CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—VOTERS WHO CHALLENGE A REAPPORTIONMENT PLAN ESTABLISH A CLAIM UNDER THE EQUAL PROTECTION CLAUSE WHERE THE CONGRESSIONAL VOTING DISTRICT IS SO EXTREMELY IRREGULAR IN SHAPE THAT ABSENT A COMPELLING JUSTIFICATION, THE REAPPORTIONMENT IS EXPLAINABLE ONLY FOR THE PURPOSE OF SEGREGATING VOTERS BY RACE—*Shaw v. Reno*, 113 S. Ct. 2816 (1993).

The Fifteenth Amendment was enacted after the Civil War to guarantee African-American citizens the right to vote.[1] The ability to cast a ballot, however, did not always ensure meaningful voting[2] power.[3] Efforts to impose restrictions on the elective franchise[4]

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[1] RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.7, at 75-77 (2d ed. 1992). According to the authors, the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments, also known as the Civil War Amendments, drastically altered the nation's political landscape. *Id.* § 18.7, at 75. The first of the Civil War Amendments, the Thirteenth Amendment, states in part: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. The Fourteenth Amendment, also applicable to voting rights legislation, states in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. For an outline of the development of the Equal Protection Clause, see *infra* note 22. Finally, the Fifteenth Amendment states: "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, or previous condition of servitude." U.S. CONST. amend. XV, § 1. The Fifteenth Amendment, ratified by Congress in 1870, specifically enfranchised African-Americans by prohibiting state and federal governments from denying the right to vote to any person. ROTUNDA & NOWAK, *supra*, § 18.7, at 77.

[2] This Note uses the term "voting" as defined in the Voting Rights Act:

> [A]ll action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

42 U.S.C. § 1973*l*(c)(1) (1988).

[3] *See* Roy W. Copeland, *The Status of Minority Voting Rights: A Look at Section V Preclearance Protections and Recent Decisions Affecting Multi-Member Voting Districts*, 28 HOW. L.J. 417, 417-20 (1985). Although the right to cast a ballot has been protected for more than a century, it was not until 1962 that the Supreme Court defined the quality of that vote. Robert S. Stern, Comment, *Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence*, 41 U. CHI. L. REV. 398, 398 (1974) (citing Baker v. Carr, 369 U.S. 186 (1962)). Recently, however, the Court acknowledged that even when votes are equally weighted, gerrymandering "may minimize or cancel out the voting strength of identifiable racial or ethnic groups." *Id.* For further discussion of efforts to circumvent the strength of minority votes, see John Lewis & Archie E. Allen, *Black Voter Registration Efforts in the South*, 48 NOTRE DAME

often frustrated the constitutional prescription, especially for minority voters.[5] One important and frequently used technique to dilute minority voting strength was racial gerrymandering.[6] In a racial gerrymander, legislative manipulation of voting district

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LAW. 105, 105-08 (1972) (detailing the history of African-American disfranchisement in the South).

[4] The elective franchise is defined as: "The right of voting at public elections. The privilege of qualified voters to cast their ballots for the candidates they favor at elections authorized by law as guaranteed by [the] Fifteenth and Nineteenth Amendments to [the] Constitution, and by federal voting rights acts." BLACK'S LAW DICTIONARY 519 (6th ed. 1990). Conversely, "*[d]isfranchisement* prevents or discourages people from voting. This may be accomplished directly by prohibiting persons belonging to a particular group from casting a ballot . . . . [and] indirectly by rules and practices that . . . discourage a group of potential voters from casting a ballot." Chandler Davidson, *Minority Vote Dilution: An Overview*, *in* MINORITY VOTE DILUTION 1, 3 (Chandler Davidson ed., 1984).

[5] *See* Bernard Grofman, *An Eyewitness Perspective on Continuing and Emerging Voting Rights Controversies: From One Person, One Vote to Partisan Gerrymandering*, 21 STETSON L. REV. 783, 783-84 (1992). Efforts to impede voting rights take both direct and indirect forms. *Id.* For example, direct barriers include preliminary voting requirements such as poll taxes; and bureaucratic techniques such as incomplete voter forms, infrequent opportunities to register, and economic and physical intimidation. *See* Dianne M. Pinderhughes, *Legal Strategies for Voting Rights: Political Science and the Law*, 28 HOW. L.J. 515, 515 (1985); *see, e.g.*, Louisiana v. United States, 380 U.S. 145, 148, 153 (1965) (invalidating a preregistration requirement that potential voters be able to understand and interpret the Louisiana and the United States Constitutions); Guinn v. United States, 238 U.S. 347, 364, 367 (1915) (invalidating grandfather clauses that exempted white voters from reregistration requirements); Lodge v. Buxton, 639 F.2d 1358, 1360-61 & n.1, 1380-81 (5th Cir. 1981) (rejecting a rural Georgia polling location, which covered an area approximately two-thirds the size of Rhode Island, because it limited the access of minorities to the political process), *aff'd sub. nom.* Rogers v. Lodge, 458 U.S. 613 (1982); United States v. Lynd, 349 F.2d 790, 792 (5th Cir. 1965) (finding unconstitutional the discriminatory grading of preregistration citizenship tests).

Unlike direct barriers, indirect obstacles arise from practices commonly known as "vote dilution." Grofman, *supra*, at 783. Vote dilution is "the minimizing or cancelling out of the voting strength of a given group through practices such as submergence in multimember districts or by practices of electoral gerrymandering that unduly fragment or unnecessarily concentrate a group's voting strength." *Id.* at 783-84 (footnote omitted); *see also* Pinderhughes, *supra*, at 518 (asserting that vote dilution occurs when state legislatures manipulate voting district boundaries to minimize the minority vote). Direct voter prohibition challenges usually arise under the Fifteenth Amendment, whereas indirect vote dilution claims are brought under the Fourteenth Amendment's Equal Protection Clause. *See* Grofman, *supra*, at 784.

[6] *See* Stephen J. Thomas, *The Lack of Judicial Direction in Political Gerrymandering: An Invitation to Chaos Following the 1990 Census*, 40 HASTINGS L.J. 1067, 1067-68 (1989) (identifying a variety of gerrymandering methods, including malapportionment and racial gerrymandering); *see also* Robert J. Sickels, *Dragons, Bacon Strips and Dumbbells—Who's Afraid of Reapportionment?*, 75 YALE L.J. 1300, 1300-03 (1966) (discussing the impact of gerrymandering on congressional elections); Stern, *supra* note 3, at 399, 404-05, 411-16 (delineating the harms incurred by unlawful gerrymanders and suggesting a mathematical remedy); Alexander A. Yanos, Note, *Reconciling the Right to Vote With the Voting Rights Act*, 92 COLUM. L. REV. 1810, 1841-42 (1992) (identifying conflicts be-

boundaries reduces the voting power of a dominant racial group.[7]

To counteract egregious forms of minority vote dilution,[8] Congress enacted the Voting Rights Act of 1965.[9] Among the goals of

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tween redistricting practices and the right to effective representation). A "gerrymander" is defined as:

> A name given to the process of dividing a state or other territory into the authorized civil or political divisions, 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.

BLACK'S LAW DICTIONARY 687 (6th ed. 1990). The term "gerrymander" was first coined in 1812, when a Massachusetts voting district, created to weaken Federalist power, was likened to a salamander. Note, Chavis v. Whitcomb: *Apportionment, Gerrymandering, and Black Voting Rights*, 24 RUTGERS L. REV. 521, 524 n.13 (1970) [hereinafter *Voting Rights*]. The district was dubbed a "gerrymander" after Governor Eldridge Gerry signed the redistricting plan into law. *Id.*

[7] Thomas, *supra* note 6, at 1067-68. Common racial gerrymandering techniques include:

> "Cracking"—A political or racial group constituting a dominant force because of its size is broken up by district lines and dispersed throughout several districts;
> "Stacking"—Instead of splitting a large political or racial group by district lines, the group is combined with a larger opposition group;
> "Packing"—A political or racial minority's representation is minimized by concentrating the group into as few districts as possible.

Bill L. Bryant, Jr., et al., *Partisan Gerrymandering: A New Concern for Florida's 1992 Reapportionment*, 19 FLA. ST. U. L. REV. 265, 267 n.13 (1991) (citation omitted).

[8] Vote dilution is a process where electoral practices combine with racial bloc voting to reduce the voting strength of an identifiable group. Davidson, *supra* note 4, at 4. While there are many types of vote dilution, a primary technique involved the use of at-large elections or multi-member districts. Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1256-57 (1989). For further discussion of the concept of vote dilution, see *supra* note 5.

[9] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971 to 1973bb-1 (1988)). Despite the Fifteenth Amendment's clear purpose, African-Americans were unable to freely exercise their elective franchise for many years. DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 1131 (1989). In 1870, Congress enacted the Enforcement Act to provide federal supervision of the electoral process. *Id.* Due to the statute's ineffectiveness, however, Congress later repealed the law, thus freeing states to enact restrictive voting legislation. *Id.* Congress again attempted to resolve unlawful voting restrictions by enacting the Civil Rights Act of 1957 and its subsequent amendments. *Id.* The Civil Rights Act facilitated case-by-case litigation to reduce discriminatory barriers in voting such as literacy tests, poll taxes, and residency requirements. *Id.* Litigation difficulties, however, prompted Congress to abandon its fragmented litigation strategy and adopt the expansive Voting Rights Act of 1965. *Id.* For further discussion of the Voting Rights Act, see Katharine I. Butler, *Reapportionment, the Courts, and the Voting Rights Act: A Resegregation of the Political Process?*, 56 U. COLO. L. REV. 1 (1984) (surveying comprehensively the Voting Rights Act's history and proposing alternative remedies); Mary J. Kosterlitz, Note, Thornburg v. Gingles: *The Supreme Court's New Test for Analyzing Minority Vote Dilution*, 36 CATH. U. L. REV. 531, 531 (1987) (explaining that the Voting Rights Act was considered instrumental in counteracting over a century of racial dis-

the Voting Rights Act were the elimination of tests and other devices that hindered the right to vote.[10] As a result, increased numbers of African-Americans were added to the voter rolls.[11] Some local governments, however, continued to reapportion district lines or employ new electoral systems as more subtle forms of minority vote dilution.[12] Responding to these avoidance techniques, Congress amended § 2 of the Voting Rights Act and authorized a "results" test to determine whether a redistricting scheme was discriminatory.[13]

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crimination within the electoral system); Cynthia Wright, Comment, *The Effects of Sections 2 and 5 of the Voting Rights Act on Minority Voting Practices*, 28 How. L.J. 589, 599-601 (1985) (discussing the increase in African-American voter registration pursuant to §§ 2 and 5 of the Voting Rights Act).

The Voting Rights Act protections are grounded in both the Fourteenth and Fifteenth Amendments. Roy A. McKenzie & Ronald A. Krauss, *Section 2 of the Voting Rights Act: An Analysis of the 1982 Amendment*, 19 HARV. C.R.-C.L. L. REV. 155, 172-73 (1984). Although the right to participate fully in the political process is an essential element of a democracy, the Constitution does not expressly mandate this precept. *Id.* at 172 n.77 (citation omitted). Nevertheless, the Supreme Court has characterized the "'right to vote as fundamental because it is "preservative of all rights."'" *Id.* (quotations omitted); *see also* South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966) (upholding challenged provisions of the Voting Rights Act as a valid conduit for the mandate of the Fifteenth Amendment); Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1434 (1991) (advocating a new approach to ensure African-American political empowerment); Daniel A. Klein, Annotation, *Racial Discrimination In Voting, and Validity and Construction of Remedial Legislation—Supreme Court Cases*, 92 L. Ed. 2d 809, 810 (1988) (analyzing Supreme Court cases that have considered discriminatory voting practices and remedies provided by federal legislation) (footnote omitted); *see also* John F. Banzhaf III, *Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle*, 75 YALE L.J. 1309, 1310 (1966) (analyzing the effect of multi-member voting districts on equal representation and voting strength).

[10] Copeland, *supra* note 3, at 420. In particular, § 5 requires states to submit voting procedure changes to the United States Attorney General for approval to prevent circumvention of the Act. *Id.* at 420-21. Additionally, § 2 of the Act protects against preregistration requirements that hindered the right to vote. *Id.* at 420. See *infra* note 13 (detailing the provisions of § 2 of the Voting Rights Act).

[11] *See* Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 6 (1991) (explaining that prior to the Act's passage, African-Americans were frequently excluded from the electoral process); Laughlin McDonald, *Racial Fairness—Why Shouldn't it Apply to Section 5 of the Voting Rights Act?*, 21 STETSON L. REV. 847, 847 (1992) (following the Act's passage, over a million African-Americans were added to the voter rolls through federal prohibition of restrictive voting schemes); *see also* Wright, *supra* note 9, at 592 (noting statistics related to African-American registration).

[12] McDonald, *supra* note 11, at 847; *see* Pinderhughes, *supra* note 5, at 518-19 (explaining that although minority voters were added to the registration rolls, poll manipulation impeded their ability to elect preferred candidates); *see also* Karlan, *supra* note 11, at 6 (noting that the formal expansion of voting rights did not fully empower the minority vote).

[13] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131,

In the early 1990s, state legislatures began reapportioning[14] voters into single-member electoral districts[15] to account for ex-

134 (codified as amended at 42 U.S.C. §§ 1971 to 1973bb-1 (1988)). Section 2 of the Voting Rights Act of 1965 now provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section [1973b(f)(2) of this title], as provided in subsection (b).
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> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Id.; *see also* Kosterlitz, *supra* note 9, at 531 & n.6 (outlining the subtle vote dilution practices which § 2 sought to prohibit). For those groups whom the Voting Rights Act and its subsequent amendments protected, § 2 replaced a previous "intent" standard with a "results" test. Bernard Grofman & Lisa Handley, *Identifying and Remedying Racial Gerrymandering*, 8 J.L. & POL. 345, 346 (1992). For a further discussion of the amendment to § 2 and its affirmation of a "results" test for vote dilution claims, see *infra* note 99.

14 "Reapportionment" is defined as:

> A realignment or change in legislative districts brought about by changes in population and mandated by the constitutional requirement of equality of representation (*i.e.*, one person, one vote mandate). A new apportionment of seats in the House of Representatives among states "according to their respective numbers," is required by Art. I, § 2 of the U.S. Constitution after every decennial census. . . . A similar requirement as to State legislative seats is found in many State constitutions.

BLACK'S LAW DICTIONARY 1264 (6th ed. 1990) (citation omitted). "Apportionment" is defined as:

> The process by which legislative seats are distributed among units entitled to representation. Determination of the number of representatives which a State, county, or other subdivision may send to a legislative body. The U.S. Constitution provides for a census every ten years, on the basis of which Congress apportions representatives according to population; but each State must have at least one representative. "Districting" is the establishment of the precise geographical boundaries of each such unit or constituency.

Id. at 99 (citation omitted).

15 "District" is defined as: "One of the territorial areas into which an entire state or country, county, municipality or other political subdivision is divided, for judicial, political, electoral, or administrative purposes." BLACK'S LAW DICTIONARY 476 (6th ed. 1990) (citation omitted). Accordingly, "districting" is defined as: "[D]efining lines of electoral districts . . . [and] [t]he establishment of the precise geographical boundaries

panding minority populations.[16] The legal standards that governed single-member voting districts, however, were not well-developed.[17] Today's voting rights controversies, therefore, reflect the emerging conflict between traditional geographically-based political representation and group-interest-based political representation.[18] As a result, the courts continue to search for managea-

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of each such unit or constituency." *Id.* (citations omitted). Reapportionment is the redistribution of political subdivisions among legislative seats, whereas redistricting is the redrawing of constitutional boundary lines. Bryant et al., *supra* note 7, at 265 n.3. Reapportionment and redistricting, however, may be used interchangeably. *Id.*

A single-member district is "drawn by the legislature for the purpose of electing one representative only for a pool of many candidates." Yanos, *supra* note 6, at 1812 n.15 (citation omitted). In a single-member district, minority group members comprised a majority. McDonald, *supra* note 8, at 1257. Because single-member districts prevented vote dilution, one writer declared, federal courts may require this type of electoral plan in order to remedy malapportionment. *Id.*

16 *See* Bryant et al., *supra* note 7, at 265 & n.6 (stating that the 1990 census compelled all 50 states to reapportion voting districts in what has been characterized as the "'remaking of the nation's political landscape'") (quotation omitted); *see also* Bernard Grofman, *Would Vince Lombardi Have Been Right if He Had Said: "When It Comes to Redistricting, Race Isn't Everything It's the* Only *Thing"?*, 14 CARDOZO L. REV. 1237, 1240 (1993) (stating that in the 1990s, Voting Rights Act issues shifted to addressing the constitutionality of single-member voting districts); Grofman & Handley, *supra* note 13, at 349, 394-400 (offering evidentiary standards for invalid single-member voting districts and alternative remedies for minority vote dilution); Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1135 (1993) (discussing the limitations of single-member districts to achieve minority representation); Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry Into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652, 655 (1993) (stating that antigerrymandering principles must be applied to preserve effective representation through single-member voting districts).

During the 1990s, increased minority populations, particularly Hispanics and Asians, compelled states to redraw district lines and utilize single-member voting plans. Grofman & Hadley, *supra* note 13, at 349; *see also* Grofman, *supra*, at 1242 (speculating that by the year 2000, the Voting Rights Act will attain its most significant impact for Asian-Americans).

17 *See* Grofman & Handley, *supra* note 13, at 348 (stating that the Supreme Court has decided relatively few challenges to single-member voting districts, compared to multi-member district claims) (citations omitted); *cf.* Karlan, *supra* note 11, at 4 (declaring that single-member voting districts may increase racial pluralism and distort the intent of § 2 of the Voting Rights Act).

18 Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 483 (1993); Grofman, *supra* note 16, at 1240 (examining voting rights controversies of the 1990s); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1079-80 (1991) (identifying the problems with current voting rights reform strategies and proposing a new model, based on "proportionate interest representation"); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 176 (1989) (suggesting vote dilution approaches based on geographic compactness and political group interests). Geographically-based districting embraces physical territory as the link between representatives and their con-

ble standards that balance racial reapportionment with fair access to the electoral process.[19]

In a recent case, *Shaw v. Reno*,[20] the United States Supreme Court demonstrated that race remains a complex issue when addressing the opposing forces of territory and political interest redistricting.[21] Declaring that the "appearance" of electoral districts are of import, the *Shaw* Court held that voters who challenged the constitutionality of an irrationally-shaped reapportionment plan unexplainable on any basis other than race stated a claim under the Equal Protection Clause.[22] A voting district configured by race

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stituents. Pildes & Niemi, *supra*, at 483. Conversely, group-interest-based representation ascribes identities to citizens based on their political interests as a group. *Id.*

19 Yanos, *supra* note 6, at 1841. One commentator traced the history of reapportionment cases, stating that the goal of voting equality included both equal population and effective participation in the political process. *Id.* at 1821. As a result of this evolution, proportional representation, based on group interests, became the standard under which to evaluate vote dilution claims. *Id.* at 1822. The author noted, however, that recent cases reflected an increasing tension between group representation and judicial aversion for race-conscious preferences. *Id.* at 1836. Therefore, the commentator proffered that courts have increasingly focused on whether a reapportionment scheme constitutes state action or a federal plan. *Id.* at 1838. To make this determination, the author added, courts consider the Voting Rights Act's requirements and the state's chosen remedies. *Id.* Because the Act did not delineate specific methods of implementation, the author concluded, a state's use of racially-aligned districts was subject to judicial scrutiny. *Id.* at 1838-39.

20 113 S. Ct. 2816 (1993).

21 Pildes & Niemi, *supra* note 18, at 483-84 (citing *Shaw*, 113 S. Ct. at 2827). Prior to *Shaw*, the commentators explained, vote dilution, which impacted a minority group's electoral strength, personified the nature of voting-related constitutional harms. *Id.* at 493. Because the *Shaw* decision questioned geographically-based representation, the authors stated that the Court now endorsed a new type of equal protection challenge, otherwise known as a "district appearance claim." *Id.* Thus, the authors posited that district-appearance and vote-dilution claims contain different elements. *Id.* The authors further postulated that each claim recognizes distinct injuries, different constitutional values, and inapposite views of the nexus between law and politics. *Id.* Therefore, the authors asserted that the two claims cannot be combined as a single approach to the Fourteenth Amendment. *Id.*

22 *Shaw*, 113 S. Ct. at 2827, 2832. *See supra* note 1 (providing the pertinent text of the Fourteenth Amendment). The Supreme Court has concentrated on the Equal Protection Clause as the guarantor of equitable treatment in the application of fundamental rights. ROTUNDA & NOWAK, *supra* note 1, § 18.1, at 5. When fundamental rights are restricted, the authors noted, the Equal Protection Clause requires that the government demonstrate a compelling governmental interest for denying an individual's rights. *Id.* § 18.1, at 6.

Some legislative acts, Rotunda and Nowak explained, entail explicit racial classifications that require equal protection evaluation. *Id.* § 18.2, at 8. In such cases, the authors proffered, the Court will examine the law's purpose and effect to determine if its enactment is facially valid. *Id.* For example, in *Arlington Heights v. Metropolitan Housing Development Corp.*, the Court upheld a zoning ordinance despite allegations that the ordinance was designed to exclude racial minorities from a residential area of

alone, the Court concluded, must therefore satisfy strict scrutiny review to pass constitutional muster.[23]

As a result of an increase in population, North Carolina qualified for a twelfth seat in the United States House of Representatives.[24] Accordingly, in 1991, the North Carolina General Assembly enacted a reapportionment plan that created a new majority-minority district,[25] District One.[26] Pursuant to § 5 of the Voting

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the city. Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 (1977). Because the ordinance had no racially-disproportionate effect, the Court reasoned, no violation of the Equal Protection Clause occurred. *Id.*

Conversely, Rotunda and Nowak asserted, some laws may not contain explicit racial classifications, but may be applied in such a manner as to result in discrimination. Rotunda & Nowak, *supra* note 1, § 18.2, at 8. In *Yick Wo v. Hopkins*, for example, the Court invalidated a San Francisco ordinance banning hand laundries in wooden buildings because it discriminated against Chinese laundry owners. Yick Wo v. Hopkins, 118 U.S. 356, 358, 374 (1886). The Court based its decision not on the direct impact of the law, but on the fact that the city granted exemptions to non-oriental laundry owners in wooden buildings. *Id.* at 374.

[23] *Shaw*, 113 S. Ct. at 2832. For further discussion of strict scrutiny analysis, *see supra* note 119.

[24] *Id.* at 2819. The 1990 census in North Carolina reflected a voting age population that was approximately 78% white, 20% African-American, 1% Native American, and approximately 1% Asian American. *Id.* at 2820 (citation omitted).

For election purposes, the states are divided into geographical units that are established in conjunction with the office held, such as legislative or congressional districts. 25 AM. JUR. 2D *Elections* § 12, at 703 (1966). Although the Equal Protection Clause governs state legislative apportionment, the states' authority to apportion congressional districts is found in the United States Constitution. *Id.* § 30, at 717. The Constitution provides, in relevant part: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ." U.S. CONST. art. I, § 2, cl. 1. Under this mandate, congressional redistricting must provide equal representation for all voters. 25 AM. JUR. 2D *Elections* § 30, at 717.

The Constitution's Census Clause further mandates the apportionment of congressional representatives by the decennial enumeration. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.36, at 861-62 (4th ed. 1991). The Census Clause states: "Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . ." U.S. CONST. art. 1, § 2, cl. 3. The federal census, conducted by the Federal Census Bureau every 10 years, is considered a rational basis on which to readjust legislative representation due to population shifts and growth. 25 AM. JUR. 2D *Elections* § 15, at 705. Accordingly, apportionment laws are generally enacted at the first state legislative session subsequent to the federal census. *Id.* § 15, at 704.

Population is both the foundation and the controlling factor in apportionment cases. *Id.* § 16, at 705. Because a legislative scheme needs a rational basis, apportionment plans are frequently required to construct election districts from contiguous or compact territories. *Id.* § 16, at 705, § 18, at 708. For a further discussion of more traditional redistricting principles such as compactness and contiguity of geographic boundaries, see *infra* note 40.

[25] A majority-minority district is a voting district in which a majority of the population is a member of a specific minority group. Voinovich v. Quilter, 113 S. Ct. 1149, 1153 (1993).

[26] *Shaw*, 113 S. Ct. at 2820. Unusually shaped, the Court noted that District One

Rights Act,[27] the legislature submitted its plan for approval to the

had been compared to a "bug splattered on a windshield" and a "Rorschach inkblot test." *Id.* (citing WALL STREET JOURNAL, Feb. 4, 1992, at A14; Shaw v. Barr, 808 F. Supp. 461, 476 (E.D.N.C. 1992)). Centered in the northeast quadrant of the state, District One narrowly tapered southward until it stopped just short of the South Carolina border. *Id.* Geographically, North Carolina consists of three regions: the western mountains, the central Piedmont Plateau, and the eastern Coastal Plain. *Id.* (citation omitted). The African-American population is relatively dispersed and constitutes a majority in only 5 of 100 counties. *Id.* (citation omitted). The highest concentration of African-Americans reside in the northern part of the Coastal Plain region. *Id.* (citation omitted).

[27] 42 U.S.C. § 1973c (1988). Section 5 of the Voting Rights Act provides:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, *such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or 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, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made.* Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the

United States Attorney General.[28] The United States Justice Department objected to the proposed plan, stating that the redistricting did not fully reflect minority voting strength.[29] In response, the North Carolina legislature created an additional majority-mi-

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sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

Id. (emphasis added).

Jurisdictions that are subject to the provisions of § 5 are defined as:

> [A]ny State or . . . any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a state determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.
>
> A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

42 U.S.C. § 1973b(b) (1988). For a discussion of the enforcement provisions under § 5 of the Voting Rights Act, see McDonald, *supra* note 8, at 1284-91; Kathleen A. Bussart, Annotation, *Requirements Under § 5 Of Voting Rights Act Of 1965 (42 USCS § 1973c) And Implementing Regulations That State Or Political Subdivision Changing Voting Procedures Seek Federal Approval—Supreme Court Cases*, 70 L. Ed. 2d 915, 916-17 (1983).

[28] *Shaw*, 113 S. Ct. at 2820.

[29] *Id.* The Justice Department contended that the plan's boundaries did not account for African-American and Native American voting strength in the south-central to southeastern part of North Carolina. *Id.* (citation omitted). The Attorney General claimed that "the [North Carolina] General Assembly could have created a second majority-minority district 'to give effect to black and Native American voting strength in this area' by using boundary lines 'no more irregular than [those] found elsewhere in the proposed plan,' but failed to do so for 'pretextual reasons.'" *Id.* (quotation omitted).

nority district, District Twelve.[30] This new district ran in a "snake-like fashion" connecting urban population centers along Interstate Highway 85, which cut across the state in a diagonal direction from the north-east to the south-west.[31]

Although the Attorney General accepted the revised plan, numerous North Carolinians rejected it.[32] Specifically, five North

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30 *Id.*

31 *Id.* at 2820-21. Even more unusually shaped than District One, District Twelve travelled 160 miles across ten North Carolina counties, cutting five counties into three different districts and dividing towns. *Id.* The *Shaw* Court described the district as winding in a "snake-like fashion through tobacco country, financial centers, and manufacturing areas 'until it gobbles in enough enclaves of black neighborhoods.'" *Id.* at 2821 (citing Shaw v. Barr, 808 F. Supp. 461, 476-77 (E.D.N.C. 1992) (Voorhees, C.J., concurring in part and dissenting in part)). As one observer remarked: "'[I]f you drove down the interstate with both car doors open, you'd kill most of the people in the district.'" *Id.* at 2821. The Court also highlighted poetry describing the district: "Ask not for whom the line is drawn; it is drawn to avoid thee." *Id.* (quoting Grofman, *supra* note 16, at 1261 n.96).

32 *Id.* (citing Pope v. Blue, 809 F. Supp. 392 (W.D.N.C.), *aff'd*, 113 S. Ct. 30 (1992)). Initially, in *Pope v. Blue*, the North Carolina Republican Party and individual voters challenged the reapportionment plan in the United States District Court for the Western District of North Carolina. *Pope*, 809 F. Supp. at 394. The plaintiffs challenged the districts as an unconstitutional political gerrymander. *Id.* According to the plaintiffs, the Democratic majority in the North Carolina legislature prevented the Republicans from influencing the redistricting process. *Id.* As evidence of their assertion, the plaintiffs emphasized that North Carolina was essentially a one party state until voters elected a Republican governor in the 1970s and the first Republican United States Senator during this century. *Id.* Furthermore, the plaintiffs asserted that Republican success in the state continued throughout the 1980s. *Id.* Thus, in creating District Twelve, the plaintiffs claimed that the Democrats rejected more compact plans offered by Republicans and nonpartisan groups and accepted a more contorted district to protect white Democratic congressman. *Id.* In addition, many of the plaintiffs resided in areas affected by the new majority-minority redistrict. *Id.*

Applying the two-pronged *Davis v. Bandemer* test, the district court dismissed the claim, holding that the *Pope* plaintiffs failed to establish their exclusion from the political process. *Id.* at 396-99. First, the court articulated that because the plaintiffs had not experienced one election under the new plan, they were unable to demonstrate the necessary history of disproportionate results. *Id.* at 396-97. Second, the court determined that, due to the plan's number of "safe" Republican seats, the redistricting did not create disproportionately high Democratic representation. *Id.* at 397.

Although there are several different types of gerrymanders, partisan or political gerrymandering is initiated by the political party in control of a legislature to improve the party position and hinder competition. Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 301-02 (1991). The dual goals of political gerrymandering are the retention of incumbent seats and the enlargement of seats for the political group in power. Stern, *supra* note 3, at 404. "Safe seats" are generally secured by giving each incumbent the largest possible majority and by maintaining only one incumbent per district. *Id.* When one party controls apportionment, the group may increase its strength through concentrating the opposing party in a few districts and retaining a clear majority in the remaining districts. *Id.* Although a district map may look gerrymandered, the districting may sometimes be characterized as legitimate

Carolina voters challenged the redistricting in the United States District Court for the Eastern District of North Carolina, asserting that the plan created an unconstitutional racial gerrymander.[33] After considering jurisdictional issues,[34] the court declined to accept race-conscious redistricting as unconstitutional *per se*.[35] Addition-

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partisan activity. Polsby & Popper, *supra*, at 313. To distinguish the two, objectionable partisan gerrymandering intends to render ineffectual certain votes for an opposing party. *Id.* at 313-14 & n.56. To this purpose, voters are selected, based on previous voting trends, for inclusion within a minority bloc within a certain district. *Id.* at 314. The objective of such gerrymandering is to increase the party's chance of electoral success. *Id.*

In 1986, the Supreme Court first held that political gerrymandering, which severely diluted political party members' voting strength, was justiciable under the Equal Protection Clause. Davis v. Bandemer, 478 U.S. 109, 113 (1986). In *Davis*, the Court considered a challenge to the Indiana legislature's 1981 reapportionment plan, which allegedly diluted Democratic voting strength. *Id.* at 115. The results of the 1982 Indiana elections, the plaintiffs claimed, demonstrated that although the Democratic candidates received 51.9% of the statewide vote for the House of Representatives, Democrats filled only 43 of the 100 house seats. *Id.*

Writing for the Court, Justice White held that the voters had to demonstrate both intentional and actual discrimination against an identifiable political group. *Id.* at 127. The Court concluded, however, that a mere lack of proportional representation would be insufficient to establish unconstitutional vote dilution. *Id.* at 131. Instead, the Court maintained, the excluded group must demonstrate that it had a limited opportunity to engage in the state's political process. *Id.* (citations omitted). Additionally, the *Davis* Court determined that the results of a single election would not adequately establish minority group suppression. *Id.* at 135. Rather, the Court contended that constitutional infirmity turns on a political process that continually debases a voting group's influence on the total electoral system. *Id.* at 132.

[33] Shaw v. Barr, 808 F. Supp. 461, 462-63 (E.D.N.C. 1992), *rev'd*, Shaw v. Reno, 113 S. Ct. 2816 (1993). In *Shaw v. Barr*, five white voters from Durham County, North Carolina filed an action against United States Attorney General William Barr and other federal and state officials. *Id.* Prior to the reapportionment, the plaintiffs were registered to vote in the same district, but under the revised plan were then separated into three districts. *Id.* at 464. When the action was finally appealed to the United States Supreme Court, however, the challenge was amended to include the present United States Attorney General, Janet Reno. *Shaw*, 113 S. Ct. at 2820.

[34] The district court dismissed the challenge against the federal defendants, concluding in part that subject matter jurisdiction was lacking under § 14(b) of the Voting Rights Act. *Shaw*, 808 F. Supp. at 466-67. Section 14(b) of the Voting Rights Act provides in relevant part: "No court other than the District Court for the District of Columbia . . . shall have jurisdiction to issue any . . . restraining order or temporary or permanent injunction against the execution or enforcement of [Section 5, *inter alia*] or any action of any Federal Officer or employee pursuant thereto." 42 U.S.C. § 1973*l*(b) (1988). The district court declared, therefore, that § 14 conferred original jurisdiction for actions challenging the constitutionality of the Voting Rights Act only upon the District Court for the District of Columbia. *Shaw*, 808 F. Supp. at 466. The court further reasoned that § 14(b) did not apply to actions involving mere coverage applications of the provisions of the Voting Rights Act. *Id.* (citations omitted)).

[35] *Shaw*, 808 F. Supp. at 470. Relying on *United Jewish Organizations v. Carey*, the court rejected the plaintiffs' contention that race-conscious redistricting was unconstitutional. *Id.* (citing United Jewish Orgs. v. Carey, 430 U.S. 144, 159 (1977)). The

ally, because the plan was not adopted with a discriminatory purpose and effect, the lower court held that the reapportionment plan was valid under the Voting Rights Act.[36]

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court noted that to comply with the Voting Rights Act, racial considerations could be utilized when redistricting. *Id.* at 471 (citing *United Jewish Orgs.*, 430 U.S. at 159).

The court also dismissed the plaintiffs' reliance on decisions that supported the "unconstitutional *per se*" challenge. *Id.* The court rejected the plaintiffs' contention that these decisions illuminated a new "color-blind" constitutional concept, stating that none of the supporting cases squarely addressed voting rights. *Id.* (citing Powers v. Ohio, 499 U.S. 400, 415 (1991) (upholding racially-motivated juror challenges); Metro Broadcasting Inc. v. FCC, 497 U.S. 547, 600-01 (1990) (upholding racial set-asides of federal broadcast licenses); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989) (invalidating racial set-aside program for municipal public contracts); Freeman v. Pitts, 112 S. Ct. 1430, 1450 (1992) (holding that the district court could relinquish control over a school desegregation case prior to full compliance)).

[36] *Id.* at 472 (citing *United Jewish Orgs.*, 430 U.S. at 165-68). The court concluded that the plaintiffs failed to meet this test because a mere intent to favor African-American voters was not within the meaning of "'invidious'" discrimination under Fourteenth Amendment jurisprudence. *Id.* at 473. Additionally, the court proffered that the plan would not lead to a statewide underrepresentation of nonminority voters. *Id.* The majority clarified, however, that a "reverse-discrimination" vote dilution case could still be established against a state redistricting plan. *Id.* To maintain such a claim, the court asserted, the plaintiffs would have to demonstrate the requisite discriminatory purpose and effect upon them as members of an identifiable group. *Id.* Because the plaintiffs did not identify themselves as white in their complaint, the court asserted that a specific constitutional injury as members of a particular classification had not been established. *Id.*

Partially dissenting, Chief District Judge Voorhees disagreed with the majority's reliance on *United Jewish Organizations*. *Id.* at 474 (Voorhees, C.J., concurring in part and dissenting in part) (citing *United Jewish Orgs.*, 430 U.S. at 144). Specifically, the dissent rejected the view that a state legislature had unlimited discretion when considering race in redistricting plans. *Id.* The chief judge further asserted that while race may be one factor in reapportionment, it is not the sole constitutional criterion. *Id.* at 475 (Voorhees, C.J., concurring in part and dissenting in part). Moreover, the dissent argued that a State must employ sound districting principles, such as compactness and population equality, to afford fair representation to racial minorities. *Id.* at 476 (Voorhees, C.J., concurring in part and dissenting in part).

Chief District Judge Voorhees emphasized that in *United Jewish Organizations*, compact majority white districts continued to outnumber the nonwhite majority districts, thus mitigating harm to white voters. *Id.* at 477 (Voorhees, C.J., concurring in part and dissenting in part). Accordingly, the dissent rejected geographically diverse white majority districts as a mitigating factor. *Id.* The chief judge contended that in the present case, there was little chance that a voter from the eastern coastal plain would be adequately represented by a representative from mountainous western North Carolina. *Id.*

Finally, the dissent noted that the reapportionment plan in *United Jewish Organizations* included a compact majority-minority district that encompassed African-Americans, Hispanics, and Asian Americans. *Id.* at 478 (Voorhees, C.J., concurring in part and dissenting in part). In contrast, the chief judge stated that the Attorney General had rejected the original North Carolina reapportionment plan because it did not account for African-American and Native American voting strength in the southeastern quadrant of the state. *Id.* The chief judge emphasized that the General Assembly ignored the Attorney General's suggestion when creating the noncompact, majority

The North Carolina voters appealed directly to the United States Supreme Court.[37] The Supreme Court noted probable jurisdiction[38] to determine whether an irregularly-shaped single-member voting district based solely on race amounted to an unconstitutional racial gerrymander.[39] Reversing the district court, the Court held that an irrationally-shaped reapportionment plan lacked compelling justification when designed solely to ensure minority representation in Congress.[40] Because North Carolina did

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black District Twelve. *Id.* at 479 (Voorhees, C. J., concurring in part and dissenting in part). Such purposeful disregard, the dissent concluded, could not be presumed constitutional or free from invidious discrimination until fully ascertained at trial. *Id.*

[37] *See Shaw*, 113 S. Ct. at 2822. Direct appeals to the United States Supreme Court are governed by 28 U.S.C. § 1253, which provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1253 (1988). The Supreme Court's ability to hear direct appeals of federal court decisions is severely limited to cases heard by special panels of three district judges designated by Congress. CRUMP ET AL., *supra* note 9, § 1.02, at 95-96; *see, e.g.*, Voinovich v. Quilter, 113 S. Ct. 1149, 1153 (1993) (considering appeal directly from a three-judge district court involving eight majority-minority state electoral districts); Growe v. Emison, 113 S. Ct. 1075, 1077 (1993) (appealing directly from a three-judge panel of a Minnesota federal district court regarding a state's effort to redraw legislative and congressional districts); Wright v. Rockefeller, 376 U.S. 52, 52, 54 (1964) (hearing a direct appeal from a three-judge district court in a case involving a constitutional challenge to four New York congressional districts).

[38] *Shaw*, 113 S. Ct. at 2822.

[39] *Id.* at 2819-20.

[40] *Id.* at 2832. The Court noted the appellants' contention that the redistricting failed to consider compactness, geographical boundaries, contiguousness, or political subdivisions. *Id.* at 2821.

Until *Baker v. Carr*, malapportionment was a powerful tool in counteracting the constitutionally mandated right to vote. Polsby & Popper, *supra* note 32, at 303 & n.12 (citing Baker v. Carr, 369 U.S. 186 (1962)). For example, gerrymandering may be used to redraw district lines to dilute the fair and effective representation of identifiable racial or political groups. *Id.* Furthermore, gerrymandering may harm democratic institutions, because the power of self-selection may insulate legislatures from the popular will. *Id.* at 304, 305. Conversely, an effective gerrymander could serve to increase the disparity between a party's actual support among constituents and its seats within the legislature. *Id.* at 333. A procedurally fair election, therefore, utilizes three interdependent districting criterion to neutralize the ability to gerrymander: equinumerosity, contiguity and compactness. *Id.* at 332.

Equinumerosity places approximately equal numbers of people in each voting district, thus deflecting the opportunity to unfairly skew election outcomes. *Id.* at 328. The mere principle of equinumerosity, however, is insufficient to counteract the effects of majority rule. *Id.* Contiguity requires a physical connection between all parts of an electoral district. *Id.* at 330 & n.139 (citation omitted). Contiguity is often employed as a remedy for the defects that result from equinumerosity. *Id.* Although a contiguity requirement may effectively diminish available districting options, noncompactness may render contiguity irrelevant. *Id.* at 330-31.

not provide sufficient justification for creating such a district, the Court concluded that the voters had established a cognizable claim under the Equal Protection Clause.[41]

The Supreme Court first announced that apportionment issues were justiciable under the Equal Protection Clause in the landmark case of *Baker v. Carr*.[42] In *Baker*, urban voters[43] chal-

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Accordingly, compactness, a third districting criterion, is indispensable to an effective gerrymander and should be required to ensure valid election results. *Id.* at 331. Compact is defined as:

> Closely or firmly united or packed, as the particles of solid bodies; firm; solid; dense, as a compact texture in rocks; also, lying in a narrow compass or arranged so as to economize space; having a small surface or border in proportion to contents or bulk; close, as a compact estate, or a compact order or formation of troops.

BLACK'S LAW DICTIONARY 281 (6th ed. 1990). The compactness requirement minimizes the effects of gerrymandering by requiring districts to be geographically united or close. Stern, *supra* note 3, at 412, 413, 415. Because individuals within the same ethnic, racial, and economic groups may not always live within the same geographic proximity, the utilization of significant political subdivisions may also bolster effective representation. *Id.* at 415. Geographic units may include traditional practices or organizations, such as reform groups and voters' leagues, that facilitate political participation. *Id.* Therefore, a legislature must justify noncompactness by showing that the historical significance was a neutral element, rather than a gerrymander in disguise. *Id.* at 415-16.

Another districting criteria, utilized to achieve effective gerrymandering, includes setting up "communities of interest." Polsby & Popper, *supra* note 32, at 340 & n.182. A "community of interest" is an "interest common to both or all parties, that is, mixture or identity of interest in venture wherein each and all are reciprocally concerned and from which each and all derive material benefit and sustain a mutual responsibility." BLACK'S LAW DICTIONARY 280 (6th ed. 1990) (citation omitted).

41 *Shaw*, 113 S. Ct. at 2832. For an additional analysis of the *Shaw* decision, see Pildes & Niemi, *supra* note 18.

42 369 U.S. 186, 209, 226 (1962). For a detailed discussion of the *Baker* decision, see James U. Blacksher & Larry T. Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden: *Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L. REV. 1, 6-9 (1982); Note, Baker v. Carr *and Legislative Apportionments: A Problem of Standards*, 72 YALE L.J. 968 (1963) [hereinafter *Standards*]. The Supreme Court initially addressed reapportionment issues in *Colegrove v. Green*. *See* Colegrove v. Green, 328 U.S. 549 (1946). In *Colegrove*, the Court considered a challenge to an Illinois redistricting plan that contained an unequal distribution of population among voting districts. *Id.* at 550-51. The plaintiffs primary claim was that, in addition to population inequality, the districts lacked compactness. *Id.* Writing for the Court, Justice Frankfurter stated that the matter was incompetent to adjudicate due to its "particularly political nature." *Id.* at 552. The Court reasoned that it lacked the remedial powers to create alternatives to the existing plan. *Id.* at 552-53. To this purpose, the Court asserted that individuals seeking redress should exercise political rights protected by the Constitution. *Id.* at 556. The Constitution, the Court continued, conferred authority for effective representation upon Congress, and if that duty was neglected, the ultimate authority for resolving those disputes rested with the citizenry. *Id.* at 554. As a result, Justice Frankfurter warned of the hazards of embroiling the judiciary in the politics of the people. *Id.* The Justice cautioned future courts to avoid the "political thicket of redistricting cases." *Id.* at 556.

lenged a Tennessee apportionment plan that had not been redistricted since 1901.[44] The plaintiffs asserted that sixty years of migration towards Tennessee's urban areas had created population disparities that inequitably favored residents of rural areas.[45] The voters therefore argued that the apportionment plan contravened their constitutional guarantee of an unimpaired voice in the electoral process.[46]

Writing for the majority, Justice Brennan repudiated earlier cases that held malapportionment controversies presented nonjusticiable political questions.[47] Instead, the *Baker* majority asserted that the Fourteenth Amendment's prohibition against racial dis-

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Fourteen years after *Colegrove*, the Supreme Court demonstrated that not all districting issues raised nonjusticiable political questions. *See* Blacksher & Menefee, *supra*, at 6. For example, in *Gomillion v. Lightfoot*, the Court considered an Alabama state law that transformed the City of Tuskegee "from a square to an uncouth twenty-eight-sided figure." Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960). The effect of the alteration removed from the city limits all but a few of Tuskegee's substantial African-American population. *Id.* at 341.

Writing for the majority, Justice Frankfurter recognized the state's right to alter the boundaries of its individual municipalities. *Id.* at 342. Rejecting a nonjusticiable political question argument, however, the Court stated that the violation of rights guaranteed to racial minorities under the Fifteenth Amendment "lift[ed] th[e] controversy out of the so-called 'political' arena and into the conventional sphere of constitutional litigation." *Id.* at 346-47. Distinguishing *Colegrove*, the Court relied upon the Fifteenth Amendment and declared that no state had the right to deprive a citizen of the right to vote on the basis of race. *Id.* at 346. *See generally* David P. Van Knapp, Annotation, *Diluting Effect of Minorities' Votes by Adoption of Particular Election Plan, or Gerrymandering of Election District, as Violation of Equal Protection Clause of Federal Constitution*, 27 A.L.R. FED. 29, 34 (1976) (noting that the Supreme Court in *Gomillion* invalidated the practice of redrawing municipal boundaries to exclude African-Americans from voting districts).

43 Plaintiffs included the residents of the cities of Nashville, Knoxville, and Chattanooga, Tennessee. *Baker*, 369 U.S. at 204 & n.23.

44 *Id.* at 192 (footnote omitted). In 1901, Tennessee's population amounted to 2,020,616 persons, 487,380 of whom were eligible to vote. *Id.* (footnote omitted). By 1960, the Federal Census reported the state population at 3,567,089, of which 2,092,891 were eligible to vote. *Id.* (footnote omitted).

45 *Id.* at 193-94. The plaintiffs characterized the current redistricting statute as not only "obsolete" but also "arbitrary and capricious." *Id.* at 193, 207.

46 *Id.* at 193-94 (footnote omitted). The plaintiffs asserted their rights were denied under the Fourteenth Amendment due to vote dilution. *Id.*

47 *Id.* at 208-09 (citations omitted). Justice Brennan asserted that the lower courts had misinterpreted *Colegrove* and that reapportionment did not present nonjusticiable political questions. *Id.* The Justice admitted that a particular case might be so intertwined with political issues, as to render it nonjusticiable. *Id.* at 227. The Justice asserted, however, that malapportioned state legislatures could be addressed on a case-by-case basis to determine if the purported "discrimination reflects *no* policy, but simply arbitrary and capricious action." *Id.* at 226. Justice Brennan noted that the critical component in political question analysis was the lack of manageable judicial standards. *Id.* at 210 (citing Coleman v. Miller, 307 U.S. 433, 454-55 (1939) (footnote omitted)).

crimination justified judicial intervention in legislative reapportionment.[48] Justice Brennan opined, therefore, that equal protection standards governed state redistricting plans.[49] Declin-

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The political question doctrine, the *Baker* Court espoused, constituted the following elements:

> [C]onstitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. Applying the political question doctrine to *Baker*, the Court concluded that none of these identifying elements were present. *Id.* at 226. The Court justified its actions, stating: (1) the issue was within the sole purview of the Court; (2) a Tennessee reapportionment challenge did not risk domestic turmoil or foreign political embarrassment; and (3) judicially manageable standards were available under the Equal Protection Clause. *Id.*

[48] *Id.* at 228-29. Analogizing the case at bar to *Gomillion*, the Court concluded that the Tennessee voters' claim was properly within its jurisdiction because the reapportionment plan discriminated against racial minorities in violation of the Fifteenth Amendment. *Id.* at 229-30. Legislative control of municipalities, the Court acknowledged, rested within the scope of relevant constitutional limitations. *Id.* at 230 (quotation omitted). Conversely, the Court noted that the State's position would sanction any state action that impaired voting rights, as long as it was disguised as mere political realignment. *Id.* (quotation omitted). Acknowledging that the exercise of state power over state interests was immune from judicial review, the Court declared that such immunity was lost when fundamental rights were circumvented. *Id.* at 231 (quoting Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960)).

[49] *Id.* at 226. Although recognizing the Fifteenth Amendment's prohibition against the denial of voting rights, Justice Frankfurter, in dissent, did not find a corresponding right to equal representation within the Fourteenth Amendment. *Id.* at 301 (Frankfurter, J., dissenting). The Justice provided three reasons why malapportionment claims should not be subject to judicial review: (1) the judiciary's unnecessary intrusion into matters reserved for the legislature; (2) the complexity in developing judicially manageable standards; and (3) the intricacy of developing adequate remedies. *Id.* at 277-78 (Frankfurter, J., dissenting). Justice Frankfurter was particularly concerned with the lack of manageable standards for reapportionment issues. *Id.* at 283 (Frankfurter, J., dissenting) (citations omitted). The Justice further contended that because voters were permitted to vote, the argument of vote debasement was "circular talk." *Id.* at 300 (Frankfurter, J., dissenting). The Justice also cautioned that the Court's decision would burden courts with reconciling complex policy factors. *Id.* at 268 (Frankfurter, J., dissenting).

In a separate dissent, Justice Harlan asserted that the apportionment plan was not an unreasonable or arbitrary classification of voting strength. *Id.* at 334 (Harlan, J., dissenting). Additionally, the Justice stated that there could be no Fourteenth Amendment violation where a rational policy was presented in support of the apportionment plan. *Id.* at 337 (Harlan, J., dissenting). The Justice proffered that the electoral imbalance may have resulted from the State's attempt to protect agricultural interests from the sheer numbers of those residing in the cities. *Id.* at 346-47 & nn.9-11 (Harlan, J., dissenting).

ing to establish a specific criteria for malapportionment claims, however, the Court concluded that the plaintiffs had established a constitutional claim by virtue of the mere debasement of their votes.[50]

The Supreme Court further defined the *Baker* standard in *Reynolds v. Sims*,[51] formulating a new population-based constitutional rule of "one person, one vote."[52] The *Reynolds* plaintiffs, Ala-

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Concurring, Justice Clark declared that a state's redistricting required a rational basis. *Id.* at 258 (Clark, J., concurring). The Justice concurred with the majority's position, however, stating that the Tennessee apportionment did not fit any rational design. *Id.*; *see also Standards*, *supra* note 42, at 970 (positing that the Fourteenth Amendment *Baker* test required reapportionment plans to be rationally related to legitimate public and social policies).

After *Baker*, courts adopted the position that the Equal Protection Clause required adherence to equal representation. *Id.* at 972 (citations omitted). Advocates of this position contended that discrimination based on geography, political subdivisions, insular minorities, and other factors were as constitutionally repugnant as traditional forms of discrimination. *Id.* Proponents of this view, therefore, considered any variation from absolute equality, absent the need to follow county or precinct lines, as impermissible. *Id.*

Critics of this premise claimed that the *Baker* Court intended only a minimum rationality test. *Id.* at 973 (citations omitted). Under this view, the Equal Protection Clause did not prohibit legislative apportionment based on criteria other than population. *Id.* Furthermore, the critics maintained that societal interests would make it undesirable to continue strict adherence to exacting requirements for equal protection. *Id.* at 973-74. Accordingly, these commentators asserted that apportionment is only one way in which to allocate power in the governing process. *Id.* at 974. Lastly, these proponents believed it may be necessary to overrepresent some interests to remediate underrepresentation in other areas of the political process. *Id.*

50 *Baker*, 369 U.S. at 193. The Justice proffered that the "well developed and familiar" standards of the Equal Protection Clause would govern judicial review. *Id.* at 226. Two years after *Baker*, the Supreme Court applied equal protection principles to congressional minority vote-packing apportionment plans. Wright v. Rockefeller, 376 U.S. 52, 54 (1964) (citation omitted). In *Wright*, the Court considered a claim that New York County had divided into four congressional districts that "packed" African-Americans and Puerto Ricans into three districts, while leaving the fourth for nonminority voters. *Id.* at 54-55. The Court rejected the claim, stating that the plaintiffs had failed to establish that the New York Legislature was racially motivated when it enacted the reapportionment statute. *Id.* at 58.

Justice Douglas, dissenting, speculated that the effect of the redistricting was to exclude minorities from the nonminority district. *Id.* at 60-61 (Douglas, J., dissenting). Justice Douglas concluded that, based on the effects of the legislation, state-sponsored racial segregation should be nullified. *Id.* at 61 (Douglas, J., dissenting).

51 377 U.S. 533 (1964).

52 *Id.* at 568; NOWAK & ROTUNDA, *supra* note 24, § 14.35, at 851. For an additional discussion of *Reynolds*, see Blacksher & Menefee, *supra* note 42, at 4-5 (discussing the evolution of the "one man, one vote" doctrine and the Supreme Court's efforts to develop judicially manageable standards for minority vote dilution); Butler, *supra* note 9, at 9-10 (discussing population-based parameters under *Reynolds*); Karlan, *supra* note 18, at 174 (asserting that the geographic compactness standard of *Reynolds* did not apply to racial vote dilution); Evan Geldzahler, Note, Davis v. Bandemer: *Remedial Difficulties in Political Gerrymandering*, 37 EMORY L.J. 443, 459 (1988) (offering use

bama voters and taxpayers, alleged a deprivation of votes based on the state's failure to reapportion its legislative districts in sixty years.[53] The existing legislative map, the plaintiffs claimed, demonstrated severe representation differences that were unreflective of population growth in urban locales.[54]

Writing for the majority, Chief Justice Warren maintained that the constitutional right to vote inferred a corresponding right to voting strength.[55] The Court declared, therefore, that an individual vote was unconstitutionally impaired if that vote carried less

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of computer technology to remedy unlawful political gerrymanders); Yanos, *supra* note 6, at 1816 (acknowledging *Reynolds*'s establishment of the individual right to equal political participation, but noting that recent Supreme Court decisions disfavored racial classifications).

Professors Nowak and Rotunda suggested that the Supreme Court's foundation for the "one person, one vote" principle was based on the Equal Protection Clause, enunciated in *Gray v. Sanders* and *Wesberry v. Sanders*. NOWAK & ROTUNDA, *supra* note 24, § 14.35, at 851 (citing Gray v. Sanders, 372 U.S. 368 (1963); Wesberry v. Sanders, 376 U.S. 1 (1964)). In *Gray*, the Court invalidated Georgia's county-unit system of nominating the Governor and other Georgia state officials. *Gray*, 372 U.S. at 370-71, 381. Under Georgia law, candidates who won by a majority of county votes in the primaries carried all of the county electoral units in the general elections. *Id.* at 371 (footnote omitted). Striking down the electoral system, the Court concluded that Georgia's electoral system unfairly weighted voters in rural counties more heavily than those residing in urban counties. *Id.* at 379. Although the county units were not allocated by population, the Court asserted that equal population would not remedy an electoral system where the winner of a county won all of its unit votes. *Id.* at 381 n.12. Therefore, the Court championed political equality under the Fourteenth Amendment as "one person, one vote." *Id.* at 381.

Following *Gray*, the *Wesberry* Court considered Georgia's system of congressional district apportionment. *Wesberry*, 376 U.S. at 2. At the time of the suit, Georgia's congressional districts had dramatic population disparities and had not been reapportioned in almost 30 years. *Id.* at 2, 7. Applying the "one person, one vote" standard, the Court held that Georgia must fulfill the constitutional mandate affording "equal representation for equal numbers of people." *Id.* at 7-8, 18 (footnotes and citations omitted).

Some commentators claim that questions concerning state legislative reapportionment still remained after *Wesberry* and *Gray*. *See* CRUMP ET AL., *supra* note 9, § 10.03, at 694. The unresolved redistricting issues included the influence of political subunits, acceptable population deviations, and population shifting on formulating redistricting plans. *Id.* The *Reynolds* decision, legal scholars argue, only provided the initial inquiry into racial and political gerrymandering. *Id.*

53 *Reynolds*, 377 U.S. at 540. This deprivation, the *Reynolds* plaintiffs claimed, violated their voting rights under the Alabama Constitution and the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 537.

54 *Id.* at 545-46.

55 *Id.* at 562-63. The fundamental right to vote, the Chief Justice proclaimed, implied a right to have that vote count. *Id.* at 554 (citation omitted). Declaring that "[l]egislators represent people, not trees or acres," the Court posited that a representative government guarantees equal representation regardless of race, economic status, sex, or place of residence. *Id.* at 561, 562.

weight than the votes of citizens in other parts of the state.[56] An individual voter's place of residence, the Court articulated, was not a valid reason for overweighing or diluting the effects of her vote.[57] Thus, the *Reynolds* Court asserted that a legislative district's population was a prevailing factor when evaluating malapportionment controversies.[58] Accordingly, the Court concluded that the "one person, one vote" standard was the most appropriate way to determine equal representation based on population.[59]

In *White v. Regester*,[60] however, the Supreme Court declined to rely on a strict interpretation of the "one man, one vote" rule.[61] Instead, the Court adopted a "results" test that required plaintiffs

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56 *Id.* at 562-63 (citations omitted).

57 *Id.* at 567. In light of the nation's rapid development from a rural to urban society, the Chief Justice stated that electoral schemes quickly become obsolete. *Id.* (footnote omitted). The Chief Justice added, however, that the fundamental premise of representative government must remain unchanged—the strength of an individual's vote cannot depend on place of residence. *Id.* at 567-68.

58 *Id.* at 568. Justice Harlan dissented, declaring that "people are not ciphers and that legislators can represent their electors only by speaking for their interests—economic, social, political—many of which do reflect the place where the electors live." *Id.* at 623-24 (Harlan, J., dissenting); *see also* Karlan, *supra* note 18, at 179 (interpreting Justice Harlan's declaration to mean that voters are not a fungible commodity when entering the voting booth).

59 *Reynolds*, 377 U.S. at 568.

60 412 U.S. 755 (1973).

61 *Id.* at 763; Andrew P. Miller & Mark A. Packman, *Amended Section 2 of the Voting Rights Act: What is the Intent of the Results Test?*, 36 EMORY L.J. 1, 5 (citing *Regester*, 412 U.S. at 765-66); *see also* Butler, *supra* note 9, at 11-12 (opining that after *Reynolds*, lawmakers would have a "gerrymanderer's holiday" with no limitations for redistricting other than population).

Prior to *Regester*, the Court declined to find multi-member voting districts unconstitutional *per se*, but speculated that a plan would be unconstitutional if it "minimize[d] or cancel[led] out the voting strength of racial or political elements in the voting population." Fortson v. Dorsey, 379 U.S. 433, 439 (1965). In *Fortson*, the plaintiffs alleged that Georgia's at-large electoral scheme diluted the strength of racial minorities, despite approximately equal population. *Id.* at 436, 439. Because the plaintiffs could not prove that the state's voting system minimized the strength of their vote through the inability to elect preferred candidates, the Court rejected the constitutional claim. *Id.* at 436-37, 439; *see also* Burns v. Richardson, 384 U.S. 73, 88 (1966) (reaffirming *Fortson*'s holding that multi-member districts, which despite nearly equal population intentionally minimized the minority vote, are invalid) (citing *Fortson*, 379 U.S. at 439).

In 1971, the Court finally considered the merits of a constitutional challenge to a reapportionment plan that included one multi-member voting district. Whitcomb v. Chavis, 403 U.S. 124, 127 (1971). Writing for the Court, Justice White concluded that the mere lack of successful elections was not dispositive of an equal protection violation. *Id.* at 153. The Court further asserted that absent sufficient proof, invalidating the plan would encourage any special interest group—political, ethnic, union, or religious—to assert their right to representation via a multi-member electoral system. *Id.* at 156 (footnote omitted). The Court, however, did not endorse single-member voting districts as a remedy for vote dilution within multi-member districts. *Id.* at 160.

to prove that the political process, under which legislative representatives were nominated and elected, did not provide minority groups with equal protection.[62] In *Regester*, African-American and Mexican-American voters challenged a Texas reapportionment plan, despite nearly equal population among voting districts.[63] Specifically, the plaintiffs contended that the use of multi-member districts[64] in both Dallas and Bexar Counties unconstitutionally diluted their votes.[65]

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62 *Id.* at 766 (citing *Whitcomb*, 403 U.S. at 149-50). Under this standard, the Court clarified, a plaintiff had the burden of showing "that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.* (citing *Whitcomb*, 403 U.S. at 766). For a more detailed discussion of the *Regester* "results" standard and its incorporation into amended § 2 of the Voting Rights Act, see Miller & Packman, *supra* note 61, at 2-16; McDonald, *supra* note 8, at 1265-66.

63 *Regester*, 412 U.S. at 758-59, 761-62. The Court noted that the Texas House of Representatives consisted of 150 members, elected from 79 single-member and 11 multi-member districts. *Id.* at 758. Under the plan, an ideal district contained 74,645 persons. *Id.* at 761. The districts, as currently apportioned, however, ranged from 71,597 to 78,943 in population for each representative. *Id.* This deviation resulted in a total variation of 9.9% between the smallest and largest district. *Id.* (footnote omitted).

Addressing population shifts, cases subsequent to *Regester* indicated that apportionment plans with less than 10% population deviation would be held constitutional. CRUMP ET AL., *supra* note 9, § 10.03, at 699-700 (citations omitted); *see, e.g.*, Mahan v. Howell, 410 U.S. 315, 319, 329 (1973) (upholding district population deviations of up to 9.6%); *c.f.* Connor v. Finch, 431 U.S. 407, 418, 420-21 (1977) (invalidating population variances for the Senate and House of Representatives of 16.5% and 19.3%, respectively). Because congressional redistricting is based on the more stringent requirements of Article I, Section 2 of the Constitution, more exacting population disparities may be required. CRUMP ET AL., *supra* note 9, § 10.03, at 699-700 (citing Karcher v. Daggett, 462 U.S. 725, 728, 744 (1983) (striking a congressional redistricting plan with 0.6984% population variance)).

64 Multi-member voting districts, in which two or more representatives are elected from a single district, tend to submerge the voting strength of minority groups. Note, *Racial Vote Dilution in Multimember Districts: The Constitutional Standard After* Washington v. Davis, 76 MICH. L. REV. 694, 696, 697 (1978) [hereinafter *Racial Vote Dilution*]. One commentator hypothesized that if a district containing an African-American majority combined with a majority white voting district, the result could undercut the minority vote. *Id.* at 695. Because multi-member voting will not always dilute minority voting strength, however, the Supreme Court has declined to hold this type of electoral system as unconstitutional *per se*. *Id.* (footnote omitted). Instead, the Court will consider the specific local political environment. *Id.* at 696. In a locale with a history of racial discrimination, bloc voting may prevent the election of minority candidates. *Id.* at 696-97. Bloc voting is the practice of voting only for candidates from a specific group. Davidson, *supra* note 4, at 4. Through the use of bloc voting, the majority group can prevent minority voters from electing preferred candidates. *Id.* The result is vote dilution which counteracts the objectives of the Voting Rights Act. *Id.* Bloc voting in multi-member voting districts, therefore, may effectively decrease representation for minority groups. *Racial Vote Dilution*, *supra*, at 697.

65 *Regester*, 412 U.S. at 759, 766-67.

Writing for a unanimous Court, Justice White concluded that a claim of disproportionate representation based on population was insufficient to demonstrate that the multi-member districts were being used to dilute minority voting strength.[66] The Court invalidated the plan, however, on grounds that it did not allow minorities equal participation in the electoral scheme.[67] Justice White first noted the locality's history of racial discrimination.[68] Observing the existence of racial campaign tactics,[69] the Court found that since the Reconstruction, only two African-Americans were elected in Dallas County to the Texas House of Representatives.[70] The Court also considered that restrictive voter registration requirements and cultural barriers inhibited minority participation in the electoral process.[71] Assessing the "totality of circumstances," therefore, Justice White concluded that the multi-member districts effectively excluded minority participation in political life.[72] The

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66 *Id.* at 765-66.

67 *Id.* at 767.

68 *Id.* at 766 (citation omitted). Specifically, Justice White noted the district court's finding that the history of racial discrimination in Texas had negatively impacted the ability of African-Americans to register, vote, and participate in the political process since the Reconstruction. *Id.* (citation omitted).

69 *Id.* The Court noted the use of two electoral practices that were disadvantageous to minority groups: the "majority vote" rule in primary elections and the "place" rule. *Id.* "A 'majority' rule requires a run-off election between the two candidates with the most votes if no candidate receives a majority in the first election." *Racial Vote Dilution, supra* note 64, at 697. The run-offs allowed white voters, who allocated their votes to different candidates in the first election, to consolidate and defeat a minority candidate who won by a plurality in the primary. *Id.* A "place" rule required candidates to run for a specific post, thus resulting in head-to-head election contests. *Id.* at 697-98. In districts that employ the "place" rule, white voters seeking to polarize voting along racial lines know which candidate to vote for to defeat the minority candidate. *Id.* at 698.

70 *Regester*, 412 U.S. at 766-67 (footnote omitted). The Court indicated that the lack of African-American representation may have been due to a nonminority "slating committee." *Id.* The slating committee was a white-dominated association that controlled Democratic Party candidate selection in Dallas County. *Id.*

71 *Id.* at 767-68 (citations omitted). Focusing on Mexican-Americans in Bexar County, the Court noted that the minority community had historically suffered from discrimination in the areas of economics, education, employment, health, and politics. *Id.* at 768 (citation omitted). In addition to low income levels, the Court acknowledged that language and cultural barriers precluded Mexican-American participation in community processes. *Id.* (footnote omitted). Based on cultural discrimination and the use of direct vote dilution techniques, such as poll taxes, the Court concluded that the Mexican-Americans were disenfranchised in Bexar County. *Id.* (citation omitted),

72 *Id.* at 769-70. Although noting that not every political and racial group has a constitutionally protected right to representation in the state legislature, the Court maintained that the multi-member districts at issue invidiously excluded Texas minority groups from effectively participating in political life. *Id.*

Refining the *Regester* standard, the Fifth Circuit considered a Louisiana district

ultimate remedy, the Court added, would foster minority political involvement by utilizing single-member voting districts.[73] Accordingly, the Court upheld the district court's order that the Dallas and Bexar Counties be reapportioned into single-member districts.[74]

Four years later, in *United Jewish Organizations v. Carey*,[75] the Supreme Court applied the *Regester* "results" standard to a New York redistricting plan designed to increase the representation of minority groups.[76] Under the New York plan, three New York counties were reapportioned in a manner that would increase the

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that was divided into an electoral system of wards, from which the school board and county government were elected. Zimmer v. McKeithen, 485 F.2d 1297, 1301 (5th Cir. 1973), *aff'd sub. nom.*, East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). Until the passage of the Voting Rights Act, African-Americans were precluded from voting. *Id.* As a result of subsequent African-American success in voting, the county electoral system changed to "at-large" elections that prevented minorities from electing their candidates. *Id.* The African-American voters filed suit, claiming the at-large system unconstitutionally diluted their minority voting strength. *Id.* at 1300, 1301 (footnotes omitted).

The district court dismissed the claim because no population deviation within the voting district existed. *Id.* The Fifth Circuit reversed, finding that political access rather than population disparity was the primary concern in establishing a vote dilution claim. *Id.* at 1303 (citations omitted). In so doing, the court of appeals extended the *Regester* holding and articulated a set of factors to determine whether a claim had been established. *Id.* at 1305. According to the Fifth Circuit, the factors of racial vote dilution included: (1) lack of minority access to the candidate selection process; (2) lack of response of elected officials to minority interests; (3) state policy favoring at-large or multi-member districting; and (4) the existence of past discrimination that precludes the effective participation of minority groups in the electoral process. *Id.*

The *Zimmer* court also identified other techniques that could enhance a showing of voter discrimination. *Id.* The factors included, the court pointed out, the use of large voting districts, the use of discriminatory electoral mechanisms, and noncompact districting. *Id.* (footnote omitted). Finally, the court concluded that vote dilution could be proved under an aggregate of factors and that all criteria need not be demonstrated. *Id.* For a further discussion of the *Zimmer* factors, see Karlan, *supra* note 18, at 190-91 (asserting that the absence of geographic compactness as a primary factor in *Zimmer* marked the rejection of geography in remediation); McDonald, *supra* note 8, at 1261-62 (noting that *Zimmer* was one of the most influential cases in clarifying the *Regester* standard).

[73] *Regester*, 412 U.S. at 769. One author explained that the ultimate remedy in *Regester* was the utilization of single-member districts based on more than geographic boundaries. Karlan, *Misreadings*, *supra* note 18, at 187-88 & n.58 (citation omitted). Single-member districts, the author posited, reflected the "community of interest" formed by the minority groups, largely in response to prior discrimination. *Id.* at 188. The author proffered that the single-member remedy was appropriate in *Regester* because the claim of unconstitutional vote dilution arose from the use of multi-member districts in minority counties. *Id.*

[74] *Id.* at 765.

[75] 430 U.S. 144 (1977).

[76] *Id.* at 165 (citing *Regester*, 412 U.S. at 765-67) (further citations omitted).

number of nonwhite majorities.[77] A group of Hasidic Jews challenged the scheme, claiming that it split their community's electoral district and therefore diluted their voting strength.[78]

Writing for the plurality, Justice White rejected the plaintiffs' challenge that the revised racially-aligned reapportionment plan violated the Fourteenth and Fifteenth Amendments.[79] The use of racial classifications when redistricting, the Court emphasized, was permissible to comply with § 5 of the Voting Rights Act.[80] Evaluating New York's racial criteria under the *Regester* standard, the Court concluded that the redistricting scheme did not unfairly dilute Hasidim voting strength.[81] First, the Court reasoned that the New York plan satisfied the "nonretrogression" requirement under § 5 of the Voting Rights Act.[82] Second, although race had been used in a purposeful manner to effect increased minority voting

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77 *Id.* at 151-52. Three New York counties were subject to § 5 of the Voting Rights Act due to use of a literacy test and a determination that less than 50% of voting-age residents in the same counties participated in the 1968 presidential election. *Id.* at 148 (footnote omitted). Under the previous plan, the entire Hasidic community was situated in a single assembly district (61% nonwhite) and one senate district (37% nonwhite). *Id.* at 152. To comply with § 5 of the Voting Rights Act, the legislature increased the assembly district to a 65% nonwhite majority. *Id.* In attaining such a figure, a portion of the white population, including half of the Hasidic community, was assigned to an adjoining district. *Id.* The New York legislature submitted the revised apportionment plan to the United States Attorney General for approval. *Id.* at 148-49. Although the initial plan was rejected, a revised reapportionment redistributed voters to increase minority strength in two majority white districts. *Id.* at 150-51. For further discussion of § 5 of the Voting Rights Act, see *supra* note 27.

78 *United Jewish Orgs.*, 430 U.S. at 152-53. The plaintiffs claimed that although the New York legislature was attempting to comply with the Voting Rights Act, the reapportionment plan was unconstitutional, as it was revised along racial lines. *Id.* at 155 (footnote omitted). The plaintiffs based their claim on both the Fourteenth and Fifteenth Amendments. *Id.* at 152-53.

79 *Id.* at 155-56.

80 *Id.* at 159, 162. The Court maintained that compliance with § 5 did not turn on evidence of past discrimination in apportionment or prohibit the use of racial quotas. *Id.* at 157, 162. Moreover, the Court emphasized that the minimum of registered voters needed to create an African-American majority district was 50%. *Id.* at 162. Beyond that, the Court noted, a state could choose whatever percentage necessary to achieve the election of a minority representative and obtain approval of its apportionment plan. *Id.*

81 *Id.* at 165.

82 *Id.* at 163. Approval pursuant to § 5, the Court maintained, hinged on whether the minority voting strength changed in comparison with the previous apportionment plan. *Id.* Relying on *Beer v. United States*, the Court asserted that the New York reapportionment plan did not exceed the requirements imposed by § 5's "nonretrogression" requirements. *Id.* at 162-63 (citing Beer v. United States, 425 U.S. 130 (1976)). The Court noted that the plan, initially rejected by the Attorney General, may have accomplished nothing more than the restoration of minority group voting strength to previous levels. *Id.* at 150, 162-63. Consequently, the Court posited that the second plan's creation of substantial nonwhite majorities was necessary to achieve the statu-

strength, the Court conceded that the New York legislature had not intentionally excluded white voters from the electoral process.[83] Thus, the Court viewed the plan as an attempt to fairly allocate political power between white and nonwhite voters in the county rather than minimize the strength of the white vote.[84] Accordingly, the Court upheld the plan.[85]

In *City of Mobile v. Bolden*,[86] however, the Court repudiated the *Regester* standard, and instead required proof of a facially discriminatory intent to establish a vote dilution claim under the Fourteenth and Fifteenth Amendments.[87] In *Bolden*, the Court

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tory rule of nonretrogression. *Id.* For further discussion of *Beer* and nonretrogression requirements imposed by § 5 of the Voting Rights Act, see *infra* note 153.

83 *United Jewish Orgs.*, 430 U.S. at 165 (citations omitted). Even if the county voting occurred strictly by race, the Court continued, white voters would not be underrepresented in their share of the total population. *Id.* at 166.

84 *Id.* at 167.

85 *Id.* at 168. In concurrence, Justice Brennan agreed that race-conscious redistricting was a constitutionally valid method of complying with § 5 of the Voting Rights Act. *Id.* at 171 (Brennan, J., concurring). *Id.* The Justice acknowledged, however, the difficulties associated with even benign race-preferential practices, including: the disguise of unconstitutional policies, the stimulation of latent race-consciousness, and the negative perception of those individuals adversely impacted by the new plan. *Id.* at 172-74 (Brennan, J., concurring).

Dissenting, Chief Justice Burger posited that predetermined racial results contravened the very essence of the Constitution. *Id.* at 181 (Burger, C.J., dissenting). The Chief Justice asserted that mere compliance with the Voting Rights Act afforded no basis for the arbitrary plan enacted by the New York legislature. *Id.* at 184 (Burger, C.J., dissenting). Calling the Court's decision "ironic," Chief Justice Burger cautioned that the use of unnecessary bias for or against a minority group may deflect the goal of a homogeneous society. *Id.* at 186-87 (Burger, C.J., dissenting). For additional commentaries on *United Jewish Organizations*, see T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 602-03 (1993) (comparing the Court's holding in *United Jewish Organizations* to subsequent racial discrimination and voting rights cases); Blacksher & Menefee, *supra* note 42, at 26 (stating that the Court's shift toward an intent standard in vote dilution claims was indicated in *United Jewish Organizations*); Philip P. Frickey, *Judge Wisdom and Voting Rights: The Judicial Artist as Scholar and Pragmatist*, 60 TUL. L. REV. 276, 291-92 (1985) (highlighting the assertion that in *United Jewish Organizations*, the Court approved benign or remedial racial classifications that adversely impacted nonminority voters).

86 446 U.S. 55 (1980).

87 *Id.* at 65, 66-68. For a detailed analysis of the intent standard established in *Bolden*, see McKenzie & Krauss, *supra* note 9, at 155-58. According to one commentator, the Supreme Court abruptly changed "the landscape of vote dilution litigation" in *Bolden* by abandoning the focus on access to the political process and instead favoring an express intent requirement. Karlan, *supra* note 18, at 192. The attack on the *Regester* "results" test began with *Personnel Administrator of Massachusetts v. Feeney*. Copeland, *supra* note 3, at 426 (citing Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979)). In *Feeney*, the Court announced that "even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." *Fee-*

considered a challenge by minority voters to the at-large[88] city council elections in Mobile, Alabama.[89] The African-American plaintiffs contended that the Mobile electoral system unfairly diluted minority voting strength.[90]

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ney, 442 U.S. at 272. In its decision, the *Feeney* Court relied on *Washington v. Davis* and *Arlington Heights v. Metropolitan Housing Development Corp.* *Id.* (citing Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977)).

In *Washington v. Davis*, a case involving racial discrimination in employment, the Court held that a showing of discriminatory intent was necessary to establish a claim under the Fourteenth Amendment. *Washington*, 426 U.S. at 232-33, 245. The plaintiffs, African-American police officers, challenged the constitutionality of a qualifying test given to applicants for positions in the District of Columbia police force. *Id.* at 232-33. The plaintiffs claimed that the test had a disparate impact upon minority applicants, thereby violating equal protection guarantees. *Id.* at 233. The Supreme Court held that to establish an equal protection claim, demonstrating a disproportionate impact alone was not enough. *Id.* at 246-47. The plaintiffs, the Court continued, must also demonstrate a discriminatory motive or purpose. *Id.* at 245.

In *Nevett v. Sides*, the Fifth Circuit subsequently applied the discriminatory intent standard to claims of vote dilution based on the Fourteenth and Fifteenth Amendments. Nevett v. Sides, 571 F.2d 209, 217 (5th Cir. 1978). In *Nevett*, however, the court also determined that the intent requirement could be proven by using the *Zimmer* factors. *Id.* at 222-28. For a review of the *Zimmer* factors, see *supra* note 72.

88 In an at-large election, "[e]lected officials [are] chosen by the voters of the State as a whole rather than from separate congressional or legislative districts." BLACK'S LAW DICTIONARY 125 (6th ed. 1990). At-large elections may dilute the minority vote when voting is racially polarized. Richard L. Engstrom, *The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases*, 28 HOW. L.J. 495, 496 (1985). If voting runs along racial lines, at-large elections advantage a white majority and disadvantage an African-American minority. *Id.* Thus, the white majority may nullify the effect of the African-American vote for a minority candidate. *Id.* Many studies indicate that African-Americans were typically underrepresented in at-large elections and that these elections were especially popular in the South. *Id.* (citations omitted).

Under *Regester*, a challenge to an at-large voting system would prevail only if the plaintiff could establish proof of a discriminatory effect or impact upon the minority population. *Id.* at 497. After *Bolden*, however, the plaintiffs had to meet the more stringent standard of proving that the motivation behind the adoption or continuance of the at-large system was to discriminate against the minority vote. *Id.*

89 *Bolden*, 446 U.S. at 58. In 1911, Mobile adopted a City Commission form of government, in which three commissioners exercised legislative, executive, and administrative authority. *Id.* at 59. After the election, the three commissioners would then designate one of themselves as Mayor of the City. *Id.* (footnote omitted). Elections for the three posts were held every four years and candidates were elected by a majority of the total at-large city vote. *Id.* at 59-60.

90 *Id.* at 58. As a result, the plaintiffs alleged that the Mobile voting plan contravened the Voting Rights Act and the Fourteenth and Fifteenth Amendments. *Id.* The district court and court of appeals found it significant that despite a 35% minority population, no minority had ever been elected to the City Commission. *Id.* at 58 & n.1, 73. Affirming the district court's judgment that Mobile's at-large elections discriminated against minority voters, the court of appeals ordered that the City Commission be replaced by a Mayor and City Council elected from single-member voting districts. Bolden v. City of Mobile, 571 F.2d 238, 245-46 (5th Cir. 1978), *rev'd*, 446 U.S. 55 (1980).

Writing for the Court, Justice Stewart posited that the Fifteenth Amendment did not guarantee minorities the right to elect preferred candidates, but merely prohibited purposeful discrimination that denied an individual's right to vote.[91] Because the Mobile at-large election plan neither prevented African-Americans from registering nor hindered them from voting, the Court upheld the electoral system.[92]

Addressing the Fourteenth Amendment challenge next, the Court held that the use of an at-large electoral scheme in a multi-member voting district violated the Equal Protection Clause only if it was designed with the purpose of minimizing or cancelling out the voting strength of racial minorities.[93] Consequently, Justice Stewart recast the *Regester* test to reflect a discriminatory purpose

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91 *Bolden*, 446 U.S. at 62 (citations omitted). Relying on prior caselaw, the Court noted that the grandfather clause in *Guinn*, which exempted white voters from voter literacy requirements, was unconstitutional because its only plausible purpose was to bypass the Fifteenth Amendment. *Id.* (citing Guinn v. United States, 238 U.S. 347, 365 (1915)); *see also* Wright v. Rockefeller, 376 U.S. 52, 56 (1964) (upholding a congressional reapportionment, despite the claim that it had been racially gerrymandered, because the plaintiffs failed to establish that the redistricting was racially motivated) (citation omitted); Gomillion v. Lightfoot, 364 U.S. 339, 341, 346 (1960) (invalidating revised municipal boundaries because the Alabama legislature's purpose was to exclude minority voters from municipal elections).

In *City of Mobile v. Bolden*, Justice Stewart proffered that § 2 of the Voting Rights Act merely elaborated upon Fifteenth Amendment language, thereby incorporating a requirement of discriminatory intent. *Bolden*, 446 U.S. at 60-61 (footnote omitted). Furthermore, the Justice proffered that § 2's lack of legislative history tended to prove that its effect did not differ from that of the Fifteenth Amendment. *Id.* Justice Stewart also noted that § 2 merely restated Fifteenth Amendment prohibitions and went uncontradicted during congressional hearings leading to the enactment of the legislation. *Id.* at 61.

92 *Bolden*, 446 U.S. at 65. The Court rejected the plaintiffs' reliance on *Smith v. Allwright* and *Terry v. Adams*. *Id.* at 63-65 (citing Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953)). The plaintiffs contended that both *Allwright* and *Adams* supported the conclusion that an at-large system was unconstitutional because it polarized voting on the basis of race. *Id.* at 64. The Court distinguished those cases, however, noting that in both *Allwright* and *Adams*, African-Americans were denied the right to vote altogether. *Id.* Conversely, the plaintiffs in the case at bar, the *Bolden* Court pointed out, were permitted to "register and *vote without hindrance.*" *Id.* at 65 (emphasis added).

93 *Id.* at 66 (citations omitted). The Court recognized that while multi-member voting districts have been criticized for their "'winner-take-all'" aspects and tendency to submerge minority votes, such districts are not unconstitutional *per se*. *Id.* at 65-66 (quotation omitted). The Court held that to demonstrate an invidious purpose, it was insufficient to show that the minority group was unable to elect representatives proportional to its numbers. *Id.* at 66 (citations omitted). Disproportionate effects alone, the Court continued, were inconsistent with the meaning of the Equal Protection Clause and insufficient to support a claim of vote dilution. *Id.* at 66-67 (citations omitted).

standard.[94] Under this new test, the Court proclaimed, it was insufficient to show that the minority group was unable to elect representatives proportional to its numbers.[95] Disproportionate effects alone, the Court reasoned, were inconsistent with the meaning of the Equal Protection Clause and insufficient to support a claim of vote dilution.[96] Instead, the Court asserted that a plaintiff must demonstrate that the disputed plan was operated or conceived with the sole purpose of furthering racial discrimination.[97] Accordingly, the Court refused to uphold the plaintiffs' claim because they failed to show any purposeful discrimination.[98]

As a result of *Bolden*, Congress amended § 2 of the Voting

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94 *Id.* at 68-70. Relying on language in *Regester*, which asked whether the "'multimember districts [were] *being used invidiously* to cancel out or minimize the voting strength of racial groups,'" the Court concluded that *Regester* essentially reflected a discriminatory purpose standard. *Id.* at 69 (quoting White v. Regester, 412 U.S. 755, 765 (1973)). Although the *Zimmer* factors could be offered as evidence, those factors alone, the Court concluded, could not support a finding of unconstitutional discrimination. *Id.* at 73.

Dissenting, Justice White asserted that use of the "totality of the circumstances" test in the case at bar implied an invidious purpose. *Id.* at 102-03 (White, J., dissenting) (quotation omitted). The Justice observed that evidence of racial bloc voting, apathy toward the minority community, and past discrimination in the electoral process had denied minority participation in the Mobile political process. *Id.* at 103 (White, J., dissenting). Because these factors were present, Justice White claimed the Mobile at-large election system would have satisfied the constitutional standard of purposeful discrimination. *Id.*

95 *Id.* at 66 (citations omitted).

96 *Id.* at 66-67 (citations omitted).

97 *Id.* at 66 (quoting Whitcomb v. Chavis, 403 U.S. 124, 149 (1971)).

98 *Id.* at 73-74. Finally, the Court proffered that the Constitution did not confer all "political groups," however defined, with the right to representation in proportion to its numbers. *Id.* at 75 (footnote omitted). The Court rejected Justice Marshall's dissent that advocated a political group's constitutional right to proportional representation. *Id.* at 77-78 (citing Reynolds v. Sims, 377 U.S. 533, 576 (1964)) (footnote omitted). Justice Marshall emphasized that the Constitution had been amended six times in an effort to ensure that democracy remained in the hands of the populace. *Id.* at 104 (Marshall, J., dissenting) (citations omitted). Accordingly, the Justice disagreed with the plurality's stringent burden of demonstrating discriminatory intent. *Id.* Instead, Justice Marshall endorsed the "results" test as the constitutional standard for vote dilution claims. *Id.*

Charging that Justice Marshall's proposition would move the Court toward becoming a "'super-legislature,'" Justice Stewart declared that the Equal Protection Clause did not protect political groups from electoral defeat. *Id.* at 76, 77 (quotation and footnote omitted). The *Bolden* Court reasoned that it is the state's right to delineate the mechanics of voting rights, absent constitutionally prohibited discrimination. *Id.* at 76-77 (quotation omitted).

Concurring, Justice Stevens also questioned Justice Marshall's rationale. *Id.* at 85-86 (Stevens, J., concurring). The Justice explained that a group's political power was grounded upon its strength in numbers, rather than its ethnic, racial, or religious characteristics. *Id.* at 88. Noting the thousands of municipalities across the nation, Justice Stevens speculated that a subjective intent test could result in endless litigation

Rights Act to ease the burden of showing purposeful discrimination in reapportionment plans.[99] In response to the new amend-

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concerning existing multi-member election districts. *Id.* at 92-93 (quotation and footnote omitted).

[99] Kosterlitz, *supra* note 9, at 541. Because of the difficulty in proving intent to discriminate, the legal community responded critically to the new *Bolden* test. Frank R. Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 737 (1983). Criticisms were based on three grounds. *Id.* at 737 & n.110 (citations omitted). First, legal commentators contended that the case was contrary to established precedent on vote dilution laws. *Id.* Second, scholars argued that the *Bolden* decision provided no guidelines on how to apply a difficult standard. *Id.* Finally, requiring plaintiffs to show a purposeful intent to discriminate would compel the courts to inquire into the minds of lawmakers and public entities—an exercise considered divisive to the judiciary. *Id.* Thus, the purpose of amending § 2 was to ease the burden of proof required under *Bolden*. Kosterlitz, *supra* note 9, at 541.

The Senate Report, which accompanied the new amendment, provided the following factors as guidelines for assessing the validity of a § 2 vote dilution claims:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
>
> Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are: whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group. [W]hether the policy underlying the state or political subdivision's use of such voting qualifications, prerequisite to voting, or standard, practice or procedures is tenuous.

S. REP. No. 97-417, 97th Cong., 2d Sess. 29-30, *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07 (footnotes omitted). Although the accompanying Senate Report delineated the nine factors, the report did not clarify how much weight should be given to any one factor. Kosterlitz, *supra* note 9, at 544. Moreover, neither the statutory language nor the legislative history of the amendment expressly articulated the bounds of a § 2 violation. *Id.* "Instead, the Senate Report and the language of section 2 indicated that courts consider the 'totality of the circumstances' and flexibly use those factors to determine a section 2 violation." *Id.* Consequently, the Fifth and Eleventh Circuits grappled with the appropriate standard for vote dilution claims. *Id.*; *see, e.g.*, United

ment, the Court established a tripartite test for analyzing vote dilution claims in *Thornburg v. Gingles*.[100] In *Gingles*, minority voters in North Carolina challenged six multi-member voting districts created in the 1982 North Carolina apportionment plan.[101]

Upholding the challenge, the Court articulated three criteria that must be examined when analyzing a § 2 claim of racial bloc voting.[102] First, Justice Brennan enunciated that the minority group must demonstrate that it was geographically compact and sufficiently large to compose a majority in a single-member district.[103] Second, the Justice stated that the minority group must

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States v. Marengo County Comm'n, 731 F.2d 1546, 1566 (11th Cir. 1984) (stating that racial polarization was the "keystone" of a vote dilution claim), *appeal dismissed*, 469 U.S. 976 (1984); Jones v. City of Lubbock, 727 F.2d 364, 385 (5th Cir. 1984) (relying on all nine factors delineated in the Senate Report to analyze a vote dilution claim); United States v. Dallas County Comm'n, 739 F.2d 1529, 1536, 1538, 1539 (11th Cir. 1984) (relying on factors such as past discrimination and the electoral system, but highlighting the importance of racial polarization); Lee County Branch of NAACP v. City of Opelika, 748 F.2d 1473, 1482 (11th Cir. 1984) (cautioning that multiple factors—campaign expenditure, name recognition, party affiliation, religion, and use of media—are important when analyzing seemingly polarized election outcomes).

100 478 U.S. 30 (1986); *see* Kosterlitz, *supra* note 9, at 551 (stating that *Gingles* was the first case to address which amended § 2 factors must be specifically proven to establish vote dilution in multi-member voting districts).

101 *Gingles*, 478 U.S. at 34-35. Registered African-American voters specifically alleged that the apportionment prevented the minority group from electing preferred candidates in violation of § 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. *Id.* at 35. After the voters initiated suit, but before the trial, Congress amended § 2 and established a "results" test. *Id.* (citations omitted). The district court, therefore, unanimously affirmed the plaintiffs' challenge, concluding that the plan resulted in impermissible vote dilution in all the challenged districts. *Id.* at 37-38 (citation omitted). On appeal, the Supreme Court unanimously upheld the findings of the district court in five of the six voting districts. *Id.* at 35 n.2, 80. *But see* Kosterlitz, *supra* note 9, at 552 (stating that despite a unanimous Court, the Justices in *Gingles* were divided on the definition of racial polarization and the proper standard by which to analyze vote dilution cases).

102 *Gingles*, 478 U.S. at 50-51. Racial bloc voting exists, the Court concluded, when "'there is a consistent relationship between [the] race of the voter and the way in which the voter votes.'" *Id.* at 53 n.21 (quotation omitted). For an additional discussion of the *Gingles* tripartite test, see Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105, 177 (1992) (characterizing vote dilution claims under the *Gingles* analysis as an ability to elect claim); Edward J. Sebold, Note, *Applying Section 2 of the Voting Rights Act to Single-Member Offices*, 88 MICH. L. REV. 2199, 2226-27 (1990) (positing that the *Gingles* tripartite test focused on the ability to elect, rather than the ability to participate in the electoral process).

103 *Gingles*, 478 U.S. at 50; *cf.* C. Robert Heath, *Managing the Political Thicket: Developing Objective Standards in Voting Rights Litigation*, 21 STETSON L. REV. 819, 829 (1992) (construing the first prong of the *Gingles* test to mean that voting age population, as opposed to total population, is the correct measure of group voting strength); Karlan, *supra* note 18, at 199 (emphasizing that *Gingles* elevated the concept of geographic compactness in voting rights controversies). *But see* Grofman & Handley, *supra* note

display political cohesiveness.[104] Lastly, the Justice asserted that the minority group must demonstrate that the existence of majority bloc voting resulted in the inability to elect minority candidates.[105]

Applying this analysis to the North Carolina plan,[106] the Court agreed with the lower court's determination that racial bloc voting existed in the multi-member districts.[107] Although sporadic electoral success would not necessarily defeat a claim of majority bloc voting,[108] the Court concluded that a minority group's consistent inability to elect preferred candidates demonstrated unequal access to the state's political process.[109]

13, at 389 (asserting that vote dilution remedies should require minority voting districts to be no more compact than existing districts).

Addressing the first prong, one commentator noted that large geographically dispersed groups would have difficulty in proving a causal relationship between vote dilution and at-large elections. Heath, *supra*, at 841. Where minority groups are small or dispersed, the author claimed, at-large elections are dilutive because such systems submerge minority voters in a district where the majority is able to defeat minority candidates solely on the basis of numerical superiority. *Id.* Large minority groups, however, would be unable to show a submergence of minority voting strength. *Id.*

104 *Gingles*, 478 U.S. at 51. A group's political cohesiveness may depend on its tendency to vote as a bloc for candidates who affiliate themselves with the group's specific interests. *See* Blacksher & Menefee, *supra* note 42, at 59.

105 *Gingles*, 478 U.S. at 51. Justice Brennan explained that racial bloc voting occurs when a majority group, because of its strength in numbers, consistently defeats candidates of a cohesive and geographically compact minority group. *Id.* at 48-49 (footnote omitted). Specifically, Justice Brennan announced that racial polarization or bloc voting occurs when "the race of voters correlates with the selection of a certain candidate or candidates; that is, it refers to the situation where different races (or minority language groups) vote in blocs for different candidates." *Id.* at 62 (citation omitted). Therefore, the majority rejected the State's use of both intent and causation-based definitions of racial polarization. *Id.* at 61-62. The government, Justice Brennan concluded, misinterpreted racially polarized voting to mean that voters intentionally select or reject candidates on the basis of the candidate's race. *Id.* at 67.

106 After describing the district court's analysis of racially polarized voting in the state, the Court elaborated on what constituted legally significant bloc voting. *See id.* at 52-58.

107 *Id.* at 60.

108 *Id.* The election of some minority candidates occurred, the Court noted, only because those minority candidates were incumbents or ran unopposed. *Id.* (footnote omitted). A history of sustained electoral success, the Court emphasized, is more significant than positive results in a single election. *Id.* at 75 (quotations omitted). Moreover, the Court asserted that proportional representation was not conclusive evidence of § 2 compliance. *Id.* at 74-75 (footnote and citations omitted). Accordingly, the Court upheld the plaintiffs' challenge in five of the six districts. *Id.* at 77. Overruling the district court's order regarding the sixth district, however, the Court concluded that the plaintiffs had failed to demonstrate racial bloc voting. *Id.* The Court noted that in the past six elections, successful minority voters had achieved proportional representation. *Id.* at 77, 88.

109 *Id.* at 74. Specifically, the Court held "that the legal concept of racially polarized voting, as it relates to claims of vote dilution, refers only to the existence of a

The Supreme Court addressed yet another form of racially discriminatory reapportionment in the recent case *Shaw v. Reno.*[110] Specifically, the *Shaw* Court considered whether the creation of an irregularly-shaped single-member voting district constituted an impermissible racial gerrymander.[111]

Writing for the majority, Justice O'Connor began her analysis by reiterating the purpose of the Fifteenth Amendment.[112] The Amendment's central purpose, the Justice noted, was to unequivo-

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correlation between the race of voters and the selection of certain candidates." *Id.* *But see* Kosterlitz, *supra* note 9, at 556 (asserting that Justice Brennan's polarized voting concept was joined only by a plurality of the Court, thus undermining the Justice's view).

In concurrence, Justice White declined to accept that a voter's race, rather than the candidates' race, was the crucial factor in identifying racially polarized voting. *Gingles*, 478 U.S. at 83 (White, J., concurring). Characterizing the plurality's opinion as "interest group politics," Justice White proffered that the standard was inapposite to congressional intent and the Court's holding in *Whitcomb v. Chavis.* *Id.* (citation omitted).

In a separate concurrence, Justice O'Connor objected to the majority's tripartite test. *Id.* at 84-85 (O'Connor, J., concurring in judgment). First, Justice O'Connor contended that the majority view would result in violations of § 2 if the minority group's preferred candidates were not elected in proportion to their population. *Id.* at 91 (O'Connor, J., concurring in judgment). Second, Justice O'Connor maintained that the majority's three part test made electoral success the "linchpin" of a vote dilution claim. *Id.* at 93 (O'Connor, J., concurring in judgment). Relying on electoral success, the Justice criticized, however, largely ignored both the *Regester-Zimmer* factors and Congress's intent in amending § 2. *Id.* at 92-93 (O'Connor, J., concurring in judgment) (citations omitted). Finally, Justice O'Connor noted that the *Gingles* decision had created an "artificial" distinction between claims involving the ability to elect and claims involving the ability to influence. *Id.* at 89 n.1 (O'Connor, J., concurring in judgment). Accordingly, Justice O'Connor concluded that a minority group unable to form a majority in a single-member district could combine with nonminority crossover voters to elect preferred candidates. *Id.* In this manner, the Justice proffered, the minority group might still be able to elect preferred candidates. *Id.* As a result, minority groups could form a majority in a single-member district, thus eliminating the need for the first part of the *Gingles* test. *See id.* at 89 & n.1 (O'Connor, J., concurring in judgment). *But see* Kosterlitz, *supra* note 9, at 560 (asserting that Justice O'Connor's conclusions misconstrued the majority's emphasis on racial polarization).

110 113 S. Ct. 2816 (1993). For a detailed analysis of the *Shaw* decision, see Aleinikoff & Issacharoff, *supra* note 85, at 606 (viewing *Shaw* as a replay of earlier reapportionment controversies, in which intent was derived from the manner in which the state drew district lines); Pildes & Niemi, *supra* note 18, at 484 (stating that *Shaw* urges policymakers to balance the tension between geographically-based election districts and political group interest); *see also* Stuart Taylor, Jr., U.S. Supreme Court Year in Review, *Race: The Most Divisive Issue*, N.J.L.J., Aug. 23, 1993 (Supp.), at 10 (characterizing race as the "most divisive issue" during the 1992-93 Supreme Court term). For decisions contemporaneous with *Shaw*, see Growe v. Emerson, 113 S. Ct. 1075, 1084 (1993) (applying the *Gingles* test to single-member voting districts) (footnote and citations omitted); Voinovich v. Quilter, 113 S. Ct. 1149, 1153, 1157-58 (1993) (applying the *Gingles* factors to a racially-packed electoral district).

111 *Shaw*, 113 S. Ct. at 2820.

112 *Id.* at 2822 (citing U.S. CONST. amend. XV).

cally guarantee citizens the right to vote regardless of their race, color, or former status as a slave.[113] Despite this constitutional mandate, however, the Court acknowledged a long history of racial discrimination in voting.[114]

The Court then addressed the North Carolina voters' contention that the North Carolina reapportionment plan amounted to an unconstitutional racial gerrymander.[115] Race-conscious redistricting, the Court acknowledged, was not *per se* unconstitutional.[116] The Court admitted, however, that redistricting legislation solely constructed as a means to segregate races for voting purposes without any regard for traditional redistricting principles required a compelling justification.[117]

Next, the Court acknowledged that race-conscious legislation fell within the core prohibitions of the Fourteenth Amendment.[118] Accordingly, the Court asserted that express racial classifications were subject to strict scrutiny review.[119] Fourteenth Amendment

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113 *Id.* The essence of a democratic society, the Justice asserted, was "[t]he right to vote freely for the candidate of one's choice." *Id.* (citing Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

114 *Id.* at 2822-23. According to Justice O'Connor, the right to vote had been historically denied to individuals on account of race. *Id.* The Justice delineated the nation's attempts to circumvent the constitutional right to vote through the use of both subtle and blunt instruments. *Id.* Examples of such techniques, the Justice noted, included literacy tests and grandfather clauses. *Id.* at 2823. Additionally, Justice O'Connor described efforts to employ more subtle devices, such as the manipulation of district lines. *Id.* (citation omitted). The majority illustrated by noting an 1870s Mississippi congressional voting district that was drawn like a "shoestring along the Mississippi River" by opponents of the Reconstruction. *Id.* (citation omitted). The Justice explained that while African-American voters were concentrated in this district, five other white majority districts remained. *Id.* (citation omitted). For further discussion of the history of racial discrimination in voting in the United States and a description of various vote dilution techniques, see *supra* notes 3-7 and accompanying text.

115 *Shaw*, 113 S. Ct. at 2823-24. Addressing this claim, the Supreme Court compared the North Carolina redistricting to some of "the most egregious gerrymanders of the past." *Id.*

116 *Id.* at 2824. According to the majority, the appellants wisely stated that all race-conscious redistricting was not always unconstitutional *per se*. *Id.* (citation omitted). Specifically, the Court noted that "[t]his Court has never held that race-conscious state decisionmaking is impermissible in *all* circumstances." *Id.*

117 *Id.*

118 *Id.* Justice O'Connor asserted that the central tenant of the Equal Protection Clause was to prevent purposeful racial discrimination. *Id.* (citing Washington v. Davis, 426 U.S. 229, 239 (1976)). Therefore, the majority maintained that all express racial classifications were included within the constitutional prohibition. *Id.*

119 *Id.* at 2824-25 (citations omitted). The Court reasoned that because other types of discriminatory classifications were subject to strict scrutiny, racial gerrymanders would also be examined under a similar standard. *Id.* at 2825 (citations omitted). The Supreme Court generally employs strict scrutiny when reviewing legislation that

principles, the Justice further noted, even extended to seemingly race-neutral statutes.[120] Justice O'Connor concluded, therefore,

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restricts fundamental constitutional rights. NOWAK & ROTUNDA, *supra* note 24, § 14.3, at 575. In utilizing strict scrutiny, the Court will not defer to governmental decisions, but will decide whether the classification meets a compelling interest. *Id.* Furthermore, laws classifying individuals on the basis of race or national origin will be treated as suspect and subject to a strict standard of review. *Id.* § 14.3, at 576. Such classifications are immediately suspect because absent judicial inquiry, the *Shaw* Court noted, there is no way to distinguish benign classifications from those motivated by notions of racial inferiority. *Shaw*, 113 S. Ct. at 2824 (citations omitted).

Benign racial classifications are remedial and designed to correct the remnants of past discrimination. NOWAK & ROTUNDA, *supra* note 24, § 14.10, at 655-56. Unlike express racial classifications, the Court has applied various levels of judicial scrutiny to benign classifications. *See id.* § 14.10, at 655-57. In 1989, for example, the Supreme Court held that racial classifications for affirmative action purposes were invalid unless strict scrutiny review was satisfied. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (holding that the use of exclusively racial criteria in university admissions programs did not promote a substantial state interest).

For example, in *Regents of the University of California v. Bakke*, Justice Powell invalidated a medical school special admissions program that utilized a racial and ethnic quota. *Id.* at 269-70, 274-75, 320. Stating that the Fourteenth Amendment applied to all people, the Justice pronounced, "equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, than it is not equal." *Id.* at 289-90. Because all racial classifications were immediately suspect, Justice Powell therefore applied strict scrutiny to the admissions program. *Id.* at 291.

The Justice explained that the Fourteenth Amendment extended beyond its original goal of protecting former slaves to unilaterally apply to all individuals regardless of race or ethnic background. *Id.* at 291-93. Characterizing racial classifications as "odious to a free people," Justice Powell proffered that such distinctions may exacerbate racial tensions. *Id.* at 290, 298-99 (citations omitted). Distinguishing *Bakke* from *United Jewish Organizations*, the Justice posited that in that case, disadvantaged minority voters were able to improve their ability to participate in the electoral process without excluding nonminorities from "meaningful participation." *Id.* at 305 (citation omitted). Absent an identifiable injury, Justice Powell declared that in *Bakke*, the medical school's finding of "societal discrimination" would not justify the special admissions program. *Id.* at 309-10 (citations omitted). To hold otherwise, the Justice declared, would provide a remedy for any group claiming societal injury. *Id.* at 310. Finally, Justice Powell concluded that although race was one element to be considered in a university admissions program, it could not be the primary criteria. *Id.* at 315; *see also* Aleinikoff & Issacharoff, *supra* note 85, at 599 (characterizing *Shaw* as a "hardened version" of *Bakke*); Bryan K. Fair, *Foreword: Rethinking the Colorblindness Model*, 13 NAT'L BLACK L.J. 1, 2-3 (1993) (asserting that, Justice Powell's opinion in *Bakke* minimized the history of racial discrimination); Pildes & Niemi, *supra* note 18, at 503 (stating that *Shaw* reflected the *Bakke* opinion, which prohibited race as the dominant factor in public policymaking).

[120] *Shaw*, 113 S. Ct. at 2825 (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977)). The Court further proffered that "'a racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.'" *Id.* (quotations omitted). This rule, the Court declared, applies not only to ostensibly neutral classifications, but those which are an "'obvious pretext for racial discrimination.'" *Id.* (quotations omitted); *cf.* Lane v. Wilson, 307 U.S. 268, 271, 277 (1939) (invalidating a voter registration

that redistricting legislation expressly distinguishing among citizens on the basis of race must be narrowly tailored to serve a compelling interest.[121] In so doing, the Court relied on prior law supporting that district lines, drawn purposely for separating voters on the basis of race, required careful review regardless of their underlying motivations.[122]

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requirement that gave preferential treatment to individuals who were previously registered); Gomillion v. Lightfoot, 364 U.S. 339, 341, 348 (1960) (striking down an alteration of town voting boundaries that virtually segregated African-American and white voters).

[121] *Shaw*, 113 S. Ct. at 2825 (citation omitted). The Court reasoned that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Id.* at 2824 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)) (further citation omitted). Such classifications, the Court further accused, threaten to stigmatize individuals on the basis of their membership in a particular group as well as incite racial hostility. *Id.* (citing *Croson*, 488 U.S. at 493; United Jewish Orgs. v. Carey, 430 U.S. 144, 173 (1977)).

[122] *Id.* at 2826 (citing Guinn v. United States, 238 U.S. 347 (1915); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Wright v. Rockefeller, 376 U.S. 52 (1964)). In *Guinn v. United States*, the Supreme Court invalidated the use of a literacy test in the voter registration process, but "grandfathered" all persons who were previously registered to vote. *Guinn*, 238 U.S. at 357. In so holding, the Court reasoned that the "grandfather clause," which related to a time when African-Americans were excluded from voting within the state, had the effect of imposing the test on all minorities but only a small number of white voters. *Id.* at 356-57. Although the literacy test was ostensibly race-neutral, the Court determined that the state legislation could be explained for no other reason than to circumvent Fifteenth Amendment prohibitions. *Id.* at 364-65.

Similarly, in *Gomillion v. Lightfoot*, the Court addressed the constitutionality of a 28-sided municipal boundary line in Tuskegee, Alabama. *Gomillion*, 364 U.S. at 340. Although the redistricting legislation was race-neutral, the Court upheld the voters' contention that the statute impermissibly removed all African-American voters from the city. *Id.* at 341. In its decision, the *Gomillion* Court maintained:

> If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.

Id. Although *Gomillion* was resolved under the Fifteenth Amendment, Justice Whittaker asserted that the "unlawful segregation of races of citizens" into separate voting districts, stated a claim under the Equal Protection Clause. *Id.* at 349 (Whittaker, J., concurring).

Finally, the Court extended the *Gomillion* rationale to congressional redistricting in *Wright v. Rockefeller*. *Wright*, 376 U.S. at 53. In *Wright*, the Court considered a New York reapportionment plan that excluded minority group members from one voting district and, instead, concentrated them in three other districts. *Id.* at 53-54. The majority agreed that the plan separated voters by race. *Id.* at 56. The Justices concurred with the district court's finding, however, that the districts were not drawn solely along racial lines. *Id.* at 58. The *Wright* Court noted that because a majority of the minority voters resided in one area, constructing voting districts that were devoid of such concentrations would be extremely difficult. *Id.* at 57-58.

The Court next acknowledged the difficulty in proving purposeful racial discrimination within single-member reapportionment plans.[123] The Court admitted, however, that proof of racial discrimination was not impossible.[124] For example, Justice O'Connor noted, a reapportionment plan that concentrated a dispersed minority population into a single district would clearly disregard traditional redistricting principles.[125] The Court cautioned, however, that traditional criteria, while not constitutionally required, served as objective factors to rebut a claim of unlawful racial gerrymandering.[126] Moreover, the Justice commented that a reapportionment plan may be so highly abnormal, that facially, it could be nothing more than an attempt to segregate voters on the basis of race.[127] Therefore, the Court concluded that in legislative reapportionment, geographical appearances were significant in demonstrating purposeful discrimination.[128]

Furthermore, Justice O'Connor characterized racially segregated voting districts as tantamount to political apartheid.[129] Such classifications, the Justice cautioned, may reinforce impermissible stereotypes[130] and serve to undermine a representative democ-

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123 *Shaw*, 113 S. Ct. at 2826. Reapportionment plans, the Court noted, are typically not based on people, but rather addresses or tracts of land. *Id.* Proof difficulties also arise, the Court recognized, because legislative redistricting often considers factors such as race, age, economic status, and political preferences. *Id.* Accordingly, the majority reasoned that a reapportionment plan concentrating group members in one district and excluding them from another may reflect legitimate state interests. *Id.* By comprising a majority of voters in that area, the majority maintained, the minority group would be more likely to elect preferred candidates. *Id.* Thus, the Court concluded, a single-member voting district generally ensures minority voting strength. *Id.*

124 *Id.* Despite the difficulty in proof, however, the Court asserted that racial gerrymanders did not warrant a lesser standard of constitutional scrutiny than other types of racial classifications. *Id.*

125 *Id.* at 2827. The *Shaw* Court recognized traditional districting principles as compactness, contiguity, and preservation of political subdivisions. *Id.* For further discussion of traditional districting principles, see Polsby & Popper, *supra* note 16, at 326-51 (discussing interdependence of compactness, contiguity, and equal population to ensure a valid electoral process).

126 *Shaw*, 113 S. Ct. at 2827 (citations omitted). Justice O'Connor pointed out that Justice Stevens had stated: "One need not use Justice Stewart's classic definition of obscenity—'I know it when I see it'—as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation." *Id.* (quotation omitted).

127 *Id.* at 2826 (citing *Gomillion*, 364 U.S. at 341).

128 *Id.* at 2827. Specifically, Justice O'Connor declared that "reapportionment is one area in which appearances do matter." *Id.*

129 *Id.* Racially segregated electoral districts encompassing vast geographical boundaries, the Justice declared, may include voters with no more in common than their skin color. *Id.*

130 *Id.* Racial gerrymandering, Justice O'Connor posited, "reinforces the percep-

racy.[131] As a result, Justice O'Connor maintained that racial gerrymanders may exacerbate the very problems that majority-minority districts seek to counteract.[132] Regardless of the proof problems, the Court emphasized that, like other racial classifications, racial gerrymanders were still subject to heightened review.[133] Accordingly, the Court held that a plaintiff who challenged a reapportionment plan under the Equal Protection Clause stated a claim if such claim alleged that the redistricting plan was unexplainable on any other basis than race.[134]

Addressing the dissenters' contentions, the Court repudiated the notion that racial gerrymanders, like other types of vote dilution, warrant a more relaxed standard of judicial review.[135] First, the majority distinguished racial gerrymanders from at-large electoral systems and multi-member districts.[136] Contrary to these practices, the Court pointed out, racial reapportionment classifies

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tion that members of the same racial group—regardless of their age, education, economic status, or the community in which the[y] [sic] live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Id.* (citing Holland v. Illinois, 493 U.S. 474, 484 n.2 (1990) (holding that the assumed bias of African-American jurors violated the Equal Protection Clause); Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2088 (1991) (declaring that society's progress as a democracy would be stunted by racial stereotyping)).

131 *Shaw*, 113 S. Ct. 2827. According to Justice O'Connor, racially-aligned redistricting undermines democracy by sending lawmakers the equally damaging message that representation should be skewed to a particular group and not an entire constituency. *Id.* Emphasizing Justice Douglas's dissenting opinion in *Wright*, the *Shaw* Court noted:

> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.

Id. 2827-28 (quoting Wright v. Rockefeller, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting)).

132 *Id.* at 2827. Justice O'Connor cautioned that express racial classifications could "balkanize" society into competing racial factions. *Id.* at 2832. The result, the Justice added, could endanger goals embodied by the Fourteenth and Fifteenth Amendments. *Id.*

133 *Id.* at 2826. Once established, the Court declared that racial gerrymanders should receive the same degree of constitutional scrutiny as other race-conscious state legislation. *Id.*

134 *Id.* at 2828. The Court declined, however, to determine whether or how a redistricting plan, facially explainable in nonracial terms, could be challenged. *Id.* Specifically, the Court refused to determine whether the creation of a "'majority-minority district, without more' always [gave] rise to an equal protection claim." *Id.* (quotation omitted). Instead, the Court limited its holding to conclude that the North Carolina voters had stated a claim that was sufficient to defeat a motion to dismiss. *Id.*

135 *Id.*

136 *Id.*

voters by race.[137] Moreover, because racial gerrymanders may lead to impermissible stereotypes, the Justices reasoned that a reapportionment plan could not be characterized as a benign racial classification.[138]

Second, the majority distinguished racial gerrymanders from political gerrymanders.[139] The *Shaw* Court noted that even political gerrymanders have been justiciable under the Equal Protection Clause.[140] Moreover, the Court concluded that unlike political gerrymanders, both Fourteenth Amendment jurisprudence and a long history of racial discrimination compelled the conclusion that racial reapportionment was subject to heightened review.[141] The majority also rejected the notion that racial gerrymandering presents no constitutional difficulties when district boundaries favor the minority.[142] Racial classifications, the Supreme Court attested, receive strict scrutiny, whether they burden or benefit a particular race.[143]

Third, the Court disclaimed both the dissenters' and the district court's reliance on *United Jewish Organizations v. Carey*.[144] The majority emphasized that the reapportionment plan approved in *United Jewish Organizations*, unlike *Shaw*, comported with traditional

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137 *Id.* The constitutionality of multi-member voting districts and at-large electoral plans, the Court emphasized, hinged upon a result of vote dilution. *Id.* Conversely, the Court proffered that the distinct harms presented by racial classifications required a different analysis than vote dilution cases. *Id.*

138 *Id.* Justice Souter, dissenting, maintained that a racial gerrymander is harmless, absent the dilution of a minority group's voting strength. *Id.* at 2847 (Souter, J., dissenting). Refuting this notion, Justice O'Connor opined that efforts to segregate voters by race reinforces racial stereotypes and signals "elected officials that they represent a particular group, rather than their constituency as a whole." *Id.* at 2828.

139 *Id.* The *Shaw* Court addressed the dissent's argument that the gerrymander at issue was analogous to other types of gerrymanders, such as those formulated along political lines. *Id.* The Supreme Court noted, however, that this assertion could not be reconciled against prior law. *Id.*

140 *Id.* (citing Davis v. Bandemer, 478 U.S. 109, 118-27 (1986)). Justice O'Connor maintained, however, that past precedent did not require that both electoral techniques be subjected to the same level of constitutional scrutiny. *Id.*

141 *Id.* (citation omitted). The majority emphasized that the Fourteenth Amendment reserved the strictest scrutiny for matters involving racial discrimination. *Id.*

142 *Id.* at 2829 (citation omitted).

143 *Id.* (citing Powers v. Ohio, 499 U.S. 400, 410 (1991)). The majority posited that "equal protection analysis 'is not dependent on the race of those burdened or benefitted by a particular classification.'" *Id.* (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989)). The Supreme Court further commented that "'[i]t is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.'" *Id.* (quoting *Powers*, 499 U.S. at 410 (citation omitted)).

144 *Id.* at 2829-30. The majority declared that critical differences between *Shaw* and *United Jewish Organizations* did not foreclose the "analytically distinct claim" at bar. *Id.*

districting principles: compactness and population equality.[145] Conversely, the Supreme Court concluded that a similar analysis could not prevail in the case at bar, because an irrationally-designed reapportionment plan offended basic principles of racial equality.[146] Maintaining *United Jewish Organizations*'s viability, the Court thus established an "analytically distinct claim" for racial gerrymandering, evidenced by a strangely-configured reapportionment plan.[147]

Finally, Justice O'Connor rejected the assertion that strict scrutiny was inappropriate because redistricting usually compels some consideration of race.[148] The Justice contended that legitimate racial factors must be proven rather than assumed.[149] Although benign racial classifications may be subject to a relaxed judicial analysis, the Court maintained that strict scrutiny was necessary to determine whether a racial classification was permissible at all.[150]

The Court next addressed North Carolina's contention that compliance with the Voting Rights Act required the creation of a majority-minority district.[151] Rebutting this assertion, the Court

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145 *Id.* at 2829 (citation omitted). The *Shaw* Court noted that in *United Jewish Organizations*, three Justices approved the New York apportionment plan because it comported with traditional districting principles, such as compactness and population equality. *Id.* Such principles, the Court observed, afforded fair representation to minority groups which were sufficiently large and compact to otherwise form their own voting district. *Id.* (citation omitted). In contrast to the instant case, the majority noted that the Hasidic community did not allege that a highly irregular redistricting plan was drawn along racial lines. *Id.*

146 *Id.* The Court acknowledged that *United Jewish Organizations* created a standard by which nonminority voters could establish unlawful vote dilution. *Id.* at 2829-30. That framework, the Court asserted, however, could not be applied to *Shaw*'s irrationally-shaped reapportionment plan. *Id.* at 2829.

147 *Id.* at 2830. Against this background, Justice O'Connor concluded that nonminority voters could assert a new type of reapportionment claim based on the appearance of a voting district. *Id.*

148 *Id.* (citation omitted). Dissenting, Justice Souter asserted that strict scrutiny for racial gerrymanders was inappropriate, as redistricting plans generally take racial considerations into account. *Id.* at 2845 (Souter, J., dissenting). The existence of racial bloc voting, Justice Souter continued, required the use of racial considerations when redistricting. *Id.*

Justice O'Connor countered that the existence of racial bloc voting in some instances should not mean dissimilar treatment for all racial gerrymanders. *Id.* at 2830. Instead, the Justice maintained that racial bloc voting must be proven on a case-by-case basis to establish a vote dilution claim under § 2 of the Voting Rights Act. *Id.*

149 *Id.*

150 *Id.* The majority addressed Justice Souter's contention that benign racial classifications warranted a relaxed standard of judicial review. *Id.* Absent strict scrutiny, however, the Court maintained that it would be impossible to determine whether racial discrimination was permissible. *Id.*

151 *Id.*

contended that while a State's interest in complying with antidiscrimination laws was strong, such compliance must be constitutionally valid.[152] Thus, the Justice suggested that North Carolina might assert that the plan prevented "retrogression" under § 5 of the Voting Rights Act.[153] Additionally, the Supreme Court speculated that the State may have reapportioned its districts as a means to avoid minority vote dilution in violation of § 2.[154] Lastly, the Justice discussed North Carolina's alternative argument that the reapportionment advanced a compelling state interest to remediate the effects

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[152] *Id.* The majority admonished the lower courts to be mindful of "what the law permits, and what it requires." *Id.*

In contrast, once a redistricting scheme was deemed in violation of § 5 of the Voting Rights Act, Justice White questioned whether the state must do more than merely maintain the status quo. *Id.* at 2842 (White, J., dissenting). In *Shaw*, the Justice noted that North Carolina chose to revise its plan in response to the Attorney General's objections, rather than seek a ruling from the district court. *Id.* Justice White supported his proposition with the Court's holding in *United Jewish Organizations*, which entitled the state to take such action. *Id.* (citation omitted).

The difficulty with the majority view, the dissent emphasized, was in applying a manageable standard of review. *Id.* Justice White pondered whether narrow tailoring required the creation of one majority-minority district or two districts where minority groups were large enough to simply influence the political process. *Id.* Acknowledging the unworkability of a standard divorced from a tangible measure of constitutional harm, Justice White concluded that the state had demonstrated a compelling justification. *Id.*

[153] *Id.* at 2830. Under § 5's "nonretrogression" principle, the Court noted, a voting process change would not be approved if it lessened minority voting influence. *Id.* (citing Beer v. United States, 425 U.S. 130, 141 (1976)). In *Beer v. United States*, the Court upheld a majority-minority district created under § 5 because it improved the position of racial minorities. *Beer*, 425 U.S. at 141-42. Although the *Shaw* Court stated that the *Beer* redistricting plan was nonretrogressive, the Court did not view similar plans as immune from constitutional challenge. *Shaw*, 113 S. Ct. at 2830-31. To the contrary, Justice O'Connor stated that § 5 did not unilaterally provide for racial gerrymandering in the name of nonretrogression. *Id.* at 2831. Moreover, the Justice acknowledged that a plan that went beyond what was reasonably necessary to avoid retrogression would not be considered narrowly tailored. *Id.*; *see also* Richmond v. United States, 422 U.S. 358, 370-71 (1975) (stating that an annexation that reduced the African-Americans in a district comported with § 5 where post-annexation districts fairly reflected black voting power).

[154] *Shaw*, 113 S. Ct. at 2831. The Supreme Court noted the State's contention that the plan was necessary to comply with *Gingles*'s interpretation of § 2 of the Voting Rights Act. *Id.* (citing Thornburg v. Gingles, 478 U.S. 30 (1986)). *See supra* notes 102-05 and accompanying text (explaining the *Gingles* tripartite test). The *Shaw* plaintiffs, the Court pointed out, however, advanced three reasons why the North Carolina reapportionment plan was not required by § 2. *Shaw*, 113 S. Ct. at 2831. First, the Court emphasized the appellants' contention that the State's African-American population was extremely dispersed. *Id.* Second, the majority highlighted the voters' allegations that the minority group was not politically cohesive. *Id.* Third, the Court noted the appellants' emphasis on recent electoral results indicating that North Carolinians were willing to vote for minority candidates. *Id.*

of past racial discrimination.[155] Leaving these issues unresolved, the Court remanded the case to determine whether the North Carolina reapportionment plan was narrowly tailored to achieve a compelling governmental interest.[156]

Justice White dissented, calling the decision a departure from equal protection jurisprudence.[157] Justice White asserted that the facts in *Shaw* mirrored those in *United Jewish Organizations*.[158] Similar to the plaintiffs in *United Jewish Organizations*, the Justice claimed, the North Carolina voters' influence in the political process had not been unfairly cancelled.[159] The Justice concluded, therefore, that the voters had not stated a cognizable claim because the white majority in North Carolina could not plausibly argue disenfranchisement.[160]

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155 *Shaw*, 113 S. Ct. at 2831-32 (citations omitted). The Court noted the State could assert a significant interest in eliminating past racial discrimination. *Id.* (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 491-93 (1989)) (further citations omitted). Justice O'Connor declined to consider North Carolina's assertion that the creation of majority-minority districts was the only effective way in which to mitigate the results of racially polarized voting. *Id.* at 2832. The Court further noted that three Justices held in *United Jewish Organizations* that the use of race-based redistricting to remedy bloc voting was constitutional only when sound redistricting principles were employed. *Id.* (quoting United Jewish Orgs. v. Carey, 430 U.S. 144, 167-68 (1977)).

156 *Id.*; *see also* Linda Greenhouse, *Justices Spar Over Validity of a District Based on Race*, N.Y. TIMES, Apr. 21, 1993, at D21 (inquiring as to what extent the Constitution must be color-blind).

157 *Shaw*, 113 S. Ct. at 2834 (White, J., dissenting); *cf.* Linda Greenhouse, *Court Questions Districts Drawn To Aid Minorities*, N.Y. TIMES, June 29, 1993, at 1 (noting that after thirty-one years as a Supreme Court Justice, the *Shaw* decision marked Justice White's final day on the Supreme Court). Justices Blackmun and Stevens joined in Justice White's dissent. *Shaw*, 113 S. Ct. at 2834.

158 *Shaw*, 113 S. Ct. at 2834 (White, J., dissenting).

159 *Id.* (citing *United Jewish Orgs.*, 430 U.S. at 165-68).

160 *Id.* (White, J., dissenting). Justice White noted that under the revised redistricting plan, white voters constituted a majority in 10 of 12 districts totalling 83% of the districts, while comprising 76% of the state's population. *Id.* at 2838 (White, J., dissenting). Relying on Justice White's dissent, one commentator concluded that *Shaw* drew an inconsistent distinction between oddly configured voting districts and those more traditionally designed. Pildes & Niemi, *supra* note 18, at 499 & n.74 (citing *Shaw*, 113 S. Ct. at 2838 (White, J., dissenting)). According to Pildes and Niemi, this dichotomy underscored the majority's analysis of the "analytically distinct" district appearance claim. *Id.* at 499. To fully understand *Shaw*, Pildes and Niemi opined, one must recognize the central concern with "value reductionism." *Id.* at 500. Value reductionism occurs when a decision involving multiple factors is simplified to a one-dimensional problem. *Id.* The use of this type of decisionmaking, the authors concluded, may appear compromised through oversimplification. *Id.* Value reductionism, therefore, may lead to a different type of constitutional injury, known as "expressive harm." *Id.* at 506. Expressive harm occurs through public perception created by governmental action, rather than tangible consequences. *Id.* at 506-07.

Applying these principles to *Shaw*'s "analytically distinct" district appearance claim, Pildes and Niemi asserted that the Court did not invalidate all voting districts

To support his position, the Justice delineated two types of impermissible electoral practices: direct deprivation of voting rights[161] and the indirect weakening of voting strength.[162] Examples of direct deprivations of the right to vote, Justice White explained, included the implementation of a literacy test or poll tax.[163] Indirect vote dilution, the Justice noted, required showing both a discriminatory intent and effect in diminishing a minority group's political influence.[164] The Justice asserted that because racial considerations inevitably impact redistricting lines,[165] the identifiable group must demonstrate that it has been effectively shut out of the electoral process.[166]

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drawn along race-conscious lines. *Id.* at 500. The nature of redistricting, the authors explained, required the use of multiple factors to represent interest groups, political subdivisions, and proximity between elected officials and constituents. *Id.* As a result, Pildes and Niemi proffered that the use of race is permissible as long as it constitutes one of several factors in the redistricting process. *Id.* at 501.

161 *Shaw*, 113 S. Ct. at 2834 (White, J., dissenting).

162 *Id.* (citing City of Mobile v. Bolden, 446 U.S. 55, 83 (1980)). Justice White stated that minority group members were traditionally required to demonstrate that the reapportionment had the intent and effect of diminishing their electoral participation. *Id.*

163 *Id.* Because neither practice was at issue, the Justice dismissed any further discussion of such measures. *Id.*

164 *Id.* & n.1. The Justice noted that indirect vote dilution is an unconstitutional practice which "'affects the political strength of various groups.'" *Id.* at 2824 (White, J., dissenting) (quoting *Bolden*, 446 U.S. at 83 (Stevens, J., concurring in judgment)). The Justice discussed a recent argument that the standard of discriminatory intent should be lessened once the intentional discrimination was proven. *Id.* n.1 (citing Garza v. County of Los Angeles, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991)). Leaving this issue to be resolved another day, Justice White noted that the courts have still insisted upon some showing of injury to ensure that a meaningful remedy could be imposed. *Id.* at 2824 (White, J., dissenting).

165 *Id.* The Justice articulated that lawmakers are conscious of race when redrawing district lines, just as they are cognizant of factors such as economic status, religious beliefs, and political persuasion. *Id.* Further, the Justice posited that redistricting plans inevitably reflect group interests and other partisan goals. *Id.* at 2835 (White, J., dissenting).

166 *Id.* The Justice proffered that to allow judicial intervention whenever partisan aims impacted the redistricting process would create constant intrusion. *Id.* The threshold requirement, the Justice added, was not established by mere lack of success at the polls, but when the minority group did not have the same opportunity as the majority to elect their candidates. *Id.* (quotation omitted). In support of his view, the Justice determined that the Court applied the same criteria in *White v. Regester* to invalidate a redistricting plan. *Id.* (citing White v. Regester, 412 U.S. 755, 766 (1973)). In *Regester*, the Justice emphasized, the minority group's history, marginal economic status, and lack of legislative response caused the group's exclusion from politics. *Id.* (citation omitted).

Relying on his opinion in *Davis v. Bandemer*, Justice White also declared that electoral influence was not restricted to electoral success. *Id.* at 2836 (White, J., dissenting) (citing Davis v. Bandemer, 478 U.S. 109, 132-33 (1986)). The Justice concluded

Relying on *United Jewish Organizations*, Justice White emphasized that the creation of majority-minority districts, absent a discriminatory purpose or effect, may be constitutional.[167] The Justice maintained that the dual elements of purpose and effect, which have traditionally governed race-conscious redistricting plans,[168] could not be based on mere appearances.[169] Although lack of compactness and contiguity provide an indicia of unlawful gerrymandering, the Justice opined, those factors do not conclusively establish constitutional infirmity.[170] Justice White, therefore, chastised the Court's standard as unworkable because a traditionally-shaped voting district could be equally discriminatory as an ir-

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that an equal protection violation existed only when certain voters' political influence was substantially impaired. *Id.* (citing *Davis*, 478 U.S. at 133).

167 *Id.* at 2837 (White, J., dissenting). Writing for the Court in *United Jewish Organizations*, Justice White explained that although minority voting strength was increased by the New York plan, white voting power was not unfairly compromised. *Id.* (citing United Jewish Orgs. v. Carey, 430 U.S. 144, 165 (1977)). Applying that case to the issue at bar, the Justice noted that North Carolina redistricted the state to comply with §§ 4 and 5 of the Voting Rights Act. *Id.* at 2837-38 (White, J., dissenting). Against this rubric, the Justice found it incredulous to suggest that the North Carolina congressional districts were redrawn for the sole purpose of discriminating against the majority group. *Id.* at 2838 (White, J., dissenting).

168 *Id.* at 2840 (White, J., dissenting). The Justice refuted the majority's interpretation of *Gomillion v. Lightfoot*, which held that the intentional creation of majority-minority districts created an equal protection challenge. *Id.* at 2839 (White, J., dissenting) (citing Gomillion v. Lightfoot, 364 U.S. 339 (1960)). Justice White stated that the touchstone of *Gomillion* was its focus on the purported *effect* of eliminating African-American voters from city limits. *Id.*

Furthermore, the Justice disagreed with the majority's reliance on *Wright v. Rockefeller*. *Id.* In *Wright*, the Justice recalled that the Court declined to invalidate a congressional redistricting plan because the plaintiffs failed to establish discriminatory intent. *Id.* (citing Wright v. Rockefeller, 376 U.S. 52, 55, 58 (1964)). Justice White reasoned that a decision based on the failure to establish requisite intent did not imply that it was unnecessary to prove discriminatory effect. *Id.* Justice White added that *Wright*'s relevance was its demonstration that a plaintiff asserting unconstitutional race-conscious redistricting could state a Fourteenth Amendment claim. *Id.* at 2839-40 (White, J., dissenting). The Justice declared, however, that a challenge must be supported by a showing of discriminatory intent and effect. *Id.* at 2840 (White, J., dissenting).

169 *Id.* Justice White suggested that racial gerrymanders come in many forms: at-large elections, minority group fragmentation among several districts (cracking), placing a large minority population within a larger white population (stacking), and concentrating minority voters into districts where they comprise the majority (packing). *Id.* (citations omitted). In each case, the Justice acknowledged that race was consciously used to affect voting strength. *Id.* Justice White proffered, however, that challengers to such schemes were required to demonstrate the requisite discriminatory purpose and effect. *Id.*

170 *Id.* at 2841 (White, J., dissenting). In support of his premise, the Justice posited: "'[D]ragons, bacon strips, dumbbells and other strained shapes'" were no more indicative of partisan districting than traditionally drawn districts. *Id.* n.9 (quoting Sickels, *supra* note 6, at 1300).

regularly-shaped one.[171]

In a separate dissent, Justice Blackmun championed a "results" test when evaluating malapportionment claims.[172] Racially-aligned redistricting, the Justice maintained, did not violate equal protection principles unless the plan minimized the voting strength of a particular group or denied such a group equal opportunity in the political process.[173] Accordingly, Justice Blackmun found it ironic that a plan that sent North Carolina's first African-American representatives to Congress since the Reconstruction violated the Equal Protection Clause.[174]

Also dissenting, Justice Stevens asserted that the North Carolina redistricting plan was permissibly drawn for the purpose of facilitating minority representation in Congress.[175] Justice Stevens maintained that there were no constitutionally prescribed requirements related to the shape of a voting district.[176] Justice Stevens further asserted that the Equal Protection Clause was violated only by evidence of invidious discrimination, such as a district designed solely to impede minority voting strength.[177] Justice Stevens con-

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171 *Id.* at 2841 (White, J., dissenting). The Justice emphasized that compactness had never previously been a prerequisite to finding a congressional district constitutional. *Id.* (citing Gaffney v. Cummings, 412 U.S. 735, 752 & n.18 (1973)). Justice White claimed that a regularly-shaped voting district could also perpetuate racial discrimination. *Id.* The Justice concluded that the majority's approach could hinder voluntary efforts to ensure minority representation, particularly in areas where the population was geographically dispersed. *Id.*

172 *Id.* at 2843 (Blackmun, J., dissenting). Justice Blackmun characterized the majority's new "'analytically distinct claim'" as an abandonment of settled law. *Id.*

173 *Id.*

174 *Id.*; *see* Lynne Duke, *Advocates Say Justices Muddy Voting Rights*, WASH. POST, June 30, 1993, at A8 (noting that North Carolina Representatives Melvin L. Watt and Eva M. Clayton were the State's first African-American representatives since the Reconstruction).

175 *Shaw*, 113 S. Ct. at 2844 (Stevens, J., dissenting). Justice Stevens agreed that the district's shape was "so bizarre" that it was admittedly drawn for the benefit or detriment of a cognizable voting group. *Id.* at 2843 (Stevens, J., dissenting). Moreover, the Justice deemed the presence of "bizarre and uncouth" district lines to be "powerful evidence of an ulterior purpose." *Id.*

176 *Id.*

177 *Id.* at 2844 (Stevens, J., dissenting). Unconstitutional gerrymanders, Justice Stevens contended, are distinguished by the controlling group's ability to enhance its power at the expense of the minority group. *Id.* The Justice proffered that the Equal Protection Clause was violated only when a state draws boundaries designed to diminish minority electoral strength. *Id.* The Equal Protection Clause is not violated, the Justice emphasized, when the majority uses its power to facilitate the election of a member of an underrepresented group. *Id.* Therefore, Justice Stevens concluded that when the districting process is used to equalize an inequitable allocation of electoral power, no constitutional violation occurs. *Id.*

Repudiating Justice Stevens's dissent, the majority maintained that equal protection analysis did not turn on the race of individuals advantaged or disadvantaged by a

cluded that adequate representation for partisan interests should include the minority group for whom the Equal Protection Clause was enacted.[178]

In the final dissent, Justice Souter declared that the majority had carved out a narrow exception to the general review applied to racial gerrymandering.[179] Placement in a particular voting district, the Justice proffered, did not deny a person a constitutional right possessed by others[180] because the use of racial criteria in redistricting was permissible.[181] Accordingly, Justice Souter advocated a categorical approach for racial gerrymandering instead of heightened scrutiny.[182]

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specific classification. *Id.* at 2829 (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989); *id.* at 520 (Scalia, J., concurring)). The Court thus concluded that racial classifications must undergo strict scrutiny even when races are equally burdened. *Id.* Distinguishing racial from political gerrymanders, the *Shaw* majority stressed that the common law did not compel precisely the same strict scrutiny for each. *Id.* at 2828. To the contrary, the Court asserted that the history of racial discrimination in voting, combined with Fourteenth Amendment prohibitions, warranted the strictest scrutiny for racial gerrymanders. *Id.*

178 *Id.* at 2844-45 (Stevens, J., dissenting). Justice Stevens noted the majority's aversion to defining a group by race in redistricting to remediate the underrepresentation of a minority group. *Id.* at 2844 (Stevens, J., dissenting). The Justice declared, however, that if such a practice was permissible as a means to ensure adequate representation for union members, rural voters, Hasidic Jews, or based on nationality or political affiliation, it was equally permissible to do so for racial groups specifically protected by the Equal Protection Clause. *Id.* at 2844-45 (Stevens, J., dissenting).

179 *Id.* at 2845 (Souter, J., dissenting). Justice Souter stated that the *Shaw* Court had created a new cause of action under which a bizarrely-shaped apportionment plan would be subject to strict scrutiny. *Id.*

180 *Id.* at 2846 (Souter, J., dissenting). According to Justice Souter, the distinction between reapportionment and other impermissible racial classifications is that in the latter category race is used at the expense of a member of another race. *Id.* For example, Justice Souter distinguished electoral redistricting from other race-conscious contexts, such as the awarding of government contracts where giving a minority group member priority would necessarily exclude other individuals on racial grounds. *Id.* (citing *Croson*, 488 U.S. at 493 (striking down racially-based municipal set-asides) (citation omitted)); *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 282-83 (1986) (invalidating the use of race to trump seniority in teacher layoffs). By contrast, the Justice noted that redistricting does not prevent any individual from exercising the constitutional right to cast a ballot. *Id.*

181 *Id.* at 2845 (Souter, J., dissenting). Unlike other racial classifications, Justice Souter noted that the use of race in reapportionment may be necessary to comply with the Voting Rights Act. *Id.* (citing United Jewish Orgs. v. Carey, 430 U.S. 144, 161-62, 180 (1977)).

182 *Id.* at 2847 (Souter, J., dissenting). In setting up this approach, Justice Souter noted a final distinction between redistricting and other racial classifications. *Id.* at 2846-47 (Souter, J., dissenting). The Justice posited that a heightened-scrutiny standard was triggered when racial preferences result in a disadvantageous effect and illegitimate purpose. *Id.* Under such an analysis, Justice Souter concluded, an electoral plan that failed to demonstrate a disparate impact was not subject to the Fourteenth Amendment. *Id.* at 2847 (Souter, J., dissenting). Therefore, the Justice determined

The *Shaw* Court, Justice Souter contended, however, created alternative levels of judicial review.[183] Application of different standards, the Justice proffered, would recognize claims devoid of constitutional harm.[184] Regularly-shaped voting districts, the Justice contrasted, would continue to require a showing of disparate impact.[185] Justice Souter therefore concluded that the Court failed to justify its departure from prior redistricting cases.[186]

At the intersection of law and social policy, *Shaw* demonstrates that race remains a complex and unresolved issue.[187] On the one hand, race-conscious redistricting provides a powerful tool in effecting equal representation for minority groups.[188] Conversely, racially-aligned voting districts may hinder coalition-building and the marketplace of ideas[189] within a diverse society.[190] Balancing

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that when communities are racially mixed and the political strength is not diluted for any group, compliance with the Voting Rights Act did not require application of strict scrutiny review. *Id.*

183 *Id.* at 2848 (Souter, J., dissenting).

184 *Id.* at 2848-49 (Souter, J., dissenting). The creation of an "analytically distinct claim," whose pleading requirements would be so infrequently met, the Justice contended, could produce an aberrational effect. *Id.* at 2848 (Souter, J., dissenting). The Justice explained that the shape of the challenged district was so bizarre, that few electoral districts would be subject to strict scrutiny. *Id.*

185 *Id.* The Justice further asserted that when sufficiently pleaded, the state would be required to demonstrate a compelling governmental interest under the majority's rationale. *Id.* Conversely, the Justice maintained that other types of redistricting would require proof of disparate impact, or, alternatively, an illegitimate state purpose. *Id.* (citation omitted).

186 *Id.* at 2849 (Souter, J., dissenting).

187 *See id.* at 2819 (noting that the definition of the "right" to vote and the issue of race-conscious state measures aimed at assisting minority group representation presented two of the most "complex and sensitive issues this Court has faced in recent years"); Aleinikoff & Issacharoff, *supra* note 85, at 651 (asserting that *Shaw*'s "murkiness" results when "law meets race").

188 *Lani's Last Laugh*, THE NATION, July 19, 1993, at 1. According to one commentator, 13 more African-Americans and 6 Hispanics were sent to Congress as a result of redistricting. Jim Morrill, *Watt Defends Snakelike 12th*, CHARLOTTE OBS., June 30, 1993, at 2C. Additionally, since 1990, the nation has seen the creation of 26 new majority-minority districts. Duke, *supra* note 174, at A8.

189 One commentator has stated that classifications based solely on race hamper "a free marketplace of ideas within the black community, a cornerstone of intellectual strength and progress." Bruce Fein, *Redistricting by Race: A New Racism*, LEGAL TIMES, July 20, 1992, at 26.

190 David Saffell, *Draw the Line on Gerrymandering*, CHI. TRIB., May 27, 1993, at 31. Saffell noted the irony of a diverse nation that has increasingly created singularly ethnic and racial electoral plans. *Id.* Since the 1970s, the states have attempted to remedy longstanding patterns of discrimination and increase minority representation. *Id.* Saffell identified fundamental problems, however, that may underlie racial gerrymandering. *Id.* For example, Saffell noted, majority-minority districts could hinder coalition-building among a multiplicity of racial and ethnic groups. *Id.* The result, Saffell pronounced, could impede efforts to build a homogeneous society. *Id.*

these interests, the *Shaw* Court fairly recognized the necessity of some remedial measures to counteract longstanding racial discrimination.[191]

Nevertheless, the majority cautioned against the use of race as a dominant redistricting factor.[192] While acknowledging traditional districting principles,[193] the Court declined to articulate affirmative criteria for evaluating strangely configured reapportion-

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191 *See Shaw*, 113 S. Ct. at 2824 (noting that while the plaintiffs' argued for a "color-blind" Constitution, it was conceded that racial redistricting would not always be impermissible); *see* Fair, *supra* note 119, at 79 (rejecting the color-blind theory and stating that racial classifications should be governed by intermediate scrutiny); Grofman & Handley, *supra* note 13, at 402 (disagreeing with the assertion that the Voting Rights Act contradicts the Constitution's color-blind spirit).

192 *Shaw*, 113 S. Ct. at 2824 (noting that while racially-aligned redistricting was not impermissible *per se*, a voting district that was solely explainable as an effort to separate voters by race established a claim under the Equal Protection Clause). Popular reaction to *Shaw* characterized the decision as an attack on race-conscious redistricting. Pildes & Niemi, *supra* note 18, at 498 n.70. (citations omitted); *see, e.g.*, Max Boot, *Supreme Court Rules that 'Bizarre' Districts May Be Gerrymanders*, CHRISTIAN SCI. MONITOR, June 30, 1993, at 7 (commenting that *Shaw* "throws into doubt the way the Justice Department has been enforcing the 1965 Voting Rights Act, designed to guarantee minorities political representation")); Greenhouse, *supra* note 157, at A1 (stating that "[a] sharply divided Supreme Court ruled today that designing legislative districts to increase black representation can violate the constitutional rights of white voters"). Conversely, it has been asserted that *Shaw* is triggered only when race becomes the pervasive factor in redistricting. Pildes & Niemi, *supra* note 18, at 501; *see also* Aleinikoff & Issacharoff, *supra* note 85, at 604 (stating that the *Shaw* Court warned against redistricting that "went too far"); Polsby & Popper, *supra* note 16, at 654 (declaring that *Shaw* addresses "how far a legislature may go in controlling who is elected to it"). For cases discussing the Court's slow abandonment of preferential minority treatment, see City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989) (concluding that racial classifications were not per se unconstitutional, and would be subject to strict scrutiny review); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283-84 (1986) (holding local school board efforts to maintain a racially integrated faculty by laying off senior nonminority teachers before minority teachers invalid under the Equal Protection Clause). *But see* Metro Broadcasting Inc. v. FCC, 497 U.S. 547, 596-97, 600 (1990) (holding that "benign" affirmative action was not subject to strict scrutiny, but would be upheld if there was a substantial connection to an important congressional interest and did not unduly burden nonminorities).

193 *See Shaw*, 113 S. Ct. at 2827 (advocating "compactness, contiguity, and respect for political subdivisions" as indicia that a district may be racially gerrymandered). Although 25 states have established compact redistricting requirements, such efforts have been largely unsuccessful. Pildes & Niemi, *supra* note 18, at 528. Recent developments such as quantitative measures, however, may provide guidelines for assessing the shape of election districts. *Id.* at 536. The mechanical application of quantitative methods, though, must be reviewed against a backdrop of local concerns. *Id.* at 539; *see also* Bryant et. al., *supra* note 7, at 280-81 (suggesting criteria to be utilized in conjunction with computer technology that would restrict partisan gerrymandering); Polsby & Popper, *supra* note 16, at 654, 677 (characterizing *Shaw*'s treatment of district compactness as "nebulous" and advancing antigerrymandering principles of equal population, contiguity and compactness).

ment plans.[194] Absent quantitative guidelines, the resulting case-by-case judgments are likely to be inconsistent and unpredictable.[195]

Furthermore, racially gerrymandered districts remain a questionable remedial strategy.[196] Single-member plans may not fulfill the vision of an empowered minority franchise.[197] Single-member districts also do not effectively address concerns related to proportional representation.[198] Therefore, the need emerges for new solutions that will extend principles of democracy to areas of

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194 *See Shaw*, 113 S. Ct. at 2842 (White, J., dissenting) (stating "how [the Court] intends to manage this standard, I do not know").

195 *See* Pildes & Niemi, *supra* note 18, at 528. One commentator predicts that the *Shaw* ruling will mean "'lots of litigation.'" Morrill, *supra* note 188, at 2C; *see also* Aleinikoff & Issacharoff, *supra* note 85, at 623-24 (stating that "there is a strong risk that *Shaw* will be nothing more than an invitation to ad hoc judicial review of redistricting decisions").

For example, a Louisiana congressional voting district was recently ordered to be redrawn as the result of an unlawful racial gerrymander. *Asserting Bias, Judges Order Louisiana to Change Districts*, N.Y. TIMES, Dec. 29, 1993, at A8. In that case, Louisiana created a second majority-minority district to comply with the Voting Rights Act. *Id.* To create such a district, the state drew an irregularly-shaped plan, reflecting a dispersed African-American population. *Id.* When the plaintiffs sought declaratory approval of the plan in the district court, the presiding judges made their ruling following the Supreme Court's *Shaw* decision. *Id. See generally* Linda Greenhouse, *Justices Plan to Delve Anew Into Race and Voting Rights*, N.Y. TIMES, July 11, 1993, at 24L (delineating reapportionment challenges from Georgia and Florida currently before the Supreme Court).

196 *See* Guinier, *supra*, note 9, at 1434 (questioning the wisdom of utilizing single-member voting districts).

197 *Id.* at 1447, 1449. Professor Lani Guinier stated that single-member districts, traditionally associated with minority electoral success, did not achieve effective African-American political representation. *Id.* at 1449. In single-member districts, the author posited, individual candidates, lacking political party support within their locale, face costly grass-roots campaigns. *Id.* at 1449-50. Ultimately, Guinier continued, reduced campaign efforts minimized African-American voter participation. *Id.* at 1449. Therefore, Guinier declared that single-member districts may defeat their proffered goals through the exclusion of low-income voters. *Id.* at 1450.

Additionally, Guinier stated that African-Americans cannot achieve effective political representation without coalition-building within the legislatures. Guinier, *supra* note 18, at 1116. According to Guinier, legislative polarization may prevent minority representatives from developing cross-racial alliances essential to the policy-making process. *Id.* at 1116, 1123. As a result, Guinier proclaimed that electing African-American officials may merely shift racial polarization from the electoral process to the legislative body. *Id.* at 1116. Consequently, Guinier advanced a new approach to effective minority representation, based on proportional representation. *Id.* at 1080. For another critique of single-member voting districts, see Guinier, *supra* note 16.

198 Saffell, *supra* note 190, at 31. Due to shifting populations, the author declared that it has become more difficult to draw districts lines that favor one minority group, without disadvantaging another set of political interests. *Id.*

minority underrepresentation.[199]

In *Baker v. Carr*, the Supreme Court first entered the "political thicket"[200] of reapportionment controversies.[201] Since then, each decade has reflected a new generation of voting rights issues.[202] Consequently, the Supreme Court must again promulgate clear, principled criteria that will distinguish effective representation from unlawful gerrymanders in the 1990s.

Patricia Doyle

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199 Richard H. Pildes, *Beyond Gerrymandering: Cumulative Voting Promotes Civil Rights Without Racial Balkanization*, L.A. DAILY J., Mar. 1, 1993, at 6. Professor Pildes outlined a new approach to minority electoral representation, known as "cumulative voting," where each voter is given as many votes as there are seats to fill. *Id.* Voters are thus able to distribute their votes in any manner. *Id.* This technique would enable voters to express not only their candidate preferences, but also the value of those preferences. *Id.* In a five candidate race, for example, a voter could cast a ballot for each candidate, three times for one candidate and twice for another, or allot all votes to the same candidate. *Id.* Under such a scheme, minority voters have a greater chance to elect preferred candidates, even when facing a strong majority. *Id.*

According to Pildes, cumulative voting has several advantages. *Id.* First, the approach avoids the need to construct racially-aligned district lines. *Id.* Moreover, cumulative voting would allow voters to adopt their own interests and affiliations, free of assumptions that minority groups unilaterally share the same political values. *Id.*

On the other hand, cumulative voting could increase campaign costs and fragment political parties because representatives would have relate to a broader constituent base. *Id.* Nevertheless, cumulative voting has been successfully used by certain corporations in electing boards of directors. *Id.*; *see also*, Aleinikoff & Issacharoff, *supra* note 85, at 627-28 (positing that modified elections, combined with limited or cumulative voting, offered promising techniques for achieving semiproportional representation); Grofman & Handley, *supra* note 13, at 394-400 (offering alternative electoral systems that include "limited voting," "weighted voting," and "power-sharing devices"); Guinier, *supra* note 19, at 1512 (preferring at-large elections with cumulative voting).

200 Justice Frankfurter first referred to a redistricting challenge as a "political thicket" in *Colegrove v. Green*. Colegrove v. Green, 328 U.S. 549, 556 (1946). For a detailed discussion of *Colegrove*, *see supra* note 42. Since that time, the phrase has been associated with judicial intervention into new issues surrounding voting rights litigation. Pildes & Niemi, *supra* note 18, at 528 (citation omitted).

201 Pildes & Niemi, *supra* note 18, at 586 (citing Baker v. Carr, 369 U.S. 186 (1962)). *Shaw* has been characterized as the "*Baker v. Carr* of the Voting Rights Act era." *Id.* Pildes and Niemi declared that in *Shaw*, the Court established a new type of constitutional claim based on the design of voting districts. *Id.* Similar to *Baker*, the authors posited, *Shaw* posed controversial voting rights issues. *Id.* Pildes and Niemi further maintained that *Shaw* will hopefully be followed by a case similar to *Reynolds*, which followed *Baker*, that will provide quantitative standards for district compactness. *Id.* at 587; *see also* Aleinikoff & Issacharoff, *supra* note 85, at 622 (stating that "*Shaw* would . . . be the *Baker* of compactness standards, with its own *Reynolds* presumably to follow").

202 *See* Grofman & Handley, *supra* note 13, at 348-49 (stating that voting rights litigation in the 1990s will shift from at-large elections or multi-member voting districts to single-member plans).