akin to the pre-\textit{Bolden} analysis that was at least partially based on proportionality; Senator Hatch considered this to be an unworkable standard that would not produce consistent results and would inherently rely on a standard of proportionality. Among several points of friction that highlighted the subcommittee hearings were, 1) whether allowing effects-based causes of action was consistent with pre-\textit{Bolden} legislation and jurisprudence; 2) whether this would inevitably rely upon proportional representation; 3) if it does not inherently rely upon proportionality, what does it rely on? and 4)

\footnote{\textit{Id.} at 1379.}

\footnote{\textit{Id.} at 1379-90 (Initially, Senator Kennedy and other sponsors of H.R. 3112 attempted to bypass normal procedures by invoking Senate Rule XIV that enables a “House-passed bill [to be put] directly on the Senate Calendar;” this procedure requires only the majority leader to consent for the Bill to be put on the Senate Floor for consideration. However, Senator Baker, the majority leader at the time, refused this fast-tracking procedure).}

\footnote{\textit{Id.} at 1390-92.}
whether or not the proportionality disclaimer used by the House (the Edwards-Fish-Sessenbrenner amendments) could be effective.\textsuperscript{31} In the end, the subcommittee gridlocked along party lines and could only emerge with amendments to S. 1992 that struck all the proposed changes to the VRA text and simply extended the VRA as written in 1965 for 10 more years.\textsuperscript{32} Senator Dole, however, was able to reestablish momentum for an effects-based claim in the full-committee debates, first by using a totality of the circumstances standard but more persuasively by adding that no part of the bill should be construed as to require proportional representation.\textsuperscript{33} This language was passed on the Floor 85-8 and the House concurred to the Senate’s amendments. On June 29, 1982, President Reagan signed the 1982 VRA amendments into law, thereby restoring the pre-\textit{Bolden} possibility to state a claim based on an effects-based voter discrimination practice.\textsuperscript{34}

\textsuperscript{31} \textit{Id.} at 1396-1401.

\textsuperscript{32} \textit{Id.} at 1412.

\textsuperscript{33} \textit{Id.} at 1415.

\textsuperscript{34} \textit{Id.} at 1424-25; \textit{see also} S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pages 28-29 listing the Senate Reports factors to be considered in the totality of the circumstances analysis: 1) The history of official voting-related discrimination in the state or political subdivision; 2) The extent to which voting in the elections of
B. The Emergence Of The Sweet Spot

_Thornburg v. Gingles_ was the Court’s first interpretation of the 1982 Amendments. In that case, North Carolina’s General Assembly had just drawn new districts for the state Senate and the House of Representatives.\(^{35}\) From this, one single-member district and six multimember districts were challenged by Black voters who alleged that the scheme impaired their “ability to elect the representatives of their choice.”\(^{36}\) Between the time that the districts were drawn and the trial, the 1982 Amendments to the VRA were enacted and, consequently, the factors listed in the Senate report to these amendments solely guided the trial court’s

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36 _Id._ at 35.
analysis. The trial court primarily addressed the history of discrimination in North Carolina and the disproportionate representation in the General Assembly compared to the Black population, and therefore held for the plaintiffs that the challenged multimember districts were drawn in a way that diluted the Black vote. On appeal, the Supreme Court explained the theory that ‘submergence’ of Black voters in White majority multimember districts systematically disabled the minority voters from winning an election. Thus, in light of the 1982 VRA amendments that enabled an effects-based claim, the Court affirmed the District Court and held that the Black vote under this districting scheme was diluted in violation of §2.

A three-part test emerged from *Gingles* as a threshold to state a § 2 claim: first, the minority group bringing the § 2 claim must be large and compact enough to comprise a majority in a single-member district; second, the minority group must be ‘politically cohesive’; third, there cannot be enough cross-over majority voters to enable the minority group to elect the candidate.

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37 *Id.* at 35-38 (§ 2(b) of the VRA calls for the totality of the circumstances test); *see also* S.Rep. No. 97-417 *supra* note 33.


39 *Id.* at 51.

40 *Id.* at 73.
of its choice. While the minority vote dilution determination is not exhausted by this inquiry, the 1st Circuit predicted and commentators have agreed that once the three-part test is satisfied the minority-group is virtually entitled to a district where it can elect the candidate of its choice. The Court

41 Id.; see, e.g., Mary J. Kosterlitz, *Thornburg v. Gingles: The Supreme Court’s New Test for Analyzing Minority Vote Dilution*, 36 CATH. U. L. REV. 531, 553 (1987) (being politically cohesive suggests that the minority group votes as a bloc. *Gingles* held that the motivations for voting as a bloc are irrelevant); see also *Thornburg v. Gingles*, 106 S. Ct. 2752, 2768 (1986) (“racial polarization exists where there is “a consistent relationship between [the] race of the voter and the way in which the voter votes”).

42 The inquiry still hinges on a totality of the circumstances analysis based upon the factors in the 1982 amendments’ Senate report, see S.Rep. No. 97-417 *supra* note 33.

43 *See* Uno v. City of Holyoke, 72 F.3d 973, 983 (1st Cir. 1995) (“We predict that cases will be rare in which plaintiffs establish the *Gingles* preconditions yet fail on a section 2 claim because other facts undermine the original inference”); see also Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1500 (2008) (stating that lower courts continually “downplay the significance of the second stage”—the totality of the factors portion—of the vote dilution analysis. Instead, the tripartite *Gingles* inquiry has generally been sufficient to state a claim of vote dilution); Rublin, *supra* note 10, at 122 (“On the surface, the three-pronged *Gingles* test appears to specify and clarify when a situation will likely fail the
subsequently acknowledged in *Holder v. Hall* that the holding of *Gingles* created a standard, perhaps unintentionally, that calls for proportional representation for minorities in redistricting schemes. *Gingles* sought to protect minority voters by providing a seemingly objective standard that required redistricters to provide a district to minority voters should they meet certain objective qualifications. Read in this light, it stood for a

“results test” of VRA Section 2 and therefore validate a plaintiff’s claim of minority vote dilution”; *but see* Johnson v. De Grandy, 512 U.S. 997, 1013 (1994) (“As facts beyond the ambit of the three *Gingles* factors loom correspondingly larger, fact finders cannot rest uncritically on assumptions about the force of the *Gingles* factors in pointing to dilution.”).

44 *Holder v. Hall*, 512 U.S. 874 (1994) (The Court twice mentions that *Gingles* may have resulted in standard of proportionality, first at 912: “And when the time comes to put the question to the test, it may be difficult indeed for a Court that, under *Gingles*, has been bent on creating roughly proportional representation for geographically compact minorities”; and again at 927: “As four Members of the Court observed in *Gingles*, there is “an inherent tension” between this disclaimer of proportional representation and an interpretation of § 2 that encompasses vote dilution claims”).

45 *But see* Rublin, *supra* note 10, at 122 (“Theoretically, *Gingles* sets bright line rules, but in practice, the conditions for a minority vote dilution claim are just as muddled as they were pre-*Gingles*.”).
threshold that redistricters must meet to comply with minority voters’ Constitutional rights.46

If Gingles was a minority voter protection case then Shaw v. Reno was a majority protection case. In Shaw, the 1990 census resulted in the addition of a new Congressional district in North Carolina.47 Pursuant to a § 5 preclearance procedure, the United States Attorney General rejected North Carolina’s first attempt at a redistricting scheme that reflected the additional district in want of an extra majority-minority district.48 In a second attempt at drawing the new districting scheme, the additional majority-minority district was drawn in an extraordinarily odd shape in order to comply with the Attorney General’s guidance.49 White voters claimed that this shape constituted an unconstitutional gerrymander because it could only be explained through racial motivations and therefore the majority-minority district should have to satisfy strict scrutiny.50 The uncouth shape of this

46 This conclusion is drawn from the premise that the VRA was enacted as a means of enforcing the 15th Amendment, and thus, compliance with the VRA is the threshold to comply with the Constitution.


48 Id. (the first districting scheme contained one majority-minority district).

49 Id. at 633-34.

50 Id. at 644.
district persuaded the Court to agree, holding that “reapportionment is one area in which appearances do matter. A . . . plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries . . . bears an uncomfortable resemblance to political apartheid.”\textsuperscript{51} The Court further held that a Plaintiff states a constitutional claim if the district lines “cannot be understood as anything other than an effort to separate voters into different districts on the basis of race,” so long as those districts do not withstand the gauntlet of strict scrutiny.\textsuperscript{52} In this case, after refusing to address claims that a compelling interest did or did not justify these district lines, the Court remanded the case to the District Court to determine if a compelling state interest that was \textit{narrowly tailored} existed that justified this district.\textsuperscript{53}

The Court in \textit{Miller v. Johnson} expanded the holding of \textit{Shaw} by permitting an equal protection claim brought by White voters for reasons other than oddly shaped districts. Similar to \textit{Shaw}, in \textit{Miller} Georgia redistricters were faced with drawing an

\textsuperscript{51} \textit{Id.} at 647-49.

\textsuperscript{52} \textit{Id.} at 649.

\textsuperscript{53} \textit{Id.} at 656-58.
additional congressional district as a result of the 1990 census.\textsuperscript{54} Georgia already had one majority-minority congressional district out of the original ten, but its redistricting scheme added a second majority-minority district with a third ‘possible’ district.\textsuperscript{55} Under a § 5 preclearance proceeding, the Department of Justice (DOJ) rejected this plan because “Georgia had created only two majority-minority districts” out of the eleven districts in a state that Black voters comprised 27\% of the voting age population.\textsuperscript{56} A second scheme that packed more Black voters into the original two majority-minority districts, and also raised the Black population in the 2nd Congressional District (the original ‘possible’ district), was also rejected by the DOJ in favor of a ‘max-Black’ plan inspired by the ACLU that contained three majority-minority districts (exactly 27\% of the districts would be majority-minority under this plan); this plan was finally pre-cleared by the DOJ.\textsuperscript{57}


\textsuperscript{55} Id. (the ‘possible’ district refers to the 2nd District; 35\% of the voting-age population in this district was black. ‘Possible’ means that the minority group is not definitely going to be able to elect the candidate of its choice, but the proportion of the minority population in the district makes it possible to do so).

\textsuperscript{56} Id. at 906-07.

\textsuperscript{57} Id. at 907 (The max-Black plan was the third attempt by the General Assembly to get pre-cleared).
The District Court in *Miller* read *Shaw* to encompass claims beyond just oddly shaped districts—it stood for the proposition that strict scrutiny applied anytime race was the “‘overriding, predominant force’ in the redistricting process.”58 The District Court noted that, while compliance with the VRA could serve as a compelling interest, the Georgia plan was not narrowly tailored because it called for proportional representation, which was not a compelling interest.59 The Court agreed with this expanded reading of *Shaw*, stating that “[t]he logical implication . . . is that parties may rely on evidence other than bizarreness [of shape] to establish race-based districting.”60 The Court explained that the somewhat odd shape, combined with the racial composition of the state, and the DOJ’s denials of previous plans, made it clear that race motivated these district lines.61 Thus, to comply with the expanded reading of *Shaw*,

58 *Id.* at 909.

59 *Id.* at 910.

60 *Id.* at 913 (although the Court did mention that this proof may be more difficult).

61 *Id.* at 917.
redistricters must have a narrowly tailored compelling state interest to draw a Gingles-inspired district.\footnote{62}

As a threshold matter, it was the District Court in \textit{Miller} that said in dicta that compliance with the VRA could be a compelling interest but proportional representation could not.\footnote{63} On appeal, the Court left this interpretation unaffirmed but did indicate that compliance with the DOJ’s preclearance requirements was not a compelling interest.\footnote{64} Further, since the district must be narrowly tailored, if the VRA could be satisfied with fewer majority-minority districts than the statewide plan calls for, the VRA cannot serve as a compelling interest to add more majority-minority districts than is minimally necessary.\footnote{65}

\footnote{62}{For an analysis on how a plaintiff can demonstrate race primarily motivated a redistricting scheme, and thus have a threshold claim under \textit{Shaw}, see Thomas C. Goldstein, \textit{Unpacking and Applying Shaw v. Reno}, 43 AM. U. L. REV. 1135 (1994).}

\footnote{63}{\textit{Miller}, 515 U.S. 900, 910 (1995).}

\footnote{64}{\textit{Id.} at 921. The Supreme Court may address this in relation to \S\ 5 in its forthcoming opinion in Alabama Legislative Black Caucus v. Alabama, No. 13-895 (argued Nov. 12, 2014).}

\footnote{65}{\textit{See} Johnson v. Miller, 864 F. Supp. 1354, 1383 (S.D. Ga. 1994) (“[I]t is evident that Georgia, wrangling with the DOJ Voting Section for over a year, did what was minimally “necessary” to secure preclearance, and putatively, to comply with the VRA. Consequently, there was a putatively compelling interest behind}}
This created a problem: when a minority group qualifies under *Gingles* for a majority-minority district, without using proportionality as the standard (which was rejected in *Miller*), it is not entirely clear if the VRA is satisfied with one district or whether the same state may call for a second or third district.\footnote{See Rublin, supra note 10, at 123 (arguing for clearer standards to satisfy *Gingles*).}

What emerges from the *Shaw* line of cases is the principle that the majority-group can state an EPC claim if it is clear that race was the predominant factor in a redistricting scheme and strict scrutiny is not satisfied.

Putting the two lines of cases together reveals the sweet spot that *Gingles* and *Shaw* have created for redistricting. On the one hand, if a minority group can demonstrate that it is sufficiently large enough and reasonably compact enough to constitute a majority in a single-member district, and polarized voting exists, then the minority group must get a majority-

\footnote{See also Goldstein, *supra* note 44, at 1193 (arguing that there could be no other means of satisfying the minimum threshold of the VRA to create a compelling interest).}
minority district, otherwise it has a vote dilution claim under § 2 of the VRA. On the other hand, if race is the primary motivation behind a redistricting scheme, as it necessarily is when a minority group is given a majority-minority district due to the *Gingles* test, it must pass strict scrutiny otherwise the majority group has a vote dilution claim under the EPC.

Thus, redistricters are given a narrow window with which to draw district lines: they must give enough deference to a qualifying minority-group in order to satisfy the VRA but not too much deference as to violate the Constitution. Thus, to successfully hit this sweet spot, the redistricters must know if (and at what point) *Gingles* has been satisfied because once it is satisfied, the compelling interest that directs a majority-minority district to be drawn disappears and no more racially motivated majority-minority districts can be drawn without an EPC violation. Proportionality questions have been consistently downplayed in both the legislative history of the VRA and the subsequent jurisprudence, but after the *Shaw* line of cases these

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67 See Voting Rights Act of 1965, supra note 5; see also Johnson v. Miller, 864 F. Supp. 1354, 1379 (S.D. Ga. 1994) (Stating that proportional representation is not required by the Constitution and is not a compelling interest); Boyd *supra* note 4, at 1415 (explaining the Edwards-Fish-Sessenbrenner amendments and
questions need affirmative answers if redistricters are expected to successfully hit this sweet spot.

II. UNPACKING THE SWEET SPOT

To recap up to this point, this paper has described the historical shortfall of the Fifteenth Amendment that led to the VRA and then the subsequent development of the VRA through jurisprudence and legislation. I then broadly described the limits of the VRA in terms of a floor (Gingles), which provides that a majority-minority district must be created under certain circumstances, and a ceiling (Shaw) that limits redistricters’ deference to minority voters by the EPC unless a narrowly tailored compelling interest can be shown. In this paper, the room between these boundaries is referred to as the sweet spot which redistricters must hit to draw a Constitutional district. In this section, I unpack both these limitations a step further to pinpoint exactly how the limits to the sweet spot are interpreted by the Court, which leads to my argument that the vague nature of if and when Gingles has been satisfied frustrates the intent of the 1982 amendments, and thus should be amended by relaxing the

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Senator Dole’s clause that explicitly refused to acknowledge proportionality as the standard).
compactness portion of the test and aiming for proportionality, should the other *Gingles* factors be satisfied.

\[ \text{A. Thornburg v. Gingles} \]

1. Prong 1—Sufficiently Large and Geographically Compact

a. Sufficiently large majority

In *Georgia v Ashcroft* it appeared that the Court broadened the first element of the first *Gingles* prong because it said that minority groups could satisfy the majority element of *Gingles* where they comprise less than 50% of the population in a proposed district. This was reasoned under the theory that a coalition of minority groups can together attenuate any one group’s ability to establish a 50% majority in the district.\(^68\) For example, a group that comprises 40% of the population in a potential single-member district, under this interpretation, may satisfy the first element of the first prong of *Gingles* because the percentage of other groups in the district prevents any group from

attaining a 50% majority.\textsuperscript{69} However, \textit{Bartlett v. Strickland} foreclosed this interpretation as applied to § 2 and instead affirmed the original \textit{Gingles} holding that requires the minority group to comprise at least 50% of the population.\textsuperscript{70} Thus, a minority group will not pass the \textit{Gingles} test if, in the possible majority-minority district, it comprises less than 50% of the population—this is an objectively defined element to prong 1.

b. Geographically compact

Justice White’s dissent in \textit{Shaw} indicated that a lack of compactness is an indicator that something may be wrong, and that disregard for “compactness often goes hand in hand with partisan gerrymandering.”\textsuperscript{71} Compactness is not mandated by the Constitution nor is it required by federal statute—it is a judicial creation aimed to alleviate a prima facie accusation that a district was drawn under improper motivations.\textsuperscript{72}

\textsuperscript{69} To illustrate this, perhaps it is that Black voters are 40% of the potential district, White voters 30%, Hispanic 20%, and Asian 10%. After \textit{Bartlett}, this district would not satisfy \textit{Gingles}.

\textsuperscript{70} \textit{Bartlett v. Strickland}, 556 U.S. 1 (2009).


But while compactness is perhaps partially about style points,\textsuperscript{73} the Court in \textit{LULAC} expressly stated that it is much more than that—compactness is about communities of interest.\textsuperscript{74} People that live in a more compact area generally share a common interest and should be able to elect a representative that will advocate on behalf of that interest. When considering a non-compact district at least partially based on race, the Court in \textit{LULAC} wrote that “[l]egitimate yet differing communities of interest should not be disregarded in the interest of race . . . [t]he practical consequence of drawing a district to cover two distant, disparate communities is that one or both groups will be unable to achieve their political goals.”\textsuperscript{75}

On the other hand, the importance of compactness is greatly reduced when it is objectively clear that a part of the statewide population already has a common community of interest based on racial identification, regardless of where they live. When the entire race in one proposed majority-minority

\textsuperscript{73} See \textit{Shaw}, 509 U.S. 630, 647 (1993) (“we believe that reapportionment is one area in which appearances do matter’’); \textit{see also} League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 434 (2006) (“Compactness is, therefore, about more than ‘style points’’).


\textsuperscript{75} \textit{Id.}
district can demonstrate that it votes for the same candidate, the localized issues have clearly taken a back seat to something that ties this community tighter: racial representation. An example may illustrate this point more clearly: consider Black voters who live in a non-compact area but are sufficiently large to constitute a majority in a single-member district. Half of this group lives in an urban zone and prefers focus to be directed toward inner-city schools, and the other half in a more rural zone wants focus directed at a reformed irrigation policy. There are separate candidates that champion each of these issues, but not both, yet the Black voters still vote for the same candidate regardless of that candidate’s support for local interests. In such a case, it is clear that localized issues that would otherwise create a community of interest have taken on less importance to the racial community of interest.

Despite its fixation with compactness, the Court has been unable to refine it to a workable and consistent definition that articulates what is compact.\footnote{See, e.g. Id. at 433 (“While no precise rule has emerged governing § 2 compactness, the inquiry should take into account ‘traditional districting principles such as maintaining communities of interest and traditional boundaries.’”). At least one lower court has cited “widely acceptable tests to determine compactness” in the “Polsby-Popper test” and the “Reock indicator.”} One pre-\textit{Shaw} case from the lower
courts, which held that a proposed majority-minority district would satisfy *Gingles* and the minority-group was therefore entitled to a majority-minority district, decided that a district was compact because the district lines were “manageable.” On the other hand, *Shaw I* held that the district was not compact because the district resembled “political apartheid.” In yet another case, the Court forbade intentionally reaching out to grab minority communities in a proposed majority-minority district simply to establish the majority requirement. Some lower courts have

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Both these tests measure geographic dispersion in a scientific format, yet the Supreme Court has not indicated a willingness to adopt these methods. Additionally, the same court citing these tests also relied on the “eyeball test” in coming to its ultimate conclusion on compactness. See Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections, 835 F. Supp. 2d 563, 570 (N.D. Ill. 2011). For an analysis on the Polsby-Popper test, see Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness As A Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL’Y REV. 301 (1991).

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79 Bush v. Vera, 517 U.S. 952, 979 (1996) (“District 30, for example, reaches out to grab small and apparently isolated minority communities which, based on the evidence presented, could not possibly form part of a compact majority-minority district, and does so in order to make up for minority populations closer to its
held compactness to mean the size and shape of a district, ideally the smallest circle possible is the most compact, while others have held it to mean the territory must be closely united to foster communication with representatives and constituents. 80 What emerges is a standard that must be manageable, meaning that it does not resemble political apartheid or intentionally grab small sections of the community, and generally speaking it should foster communications with representatives.

Compactness has become a standard justified by style points and the blind presumption that it consolidates a community of interest. Yet, it is also a standard that lacks express guidance from either the Supreme Court or Congress. Consequently, this standard that can make or break a § 2 claim hinges on a subjective “eye-ballling” test or an ad hoc method by a lower court. 81

2. Prong 2—political cohesion:

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80 See 114 A.L.R.5th 311 (Originally published in 2003).

Unlike compactness, political cohesion is objectively definable. Soon after the *Gingles* holding the Fifth Circuit in *Campos v. City of Baytown, Tex.* created a bright line rule to interpret how a group can be politically cohesive: if the minority group votes for a minority candidate of the same race then cohesion is established.\(^{82}\) While this is not an established rule by the Supreme Court (race of the candidate was considered irrelevant by Justice Brennan in *Gingles*\(^{83}\)), the opinion of the Court is that this prong of *Gingles* is a relatively objective analysis that is satisfied if there is a candidate generally preferred by the minority group.\(^{84}\) When a minority group shows that it votes in unison, this prong is satisfied.

3. Prong 3—insufficient crossover voting:

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\(^{82}\) *Campos v. City of Baytown, Tex.*, 840 F.2d 1240, 1245 (5th Cir. 1988) (This case asked whether a coalition of minorities can together state a §2 claim, which the 5th Circuit held that they could. In determining whether the claim existed, the court applied the *Gingles* test and held that “if the statistical evidence is that Blacks and Hispanics together vote for the Black or Hispanic candidate, then cohesion is shown.”): *see also* Rublin, *supra* note 10, at 124.

\(^{83}\) *Gingles*, 478 U.S. 30, 67 (1986) (all that must be shown is that the minority group has “less opportunity than other members of the electorate to ... elect representatives of their choice”).

\(^{84}\) *See, e.g.*, Rublin *supra* note 10, at 133.
The third prong of *Gingles* resembles the second prong in a sense because it relies on an identification of a minority-preferred candidate—a prerequisite to identifying a crossover voter is knowing which candidate counts as a crossover vote. Justice Brennan believed that race should not play a part in this determination—under this view, a White voter may vote for a White candidate and it still may count as a crossover vote because the White candidate is who the minority-group prefers. Justice White, in his concurrence to *Gingles*, interpreted Justice Brennan’s position to mean “the minority candidate would possess an entitlement to victory rather than simply the ability to compete on the same level as other candidates in the race.” This analysis means that § 2 cannot be violated if the minority preferred candidate is elected, and alternatively, the prong is satisfied if the minority-preferred candidate is not elected.

Justice O’Connor blends the second and third prong of the analysis as well by suggesting that the inquiry should not be limited to who is voted on by the minority group, but rather why the minority group votes on that candidate (what is the

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85 *See id.*


87 *See Rublin, supra* note 10, at 134; *See also Gingles, supra* note 82, at 83 (White, J., concurring).
community of interest). This may be moot for the third prong analysis, however: if the minority group shows that it prefers a certain candidate (i.e., it demonstrates political cohesion), and that minority group also satisfies the first prong, yet that candidate is not elected, it cannot be said that there are sufficient crossover majority voters to dissolve a §2 claim. On the other hand, if the first two prongs are shown but the minority preferred candidate wins elections regardless of not having a majority-minority district, the third prong is not satisfied because the minority-group is able to participate in the political process despite not having a majority-minority district. This too is a fairly objective analysis.

4. *Thornburg v Gingles* as an *almost* objective test:

The second and third prongs of *Gingles*, if present in a proposed majority-minority district, are sufficient to prove that a strong community of interest that transcends the benefits of compactness exists—these are objective prongs. Should a group large enough to form a majority in a single member district vote

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88 See Rublin, supra note 10, at 134; see also *Gingles*, 478 U.S. 30, 100 (1986) (O’Connor, J., concurring) (Justice O’Connor suggests that the inquiry should ask if other actors such as incumbency or political affiliation motivated the vote for a certain candidate, rather than simply race).
in unison and yet remain unable to elect a candidate of its choice, a strong community of interest that should have a majority-minority district is demonstrated. However the lack of guidelines for compactness beyond “reasonable” and the different interpretations available to reasonableness may hold the purpose of Gingles and the 1982 amendments hostage—if the district is non-compact, the whole test fails.

B. Shaw v. Reno

In both Shaw v. Reno and Miller v. Johnson, the Court determined that an Equal Protection Clause violation occurred in the redistricting scheme because it constituted a racial gerrymander that could not withstand the gauntlet of strict scrutiny. The constitutional analysis under the Shaw line has thus become a two-part inquiry. First, the plaintiff must show that the challenged district was drawn entirely, or at least primarily, under racial motivations. Second, if this threshold inquiry is shown, the defendant then has the burden to show that a compelling state interest existed and, despite the gerrymander, the district was narrowly tailored to fulfill that compelling interest—if either of these prongs cannot be demonstrated, an EPC violation is established and the district is struck down. While the compelling interest prong of strict scrutiny has been
fleshed out to a manageable (although not a certain) definition in post-*Shaw* jurisprudence, the Court, along with lower District Courts, has been much less clear on how the compelling interest can be narrowly tailored. This subsection will unpack *Shaw* a step further to figure out what the interplay between the EPC and the VRA is when the *Shaw*-line of cases is factored into the analysis.

On remand to the District Court, *Shaw II* held that the challenged districts in North Carolina were unconstitutionally gerrymandered because they were primarily motivated by race and could not withstand strict scrutiny.89 The defendant listed three potential compelling state interests that would justify the gerrymander: 1) that the gerrymander was necessary “to eradicate the effects of past and present discrimination;” 2) that the gerrymander was necessary to comply with § 5 preclearance requirements of the VRA; and 3) that the gerrymander was necessary to comply with § 2 of the VRA.90 As to eradicating the effects of past and present discrimination, the Court held that as a threshold matter, this interest would require two showings: 1) the discrimination was identifiable and 2) that there is a “strong

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90 *Id.* at 908.
basis in evidence to conclude that remedial action was necessary.”91 This compelling interest was dismissed quickly on the facts due to a failure of both of these inquiries.92 As to the second compelling interest, to comply with § 5 of the VRA, the Court refused to address whether this was a potential compelling interest because, even if it was, the challenged districts were not narrowly tailored to meet that interest.93 There was already a majority-minority district in North Carolina and § 5 only required non-retrogression,94 thus to allow § 5 to succeed as a compelling interest in this case would hint at a “max-black,” or proportional representation standard that had been consistently rejected in both the legislature and the courts.95 Similarly, the compelling interest in complying with § 2 was held to be a potential, though not definite, compelling interest. Whether it was a compelling interest or not was left unanswered because the districts in this case were not narrowly tailored to meet that interest because

91 Id. at 909-10.
92 Id. at 910.
93 Id. at 911.
94 See Beer v. United States, 425 U.S. 130 (1976) (holding that a state only has to show that it has not regressed since the previous redistricting to receive §5 preclearance—the district may still fail a §2 claim even though it passes §5).
*Gingles* had not been satisfied—the challenged districts were not compact and thus there was no requirement to provide an additional majority-minority district.96

After *Shaw II, Bush v Vera* followed suit and struck down a Texas districting scheme on the basis of an EPC challenge.97 In that case, due to the 1990 Census, Texas received three more seats in Congress and redistricted in a way that created more majority-minority districts than the previous scheme; six voters alleged this constituted a racial gerrymander.98 The Court first determined that strict scrutiny was the applicable standard because even if the districts were partially motivated by incumbency protection, the predominant motivation was clearly to increase the number of majority-minority districts.99 The Defendant listed § 2 compliance as the compelling state interest, but like *Shaw II,* safeguarding the scheme from a VRA § 2 challenge was not narrowly tailored, under the particular facts.100 Again the issue was compactness—the court admitted that compactness was not a “beauty contest” but also said that there

96 *Id.*


98 *Id.* at 957.

99 *Id.* at 959.

100 *Id.* at 977.
still must be reasonable compactness to the district, which was
not the case under this redistricting scheme.\textsuperscript{101} Thus, because one
of the prongs of \textit{Gingles} was not satisfied, there was no potential
challenge available to minority groups to state a § 2 violation and
the racial gerrymander was therefore unnecessary.

\textit{Shaw and Vera} paved the path for the Court to circumvent
the sweet spot by simply saying compactness does not exist so
there is no risk of a § 2 claim, and consequently no compelling
interest to draw the uncouth district. Several subsequent cases
have demonstrated this consistent avoidance of the sweet spot due
to a lack of compactness.\textsuperscript{102} While many of these cases have

\textsuperscript{101} \textit{Id.} at 977-81.

\textsuperscript{102} See, \textit{e.g.} United States v. Hays, 515 U.S. 737 (1995) (In \textit{Hays}, Louisiana had
initially sought to enact a districting scheme with one majority-minority district
but could not get pre-cleared under § 5 because it “failed to demonstrate that its
decision not to create a second majority-minority district was free of racially
discriminatory purpose.” Thus, after revising the plan to include two majority-
minority districts, the districting scheme was pre-cleared. However, as a result
of the 1990 Census, Louisiana lost a seat in Congress and had to redraw its
lines, but still drew two of the seven congressional districts as majority-minority
districts. The lower courts held that, because of the odd shape of the district, the
EPC was violated against the plaintiffs on the grounds that one of the majority-
minority districts was oddly shaped. On appeal to the Supreme Court, the case
was dismissed due to a lack of standing but the merits were later affirmed via
allowed compliance with § 2 as a compelling state interest for the sake of argument, the Court avoids adopting this as a per se rule because it avoids the sweet spot altogether by exploiting the only subjective portion of the *Gingles* test—compactness.

**C. Trying to hit the Sweet Spot**

an amended complaint in the district court.): Moon v. Meadows, 952 F. Supp. 1141, 1145 (E.D. Va. 1997) (In *Moon*, one majority-minority district in Virginia was challenged on the basis that it constituted a racial gerrymander. The court concluded that the district was created primarily under racial motivations so the district was subjected to strict scrutiny. The defendants argued that compliance with §2 of the VRA was the compelling interest that justified drawing a district primarily motivated by race but this interest was not narrowly tailored for two reasons: first, maximization of the minority group is not the requirement. Second, this district was found to be not compact enough to satisfy the *Gingles* requirements, thereby relieving pressure of a potential §2 claim. On appeal, the Supreme Court affirmed the decision without issuing an opinion.): see also *Diaz* v. Silver, 978 F. Supp. 96 (E.D.N.Y. 1997) (The District Courts have followed the Supreme Court’s lead and circumvented the sweet spot by claiming compactness does not exist. That case involved a plan that sought to emplace seven majority-minority districts (two Latino districts and five Black districts in New York, which had a total of 31 districts). The plan was pre-cleared under a § 5 proceeding, however, when challenged under the EPC the court found it to be primarily motivated by race and not geographically compact enough to pass strict scrutiny)
The sweet spot illustrates the range of discretion that redistricters have to consider race when redrawing congressional districts. As one limit, Gingles suggests race must be wholly considered when certain conditions are met—which are objective conditions with the lone exception of compactness. The other limit (or ceiling of discretion allowed) is Shaw, which indicates race cannot be wholly considered, or even primarily considered, without an identifiable compelling interest. Yet, for Gingles to carry any weight, it must be able to hold firm when put under the scrutiny of an EPC challenge under Shaw. In practice, this has not been the case—the subjective nature of compactness provides courts an easy way of going around the sweet spot and, consequently, frustrating the purpose of Gingles, and consequently, the 1982 Amendments. The next section will empirically illustrate this principle and advocate for a possible fix.

III. FRUSTRATING AND REIGNITING THE VRA

The Shaw line of cases has given the sense that strict scrutiny in racial gerrymandering cases is perhaps insurmountably strict.103 From the outset, it is telling that the

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Court is yet to hold the VRA as a per se compelling state interest but rather refers to it as a potential compelling state interest.\textsuperscript{104} This demonstrates the flexibility the Court has in ignoring \textit{Gingles} altogether—the Court has yet to determine if §2 compliance is a compelling interest because the issue is consistently sidestepped by holding that \textit{Gingles} is not satisfied due to a lack of compactness.\textsuperscript{105} This presents a significant problem: since there is hardly any standard that defines what a reasonably compact district is, beyond the two rhetorical goal posts stated by the Court,\textsuperscript{106} and because there is no requirement to provide proportional representation to politically cohesive minority-groups, a \textit{Gingles}-inspired district that calls for a majority-minority district solely because of a sufficiently large community of interest (that community of interest being race)

\textsuperscript{104} See, \textit{e.g.} Shaw v. Hunt, 517 U.S. 899 (1996).

\textsuperscript{105} Because \textit{Gingles} indicates when §2 claims have been established, §2 and \textit{Gingles} are analogous in this context.

\textsuperscript{106} It is not a beauty contest but it cannot resemble political apartheid
actually works against the purpose of the VRA.\textsuperscript{107} The Gingles boundary of the sweet spot is easily circumvented in situations where the Court has no way through the boundaries other than to look at the compactness of the proposed district.\textsuperscript{108} This section illustrates lack of minority representation that the sweet spot has caused and offers a solution.

\textit{A. Frustration of the VRA}

Because proportionality is not the standard and because compactness is required, deference to the Shaw boundary of the sweet spot has excluded minorities from equal participation in the political process. This subsection will look to the cases that have circumvented the sweet spot by citing a lack of compactness. Since this paper will later suggest that proportionality should guide redistricting schemes rather than strict adherence to compactness, the cases I describe will first identify the statewide

\textsuperscript{107} The purpose refers to the goal of empowering more minority voters by concentrating their votes and countering the long history of racial discrimination in American elections.

\textsuperscript{108} Other routes to a non-narrowly tailored compelling interest have been used, such as determining that Gingles is already satisfied in an unchallenged district and therefore the compelling interest of compliance with the VRA is moot because the unchallenged district satisfied the minimum requirement of the VRA.
Voting Age Population (VAP) for different racial groups. Then I will identify the proportion of the proposed redistricting scheme, in terms of total majority-minority districts divided by total districts in the state. Ideally, the proportion of the minority VAP and the proportion of majority-minority districts would be roughly similar. I will then identify the resulting proportion of majority-minority districts after the scheme was struck down due to non-compactness. In reading these statistics, it is important to keep in mind that I do not advocate proportionality to be the sole mechanism for redistricting; instead, I suggest that proportionality should be the target when the other prongs of Gingles are met, while considering a significantly relaxed standard of compactness.

In Shaw, North Carolina was comprised of a 78% White, 20% Black, 1% Native American, and 1% Asian VAP.\textsuperscript{109} The redistricting scheme proposed two majority-minority districts out of the 12 statewide districts (16%), but because a challenged majority-minority district was not compact, North Carolina emerged with only one majority-minority district (or 8%), despite

*Gingles* otherwise being satisfied.\textsuperscript{110} Similarly in *Hays*, the statewide VAP was 30.79% Black and 67.28% White.\textsuperscript{111} The proposed plan included two majority-minority districts out of the seven (or roughly 28.5% of the statewide districts), but due to a lack of compactness, one of these districts was struck down and Black voters were left with about 14% of the districts, despite all other *Gingles* factors being satisfied.\textsuperscript{112} In *Diaz*, New York was made up of a 12.31% Latino and 15.9% Black VAP.\textsuperscript{113} The proposed plan called for three Latino and four Black majority-minority districts, out of the statewide 31 districts (9% and 12.9% respectively), but one of the Latino districts was struck down due

\textsuperscript{110} *Id.*; see also, *Miller*, 515 U.S. 900 (In that case, the Black VAP was 27% of the Georgia’s total state VAP. The 1990 Census awarded Georgia an 11th Congressional district and the redistricting scheme drew a second majority-minority district. Because the second district went above the non-retrogression standard of §5, it was not narrowly tailored and was struck down; thus, despite a 27% VAP, Black voters only were able to elect the candidate of their choice in 9% of the state. This was not a district struck down due to a lack of compactness, but had a proportionality standard been emplaced, a greater part of the population would have an equal opportunity to participate in the political process).

\textsuperscript{111} *Hays* v. State of La., 839 F. Supp. 1188, 1209 (W.D. La. 1993).


\textsuperscript{113} *Diaz* v. Silver, 978 F. Supp. 96, 99 (E.D.N.Y. 1997).
to compactness resulting in Latinos only getting 6% of the districts: all other *Gingles* factors were present.\footnote{Id. at 131.} Lastly, in *Moon*, the Black VAP was 18.9% of the statewide VAP, and the districting scheme called for only one of the ten districts to be majority-minority, but this too was struck down because the odd shape was not compact and thus not narrowly tailored.\footnote{Moon v. Meadows, 952 F. Supp. 1141, 1145-50 (E.D. Va. 1997).} Thus, 18.9% of the VAP were unable to elect the candidate of their choice, despite voting cohesively.

Although it is clear that proportionality is not the standard, the lack of an objective standard has favored the majority group at the VRA’s expense. Should proportionality be reached with the primary purpose of compliance with §2, the district will be struck down per se as a racial gerrymander, unless it passes strict scrutiny.\footnote{Johnson v. De Grandy, 512 U.S. 997, 1000 (1994) (“We hold that no violation of § 2 can be found here, where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population”).} This is because a district drawn under *Gingles* pretenses is necessarily primarily motivated by race and somewhere below exact proportionality is the amount of majority-
minority districts needed to reach § 2 compliance. Once this number is reached, *Gingles* can no longer justify creating a majority-minority district. Thus, while jurisprudence asserts that “max-Black” is not the standard, this proposition has consistently degraded minorities’ ability to fully participate in the political process in comparison to White voters. In this light, after the *Shaw* line of cases, the *Gingles* holding (which can only be minimally complied with or else it will not be narrowly tailored to withstand strict scrutiny) negatively affects the ability of minority-groups to achieve any semblance of proportional representation. *Gingles* was the first attempt at interpreting the 1982 amendments, and did so successfully until *Shaw*, but has over time proven to be an inadequate remedy to the intent of the 1982 amendments.

**B. Moving Forward**

1. Shifting compactness to proportionality

   In Justice White’s dissent of *Shaw*, which suggested that uncouth shapes may indicate something is amiss, he asserted that the uncouthness of the shape does nothing more than indicate something is amiss—it does not *prove* something is amiss.118 He

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117 See, id. at 1006.

wrote, “[i]n particular, [oddly shaped districts] have no bearing on whether the plan ultimately is found to violate the Constitution.”119 Plainly, compactness does little more than make a district more pleasing on the eye.120

This paper advocates for relaxing the compactness requirement to Gingles and making proportionality the target when the Gingles test is otherwise met. One objection to this proposal is that proportionality is not required by the Constitution—neither is compactness. Another objection may be that proportionality was expressly written out of the 1982 amendments, but this was in a pre-Shaw era that was not privy to the competing standard of Shaw. Lastly, it is clear

119 Id. Of course, there is also the issue of communities of interest discussed in Section 3. However, while compactness serves as a default community of interest, should something else emerge as a stronger community of interest (race), the purpose for compactness is nullified.

120 See Nicholas O. Stephanopoulos, Redistricting and the Territorial Community, 160 U. Pa. L. Rev. 1379, 1398 (2012) (“Beginning with compactness, there is no reason to think that people are represented adequately only when they are placed in districts whose shapes are aesthetically pleasing. No theory holds that people's engagement with the political process, the relationships between constituents and their elected officials, or politicians' performance in office, is optimal in a regime where districts are compact. Neither the jaggedness of districts' boundaries, nor the dispersion of their territories, has any inherent connection to the caliber of districts' political life.”)
proportionality is not a clean one-for-one swap with compactness: proportionality and compactness seek to accomplish different objectives. While compactness tries to minimize the appearance of racial influence as the sole factor driving the community of interests in a district, proportionality would ostensibly heavily favor reliance on race.

This issue is resolved by ensuring proportional districting would not be required in situations where there is not a politically cohesive minority group or where minority groups are able to elect the candidate of their choice despite not having a majority minority district. By relaxing the compactness standard and adding a proportionality target, the other factors of Gingles remain in tact as a threshold. Only when the voting in unison prong and the lack of cross-over voter prongs are satisfied, which indicates that a stronger community of interests than geographic closeness exists, would the proportionality standard come into effect. Thus, once the other prongs of Gingles are met, proportionality could serve as a compelling interest to bypass Shaw.

This paper contends that by shifting the focus from the compactness requirement of Gingles to a target of proportionality, it can be assured that VRA will be reignited back to its original
intent. This solution is not purported to be the only means of resolving the problems of the sweet spot; it may even be that once the compactness standard is dropped, the VRA no longer is frustrated, but targeting proportionality ensures this end is accomplished (this is a belt-and-suspenders approach).

2. Using proportionality

Michael McCann has argued that the majority-minority districting experiment of the early 1990’s should be replaced by an at-large proportionality system. 121 Two basic forms of proportional representation emerge from his argument: the “list system” and the “choice voting/single transferable vote.” 122 The list system involves a voter selecting a party and all the candidates that party prefers, and the proportion of total votes that the party receives, with a margin for error, is the number of seats that the party receives in congress. 123 McCann’s article illustrated this kind of proportional-based voting system in Iowa’s


122 Id.

123 Id.
In 1994 Congressional elections, the Democratic Party garnered 42% of the vote and therefore sent Democratic Congressmen to two of the five congressional districts. The other form of proportional representation is the “Choice Voting/Single Transferable Vote.” In that system, voters rank their choice of candidates and, when their candidate gets elected or eliminated, the excess votes are transferred to a second ranked candidate. This is a method that allows voters to hedge their bets by ensuring that vote for a candidate that is either a runaway or a long shot is not a waste because the vote can transfer to a second-best option for that voter.

McCann’s at-large proportionality recommendation would not necessarily favor minority voters. First, in the list-based system, McCann restricts votes to two parties, but also forces voters to choose a candidate chosen by the party. An example may help illustrate this: consider a state with ten congressional districts, and Democrats get 50% of the vote. Five Democratic candidates are sent to office, but none of them are necessarily the

124 Id.
125 Id.
126 Id.
127 Id.
128 Id.
minority’s preferred candidate. The Democratic slate of candidates consisted of up to ten candidates and the top five of these candidates will be sent to Congress. When votes are cast along racial lines, the White majority Democrats are able to overwhelm the Black minority Democrats and put the White-preferred Democrat in office. For example, it may be that four of the ten candidates on the Democratic slate are minority-preferred candidates, but the six that are majority-preferred candidates are going to overwhelm this vote because the majority group dominates the minority group in the primaries. This kind of system ignores voters that vote along racial lines and assumes that minorities can be satisfied by simply getting the political party of its choice in office rather than candidate.

A similar problem occurs in the “vote transfer” system. A minority preferred candidate would be a long shot vote in a statewide election because the majority would overwhelm that candidate. For example, the minority preferred candidate may receive 20% of the statewide vote, but 20% will never be able to overwhelm majority candidates who may lose a race narrowly, but then get votes transferred to them for second and third place. Similar to the first situation, this kind of proportional representation would potentially create a partisan-proportionality
standard, but not a racially preferred proportionality standard. Thus, both of these standards ignore the racial cohesion prong of *Gingles*: if votes are cast along racial lines, it is too hasty and narrow assume that proportional party representation will compensate for the lack of minority representation.

Lastly, by creating an at-large system, the benefits of even a relaxed compactness requirement are lost both in situations where there is racially polarized voting and in situations where there is not. As I argued above, compactness is a traditional means for identifying a community of interests. While I contend that compactness does not always serve as the best measure of a community of interest, this paper does not argue that compactness serving as a default method of identifying a community of interest does nothing to increase equal participation in the political process. Compactness is a valuable tool to represent the values of as many voters as possible. Without a showing that something else is a stronger community of interest for a potential district—such as race—compactness still has value as a default. What is left of compactness should proportionality become the target is discussed later in this paper.

This paper argues that proportional representation can be subtler than a complete overhaul of the voting system. First, the
proportionality standard only needs to be targeted when there is clear political cohesion along racial lines because only then is it demonstrated that a community of interest that transcends geography exists. Once that is established, it must be addressed whether the minority group that seeks proportional representation is large enough to constitute a majority in a single-member district and compact enough to arguably fit within a relaxed standard of compactness from the current state of the law.\textsuperscript{129} If that is the case, the statewide VAP for that minority group would govern how many districts the minority group receives. For example, a state with 20% Black VAP, 80% White VAP, and ten congressional districts would comprise of eight majority districts, and two majority-minority districts. Proportional representation of this sort would simply become a compelling interest that allows a district to be primarily motivated by race and would reignite §2 of the VRA.

3. Reigniting the VRA

It would require a statutory amendment from Congress to use proportionality as articulated in this paper. Proportionality cannot be a judicially driven solution because under the 1982

\textsuperscript{129} The next section will discuss what a relaxed compactness standard may look like.
Amendment’s to the VRA, Senator Dole stressed that no part of
the amendments were to construe the amended VRA to mean
proportionality is required.\textsuperscript{130} Thus, the Court would be hard
pressed to enact a proportionality standard that is not in direct
conflict with statutory law, or at least its express intent.
However, Congress did not factor in the competing standard
created by \textit{Shaw} in its reluctance to adopt a proportionality
standard. Insofar as compactness, the Court in \textit{Gaffney} stated,
“compactness has never been held to constitute an independent
federal constitutional requirement.”\textsuperscript{131} Thus, the Court could
simply do away with or relax the compactness prong of \textit{Gingles} on
its own because that is a judicially created rule. Either change
would help the frustration of the VRA.

Over time, the lack of legislative action has demonstrated
that Congress has adopted \textit{Gingles’} three preconditions as a
correct interpretation of the amended §2. Now, the competing line
of \textit{Shaw} frustrates the purpose of \textit{Gingles} and, consequently, the
1982 Amendments, just as \textit{City of Mobile, Ala. v. Bolden}
frustrated the 1965 language of the VRA in 1980. It is time for
Congress to go back to the drawing table and legislate a

\textsuperscript{130} \textit{See} Boyd, \textit{supra} note 4, at 1415.

\textsuperscript{131} \textit{Gaffney v. Cummings}, 412 U.S. 735, 752 (1973).
proportionality target for §2 claims when the other two prongs of *Gingles* have been established—a modern amendment to the VRA is advocated by this paper. This amendment would codify *Gingles*, lessen the compactness standard, and call for proportional representation in situations where the modified *Gingles* test is met.

This paper does not advocate for complete abolishment of the compactness standard, just significant relaxation of its importance. Of course, this requires a line to be drawn and risks “kicking the can”—the current problem is the lack of a fair and clear definition of what compactness is, so simply contending that the standard is “relaxed” does little to advance it. Other types of voter dilution cases can perhaps help pin down a definition. In partisan gerrymandering cases, for example, strict scrutiny does not come into the compactness equation, but rather rational basis and the result is many uncouth yet Constitutional districts.  

There are still traditional factors such as county, city, or state lines, geographic features, and contiguity that may factor into the analysis of where lines should be drawn. While admittedly the

shapes of the struck down districts described in this case may be uncouth, they are far less uncouth than those districts gerrymandered for partisan purposes. There need not be a primary focus on what the shape looks like, but rather just an assurance that districts can be drawn on one contiguous plot of land, with other traditional factors to be accommodated as best as possible after proportionality is satisfied.

Should proportionality be targeted rather than strict adherence to compactness, it may be that the Court simply chooses to narrow the meaning of political cohesion to circumvent the sweet spot in a similar way that the Court circumvents it with compactness right now. This would not be unlike the back and forth nature of minority vote dilution law the previous 150 years has witnessed. Future jurisprudence and legislation cannot be predicted, but the seesaw nature of voter disenfranchisement and dilution that aims to give equal participation in the political process has made positive progress since the Reconstruction and

\[133\text{ Id.}\]

\[134\text{ The Jim Crow laws were a response to the 15th Amendment, followed by the VRA responding to the Jim Crow laws: the } Bolden \text{ holding responded to the VRA and the 1982 Amendments responded to } Bolden; \text{ lastly, } Shaw \text{ responded to the 1982 Amendments. This paper advocates that it is time for the next series of responses.}\]
Jim Crow-era. This momentum need not be stopped because the Court may have a different way to circumvent the sweet spot between the EPC and the VRA in the future. The current problem is that a subjective and unnecessary standard is an ironclad barrier to equal participation in the political process for minorities—at this stage, that is what needs to be remedied.

CONCLUSION

This paper has addressed the history of minority disenfranchisement that led to the VRA, the subsequent jurisprudence and legislative amendments interpreting the VRA, and lastly the sweet spot created by the VRA under Gingles and the EPC under Shaw I. This paper has shown that when courts are faced with trying to hit the sweet spot, and thus they must state that either a VRA or an EPC violation exists, they have repeatedly bypassed it by exploiting the subjective compactness prong of Gingles. This is antithetical to the intent of the VRA and to the 1982 amendments to the VRA. The conclusion is that the Gingles holding has been frustrated by Shaw to the point where it now holds minority groups back from full participation in the political process, and thus should be supplemented with a proportionality target that can serve as a compelling state interest when Gingles is otherwise satisfied. Along with this, the
compactness element must be relaxed. While on its face this would seem to indicate a political process motivated by race more so than the current state of the law, by keeping the other two prongs of *Gingles* in place, proportionality would only be the standard when it is already clear that a state’s political landscape is racially polarized. These changes would enable minority voters to equally participate in the political process.