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I. INTRODUCTION

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society . . . ."\(^1\) For minorities, the path to full realization of this right has been long and tortuous—as long and tortuous, perhaps, as the boundaries of North Carolina's controversial twelfth congressional district which, in 1992, gathered up enough black voters to give the state one of its first black representatives to Congress since Reconstruction.\(^2\)

\(^2\) North Carolina sent two black representatives to the United States House of Representatives in 1992. Mel Watt, a black Democrat, won election in the twelfth congressional district, while Eva Clayton, also a black Democrat, won election in
During its 1993 term, the Supreme Court held in *Shaw v. Reno*\(^3\) that North Carolina’s winding congressional district and majority-minority districts\(^4\) like it can be challenged under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.\(^5\) In doing so, the Court ignited a national debate over the wisdom of creating legislative districts for historically-disadvantaged minority populations in an effort to increase their representation in government. The decision has far-reaching effects, jeopardizing not only the validity of majority-minority districts\(^6\) but the very mechanism which led to their creation: the Voting Rights Act of 1965.\(^7\)

This Note analyzes the Court’s decision in *Shaw v. Reno* and examines its impact on the Court’s prior voting rights jurisprudence. It begins by tracing the history of voting rights litigation from the groundbreaking reapportionment cases of the 1960s to the enactment and interpretation of the Voting Rights Act and its amendments.\(^8\) The Note then sets forth the facts, issues, arguments, and holding of *Shaw*. It continues by delineating the principles established by the Supreme Court in its earlier voting rights cases\(^9\) and criticizing *Shaw*’s retreat from these principles. This Note concludes that the Supreme Court has promulgated unworkable standards for the newly-created constitutional claim announced in *Shaw*. By rejecting goals of group empowerment and placing undue emphasis on aesthetic districting criteria, the Court creates disharmony between the dictates of the Voting Rights Act and the principles of the Fourteenth Amend-

the state’s first congressional district. The two became North Carolina’s first black representatives to Congress this century. *Whither Shall It Wander?*, *The Economist*, July 10-16, 1993, at 18, 19.


4. “Majority-minority district” is a term used by courts to describe an election district where a racial or ethnic minority constitutes a majority of the population. *David Butler & Bruce Cain, Congressional Redistricting: Comparative and Theoretical Perspectives* 159 (1992).

5. “No State shall... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

6. After the 1992 census alone, states across the country created 26 majority-minority congressional districts, and 13 more blacks and 6 more Latinos won seats in the House of Representatives. *Whither Shall It Wander?*, supra note 2, at 19. These additional representatives bring the total number of minority members of Congress to 56. *David Van Biema, Snakes or Ladders?*, *Time*, July 12, 1993, at 30. The use of majority-minority districts is prevalent in districting for state legislatures and municipal governments as well.


ment, thus paralyzing state efforts to achieve meaningful inclusion of all populations in government.  

II. BACKGROUND

A. State Reapportionment and One Person, One Vote

The Supreme Court took its first step into the "political thicket" of state reapportionment plans in 1962 when it decided *Baker v. Carr*, an historic case in which Tennessee voters challenged the state's reapportionment of seats in the state legislature. Rejecting its earlier position that a dispute over state election districting presented a nonjusticiable "political question," the Court in *Baker* discerned in the Equal Protection Clause manageable judicial standards by which the constitutionality of the state's reapportionment plan could be judged. "Judicial standards under the Equal Protection Clause are well developed and familiar," the Court concluded, "and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action." Thus, the Court allowed the plaintiff's Fourteenth Amendment challenge to proceed.

*Baker* cleared the way for more active judicial review of state election procedures. Shortly after *Baker*, the Court in *Gray v. Sanders* struck down Georgia's unit voting system which had the effect of

10. For purposes of this Note, "state" districting efforts also include the districting undertaken by state political subdivisions such as counties and cities.

11. The lack of discussion of the dissenting opinions in this Note is not meant to imply a lack of esteem for the arguments advanced in them. The opinions of Justice White and Justice Souter, in particular, lend well-reasoned insight into the debate over whether the Fourteenth Amendment or previous Supreme Court decisions require strict scrutiny of race-based districts. Nevertheless, the focus of this Note is on the disharmony between the majority's equal protection analysis in *Shaw* and the dictates of the Voting Rights Act. It does not attempt to re-open the equal protection debate between the majority and minority in *Shaw*.

12. Justice Frankfurter used these words in *Colegrove v. Green*, 328 U.S. 549 (1946), when he declined to intervene in a challenge to an Illinois congressional districting plan. Frankfurter feared that judicial evaluation of the claim would amount to encroachment upon state legislative powers and concluded, therefore, that "[c]ourts ought not to enter this political thicket." *Id.* at 556.

13. Apportionment is defined as "the process of allocating congressional districts across states." *Butler & Cain*, supra note 4, at 156.


18. Georgia's voting system allocated varying units to counties for purposes of vote counting in Democratic primaries. Two units were allocated to counties with populations of 0-15,000 people, an additional unit was allotted for the next 5,000 persons, one additional unit for the next 10,000 persons, another for the next
weighting the votes of certain Georgia citizens differently based upon county residency. In *Gray*, the Court held that "[t]he conception of political equality . . . can mean only one thing—one person, one vote."^{19}

The Court took this definition of political equality a step further in *Reynolds v. Sims*^{20} when it applied the "one person, one vote" standard to a suit against Alabama's apportionment of state legislative seats. In *Reynolds*, the state's districting scheme had remained unchanged from its enactment in 1900 until the suit was brought in 1960. During that time, the state's population had grown unevenly, producing districts of vastly disproportionate numbers of voters. The *Reynolds* majority determined that "every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies,"^{21} and that, in a representative government, this right could be realized only if all citizens stood "in the same relation" to their government.^{22} Because the right to full and effective participation is impaired if the weight of a citizen's vote is "diluted when compared with votes of citizens living in other parts of the State,"^{23} the Court held that the Equal Protection Clause mandates that seats in all houses of state legislatures be apportioned on a population basis.^{24}

The reapportionment cases established an individual's right to an equally-weighted vote as the starting point for adjudicating state districting plans. In addition, they opened the door for more ambitious judicial oversight of the range of state voting procedures which impact voting rights even while adhering to notions of population equality.

**B. The Voting Rights Act**

Supreme Court rulings espousing egalitarian principles and the right of each person to an equally-weighted vote could do little to curtail the pervasiveness of racial discrimination which was embedded in state election practices by the 1960s. Since the passage of the Fifteenth Amendment,^{25} states had built up an arsenal of techniques designed to impede black registration and voting. Grandfather

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15,000 persons, and two units for each population increase of 30,000 thereafter. All candidates for statewide office were required to receive a majority of the county unit votes to receive nomination in the primary. *Id.* at 372.

19. *Id.* at 381.
21. *Id.* at 565.
22. *Id.*
23. *Id.* at 568.
24. *Id.*
25. Enacted in 1870, the Fifteenth Amendment provides:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color,
clauses, literacy tests, property qualifications, and "good character" tests became popular methods of systematically depriving blacks of their right to vote.\textsuperscript{26} Gerrymandering,\textsuperscript{27} traditionally a partisan districting device, was adopted by states and other political subdivisions to obstruct black efforts to achieve legislative representation.\textsuperscript{28} Although the Supreme Court struck down many of these techniques\textsuperscript{29} and Congress passed various forms of anti-discrimination legislation,\textsuperscript{30} voter registration records in the early sixties reported black voter registration up to fifty percentage points behind registration of whites.\textsuperscript{31}

It was against this background of "unremitting and ingenious defiance of the Constitution"\textsuperscript{32} that Congress passed the Voting Rights Act of 1965.\textsuperscript{33} Hailed as "one of the most monumental laws in the entire history of American freedom,"\textsuperscript{34} the Act was designed to "banish the blight of racial discrimination in voting"\textsuperscript{35} and achieve the extension of the franchise which the Fifteenth Amendment and previous legislative and judicial efforts had been unable to accomplish. The Voting Rights Act suspended literacy tests and other devices designed

\begin{quote}
\textit{or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation.}
\end{quote}

U.S. Consta. amend. XV, §§ 1-2.

\textsuperscript{26} See Karen McGill Arrington, \textit{The Struggle to Gain the Right to Vote: 1787-1965}, in \textit{Voting Rights in America: Continuing the Quest for Full Participation} 25, 29-31 (1992). See also South Carolina v. Katzenbach, 383 U.S. 301, 311 (1966)(carefully implemented literacy testing systems allowed states to exclude the two-thirds of adult blacks who were illiterate while still including illiterate white voters through alternate tests).

\textsuperscript{27} Gerrymandering is defined as:

\begin{quote}
the process of dividing a state or other territory into the authorized civil or political subdivisions, but with such a geographical arrangement as to accomplish an ulterior or unlawful purpose, as, for instance, to secure a majority for a given political party in districts where the result would be otherwise if they were divided according to obvious natural lines.
\end{quote}


\textsuperscript{28} See infra note 108 and accompanying text.


\textsuperscript{31} \textit{Id.} For a more detailed illustration of the gap between registration of whites and blacks, see \textit{Charles V. Hamilton, The Bench and the Ballot} 238, Table II (1973).


\textsuperscript{34} D. Garrow, \textit{Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965}, at 132 (1978)(quoting President Lyndon Johnson).

to discriminate against voters on the basis of color. In addition, it implemented a controversial tool for curbing the creation of new discriminatory devices. Anticipating that those with a demonstrated history of voting discrimination would "try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act," Congress included in the Act provisions applicable only to suspect areas. Under section 5 of the Act, "covered jurisdictions" are prohibited from enacting a new voting procedure pending scrutiny by federal officials that the procedure "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 . . . ."

Unlike previous attempts to remedy voting discrimination, the Voting Rights Act was largely successful in securing to minority voters the promises of the Fifteenth Amendment. Minority voter registration increased dramatically until by the 1970s the disparity between black and white voter registration in several of the section 5 states closed to below ten percent. Yet the Voting Rights Act encompassed goals of effective participation which reached beyond the immediate objective of achieving greater minority voter registration. It is these goals which create the nexus between the Voting Rights Act of 1965 and the Court's population-based reapportionment cases.

1. Vote Dilution

In Reynolds, the Court wrote that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." This assumption was quickly adopted and expanded in.

38. The Act's provisions restricting state changes to election practices in targeted areas were immediately challenged on the ground that they "exceed[ed] the powers of Congress and encroach[ed] on an area reserved to the States by the Constitution." South Carolina v. Katzenbach, 383 U.S. 301, 323 (1966). The Supreme Court nevertheless upheld all of these provisions, concluding that "the Fifteenth Amendment supersedes contrary exertions of state power," and expressly gives Congress the power to enact legislation to enforce the Amendment's provisions. Id. at 325.
40. A covered jurisdiction is any state or political subdivision of a state which is deemed to meet the requirements of 42 U.S.C. § 1973b(b) by having maintained on one of the statute's designated dates a voting test or device and a minority voter registration figure below fifty percent. For a list of jurisdictions requiring preclearance of voting changes, see 28 C.F.R. § 51 app. (1993).
cases interpreting the Voting Rights Act. In *Allen v. State Board of Elections*, the Supreme Court relied on *Reynolds* in holding that state election practices which had the effect of diluting minority voting strength violated section 5 of the Voting Rights Act. The Court's use of "dilution" in *Allen*, however, evidenced a meaning distinct from that used in the cases guaranteeing citizens equally-weighted votes. As voting rights theorist Pamela Karlan explains, the reapportionment cases and the cases under the Voting Rights Act in fact establish two separate theories of vote dilution. The first, "quantitative" dilution, includes the one person, one vote principle. These cases are "based solely on a mathematical analysis" that shows that the votes of persons in one district are devalued relative to the votes of persons in a less-populated district. "Qualitative" vote dilution, on the other hand, results when the election practice "impairs the political effectiveness of an identifiable subgroup of the electorate." Because the latter kind of vote dilution focuses on the "quality" rather than the weight of votes, qualitative vote dilution can occur even in cases where absolute population equality exists.

Cases invoking the protections and remedies of the Voting Rights Act, particularly section 5 and, most recently, amended section 2 of the Act, concentrate on "qualitative" vote dilution. Consequently, these cases have redefined the meaning of the right to vote.

2. Section 5

The section 5 preclearance provision has been described as "the heart of the Voting Rights Act." Though it imposes upon covered states a "severe requirement," the Court has nevertheless held that the section is to be given the "broadest possible scope." Accordingly,

44. 393 U.S. 544 (1969).
45. Id. at 569.
46. In *Allen v. State Board of Elections*, the Court focused not on population disparities but on voting procedural changes which, although respecting notions of population equality, nevertheless "nullify" the ability of minority voters "to elect candidates of their choice . . . ." Id.
48. Id. at 176 (citing Nevitt v. Sides, 571 F.2d 209, 215 (5th Cir. 1978)).
49. Id. (emphasis added).
a wide range of voting practices and procedures have been held to re-
quire preclearance under the Act.\textsuperscript{54}

Although the Court had little difficulty defining what practices re-
quired preclearance under section 5, it had more trouble determining
when these practices had the effect or purpose of denying or abridging
the right to vote. In 1976, the Court finally articulated its standards
for measuring a section 5 violation. In \textit{Beer v. United States},\textsuperscript{55}
the City of New Orleans brought suit under section 5 seeking a declara-
tory judgment that its municipal voting plan, enacted after the 1970
census, did not violate the standards of section 5. Noting that under
the 1961 plan none of the city's five city council districts had a major-
ity of black voters, while under the new plan blacks would constitute a
majority population in two of the districts, the Court upheld the plan.
The Court reasoned that a reapportionment plan which improved the
position of minorities could not logically be said to dilute or abridge
the voting rights of minority citizens and therefore held that section 5
prohibited only those changes in voting procedures which "would lead
to a retrogression in the position of racial minorities with respect to
their effective exercise of the electoral franchise."\textsuperscript{56}

The Court's standard of nonretrogression for section 5 cases was
reaffirmed in \textit{City of Lockhart v. United States}.\textsuperscript{57} It remains a corner-
stone principle for state legislators revising state voting plans and
drives much of the litigation brought under the Voting Rights Act.\textsuperscript{58}

3. \textit{Section 2}

Section 2 of the Voting Rights Act,\textsuperscript{59} like section 5, has become a
key provision of the Act. Unlike section 5, which limits its coverage to
specific areas, the provisions of section 2 apply \textit{nationwide} to all state
and state political subdivisions. While its original language generated
little controversy, congressional amendments to the provision in 1982
proved to play a substantial role in reshaping the concept of the franchise.

\begin{footnotesize}
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\item 54. See, e.g., City of Richmond v. United States, 422 U.S. 358 (1975) (holding that extension of a city's boundaries through annexation requires section 5 preclearance); Perkins v. Matthews, 400 U.S. 379 (1971)(requiring section 5 preclearance of all changes in the location of polling places). Allen itself held that preclearance was required when a state sought to initiate a change from single-member to multimember districts, from election to appointment of certain officials, and from lower to higher candidate eligibility standards. Allen v. State Bd. of Elections, 393 U.S. 544, 550-51 (1969).
\item 55. 425 U.S. 130 (1976).
\item 56. Id. at 141.
\item 57. 460 U.S. 125 (1983).
\end{footnotes}
\end{footnotesize}
The significance of the 1982 amendments is most apparent when placed against the backdrop of cases which led to their adoption. In 1980, the Supreme Court interpreted the original wording of section 2 in City of Mobile v. Bolden, a case attacking the City of Mobile's at-large election scheme under section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the Constitution. The Court in Bolden found that section 2 "was intended to have an effect no different from that of the Fifteenth Amendment itself" and therefore based its decision to uphold the City's plan on constitutional grounds. Relying on earlier equal protection cases which explored the requirements for making out a valid equal protection claim, the Court then held that without proof that the plan embodied "purposeful discrimination," the plan violated neither the Equal Protection Clause nor the Fifteenth Amendment.

Concerned that the decision in Bolden would undermine the Act's ability to combat vote dilution, Congress acted quickly after Bolden to amend section 2. The new provision drew heavily from pre-Bolden cases which had relied upon broad principles of minority inclusion in their evaluation of vote dilution claims. Amended section 2

60. As originally enacted, section 2 provided:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.


62. In an election at-large, also known as an election from a multimember district, all voters of a town, county, or other jurisdiction vote for all of the members of the legislative body seeking election. Laughlin McDonald, The Quiet Revolution in Minority Voting Rights, 42 Vand. L. Rev. 1249, 1257 (1989). In a school board at-large election, for example, where six seats are open, each voter may cast six votes but may only cast one of the six votes for a particular candidate. Out of the candidates running, the six who receive more than fifty percent of the votes will be elected.


64. Among other cases, the Court relied heavily on Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1976), and Washington v. Davis, 426 U.S. 229 (1975), in its analysis in Bolden.


68. See White v. Regester, 412 U.S. 755, 769-70 (1973) (invalidating a multimember districting scheme using a "totality of the circumstances" test which incorporated "an intensely local appraisal of the design and impact of the . . . multimember
established a “results” test which eliminated any requirement that the challenging litigant show discriminatory intent. Under the new terms of section 2, a violation would be established if the “totality of the circumstances” demonstrated

that the political processes leading to nomination or election in the State or political subdivision [were] not equally open to participation by members of a class [of protected citizens] in that its members had less opportunity than other members of the electorate to participate in the political process and to elect representative of their choice.

In Thornburg v. Gingles, the Supreme Court articulated precisely when the “totality of the circumstances” would precipitate a finding of unlawful vote dilution under section 2. Gingles involved a challenge to North Carolina’s 1982 redistricting plan apportioning the seats of the state Senate and House of Representatives. Black citizens of North Carolina had attacked seven districts in the plan—one single-member district and six multimember districts—on the grounds that they “impaired black citizens’ ability to elect representatives of their choice . . . .”

The Supreme Court was no stranger to the unusual potential of multimember districts to have a dilutive effect on minority voting strength, having explored their suspect use in several cases before Gingles. The Court reiterated these concerns in Gingles, noting the danger that in multimember districts “the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.” Nevertheless, as it had in the past, the Court stopped short of deciding that multimember districts were violative of minority voters’ rights per se, holding instead that unless a block voting majority is usually able to defeat the choices of minority voters, the “totality of the circumstances” test would not be met. Instead, to prove section 2 vote dilution through use of multimember districts, the Court de-


72. A single-member district is a district “electing only one representative.” BUTLER & CAI, supra note 4, at 160.
73. See supra note 62.
77. Id. at 69.
decided that the minority group must demonstrate: (1) that it is "sufficiently large and geographically compact to constitute a majority in a single-member district;"78 (2) that it is "politically cohesive;"79 and (3) that "the white majority votes sufficiently as a block to enable it . . . usually to defeat the minority's preferred candidate."80

The Gingles preconditions have made single-member districting plans the norm as states strive to comply with section 2 of the Voting Rights Act.81 This change in state districting theory and Gingles' emphasis on group cohesiveness, as recognized and reinforced through majority-minority districts, have reshaped the contours of vote dilution cases over the past decade.

III. SHAW v. RENO—A NEW ERA?

Against this background the Supreme Court announced its decision in Shaw v. Reno.82 While Shaw has its roots in both population reapportionment cases and vote dilution cases, in striking down various affirmative action programs and other race classifications, it borrows its tenor and rationale from recent equal protection decisions.83 The case involves, according to Justice O'Connor, who penned the decision for the majority, "two of the most complex and sensitive issues this Court has faced in recent years: the meaning of the constitutional right to vote, and the propriety of race-based state legislation designed to benefit members of historically disadvantaged racial minority groups."84

A. Facts of Shaw v. Reno

In 1990, as a result of population increases reflected in the 1990 federal census, North Carolina became entitled to an additional seat in the United States House of Representatives.85 The state's General
Assembly accordingly passed legislation to redistrict the state into twelve congressional districts. The plan included one district in the northeastern part of the state that had a majority black voting age population.

Because forty of North Carolina's one hundred counties are covered by the preclearance provisions of section 5 of the Voting Rights Act, the General Assembly submitted its redistricting plan to the United States Attorney General for approval. The Attorney General formally objected to the plan, voicing concern that the state had failed to "give effect to black and Native American voting strength" in the south-central to southeastern region of the state. The Attorney General believed the state's minority population in those areas could support a second majority-minority district.

Rather than seek a declaratory judgment to have the original plan implemented notwithstanding the Attorney General's objection, the General Assembly revised its redistricting plan, this time creating two majority black districts. Again, the Assembly submitted its plan to the Attorney General. This time, the Attorney General expressed no objections. Many North Carolina citizens, however, were not as easily satisfied. In 1991, five North Carolina residents brought suit against the Governor, Lieutenant Governor, and Secretary of State of North Carolina, the Speaker of the North Carolina House of Representatives, members of the North Carolina State Board of Elections, and the United States Attorney General and Assistant Attorney General for the Civil Rights Division, claiming that the second plan violated several provisions of the United States Constitution including the Equal Protection Clause of the Fourteenth Amendment.

It was the shape of the plan's two minority districts which most offended the plaintiffs. One of the two districts, Congressional District

86. See supra note 40.
89. The plaintiffs in Shaw are all residents and registered voters of Durham County, North Carolina. Before the challenged redistricting, all had been registered to vote in the same district. Under the new plan, two would vote in District 12 and three would vote in District 2. Shaw v. Reno, 113 S. Ct. 2816, 2821 (1993).
90. Id.
1, has been described as "somewhat hook shaped,"91 or, more bluntly, akin to a "Rorschach ink-blot test."92 It rests primarily in the north-eastern part of the state, but its "finger-like extensions"93 reach almost to the South Carolina border. The second district, District 12, is now the more famous of the two. Drawn along Interstate Highway 85, District 12 stretches diagonally across the state from Durham to Gastonia for approximately 160 miles, dividing precincts, counties, and towns.94 Its irregular shape has earned it the nickname "the snake"95 and has prompted one state representative to remark, "You could drive down I-85 with both doors open and kill everybody in the district."96

In their complaint, the plaintiffs alleged that by drawing districts along racial lines without regard to any other considerations, the Assembly had created a racial gerrymander97 in violation of the Equal Protection Clause. Such a plan, they contended, deprived plaintiffs of their right to participate in a "colorblind" electoral process.98

The three-judge district court99 dismissed the plaintiffs' complaint upon the defendants' motion,100 concluding that the plaintiffs failed to state a cognizable claim. The district court held that the plaintiffs had failed to allege an essential element in an equal protection claim: "that the redistricting plan was adopted with the purpose and effect of discriminating against white voters . . . on account of their race."101 In addition, the district court found that the plaintiffs had failed to demonstrate the requisite discriminatory effect: that the plan had acted to fence out white voters from the political process or to minimize

94. Id. at 2820-21.
95. Van Biema, supra note 6, at 30.
96. Id. at 31 (quote attributed to State Representative Mickey Michaux).
97. See supra note 27.
100. Both the federal and the state defendants moved for dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. The federal defendants also invoked Federal Rule of Civil Procedure 12(b)(1), alleging a lack of subject matter jurisdiction pursuant to 42 U.S.C. § 19731(b) (1988), which gives the District Court for the District of Columbia exclusive jurisdiction to enjoin actions taken by federal officers pursuant to the Voting Rights Act. Shaw v. Barr, 808 F. Supp. 461, 463, 467 (E.D.N.C. 1992). The district court's actions as to the jurisdictional issue is beyond the scope of this Note. This Note focuses only on the Supreme Court's review of the district court's 12(b)(6) dismissal.
101. Id. at 472.
or unfairly cancel out white voting strength. The plaintiffs appealed, and the Supreme Court granted certiorari to hear the case.

B. The Majority Opinion

In a 5-4 decision, the Supreme Court reversed the decision of the district court. Because of the difficulty of distinguishing when a race-based measure is "benign" or "remedial" and when it is "motivated by illegitimate notions of racial inferiority or simple racial politics," the Court held that redistricting legislation which either expressly distinguishes between races or is "unexplainable on grounds other than race" must meet the same strict scrutiny required of all other racial classifications. Thus, a plaintiff may state a cognizable claim under the Fourteenth Amendment by alleging that a reapportionment plan, "though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." The Court found support for requiring strict scrutiny of racially-motivated districts in racial gerrymandering cases decided prior to the enactment of the Voting Rights Act. One of these cases, Gomillion v. Lightfoot, had struck down Tuskegee, Alabama's attempt to "fenc[e] Negro citizens out of town," and thereby out of their municipal voting rights, by changing Tuskegee's municipal boundaries from a square to an "uncouth twenty-eight sided figure." Although Gomillion was decided under the Fifteenth Amendment, the Shaw majority noted that Justice Whittaker's concurring opinion had concluded that the bizarre district effectuated an unconstitutional segregation of races in violation of the Equal Protection Clause. While acknowledging that a racial gerrymander would not always be easy to prove, the Court in Shaw found that deviations from "traditional districting principles such as compactness, contiguity, and respect for

102. Id. at 473.
103. Supreme Court jurisdiction to hear a direct appeal from a three-judge district court panel is conferred by 28 U.S.C. § 1253.
105. Id. at 2825 (internal quotation marks omitted).
106. Id. at 2828.
108. Id. at 341.
109. Id. at 340.
110. Id. at 349.
111. Shaw v. Reno, 113 S. Ct. 2816, 2826 (1993). The Court points to Wright v. Rockefeller, 376 U.S. 52, 57 (1964), to illustrate the difficulty in proving racial gerrymandering. In Wright, the Court held that, because "conflicting inferences" could be drawn from the shape of the districts in question, the Court was precluded from finding that the challenged district lines were racially-motivated.
political subdivisions" provide especially telling evidence of racially-motivated districting. Although the Court adhered to its earlier views that compliance with such "traditional" districting principles is not constitutionally required, it nevertheless decided that respect for these principles might save majority-minority districts from a racial gerrymandering claim.\footnote{112. Shaw v. Reno, 113 S. Ct. 2816, 2827 (1993).}

Although the majority opinion focused primarily on the general dangers of race classifications rather than on a lengthy discussion of precedent, it was necessary for the Court to distinguish at least one case which both the district court and the dissenters felt barred the plaintiffs' claims. This case, United Jewish Organizations of Williamsburgh, Inc. v. Carey,\footnote{113. Id. at 2818.} involved the state of New York's apportionment plan for congressional, state senate, and state assembly seats. In UJO, New York had submitted a reapportionment plan to the Department of Justice pursuant to its obligation under section 5 of the Voting Rights Act and had received in return a formal objection from the Attorney General expressing concern that the plan had a dilutive effect on minority voting strength. New York subsequently overcame the Department's objections by creating "more substantial nonwhite majorities"\footnote{114. 430 U.S. 144 (1977) [hereinafter UJO].} in two senate districts. In order to accomplish this result, the state split a community of Hasidic Jews into two districts. Members of this Jewish community challenged the plan, alleging that it would dilute the value of their votes "solely for the purpose of achieving a racial quota"\footnote{115. Id. at 152.} in violation of the Equal Protection Clause.

The Court in UJO rejected the plaintiffs' claim. Writing for the plurality, Justice White rejected the proposition that racially-motivated districting was per se unconstitutional and, in fact, found that "the Constitution does not prevent a state subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with Section 5."\footnote{116. Id. at 161.} Further, the opinion held, it was not unconstitutional for states to decide how much of a black majority would satisfy section 5.\footnote{117. Id. at 162.} Finally, because the petitioners could not prove that the plan did more than meet requirements of nonretrogression and because "there was no fencing out of the white population from participation in the political processes of the county,"\footnote{118. Id. at 165.} the
Court held that the plan did not violate the Fourteenth or Fifteenth Amendments.

Although the Shaw majority admitted that in many ways UJO "closely resembles"120 Shaw, they read UJO's "highly fractured decision"121 as merely providing a standard whereby white voters can establish vote dilution. According to Justice O'Connor, such a framework does not apply where voters allege that a reapportionment plan is "so irrational on its face that it immediately offends principles of racial equality."122

After rejecting the argument that the claim as stated was barred by UJO, Justice O'Connor contemplated what strict scrutiny would require in reapportionment cases brought under the "analytically distinct"123 constitutional claim recognized by Shaw. It is this dicta which gives Voting Rights Act experts pause because it questions whether a state's districts will satisfy strict scrutiny even if drawn to comply with the provisions of the Voting Rights Act or, independently, to accomplish a remedy for past discrimination.124 Although the Court acknowledged that states have a "very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied,"125 it cautioned that "courts must bear in mind what the law permits, and what it requires."126 Having crafted disharmony between the requirements of the Equal Protection Clause and the parameters of the Voting Rights Act, the Court then declined to further consider the problem and instead left its resolution to the lower court on remand.

IV. ANALYSIS

In Shaw, the Court abandons its prior commitment to group voting rights and to the majority-minority district as the primary means of combatting vote dilution. In doing so, the Court places its holding in Shaw in direct conflict with the principles embodied in the Voting Rights Act without providing manageable standards by which to resolve that conflict. The rivalry of these competing principles promises to paralyze state efforts to effectuate inclusion of all people in govern-

121. Id. at 2829.
122. Id.
123. Id.
124. The state appellees argued that they had a compelling state interest, independent of their interest in complying with the Voting Rights Act, in "eradicating the effects of past racial discrimination." Id. at 2831. The Shaw Court left this argument for consideration on remand.
125. Id. at 2830.
126. Id. (emphasis added).
VOTING RIGHTS ACT

A. Voting as a Group Right

One of the key distinctions between the “quantitative” right to vote and the “qualitative” right to vote is the latter’s recognition that mathematical equality does not ensure that the broadest goals of representative democracy will be accomplished. As Justice Stevens explained in the reapportionment case of Karcher v. Daggett,127 “[m]ere numerical equality is not a sufficient guarantee of equal representation. Although it directly protects individuals, it protects groups only indirectly at best.” Litigators of vote dilution claims have emphasized this reality, and the Supreme Court has embraced it. Borrowing from Reynolds’s concept of “full and effective participation,” the Court’s vote dilution cases forge an expansive concept of the franchise.

In the aggregate, the Court’s vote dilution cases both implicitly and explicitly acknowledge that when voters enter the voting booth they take with them not only their equally-weighted vote but “their political, racial, ethnic, and socioeconomic affiliations and interests.” With this respect for group interests comes the Court’s gradual yet discernible development of group voting rights.

Nowhere is the concept of group rights more apparent than in the Voting Rights Act and the cases interpreting it. The rich history behind the Act reveals a commitment by both Congress and the Court to equal political opportunity for disadvantaged groups at every stage of the political process and at all levels of government. Prominent voting rights lawyer Lani Guinier elaborates:

It is evident from the statutory scheme that the Voting Rights Act was conceived to respond to both political equality and empowerment visions. . . . [T]he statute’s broad political equality and empowerment norms, which incor-

127. 462 U.S. 725 (1983)(Steven, J., concurring.) Karcher involved a challenge to a New Jersey reapportionment plan which evidenced slight population deviations among districts. The plaintiffs alleged that although the deviations were small, the state had not made a good faith effort to achieve population equality. On that basis, the Supreme Court declared the plan unconstitutional.

128. Id. at 752.


130. Karlan, supra note 47, at 179. The Court’s decisions often examine thoroughly the complaining group’s employment, health, and educational status to determine whether interests particularly relevant to them receive adequate attention in the voting scheme at issue. See White v. Regester, 412 U.S. 755, 762-70 (1973)(describing interests unique to black and Latino populations in Texas).

porate both an equality and an empowerment dynamic, focus on the rights of protected voters to limit the extent to which government may disadvantage specific voters, groups of voters, or their interests through voting practices, standards, and procedures.132

The Court’s Voting Rights Act opinions manifest a similar interpretation of the goals and principles of the Act. By framing vote dilution cases in terms of “minority voting strength”133 and “loss of political power through vote dilution,”134 the Court elevates empowerment visions over narrower visions of mathematical equality.

Shaw represents a definite departure from this expansive construct of voting. The majority’s emphasis on the “special harms”135 which it believes accompany race districting implicitly rejects the special benefits which have been attributed to inclusion of various group interests in political processes and outcomes.136 Suddenly, the majority finds that maximizing group interests through majority-minority districts threatens to “balkanize us into competing factions.”137 Justice O’Connor’s emotionally-laden rhetoric138 signifies not only a retreat from group interests but a resignation from empowerment visions. As such, it is both inconsistent with previous Supreme Court cases and incompatible with the tool the Court itself has created to boost group representation: the majority-minority district.

B. The Requirements of the Voting Rights Act

While a review of vote dilution cases over the past three decades reveals an expansive concept of voting, it conversely reveals a surprisingly narrow view of how vote dilution should be remedied. Because of the nature of vote dilution and the remedy first fashioned to address

136. According to Pamela Karlan, inclusion brings “a sense of connectedness to the community and of equal political dignity; greater readiness to acquiesce in governmental decisions and hence broader consent and legitimacy; and more informed, equitable and intelligent governmental decisionmaking.” Karlan, supra note 47, at 180. Indeed, whenever the Court considers whether a group’s voting strength has been “diluted” or “cancelled out,” it at the same time makes the assumption that undiluted group voting strength, which accomplishes adequate governmental representation of minority interests, is a valuable objective.
138. In several parts of the opinion, Justice O’Connor uses language with emotional overtones. “It is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past,” O’Connor writes. Id. at 2824. “A reapportionment 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.” Id. at 2827.
it, the Supreme Court has cornered states into believing that they must draw single-member districts wherever possible in order to comply with the Voting Rights Act.

The battery of vote dilution cases illustrates that many election practices can have the effect of diluting a particular group's voting strength and denying them the ability to elect candidates of their choice. By far the most popular method employed by states to achieve vote dilution, however, has been the use of multimember election districts. Because of their winner-take-all rules, multimember districts ensure that a bloc-voting majority can consistently cancel out minority votes for other candidates. Consequently, majority interests are often over-represented, and minority interests are left without a voice in government.

Because vote dilution has traditionally taken the form of multimember districting, the remedy recommended for vote dilution has traditionally taken the form of mandated single-member districts and, in many cases, majority-minority districts. The Gingles Court's approach to amended section 2 of the Voting Rights Act most clearly illustrates this phenomenon. In order to articulate when the "totality of the circumstances" demonstrated minority vote dilution, the Court in Gingles found it necessary to establish a base measurement of "undiluted" voting strength. The Court chose a framework whereby "undiluted voting strength" is calculated by how many representatives of their choice a minority group "could potentially elect in the hypothetical district or districts in which it constitutes a majority." In a vote dilution claim brought by black voters, for example, the Court would measure "submergence of black voter strength by its converse: the ability to elect black candidates from majority-black districts."
Since the Court itself visualizes the creation of majority-minority districts as the antithesis of vote dilution, it is not surprising that the states have incorporated the same framework into their reapportionment plans. Particularly after the 1990 census, states began drawing majority-minority districts in an effort to comply with what the Supreme Court had led them to believe was required by section 2 and section 5 of the Voting Rights Act. With analyses vastly different from that applied in Shaw, the Court has upheld these state plans, most recently in Voinovich v. Quilter.\textsuperscript{146} In Voinovich, a unanimous Court reversed a district court decision which had held that majority-minority districts could only be created to remedy section 2 violations. In doing so, the Court reminded the parties that while "the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law . . . that does not mean the state's powers are similarly limited."\textsuperscript{147}

Though hardly unaware of the fact that states and municipal bodies have read the Court's Voting Rights Act cases as mandating the creation of majority-minority districts whenever possible,\textsuperscript{148} the Shaw majority avoids the substance of this argument, leaving the issue for the lower courts to tackle on remand. Nevertheless, the Court does not fully resist calling this reading into question. Justice O'Connor's brief discussion of the Voting Rights Act in relation to North Carolina's reapportionment plan clearly implies that drawing these districts in a reapportionment plan, while not unconstitutional per se, is something the Act "permits" but does not require.\textsuperscript{149} As such, use of these racially-motivated districts would be unlikely to satisfy strict scrutiny in an equal protection challenge.\textsuperscript{150}

By avoiding the crucial issue of when states may create majority-minority districts and relegating arguments over compliance with the Voting Rights Act to dicta, the Court throws the future of dozens of election districts into a state of uncertainty. Yet the Court leaves little guidance, save that which may be extracted from the Court's preoccupation with aesthetic districting criteria, by which states may

\textsuperscript{146} 113 S. Ct. 1149 (1993).
\textsuperscript{147} Id. at 1156.
\textsuperscript{148} The argument that majority-minority districts were to be created whenever possible appeared, for example, in Voinovich. Id. at 1153. Yet it was not until its 1993-94 term, when the Court held that failure to maximize majority-minority districts was not the measure of a section 2 violation, that the Court began to address the substance of this position. See Johnson v. DeGrandy, 114 S. Ct. 2647 (1994).
\textsuperscript{150} "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." Id. at 2831.
evaluate their districts for consistency with the Court's holding in Shaw and with the provisions of the Voting Rights Act.

C. The States' Dilemma

In Shaw, the Supreme Court insists that states are not constitutionally required to adhere to criteria of "compactness, contiguity, and respect for political subdivisions." Nevertheless, a careful reading of Shaw will reveal no other standards by which to distinguish an unconstitutional majority-minority district from one which does not warrant a Shaw equal protection challenge. By raising subjective geographic criteria to constitutional levels, the Court creates a judicially-unmanageable standard by which to judge the viability of majority-minority districts.

Foremost among Shaw's unanswered questions over geographic compactness is just how "bizarre" or "uncouth" a district must be to subject it to an equal protection challenge. Although such labels invoke powerful images, a brief probe behind them illustrates that they will be of limited helpfulness in future voting rights litigation. For example, if segregation by race without justification is unconstitutional, why should it matter whether that segregation is accomplished by a snake-like district or by a circle or square? Put differently, if reapportionment is "one area in which appearances do matter," just how much and at precisely what point do they matter? North Carolina's "snake" was deemed suspect because it divided counties, precincts, and towns, yet prior to Shaw the Court had recognized that many legitimate considerations—such as balancing rural and urban representation and protecting incumbents—justified a sacrifice of geographic integrity in districting. As the majority in Gaffney v. Cummings aptly explained:

151. Id. at 2827.
152. See id. at 2841 (White, J., dissenting) ("Given two districts drawn on similar, race-based grounds, the one does not become more injurious than the other simply by virtue of being snake-like, at least so far as the Constitution is concerned . . . ").
153. Id. at 2827.
154. See, e.g., Gaffney v. Cummings, 412 U.S. 735 (1973) (approving district variations which preserved a balance between political parties); Reynolds v. Sims, 377 U.S. 533 (1964) (expressing concern over failure to balance rural, urban, and suburban interests); Wright v. Rockefeller, 376 U.S. 52 (1964) (recognizing legitimate state interest in protecting seats of incumbents).
155. 412 U.S. 735 (1973). Gaffney involved a challenge to the Connecticut redistricting plan's population variances. In formulating the plan, the Connecticut Apportionment Board had looked at previous statewide election results and created on that basis what was attempted to be a proportionate number of Republican and Democratic legislative seats. Id. at 738. In rejecting the equal protection challenge, the Court held:

[N]either we nor the district courts have a constitutional warrant to invalidate a state plan . . . because it undertakes, not to minimize or elimi-
It requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena.156

District lines, in other words, are not necessarily as determinative of impermissible racial motives as the Shaw majority seems to believe. The Court's failure to mention its prior case law acknowledging legitimate reasons for irregular districting is perhaps not its greatest omission, however. More conspicuously absent is any discussion of districting considerations which, although not strictly race-based, are at least to some degree race-linked. Socioeconomic status is a prime example of one such consideration. Utilizing socioeconomic profiles is certainly one means of creating districts which presumably reflect a commonality of interests within district populations. Yet in many states, including North Carolina,157 differences in socioeconomic status seem inextricably linked to racial or ethnic background.158 Shaw's narrow holding seems to leave room for states or local governments to justify their districting schemes with evidence that nonracial concerns, rather than their racial correlations, actually led to the creation of the districting plan. Yet the Court leaves no clear guidance for lower courts to evaluate any of these arguments in the wake of Shaw.

Given the variety of considerations which go into the drawing of district lines, then, the Shaw Court's allusion to Justice Stewart's now-famous standard for defining obscenity—"I know it when I see it"159—fails to explain why geographic compactness should be able to defeat a Shaw attack. Thus, the majority's opinion contains absolutely no tangible standards by which the lower courts may determine when "a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race"160—the prerequisite

156. On remand of Shaw v. Reno, the three-judge district court panel noted precisely such a correlation, stating, "there are within each of the [majority-minority] districts substantial, relatively high degrees of homogeneity of shared socio-economic—hence political—interests and needs among its citizens." Shaw v. Hunt, 861 F. Supp. 408, 470 (E.D.N.C. 1994).


160. Id. at 2826.
for requiring a district to undergo strict scrutiny to ensure its legitimacy.

The Supreme Court's failure to articulate a workable standard for when the shape of a district will warrant scrutiny under Shaw leaves all arguably "irregular" majority-minority districts vulnerable to attack. As a result, the Court places the states in the highly precarious position of second-guessing the aesthetic sensibilities of the federal courts. States which created majority-minority districts under the judicially-prompted assumption that the Voting Rights Act requires them are likely to face mounting litigation from voters invoking Shaw. The creation of new districts which would increase minority governmental representation will in turn be placed on hold pending resolution of the disharmony in voting rights which Shaw creates. Ultimately, as Justice White explains in his dissent, "the Court's approach . . . will unnecessarily hinder to some extent a State's voluntary effort to ensure a modicum of minority representation."161 Paralyzing states in this way will prevent them from constructively contributing to the "colorblind" electoral ideals which the Shaw majority embraces.

D. Prospects for the Future

With the legitimacy of majority-minority districts uncertain, states may now be faced with the challenge of devising other means of ensuring minority representation in government. Indeed, in the immediate wake of Shaw, modified at-large voting systems, such as single transferrable voting162 or cumulative voting,163 have received increased at-

162. Single transferrable voting is a form of proportional representation whereby "every voter ranks the candidates for all of the positions available in the legislature in order of preference from favorite to least favorite." Alexander Athan Yanos, Note, Reconciling the Right to Vote with the Voting Rights Act, 92 Colum. L. Rev. 1810, 1859 (1992). In the event the candidate ranked first does not need the vote in question, the vote is transferred to the second-choice candidate, and the process continues as necessary. In order to be elected in a single transferrable voting system, a candidate must receive a predetermined quota of votes. Id. at 1860. Single transferrable voting is used in at-large districts rather than single-member districts, yet it eliminates the "winner-take-all" qualities of traditional at-large districts. Consequently, any group that identifies a "common political interest" is capable of achieving proportional representation in the legislative body up for election. Id.
163. Under a cumulative voting scheme, each voter may cast as many votes as there are seats to be filled in the election. A voter is not restricted to casting only one vote for a candidate, however, and may "cumulate or aggregate her support by giving preferred candidates more than one vote." Karlan, supra note 47, at 231. The opportunity for voters to "plump" their votes, along with a lower threshold of exclusion of candidates from the election, makes it easier for the interests of politically-cohesive groups to elect candidates of their choice without the help of majority-minority districts. Guinier, supra note 51, at 1461-67.
tention from states searching for legitimate alternatives to districting.164 Under these systems, "voters, rather than district-drawers, determine with whom they will unite to elect representatives."165 Thus, if minorities find they have more in common with other members of their minority group than with their geographic neighbors, this preference will be recognized through voting patterns instead of through manipulation of district lines. This "self-identity" of shared interests is therefore said to ensure that group interests are fairly represented in government while at the same time eliminate the need for states to engage in race-based districting to accomplish similar ends.

It is true that alternative voting methods seem to avoid at least some of the concerns expressed by the Court in Shaw while still maintaining the integrity of empowerment visions expressed throughout the Court's vote dilution cases and the provisions of the Voting Rights Act. Nevertheless, experimentation with new electoral systems is not an easy task and will not in any event completely evade the uneasiness which Shaw leaves behind. Adoption of what some consider to be complicated voting systems is difficult to accomplish in the face of well-established districting traditions; consequently, support for experimentation among state and local governing bodies remains tenuous at best.166 Moreover, even those with realistic prospects of reinventing their electoral systems realize that the nature of alterna-

164. Alternative voting systems have traditionally been credited as legitimate electoral alternatives only in academic circles. See, e.g., Guinier, supra note 51, at 1416-76; Alan Howard & Bruce Howard, The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm, 83 COLUM. L. REV. 1615, 1658-60 (1983); Karlan, supra note 47, at 221-36. Among the arguments for alternative voting systems advanced by leading voting rights scholars, Guinier's arguments are perhaps most compelling and, at the same time, most controversial. In one particularly insightful work, Guinier argues for alternative voting methods as a means of combatting the failure of the majority-minority district to fully accomplish the original goals found in the provisions of the Voting Rights Act. According to Guinier, the majority-minority district fell short of these goals by shifting the focus of the Act from minority empowerment to a "head count" of the number of black representatives in legislative bodies across the country. This "head-count" analysis, which Guinier designates as the "theory of black electoral success," ignores the tendency of those legislative bodies to treat minorities elected from majority-minority districts as token representatives. Thus, despite an increase in the number of minority representatives in government, those representatives remain marginalized from large parts of the legislative decision-making process, and are powerless to advance the unique interests of minority groups. Lani Guinier, The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 MICH. L. REV. 1077 (1991).

165. Karlan, supra note 47, at 226.

166. Fortunately, while alternative systems are difficult to implement, states are not without models for their development. For an account of the use, success, and constitutionality of alternative voting systems in the United States, see Karlan, supra note 47, at 223-36.
tive voting systems limits their effectiveness outside of county or city government elections. Therefore, regardless of any reform which could be implemented at the local level, single-member districting would remain the most likely means of apportioning seats in state legislatures and in the United States House of Representatives. Consequently, the need for the Court to provide more manageable standards than those it advanced in Shaw remains very real.

V. CONCLUSION

The Supreme Court’s decision in Shaw establishes a distinct tension between the group empowerment goals of the Voting Rights Act and the newly-recognized goals of “colorblind” electoral processes expressed in Shaw. Unfortunately, it fails to address the crucial issue of how that tension should be resolved. The Court’s subjective geographic standards are of little help to states as they strive to comply with the dictates of the Act and the requirements of the Fourteenth Amendment.

With the boundaries of Shaw still largely undefined, it is impossible to know whether, as many fear, the Court has truly laid the groundwork for a full-scale attack on all majority-minority districts. In upcoming terms, the Supreme Court will have ample opportunities to develop principles for its newly-created equal protection claim and re-evaluate its commitment to “full and effective participation” of all citizens in the electoral systems and legislative bodies across the country.167 Only when these principles are firmly in place will the unfulfilled objectives of the right to vote—“the essence of a democratic society”168—be fully realized.

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