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NOTE

THE REHNQUIST COURT'S CHANGED READING OF THE EQUAL PROTECTION CLAUSE IN THE CONTEXT OF VOTING RIGHTS

Jeanmarie K. Grubert

INTRODUCTION

In 1993, the Supreme Court in *Shaw v. Reno*1 ("Shaw I") recognized a new constitutional violation under the Equal Protection Clause in the context of voting rights. The Court found that a districting plan2 which segregates voters on the basis of race and disregards traditional districting principles constitutes a racial gerrymander3 in violation of the Equal Protection Clause.4 *Shaw I* marked a departure from the Court's earlier voting rights cases, which required a showing of discriminatory effect to establish a claim of vote dilution under the Equal Protection Clause.5 The Rehnquist Court built on its *Shaw I* decision in *Miller v. Johnson,*6 *Shaw v. Hunt,*7 ("Shaw II") and *Bush v. Vera,*8 finding that an equal protection violation is established simply by a showing that race was the predominant factor in the creation of the district lines.9

3. The term "gerrymander" was coined in 1812 in reference to the bizarre districting plan of Essex County, Massachusetts, which was approved by Governor Elbridge Gerry. *Id.* at 588 n.1. Racial gerrymandering refers to the creation of an abnormally shaped district drawn to advantage one racial group. See, e.g., *Shaw I,* 509 U.S. at 670-71 (White, J., dissenting) (providing examples of various districting practices constituting racial gerrymanders to the disadvantage of racial minorities). Prior to *Shaw I,* racial gerrymandering was a claim brought by members of a racial minority who were fenced-out of the political process: "The racial gerrymander carves districts so as to diminish the minority percentage in districts or, alternatively, it packs almost all minority voters into one or a few districts to prevent their having influence outside that area." Chandler Davidson, *The Voting Rights Act: A Brief History,* in *Controversies in Minority Voting,* 7, 23 n.56 (Bernard Grofman & Chandler Davidson eds., 1992). The *Shaw I* plaintiffs, however, were members of the white majority.
5. See *infra* part II.A.
9. See *infra* part II.B.
Although much has been written concerning the Supreme Court's changed equal protection jurisprudence,\(^{10}\) most commentators have used an originalist approach\(^ {11}\) to analyze the Court's reading of the Equal Protection Clause. This Note proposes that Professor Lessig's translation theory, which recognizes that changed readings of the Constitution are not necessarily unfaithful readings,\(^ {12}\) provides a stronger method for interpreting the Fourteenth Amendment and for demonstrating that the Court is not remaining faithful to the Constitution in \textit{Shaw I} and its progeny.\(^ {13}\) This Note argues that under the translation model, recognition and treatment of race in voting rights would be faithful to the Constitution because it would be consistent with both the original understanding of the Fourteenth Amendment and the pre-\textit{Shaw I} cases addressing voting rights under the Equal Protection Clause.

Part I of this Note sets out Professor Lessig's translation theory and compares his approach to originalism; it concludes that the translation model remedies many weaknesses in the originalist approach. Part II traces the voting rights cases from \textit{Baker v. Carr},\(^ {14}\) which first recognized that state apportionment plans\(^ {15}\) were justiciable in federal courts, through the \textit{Shaw I} line of cases to demonstrate that the Court changed its reading of the Equal Protection Clause beginning with


\(^{11}\) “Originalism,” as used in this Note, refers to a strict originalist approach that would treat the Framers' intent as dispositive for deciding current constitutional questions. See H. Jefferson Powell, \textit{Rules for Originalists}, 73 Va. L. Rev. 659, 659 (1987) (explaining originalism as “faithful adherence to ‘the original intent of the framers’”). Originalism does not have a precise meaning, but rather refers to a general theory of constitutional interpretation that looks to the Framers' intent as a starting point; varying degrees of originalism advocate different levels of adherence to the original intent. See, e.g., Daniel A. Farber, \textit{The Originalism Debate: A Guide for the Perplexed}, 49 Ohio St. L.J. 1085, 1086-87 (1989) (discussing the varying degrees of originalism); Jed Rubenfeld, \textit{On Fidelity in Constitutional Law}, 65 Fordham L. Rev. 1469, 1486 (1997) (contrasting strict originalism with the “‘softer’ versions of originalism” which advocate remaining faithful to the ideals or principles of the Framers rather than to their exact intentions). Indeed, Professor Lessig's translation theory, which this Note will employ to analyze the Rehnquist Court's voting rights jurisprudence, has been construed as similar to originalism because “both are based on the notion of a primordial text whose meaning has grown elusive because of the passage of time.” Sanford Levinson, \textit{Translation: Who Needs It?}, 65 Fordham L. Rev. 1457, 1460 (1997).

\(^{12}\) \textit{See infra} part I.

\(^{13}\) \textit{See infra} part I.B.

\(^{14}\) 369 U.S. 186 (1962).

\(^{15}\) States are required to apportion, or distribute voters into different voting districts, on the basis of population so as not to violate the Equal Protection Clause by diluting the weight of certain votes on the basis of residence. \textit{See} Reynolds v. Sims, 377 U.S. 533, 566-68 (1964).
Shaw I. In part III, Professor Lessig's translation theory is applied to the voting rights cases to determine whether the Court's changed reading constitutes a faithful reading. Part III begins by reviewing the legislative history of the Fourteenth Amendment and the original understanding of the Fourteenth Amendment. The original understanding is viewed as the implementation of a particular concept of representative government into the Fourteenth Amendment. Part III then asserts that racial classifications which benefit a racial minority are constitutionally permissible under the Equal Protection Clause. This Note concludes that under Professor Lessig's model of constitutional interpretation, the Rehnquist Court's reading of the Equal Protection Clause in the Shaw I line of cases is not faithful to the Fourteenth Amendment.

I. FIDELITY IN TRANSLATION

This part first presents Professor Lessig's fidelity theory as a two-step process. It then compares Professor Lessig's method of constitutional interpretation with originalism and concludes that translation is a more useful method to analyze the Supreme Court's reading of the Equal Protection Clause in the voting rights cases.

A. Translation Theory

Professor Lessig sets out his translation theory as a method of constitutional interpretation in *Fidelity in Translation*\(^\text{16}\) and in a number of his later articles.\(^\text{17}\) Professor Lessig notes, as a simple historical fact, that readings of the Constitution change.\(^\text{18}\) Indeed, he argues that in certain circumstances a changed reading will be necessary in order to remain faithful to the meaning of the Constitution.\(^\text{19}\) As a

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\(^{18}\) Lessig, *Constraint*, supra note 17, at 1366; Lessig, *Understanding Changed Readings*, supra note 17, at 396. Professor Levinson explained Professor Lessig's translation model as a method "to address the ways that we explain and/or justify ... the changes that undoubtedly have occurred within the American constitutional order." Levinson, *supra* note 11, at 1461.

\(^{19}\) Lessig, *Understanding Changed Readings*, supra note 17, at 423-25; Lessig & Sunstein, *The President and the Administration*, supra note 17, at 87-88. Professor Lessig asserts, for example, that in Brown v. Board of Education, 347 U.S. 483 (1954), the Court overruled the reading of the Equal Protection Clause in Plessy v. Ferguson,
result, a theory of constitutional interpretation must account for these changed readings to distinguish between changes that are faithful to the Constitution and changes that are not.20 A change that remains faithful to the Constitution would permit a new reading of the text that preserves the meaning of the original reading in situations where the context of the original text has changed.21 Professor Lessig suggests, for example, that modern technological advances, such as automobiles and helicopters, would govern the length of time that police could reasonably delay before presenting a warrantless arrestee to a magistrate under the Fourth Amendment's proscription of "unreasonable searches and seizures."22 Thus, the reading of the Fourth Amendment's reasonableness requirement has changed from the Framing—where it may have been reasonable to take six hours to travel thirty miles on horseback—to the present—where it would no longer be reasonable to allow such a delay in light of the changed technology. Professor Lessig asserts that in order to preserve original meaning across changed contexts, it is necessary to "translate" the original understanding of a constitutional provision into the present context.23 Similar views have been expressed in both case law and articles prior to the publication of Professor Lessig's theory.24 In addition, a number of legal scholars have applied Professor Lessig's

163 U.S. 537 (1896), in response to a change in social science. Lessig, Understanding Changed Readings, supra note 17, at 423-25. When Plessy was decided, science—genetic determinism—supported the racist status quo and provided judges with a reason to uphold segregation. Once the views of genetic determinism or scientific racism were effectively refuted, courts no longer had any reasonable basis for upholding segregation. Lessig, Understanding Changed Readings, supra note 17, at 423-25.
20. Lessig, Constraint, supra note 17, at 5; Lessig, Understanding Changed Readings, supra note 17, at 396.
21. Lessig, Understanding Changed Readings, supra note 17, at 396-400 (giving examples of constitutional provisions whose meanings have evolved over time).
22. Id. at 397-400.
23. Lessig, Fidelity, supra note 16, at 1171-73; see also Lessig, Constraint, supra note 17, at 1370. In analyzing Professor Lessig's model, Professor William M. Treanor explains that "a translator seeks to identify the ends that the Constitution's framers sought to advance and then interprets a constitutional provision in a way that best advances those ends in today's world." William M. Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782, 857 (1995).
24. See, e.g., Tennessee v. Garner, 471 U.S. 1, 14-15 (1985) (noting that due to changes in context since the Fourth Amendment was enacted, a literal application would not preserve the original meaning); Board of Educ. v. Barnette, 319 U.S. 624, 639-40 (1943) (discussing the "task of translating" the Bill of Rights from the eighteenth century to address the problems of the twentieth century); Weems v. United States, 217 U.S. 349, 373 (1910) (discussing how constitutions must account for changing conditions and purposes over time); Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 205 (1980) (finding that legislative history and intent are useful but not binding "in the light of changing experiences and perceptions").
model of translation to interpret the Constitution and to analyze various legal issues.\textsuperscript{25}

Professor Lessig's fidelity theory is premised on the notion that the meaning of a text depends on the context within which the text is written.\textsuperscript{26} Therefore, one cannot understand the meaning of a text absent knowledge of its background context because the same words may have very different meanings depending upon the surrounding context.\textsuperscript{27} For example, Professor Lessig points out that the text "Vote Republican" uttered by Thomas Jefferson in 1800 would have had a very different meaning than the meaning this same text would have if uttered by the Republican Party in 1996.\textsuperscript{28} As a result, the reader may distort the original meaning of the text by ignoring a change in the context.\textsuperscript{29} Professor Lessig explains that the background context consists of the underlying facts and values which led the author to use particular words to communicate the intended meaning in the text.\textsuperscript{30} The elements making up the background context may change over time.

As a further example, Professor Lessig notes that homosexuality was at one time considered a pathology.\textsuperscript{31} On this basis, the 1952 Mc-

\textsuperscript{25} See, e.g., Albert W. Alschuler, A Peculiar Privilege in Historical Perspective: The Right to Remain Silent, 94 Mich. L. Rev. 2625, 2668 & n.170 (1996) (arguing that "treating today's sworn statements like the unsworn statements of the past might be the most accurate 'translation' of the Framers' understanding"); Akhil R. Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 816 n.223 (1994); Akhil R. Amar, Reinventing Juries: Ten Suggested Reforms, 28 U.C. Davis L. Rev. 1169, 1173 n.9, 1189 n.44, 1193 n.53 (1995) (referring to Professor Lessig's theory of translation to support his suggested jury reforms); Martin S. Flaherty, The Most Dangerous Branch, 105 Yale L.J. 1725, 1811-16 (1996) (comparing competing theories of translation, originalism, and synthesis to analyze the changed role of the executive branch); Charles A. Reich, Property Law and the New Economic Order: A Betrayal of Middle Americans and the Poor, 71 Chi.-Kent L. Rev. 817, 822 (1996) (applying translation theory to provide constitutional protection for new forms of wealth such as social security and welfare benefits); Rosen, supra note 10, at 799, 801 n.58 (arguing for the Supreme Court to use translation in their Fourteenth Amendment jurisprudence); Cass R. Sunstein, An Eighteenth Century Presidency in a Twenty-First Century World, 48 Ark. L. Rev. 1, 16-17 (1995) (illustrating translation by using the President's expanded authority as an example); Treanor, supra note 23, at 855-87 (translating the Takings Clause into a modern context).

\textsuperscript{26} Lessig, Constraint, supra note 17, at 1369-70; Lessig, What Drives Derivability, supra note 17, at 843. As noted by Professor Frederick Schauer, "Lessig appears to take the existence or non-existence of a background social or political context as the primary determinant of constitutional outcome." Frederick Schauer, Constitutional Invocations, 65 Fordham L. Rev. 1295, 1296 n.7 (1997). Professor Schauer instead advocates "formalism" or "textualism." \textit{Id.} at 1298. This approach, unlike Professor Lessig's, asserts that a literal reading of the legal text should be determinative "even when that approach impedes the judicial realization of morally and constitutionally optimal outcomes." \textit{Id.}

\textsuperscript{27} Lessig, Fidelity, supra note 16, at 1175.

\textsuperscript{28} Lessig, The Limits of Lieber, supra note 17, at 2249.

\textsuperscript{29} Lessig, Fidelity, supra note 16, at 1175.

\textsuperscript{30} \textit{Id.} at 1178.

\textsuperscript{31} Lessig, Understanding Changed Readings, supra note 17, at 415.
Carran-Walter Act barred homosexuals from entering the United States.\(^3\) In 1973, however, the American Psychiatric Association changed its classification of homosexuality, acknowledging that it was not a psychopathic condition.\(^3\) As a result, in *Lesbian/Gay Freedom Day Committee, Inc. v. INS*,\(^3\) the Court found that the INS could no longer exclude homosexuals on this basis.\(^3\)

Professor Lessig contends that an understanding of each element constituting the background context may be necessary to faithfully interpret a text but that a change in any individual element does not necessarily alter the meaning of the text or require a changed reading of the original text.\(^3\) Rather, Professor Lessig proposes that a changed reading is required as a matter of interpretive fidelity only when a "presupposition" changes.\(^3\) According to Professor Lessig, a "presupposition" is an element so fundamental to the meaning of the original text that if this element were to change, the text would have a different meaning in the second context and, accordingly, would require a changed reading to remain faithful to the meaning of the original text.\(^3\) In other words, had this element been different at the time the original text was written, the author would have used different words in the original text because a proper understanding of this element was essential to understand the meaning of the text.\(^3\)

Professor Lessig posits that there are two steps in determining if a new reading is faithful to the original meaning.

1. Step I of Fidelity: The Original Understanding of the Text

The first step of fidelity theory is consistent with the originalist approach: \(^4\) the reader must read the text in its original context to discern the meaning the text had at the time it was written.\(^4\) But Professor Lessig points out that an adherent to originalism, which could be described as "one-step fidelity," would simply apply that meaning in the present situation, thereby ignoring any disparity between the original and present contexts.\(^4\) In contrast, Professor Lessig argues that translation, or "two-step fidelity," is required for legal

\(^{32}\) Id.

\(^{33}\) Id. at 417.

\(^{34}\) 541 F. Supp. 569 (N.D. Cal. 1982), aff'd sub nom., Hill v. INS, 714 F.2d 1470 (9th Cir. 1983).

\(^{35}\) *Lesbian/Gay Freedom Day Committee, 541 F. Supp. at 585.

\(^{36}\) Lessig, *Fidelity, supra* note 16, at 1180-81.

\(^{37}\) Id. at 1181; Treanor, *supra* note 23, at 857.

\(^{38}\) Lessig, *Fidelity, supra* note 16, at 1180-81, 1213.

\(^{39}\) Lessig, *Constraint, supra* note 17, at 1370; Lessig, *Fidelity, supra* note 16, at 1179-80.

\(^{40}\) See *supra* note 11.


\(^{42}\) Lessig, *Fidelity, supra* note 16, at 1183; see Lessig, *Constraint, supra* note 17, at 1370.
texts because they are normative texts which must first be read in context to understand their original meaning, and then applied faithfully in the present context. While the two-step fidelitist endeavors to translate the original application of the normative text into the current context, the one-step fidelitist, by attempting only to preserve the meaning of the original text, ignores possible changes in context, which may change rather than preserve meaning; this can result in infidelity to the law.

2. Step II of Fidelity: Translation

Translation is the process that neutralizes the impact that changed context will have on a text's meaning. Before describing how translation actually works in practice, however, it is worth discussing how translation, in theory, can accomplish the goals of the two-step fidelitist. As it is commonly understood, translation is the process of converting a text in one language into the text of a different language while preserving the meaning of the original text. Translation attempts to diminish the effect changed language has on the meaning of a text. If language is viewed as the background context of the text, translation is a process that offsets contextual changes. Professor Lessig claims that two-step fidelity applies this model to neutralize other types of contextual changes as well. Naturally, there are some distinctions between the processes for interlanguage translation and legal translation. For the interlanguage translator, the source text is an original text in a foreign language; for the legal translator, the source text is the normative text as previously applied in a different context. Additionally, for the interlanguage translator, the second text is a new text in a different language; for the legal translator, the reconstructed text is a new application of the original text where the background context has changed. As a result, the interlanguage translator must preserve the meaning of the original text in the new text, but the legal translator must ensure that the meaning of the new application is the same as the meaning of the original application.

43. Lessig, Fidelity, supra note 16, at 1184.
44. Id. at 1188.
45. Lessig, Constraint, supra note 17, at 1370; Lessig, Fidelity, supra note 16, at 1189.
46. Lessig, Fidelity, supra note 16, at 1189; Lessig, Understanding Changed Readings, supra note 17, at 406; Lessig, What Drives Derivability, supra note 17, at 843. Webster's defines "translate" as "to turn into one's own or another language." Merriam-Webster Dictionary 764 (5th ed. 1994).
47. Lessig, Fidelity, supra note 16, at 1189; Lessig, Understanding Changed Readings, supra note 17, at 406-07; Lessig, What Drives Derivability, supra note 17, at 843.
49. Id. at 1213.
50. Id.; see Lessig, Understanding Changed Readings, supra note 17, at 406.
To practice legal translation, the translator must engage in two separate processes. First, the translator must develop an understanding of the material to be translated—the process of finding “familiarity.” Second, the translator must find sameness in meaning—the process of finding “equivalence.” To find familiarity, the translator must have knowledge “of the source text and context, the target text and context, and the relationship between the two.” Further, the translator should understand how that text compares with others near it and, additionally, understand the text’s “purpose, the assumptions that underlie it, the scope of its reach, and [the] theories it embraces.” Familiarity is required so that the translator understands “from where and to where meaning is to be carried.”

Once the translator has knowledge of both texts and contexts, she must find equivalence in meaning between the two contexts. To find equivalence, the translator must create a text that the original author would have created had the original author been in the present context. As the first step in finding equivalence, the translator must set norms of equivalence because determining what constitutes an equivalent meaning depends on the purpose of the translation itself, or on what the translator is attempting to preserve between the two texts. For example, in placing a parable from the Bible in modern English and in a modern context, the objective is to impart a lesson. This may require making significant changes in the text to allow the receiver to relate personally to the parable. If instead the text were a novel to be translated into a foreign language, the translator might be more concerned with conveying the actual language of the original text. Equivalence in meaning would therefore differ for these two types of texts.

A second step to find equivalence is the translator’s “duty of creativity” when confronted with interpretive gaps that cannot be filled by simply replicating the words of the original text. Professor Lessig,
providing a simple example of such an interpretive gap, noted that the Constitution nowhere mentions an air force although it expressly gives Congress authority to create and support both an army and a navy.\(^6\)

Of course, an air force could not have existed in 1789, so it would defy logic to find, on the basis of this exclusion, that the Air Force is unconstitutional. Accordingly, the translator must exercise some discretion in deciding how such gaps are to be filled. The translator may even have to disregard the actual language of the original text in order to preserve the original meaning.\(^6\) There must necessarily be limits to this creativity, however, because fidelity theory rests on the premise that judges must remain faithful to the texts drafted by Congress or the Framers.\(^6\)

B. Translation as a More Faithful Method of Constitutional Interpretation

Previously, commentators analyzing the Supreme Court's equal protection jurisprudence in the context of voting rights have generally used an originalist approach in their analyses.\(^6\) Professor Lessig's model of translation, however, provides a more faithful method of constitutional interpretation. As Professor Flaherty argues, "the most appropriate way to maintain fidelity to the Founding is not through literal ‘originalism,’ such as that advanced by Justice Scalia and Judge Bork, but through models that serve the Founders' more general purposes in light of changed circumstances, as suggested by Lawrence
As noted above, translation recognizes that changes in background context may require changed readings of a text to preserve the text's original meaning in light of the changed context. Under the strict originalist approach, a changed reading is automatically an act of interpretive infidelity simply because it strays from the meaning the Framers and Ratifiers would have given it. Therefore, originalists often limit their inquiry to ask only how the Framers and Ratifiers would have answered the question. The translator, in contrast, recognizing that interpretive change may be required to remain faithful to the original meaning of the Constitution, attempts to preserve the meaning of the original text across changing contexts.

Translation remedies the failure of the originalist approach to keep the Constitution in tune with changing times. The Framers did not and, more importantly, could not discuss certain issues of present interest, such as whether the Fourth Amendment applies to electronic eavesdropping. This ambiguity makes it difficult to implement originalism. Translation provides a solution by recognizing that the translator may have to alter the original application in such a case to preserve the original meaning in the present context. As a method of constitutional interpretation, originalism "attempts to implement the rule of law by assuming that the meanings of words and rules are stable over extended periods."

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66. See supra part I.A.

67. See Lessig, Fidelity, supra note 16, at 1169. Professor Rubenfeld similarly notes that "strict originalism . . . must twist and turn in agonies of rationalization if it wants to account for the great departures from original intent—the single example of Brown v. Board of Education is sufficient [as an example] here." Rubenfeld, supra note 11, at 1486 (footnote omitted).

68. Professor Rubenfeld argues, however, that "no account of political legitimacy could ever yield the conclusion that this aged text . . . exerts any legitimate authority over American citizens today," Rubenfeld, supra note 11, at 1110, because the idea that a sovereign people create a written constitution to bind future generations "violates the very principle of self-government on which the Constitution claims legitimacy in the first place." Id. at 1111. For this reason, originalism is inconsistent with the concept of self-government. Id. at 1113-14.


70. Farber, supra note 11, at 1095-97; Flaherty, supra note 25, at 1811-12; Treanor, supra note 23, at 858.


72. Farber, supra note 11, at 1093.

73. Tushnet, supra note 71, at 785.
claimed originalist, admits that he may be only a "faint-hearted originalist" because in practice it can be problematic to base decisions strictly upon views held in 1791. He provides as an example that public flogging in 1791 would not have been considered "cruel and unusual" under an Eighth Amendment challenge. As a result, under the originalist approach such a punishment should not presently be deemed unconstitutional; yet Justice Scalia acknowledges that he could not imagine upholding such a statute now.

Moreover, translation, as a practice of constitutional interpretation, appears to be consistent with the expectation of the Framers. Originalism has been criticized as self-contradictory because the Framers may not have intended that judges would use an originalist approach. The framers did not endorse strict literalism as the proper method of constitutional interpretation; rather, they recognized that unforeseen issues would arise in the future requiring some further construction of the Constitution. As Professor Treanor points out, "[t]his notion of an adaptable Constitution is represented perhaps most famously by Chief Justice Marshall's statement in McCulloch v. Maryland: 'We must never forget it is a constitution we are expounding."' Although Professor Lessig's fidelity theory begins at the same point as originalism, the second step of translation accounts for changes since the framing of the original text and is therefore a more faithful method of constitutional interpretation.

Professor Lessig's fidelity model allows the Constitution to be interpreted to apply to present concerns, and thereby provides a method to determine if a changed reading of the Constitution is nonetheless faithful in the present context. Translation is therefore a more useful method than originalism to analyze the Supreme Court's reading of the Equal Protection Clause in the Shaw I line of cases.

75. Id. at 861-62, 864.
76. See H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885 (1985). Powell also points to Alexander Hamilton's views on constitutional interpretation as expressed in The Federalist and a formal opinion Hamilton submitted to President Washington. See id. at 915. Hamilton claimed that "whatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual & established rules of construction." Alexander Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank (1791), reprinted in 8 Papers of Alexander Hamilton 111 (Harold Syrett ed., 1965). So that if "a power . . . be deducible by fair inference from the whole or any part of the numerous provisions of the constitution of the United States, arguments drawn from extrinsic circumstances, regarding the intention of the convention, must be rejected." Id.
77. See Powell, supra note 76, at 904; Treanor, supra note 23, at 857 (arguing that "[t]he framers were not traditional originalists. They created a terse, open-ended constitution whose meaning would change in response to changed circumstances").
78. See Treanor, supra note 23, at 857 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819)).
II. Tracing the Voting Rights Cases

In the recent voting rights cases beginning with Shaw I and followed by Miller v. Johnson,79 Shaw v. Hunt80 ("Shaw II"), and Bush v. Vera,81 the Supreme Court found that a number of voting district plans violated the Equal Protection Clause where race was the predominant consideration in creating the district lines.82 These cases depart, however, from earlier Supreme Court decisions where the Court found race to be a permissible basis for drawing district lines and required a showing of discriminatory effects in order to establish an equal protection claim.83 This departure is made apparent by tracking the voting rights cases which precede Shaw I. This part examines these pre-Shaw I cases and then traces the development of Shaw I and its progeny.

A. Pre-Shaw I Cases

In Baker v. Carr,84 the Court first recognized that an allegation of vote dilution85 brought in response to a state legislative apportionment plan constituted an equal protection claim subject to adjudication by federal courts.86 The Baker Court failed, however, to provide the constitutional standard to analyze such a claim beyond advising that the standard would be found under the Equal Protection Clause.87 In Reynolds v. Sims,88 the Court was again presented with a

82. In another case, United States v. Hays, 115 S. Ct. 2431 (1995), plaintiffs brought a similar equal protection claim but the Court held that the plaintiffs, who did not live in the district at issue, lacked standing to bring the suit.
83. See infra part II.A.
84. 369 U.S. 186 (1962).
85. A vote dilution claim asserts that the petitioner's right to vote has been impaired because the value or weight of the vote has been minimized. As declared by Justice Douglas in South v. Peters, 339 U.S. 276 (1950), "[t]here is more to the right to vote than . . . the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. It also includes the right to have the vote counted at full value without dilution or discount." Id. at 279 (Douglas, J., dissenting) (citation omitted). Vote dilution claims have been termed the "second generation" of voting rights claims whereas practices which denied access to the ballot box constituted the "first generation" rights. See Lani Guinier, No Th'o Seats: The Elusive Quest for Political Equality, 77 Va. L. Rev. 1413, 1424 (1991); Samuel Issacharoff, Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence, 90 Mich. L. Rev. 1833 (1992).
87. Id. at 226.
88. 377 U.S. 533 (1964). Note also that in Gray v. Sanders, 372 U.S. 368 (1963), a case decided in-between Baker and Reynolds, the Court found Georgia's system for
vote dilution claim in response to a state legislature's apportionment plan. The plaintiffs in *Reynolds* were voters of Jefferson County, Alabama who claimed that their rights under both the Equal Protection Clause and the Alabama Constitution were violated based on the apportionment plan of the Alabama Legislature.\(^8\) The Alabama State Constitution required reapportionment of the Legislature every ten years in response to a decennial census.\(^9\) There had been no reapportionment in Alabama, however, from 1901 until the plaintiffs brought suit in 1961.\(^1\) As a result of this failure, the plaintiffs maintained that certain counties, such as Jefferson, suffered from discrimination in the legislative representation allotted to them because the population growth in Alabama in that time had been irregular.\(^2\) In that sixty-year period, Alabama's population rose from 1,828,697 to 3,244,286.\(^3\) The increase occurred entirely in the urban areas while a number of the rural counties actually decreased in population.\(^4\) Furthermore, the district court determined on the basis of the 1960 census results that "only 25.1% of the State’s total population resided in districts represented by a majority of the members of the Senate, and only 25.7% lived in counties which could elect a majority of the members of the House of Representatives."\(^5\)

The district court, after finding that the districting plan violated the Equal Protection Clause, fashioned a temporary reapportionment plan which it ordered into effect for the 1962 election.\(^6\) The Supreme Court upheld the district court's ruling and temporary plan,\(^7\) maintaining that "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race."\(^8\) The Court noted further that "the fundamental

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\(^8\) *Reynolds*, 377 U.S. at 537.
\(^9\) *Id.* at 539.
\(^1\) *Id.* at 542, 569-70.
\(^2\) *Id.* at 540.
\(^3\) *Id.* at 542 n.7.
\(^4\) *Id.* at 543 n.7.
\(^5\) *Id.* at 545.
\(^6\) *Id.* at 545, 552. The district court gave the legislature an opportunity to design a new apportionment plan after finding a violation of the Fourteenth Amendment, but the court later rejected the two plans proposed by the legislature as discriminatory. *Id.* at 546-47. The district court's provisional plan incorporated part of each plan but only on a temporary basis. *Id.* at 552.
\(^7\) *Id.* at 586-87.
\(^8\) *Id.* at 566.
principle of representative government in this country is one of equal representation for equal numbers of people."\textsuperscript{99} The Reynolds Court therefore established that the "constitutional standard [under] the Equal Protection Clause requires that the seats in both houses . . . be apportioned on a population basis."\textsuperscript{100}

Similarly, in Wright v. Rockefeller\textsuperscript{101} African-American and Puerto Rican voters challenged a statute which established the congressional districts in New York County, claiming it created racially segregated districts in violation of the Fourteenth and Fifteenth Amendments.\textsuperscript{102} The Wright Court rejected the claim, however, holding that the plaintiffs "failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines."\textsuperscript{103} Although the Court recognized that there was evidence demonstrating that the New York Legislature may have drawn the district lines on the basis of race, it decided that other plausible inferences could be drawn from this same evidence so that the plaintiffs' claim could not be sustained.\textsuperscript{104} A year after Wright and Reynolds were decided, the Voting Rights Act of 1965\textsuperscript{105} ("VRA" or "Act") was enacted. Most of the remaining voting rights cases were decided in accordance with the Act.

The VRA was enacted to force the Southern States to comply with the Fifteenth Amendment's command that "[t]he 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."\textsuperscript{106} Nevertheless, the Fifteenth Amendment had not been effectively enforced after Reconstruction. For example, in 1964, even though civil rights acts addressing the exclusion of African-Americans from the right to vote had been promulgated in 1957, 1960, and 1964, an average of only 22.5\% of the African-Americans eligible to vote were registered to do so in Alabama, Georgia, Louisiana and Mississippi because of strong white resistance.\textsuperscript{107} Indeed, in Mississippi only 6.7\% of the African-Americans eligible were registered to vote.\textsuperscript{108} In response, President Lyndon B. Johnson ordered his attorney general, Nicholas Katzenbach, to draft a voting bill which

\textsuperscript{99} Id. at 560-61.
\textsuperscript{100} Id. at 568. Otherwise, state districting plans that allot "the same number of representatives to unequal numbers of constituents" will undervalue the vote of those in the more populated district. Id. at 563. Reynolds thus established the "one person, one vote" standard. See id. at 558 (quoting Gray v. Sanders, 372 U.S. 368, 381 (1963)).
\textsuperscript{101} 376 U.S. 52 (1964).
\textsuperscript{102} See id. at 54.
\textsuperscript{103} Id. at 56.
\textsuperscript{104} Id. at 56-58.
\textsuperscript{106} U.S. Const. amend. XV, § 1.
\textsuperscript{107} Davidson, \textit{supra} note 3, at 13.
\textsuperscript{108} Id.
the President then presented to Congress on March 15, 1965.\footnote{109} When Congress passed the VRA that August, it enacted a law which went much further than the acts of 1957, 1960, and 1964 in providing for federal enforcement of African-Americans' rights to register and to vote.\footnote{110}

The Court first addressed the VRA in \textit{South Carolina v. Katzenbach}.\footnote{111} In \textit{Katzenbach}, South Carolina challenged several provisions of the VRA as violative of the Constitution and sought an injunction against the Attorney General's enforcement of these provisions.\footnote{112} The Court found that Congress passed the VRA "to banish the blight of racial discrimination in voting," to create new remedies, and to strengthen those remedies already existing to further this end.\footnote{113} Most importantly, in view of later cases,\footnote{114} section 2 of the VRA prohibits the use of voting qualifications which deny or abridge the right of any citizen of the United States to vote on account of race or color\footnote{115} and section 5 suspends all new voting regulations in covered states until federal authorities determine the regulations will not have a discriminatory effect.\footnote{116} The Court further determined that Con-

\footnote{109. \textit{Id.} at 16-17. Two events in particular precipitated the drafting of the voting bill. First, the murder of three civil rights workers who were part of a grass-roots effort to counter the white resistance to African-American voting in Mississippi in the summer of 1964. \textit{Id.} at 14. Second, the severe beating of 90-100 peaceful marchers in Selma, Alabama on March 7, 1965, later termed "Bloody Sunday." \textit{Id.} at 16. In Selma, at the time of the march, out of approximately 15,000 eligible African-American voters, only 335 were registered because of the onerous registration process. \textit{Id.} at 15.}

\footnote{110. \textit{Id.} at 17. The VRA's enactment was split along regional rather than party lines with the northerners supporting it and the southerners opposing it. \textit{Id.}}

\footnote{111. 383 U.S. 301 (1966).}

\footnote{112. \textit{Id.} at 307. South Carolina alleged that the VRA "exceed[ed] the powers of Congress and encroach[ed] on an area reserved to the States by the Constitution." \textit{Id.} at 323.}

\footnote{113. \textit{Id.} at 308. The Court reviewed the legislative history of the Act and concluded that Congress deemed this legislation necessary to address the still-pervasive problem of racial discrimination in voting which past remedies had failed to eradicate. \textit{Id.} at 309-15. The remedial provisions of the Act automatically cover any state that on November 1, 1964, "maintained a 'test or device'" as a prerequisite to voting or where "less than 50% of its voting-age residents were registered on November 1, 1964." \textit{Id.} at 317.}

\footnote{114. \textit{See infra} note 118.}

\footnote{115. 42 U.S.C. § 1973c (1994). Congress amended section 2 in 1982 in response to Mobile v. Bolden, 446 U.S. 55 (1980), which declared that minority voters had to prove discriminatory intent behind a voting practice in order for it to violate section 2 or the Fourteenth or Fifteenth Amendments. Thornburg v. Gingles, 478 U.S. 30, 35 (1986). In amending section 2, Congress clarified that a violation could be established by showing discriminatory effect alone. \textit{Id.}}

\footnote{116. 42 U.S.C. § 1973c (1994). Section 5 establishes that if a State covered by the Act passes 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" the State must, in order to enforce the enactment, receive a declaratory judgment in the District Court for the District of Columbia that it "does not have the purpose and will not have the effect of denying or abridging the right to vote on
gress had the authority to create these remedies under section 2 of the Fifteenth Amendment. The Court therefore upheld the contested provisions of the VRA and denied South Carolina’s request for an injunction.

Although two subsequent cases, Whitecomb v. Chavis and White v. Regester, were decided without reference to the VRA, their holdings were later used to determine whether either the Equal Protection Clause or section 2 of the VRA had been violated. In Whitecomb, the plaintiffs challenged two Indiana statutes which provided for multi-member districting. The plaintiffs claimed that such districting diluted the vote of African-American voters within Marion County in violation of the Fourteenth Amendment. The Court recognized that multi-member districts may minimize the value of a racial or political group’s vote within the voting population, but placed on the challenger the burden of proving that multi-member districting diluted the quality of representation in comparison to single-member districting. In this case, the challengers could not meet their burden of account of race or color.”

1. South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966). Section 1 of the Fifteenth Amendment provides that “[t]he 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. Section 2 then states that “[t]he Congress shall have power to enforce this article by appropriate legislation.” U.S. Const. amend. XV, § 2.

2. See infra notes 127-28 and accompanying text (discussing use of Whitecomb and White holdings in subsequent voting rights cases).

3. Whitecomb, 403 U.S. at 128-29. Multi-member districts “allow for serial voting that, in the context of a majority voting bloc, will reward a cohesive majority with superordinate representation.” Issacharoff, supra note 85, at 1840. Multi-member and at-large electoral schemes permit each voter “to vote separately on each candidate for office, thereby allowing a voting majority to control every seat in an election.” Aleinikoff & Issacharoff, supra note 2, at 590.

4. Whitecomb, 403 U.S. at 128-29. Plaintiffs also challenged the constitutionality of multi-member districting in general. Id. at 144. The Court, however, declined to adopt a per se rule against multi-member districting. Id. at 147.
because they had "equal opportunity to participate in and influence the selection of candidates and legislators." 125

Following Whitecomb, the Court in White 126 held that a racial group could establish a claim that multi-member districting was being used to dilute its vote in violation of the Equal Protection Clause by presenting evidence to show that the Whitecomb standard was violated: that "the political processes leading to nomination and election were not equally open to participation by the group in question—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." 127 The Court later used this "results test" from White to identify violations of section 2 of the Voting Rights Act. 128 The Court additionally provided a number of factors to be used in determining whether the "totality of the circumstances" indicated a violation of the Equal Protection Clause under this test. 129 Several factors to be considered were the number of representatives to be elected from the minority group, the cultural and economic realities of the minority group, and the past and present discrimination against that group. 130

Returning to cases decided under the VRA, the Supreme Court, in Georgia v. United States, 131 held that for purposes of section 5, a state's newly enacted reapportionment plan was a change in "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" and therefore subject to preclearance. 132 The Court also clarified that a plaintiff challenging a reapportionment plan under section 5 does not have to prove that the change has a racially discriminatory purpose; instead the issue is whether the change would conceivably dilute the value of the African-American

125. Id. at 153.

126. In White, a redistricting plan for the Texas House of Representatives was challenged on two grounds: first, that the plan created "impermissible deviations from population equality"; second, that it created multi-member districts which diluted the voting power of racial and ethnic minorities. White v. Regester, 412 U.S. 755, 759 (1973). The Court rejected the first claim, id. at 764, but held that the multi-member districting at issue did dilute the weight of the racial minorities in violation of the Fourteenth Amendment. Id. at 765, 769-70.

127. Id. at 766 (quoting Whitcomb v. Chavis, 403 U.S. 124, 149-50 (1971)).


129. White, 412 U.S. at 766-69.

130. Id.


132. Id. at 529 (quoting 42 U.S.C. § 1973c). Georgia, which was subject to section 5, failed to obtain preclearance for its 1972 reapportionment plan from either the Attorney General or the District Court for the District of Columbia. Id. at 527-28. The reapportionment plan increased the number of multi-member districts and required any candidate who received less than a majority of votes to partake in a majority runoff election. Id. at 528-29.
vote. In *Beer v. United States*, the Court further construed section 5 of the Act, maintaining that a legislative apportionment plan that improves the position of a racial minority cannot violate section 5, unless this new plan itself is so discriminatory as to violate the Constitution. Section 5, rather, prevents only a retrogression in the position of a racial minority.

United Jewish Orgs. of Williamsburgh, Inc. *v.* Carey ("UJO") most clearly demonstrates that the Court's later reading of the Equal Protection Clause in the *Shaw I* line of cases marks a departure from its reading of the Equal Protection Clause in the earlier voting rights cases. In *UJO*, the New York legislature promulgated a new districting plan which created more non-white majorities in two districts to comply with section 5 of the Act and to secure approval from the Attorney General who had objected to New York's prior districting plan. Petitioners were members of a Hasidic community who claimed that the new districting plan, which separated their community into two separate districts, diluted their vote by "halving its effectiveness" and violated the Fourteenth Amendment because the district was drawn to achieve a racial quota. Petitioners also claimed that the district lines were created exclusively on the basis of race which diluted their voting power in violation of the Fifteenth Amendment.

The Court rejected the petitioners' arguments for a number of reasons. The Court found that "compliance with the Act in reapportionment cases would often necessitate the use of racial considerations in drawing district lines" and that a reapportionment plan will not violate the Fourteenth or Fifteenth Amendment simply because the legislature used numerical quotas in creating majority-black districts. The Court also noted that, independently of the VRA, New York's plan did not violate the Fourteenth or Fifteenth Amendments because it did not represent a "racial slur or stigma with respect to whites," and it did not "fenc[e] out . . . the white population from participation

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133. *Georgia v. United States*, 411 U.S. at 534. The Court confirmed in *City of Rome v. United States*, 446 U.S. 156 (1980), that under section 5 the electoral change only has to be shown to have a discriminatory effect, it need not have a discriminatory purpose. *Id.* at 172, 177.
135. *Id.* at 141.
136. *Id.*
138. *Id.* at 150-52.
139. *Id.* at 152-53.
140. *Id.* at 153.
141. *Id.* at 159. The Court noted that "the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5." *Id.* at 161.
142. *Id.* at 162.
in the political processes of the county” or “minimize or unfairly cancel out white voting strength.” Under the reasoning of UJO, one of these above harms would have been required for the petitioners to have established a constitutional claim.

In two later cases, *Davis v. Bandemer* and *Thornburg v. Gingles*, the Court confirmed that the proper test to establish vote dilution in violation of the Equal Protection Clause was the “results test” from *White*. In *Davis*, the plaintiffs were Democrats contesting an Indiana redistricting plan as political gerrymandering. The Court found that for claims of both racial and political gerrymandering “the question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process.” In *Thornburg*, the Court held that section 2 of the VRA was violated “where the ‘totality of the circumstances’ reveal that ‘the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class].’” *Thornburg* additionally requires minority voters to meet three requirements under section 2 to establish a vote dilution claim in a multi-member district: first, that the minority group is “sufficiently large and geographically compact to constitute a majority in a single-member district”; second, that the minority group is “politically cohesive”; and third, that the white majority votes as a bloc “usually to defeat the minority’s preferred candidate.” The pre-*Shaw I* cases therefore required the plaintiffs to demonstrate the discriminatory effect of a districting plan in order to establish an equal protection claim.

**B. *Shaw I* and Its Progeny**

Beginning with *Shaw I*, the Court’s approach to equal protection in the voting rights cases unjustifiably departed from the approach taken in *UJO* and the earlier line of cases. The plaintiffs in *Shaw I* contested North Carolina’s 1991 districting plan which had created two new majority-black districts in order to comply with section 5 of the Act. The plaintiffs contended that this new districting plan effected an unconstitutional racial gerrymander because the districts were created

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143. *Id.* at 165.
144. The Court concluded that white majorities were left in 70% of the districts while the population was 65% white. Therefore, even if racial block voting occurred whites would not be proportionally underrepresented. *Id.* at 166.
146. 478 U.S. 30 (1986).
149. *Id.* at 132-33.
150. *Thornburg*, 478 U.S. at 43; *see supra* note 116 (noting that Congress amended section 2 to establish that the White “results test” was the correct legal standard).
solely on the basis of race without considering traditional districting criteria. Although recognizing that race-conscious districting is sometimes permissible, the Shaw I Court found that the plaintiffs had stated a claim under the Equal Protection Clause for "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification."154

The Court attempted to distinguish Shaw I from the earlier vote dilution cases, claiming that "[c]lassifying citizens by race, as we have said, threatens special harms that are not present in our vote-dilution cases. It therefore warrants different analysis."155 Because all racial classifications were subject to strict scrutiny, the Court further held that on remand, unless the plaintiffs were to fail in their racial gerrymander claim, the District Court must determine whether the districting plan survived strict scrutiny.156 In the voting rights cases decided prior to Shaw I, however, the Court did not apply strict scrutiny to districting plans which had considered race in drawing district lines such as UJO.157

The Court built on its Shaw I decision in Miller v. Johnson.158 In Miller, plaintiffs were five white Georgia voters who alleged that Georgia's 1992 districting plan, which created three new majority-minority districts,159 constituted a racial gerrymander in violation of the Equal Protection Clause under Shaw I.160 The Court explained that

\[\text{References:}\]
153. Id. at 633-34, 637.
154. Id. at 642. The Court explained that "appearances do matter" in reapportionment because of the danger of racial stereotyping which may be present when a districting plan "includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin." Id. at 647.
155. Id. at 649-50. The dissenters noted, however, that "[a] plan that 'segregates' being functionally indistinguishable from any of the other varieties of gerrymandering, we should be consistent in what we require from a claimant: proof of discriminatory purpose and effect." Id. at 671 (White, J., dissenting).
156. Id. at 653. To pass strict scrutiny, the legislation in question must be "narrowly tailored to further a compelling governmental interest." Id. at 658.
157. See text accompanying notes 139-42.
159. A majority-minority district is a voting district drawn so that a racial minority constitutes the majority of the voting population in that district. See id. at 2483-84.
160. Id. at 2485. Georgia redistricted after the 1990 Decennial Census. Id. at 2483. Because the district in question was covered by the Act, the legislature sought preclearance from the Attorney General for the redistricting plan. Id. The Georgia legislature submitted two plans, each containing two majority-minority districts, but the Justice Department rejected the plans. Id. at 2484. The legislature then submitted the third plan, at issue in Miller, which created three majority-minority districts. It is the third majority-minority district created, the Eleventh District, which the plaintiffs in Miller contested. Id. at 2484-85.
bizarre shape was not a threshold requirement to sustain an equal protection claim under Shaw I. Rather, the Miller Court found that "the essence of the equal protection claim recognized in Shaw is that the State has used race as a basis for separating voters into districts." The Court reasoned that to establish this claim a plaintiff could show "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." After determining that Georgia's redistricting plan was motivated predominantly by racial considerations, the Court subjected the plan to a strict scrutiny analysis and found that it failed for lack of a compelling state interest. The Court declined to decide whether compliance with the VRA alone could suffice as a compelling state interest. Rather, the Court held that the redistricting plan in Miller was not required to comply with section 5 of the VRA because that section prohibits only a retrogression in the position of racial minorities unless the new plan itself is discriminatory. The Court reasoned that the Justice Department's rejection of two ameliorative plans previously submitted by Georgia which would have satisfied section 5 demonstrated that the Justice Department was "driven by its policy of maximizing majority-black districts" which was beyond the scope of section 5.

The two most recent cases in this line, Shaw II and Bush v. Vera, were similar decisions handed down by the Court on the same day. In Shaw II, the Court was presented with the district court's finding on remand in Shaw I. The district court had found that the North Carolina redistricting plan at issue in Shaw I had been drawn on the basis of race, but held that it nonetheless survived strict scrutiny because it was narrowly tailored to advance the compelling state interest.

161. Id. at 2486. Note that after Shaw I the appellants' argument in Miller—that bizarre shape was a threshold requirement—seemed to be the correct reading of Shaw I; indeed, even the dissenting justices in Shaw I believed that "because the holding is limited to such anomalous circumstances . . . it perhaps will not substantially hamper a State's legitimate efforts to redistrict in favor of racial minorities." Shaw v. Reno, 509 U.S. 630, 659 (1993) (White, J., dissenting).
162. 115 S. Ct. at 2485-86.
163. Id. at 2488.
164. Id. at 2490-91. The Court accepted the district court's determination that race was the predominant factor in the creation of the Eleventh District. The district court found that the shape of the Eleventh District combined with the racial demographics indicated that the districting had deliberately incorporated segments of the black population into the district. Id. at 2488-89.
165. Id. at 2490-91.
166. Id. at 2492. The Court noted that the two previous plans would have "increased the number of majority-black districts from 1 out of 10 (10%) to 2 out of 11 (18.18%)" so that they "could not have violated § 5's non-retrogression principle." Id.
of compliance with sections 2 and 5 of the VRA. Finding that section 5 did not require the creation of an additional majority-minority district, the Supreme Court reversed, again declining to decide if compliance with the VRA would suffice as a compelling interest. Further, the Court held that the district at issue was not narrowly tailored to be justified as a way to avoid liability under section 2. On appeal, the State also argued that its "interest in remedying the effects of past or present racial discrimination" should suffice as a compelling state interest. The Court, however, maintained that two conditions would have to be present for this interest to be compelling: (1) the discrimination would have to be "identified" rather than "[a] generalized assertion of past discrimination"; and (2) the State would need a "'strong basis in evidence' to conclude that remedial action was necessary, 'before it embarks on an affirmative-action program.'"

In Bush, the plaintiffs contested a redistricting plan in Texas which created three new majority-minority voting districts under the VRA. The plaintiffs alleged that the districting plan constituted racial gerrymandering in violation of the Equal Protection Clause. The Court held that under Shaw I and Miller, the Texas redistricting plan was subject to strict scrutiny. The Court found that a redistricting plan would not be subject to strict scrutiny simply because it was promulgated with "consciousness of race" but would apply where race was the "predominant factor" in drawing the district lines. The Court acknowledged that Bush was a "mixed motive case" because evidence showed that the legislature was motivated by concerns other than creating majority-minority districts, such as incumbency protection, when they drew the district lines. The Court

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170. The Court concluded that its decision in Miller foreclosed the section 5 argument, id. at 1903-04, and noted that the district court's opinion preceded the Supreme Court's Miller decision. Id. at 1900.
171. Id. at 1905. The additional district created, District 12, did not contain a "geographically compact" minority group which is required under Thornburg to establish a section 2 challenge. Id. at 1905-06.
172. Id. at 1902.
173. Id. (quoting Richmond v. J.A. Croson Co., 448 U.S. 469, 499 (1989)).
174. Id. at 1902-03.
175. Id. at 1903 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986)). The Court accepted the district court's finding on this point that the State's "interest in ameliorating past discrimination did not actually precipitate the use of race in the redistricting plan." Id. at 1903.
177. Id. at 1951. The district court held that the three new majority-minority districts were unconstitutional and the Governor of Texas appealed. Id.
178. Id.
179. Id. at 1951 (citing Shaw v. Reno, 509 U.S. 630, 646 (1993)).
180. Id. at 1952 (quoting Miller v. Johnson, 115 S. Ct. 2475, 2488 (1995)).
181. Id. at 1952.
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nonetheless held that strict scrutiny applied based on the findings of the District Court\(^{182}\) and found that, as in *Shaw II*, the redistricting plan was not narrowly tailored to further a compelling state interest.\(^{183}\) This approach in *Bush*, however, is inconsistent with the approach taken earlier in *Wright v. Rockefeller*.\(^{184}\) In *Wright*, despite evidence that the New York Legislature was motivated by racial considerations when it drew the district lines in question, the Court would not find a violation of the Equal Protection Clause because there were alternative inferences which could be drawn from that evidence.\(^{185}\)

As demonstrated above, the Court beginning with *Shaw I* no longer requires plaintiffs to prove the discriminatory effects of a redistricting plan in order to establish an equal protection violation. Instead, under *Shaw I* and its progeny, it is sufficient to prove only that race was the "predominant factor" in the creation of district lines. This constitutes a changed reading of the Equal Protection Clause.\(^{186}\) To determine if this new reading is faithful to the Fourteenth Amendment, part III will apply translation theory to *Shaw I* and its progeny.

III. APPLICATION OF FIDELITY THEORY TO SHAW I AND ITS PROGENY

In determining whether the Supreme Court's reading of the Fourteenth Amendment in *Shaw I* and its progeny constitutes a faithful reading, the first step of Professor Lessig's fidelity analysis is to read the Equal Protection Clause in its original context to discover the meaning it had at the time of the framing of the Fourteenth Amendment.\(^{187}\) This part first reviews the legislative history of the Four-

\(^{182}\) The district court found that the Texas legislature intended to create majority-minority districts to comply with section 5 of the VRA, that the three districts did not follow traditional districting criteria such as compactness, and that they had used a computer program containing detailed racial statistics in drawing the district lines. *Id.* at 1952-53. The Court recognized that none of these factors alone would necessarily require the application of strict scrutiny. *Id.* at 1953.

\(^{183}\) The appellants here advanced the same state interests that were advanced in *Shaw II*: avoiding liability under section 2 of the VRA, complying with section 5's "nonretrogression" principle, and remedying the effects of past discrimination. *Id.* at 1960. These arguments were rejected for the same reasons expressed in *Shaw II*. See *supra* notes 169-74 and accompanying text.


\(^{185}\) *Id.* at 56-57.

\(^{186}\) See *infra* part III.B.

\(^{187}\) It should be noted that the Supreme Court avoids discussing the original meaning of the Reconstruction amendments in the voting rights cases beginning with *Shaw I*. See *Rosen, supra* note 10, at 791. This is logical considering that the Court's approach is at odds with an originalist understanding of the Fourteenth Amendment. *Id.* It is particularly interesting in light of Justice Scalia's own comment, as a self-proclaimed originalist, that "nonoriginalist opinions have almost always had the decency to lie... about what they were doing—either ignoring strong evidence of original intent... or else not discussing original intent at all, speaking in terms of broad constitutional generalities with no pretense of historical support." Scalia, *supra* note 74, at 852.
teenth Amendment to demonstrate that the Equal Protection Clause was not intended to bar racial classifications as unconstitutional.\textsuperscript{188} Second, this part asserts that Madison's view of representative government is incorporated into the Fourteenth Amendment. Accordingly, the enforcement provisions of the Fourteenth Amendment sanction race-conscious legislation to ensure that racial minorities are provided with equal access to the political process.\textsuperscript{189} This understanding of the Equal Protection Clause would, in addition, preclude the application of strict scrutiny to race-conscious legislation enacted by the majority to benefit the minority.\textsuperscript{190} Finally, this part engages in the second step of Professor Lessig's theory, translation, to determine whether a presupposition has changed so that the Court's new reading of the Equal Protection Clause would nonetheless remain faithful to the original meaning.

A. Step I: The Original Understanding of the Fourteenth Amendment

Congress, at the outset of the Civil War, had not formulated a policy regarding the rights of the emancipated slaves, nor had it devised a plan to enforce these rights.\textsuperscript{191} The freedmen had to be integrated into society, however, and to become self-sufficient; the Republican Congress tried to improve the position of the freedmen in the occupied South through legislation enacted from 1862 through 1865.\textsuperscript{192} In 1865, Congress enacted a bill creating the Freedmen's Bureau to oversee matters concerning the emancipated slaves for the duration of the war.\textsuperscript{193} Also in 1865, the Thirteenth Amendment was ratified proscribing slavery and involuntary servitude.\textsuperscript{194} Actions of the former Confederate states after the Civil War revealed that more was needed to guarantee the civil rights of the newly freed slaves, leading the Congressional Republicans to enact the Civil Rights Act of 1866 and the Fourteenth Amendment.\textsuperscript{195}

\begin{itemize}
\item \textsuperscript{188} See infra part III.A.1.
\item \textsuperscript{189} See infra part III.A.2.
\item \textsuperscript{190} Id.
\item \textsuperscript{191} Herman Belz, Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era 66-67 (1978).
\item \textsuperscript{192} Id. at 49, 67.
\item \textsuperscript{193} Id. at 69-70 (providing relief assistance and renting land to the freedmen); Alexander M. Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 8 n.20 (1955).
\item \textsuperscript{194} U.S. Const. amend. XIII, § 1.
\item \textsuperscript{195} Robert J. Kaczorowski, Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction, 61 N.Y.U. L. Rev. 863, 879 (1986).
\end{itemize}
1. The Legislative History of the Civil Rights Act of 1866 and the Fourteenth Amendment

To discern the original understanding of the Equal Protection Clause it is necessary to examine the legislative history of the Fourteenth Amendment and, additionally, the legislative history of the Civil Rights Act of 1866\(^{196}\) ("CRA") which the 39th Congress enacted in the same session in which it promulgated the Fourteenth Amendment.\(^{197}\) The Congressional Republicans incorporated the CRA into the first section of the Fourteenth Amendment because they feared that a future Congress would repeal the statute and eliminate the safeguards it provided.\(^{198}\) The CRA was enacted under Congress’s power to enforce the Thirteenth Amendment in response to the "Black Codes" of the Southern states which deprived the freedmen of fundamental civil rights.\(^{199}\) The CRA’s constitutionality, however, had been questioned from the outset, even by its draftsmen.\(^{200}\) Therefore, the Fourteenth Amendment was intended to constitutionalize the CRA\(^{201}\) and its Framers often spoke as if the two were identical.\(^{202}\) Section I of the CRA conferred citizenship on African-Americans and attempted to guarantee certain fundamental rights for all United States citizens.\(^{203}\) It is clear from the congressional debates that the CRA protected only those civil rights enumerated in the Act; it did not extend protection for political rights\(^{204}\) and did not proscribe all racial discrimination.\(^{205}\)

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\(^{196}\) Ch. 31, § 1, 14 Stat. 27 (1866).

\(^{197}\) See Bickel, supra note 193, at 7; Kaczorowski, supra note 195, at 864-66; Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947, 957, 960 (1995). Alexander M. Bickel also suggests that it is useful to consider the failed Freedman's Bureau Bill which would have increased the authority of the Freedmen's Bureau but was vetoed by President Andrew Johnson. Bickel, supra note 193, at 7. The 39th Congress passed the Bill which required the Southern States to extend to African-Americans all the "civil rights and immunities which are enjoyed by the white people" and upon their failure to do so would have required the President to extend military protection to carry out this imperative. Cong. Globe, 39th Cong., 1st Sess. 318 (1866).


\(^{201}\) Cong. Globe, 39th Cong., 1st Sess. 2465 (1866).

\(^{202}\) McConnell, supra note 197, at 957, 960; see also Kaczorowski, supra note 195, at 911-12 (arguing that it is important to recognize the identity in meaning of the CRA and section 1 of the Fourteenth Amendment because both were intended by the framers to affirmatively guarantee civil rights even though the Fourteenth Amendment was worded negatively).

\(^{203}\) Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866). The CRA secured the rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens." Id.


\(^{205}\) See Bickel, supra note 193, at 12-13; see also Kaczorowski, supra note 195, at 881-82; McConnell, supra note 197, at 958.
The Fourteenth Amendment similarly did not explicitly prohibit racial discrimination in all circumstances. Rather, it secured "the natural rights of free men—the rights to life, liberty, and property—as the basic civil rights of United States citizens."\(^{206}\) The Fourteenth Amendment did not prohibit discrimination in the context of political or social rights.\(^{207}\) For example, the framers of the Fourteenth Amendment deliberately excluded the right to vote from those rights secured by the Amendment.\(^ {208}\) In addition, there is nothing in the legislative history of the Fourteenth Amendment to suggest an intention to prohibit school segregation: "[T]he Reconstruction Congress considered, debated, and ultimately rejected measures to prohibit school segregation under its power to enforce the Fourteenth Amendment."\(^ {209}\)

\(^{206}\) Kaczorowski, supra note 195, at 884; see Michael Klarman, An Interpretive History of Modern Equal Protection, 90 Mich. L. Rev. 213, 216, 220 (1991); see also Rosen, supra note 10, at 792 (arguing that the Fourteenth Amendment guaranteed "to all citizens a limited set of absolute civil rights" rather than proscribing all racial discrimination).

Several articles have criticized the Supreme Court's "colorblind" approach. See Thomas C. Berg, Religion, Race, Segregation, and Districting: Comparing Kiryas Joel with Shaw/Miller, 26 Cumb. L. Rev. 365, 366 (1995-96); Conference, Race Law and Justice: The Rehnquist Court and the American Dilemma, 45 Am. U. L. Rev. 567, 573 (1996); Natapoff, Madisonian Multiculturalism, supra note 10, at 752; Rosen, supra note 10, at 791. The Court has not yet required color-blindness, however, although a number of Justices seem to be moving in that direction for government classifications. See Rodney A. Smolla, The Ghosts of Homer Plessy, 12 Ga. St. U. L. Rev. 1037, 1052-53 (1996). The "color-blind" language was originally used by Justice Harlan in his dissent in Plessy v. Ferguson, 163 U.S. 537 (1896), where he stated that "[o]ur Constitution is color-blind." Id. at 559 (Harlan, J., dissenting). It has been argued, however, that Justice Harlan was not arguing for color-blindness as the term is now understood. Rather, Justice Harlan's dissent may be interpreted as "an attack, not on the use of racial classifications, but on a social system based on an ideology of white supremacy." T. Alexander Aleinikoff, Re-reading Justice Harlan's Dissent in Plessy v. Ferguson: Freedom, Antiracism, and Citizenship, 1992 U. Ill. L. Rev. 961, 961; see also Rosen, supra note 10, at 793 (arguing that "Harlan's complicated dissent is subject to many readings, but a per se rule against intentional discrimination in all circumstances is not one of them. . . . To the extent that Justice Harlan is arguing for a color-blind constitution, it is in respect to civil rights alone."). But see Raskin, supra note 10, at 744 (agreeing that our society was not founded on color-blindness but arguing that Justice Harlan viewed color-blindness "as a principle of formal neutrality that would allow white people to continue their absolute dominance of American life").


\(^{209}\) McConnell, supra note 197, at 956; Tushnet, supra note 71, at 800; see also Klarman, supra note 206, at 252-53 (discussing failure of Senator Charles Sumner to have legislation enacted to prohibit school segregation in 1870s as evidence that such segregation was not viewed as violative of the Fourteenth Amendment).
2. The Equal Protection Clause as the Embodiment of Madison’s Theory of Representation

The Framers of the Constitution intended to establish a representative government in order to control the problem of factions. Madison defined a faction as “a number of citizens... who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens or to the permanent and aggregate interests of the community.” Madison recognized further that factionalism is particularly dangerous where the majority is included in the faction, because it would be able to sacrifice the rights of the minority to its own self-interest. Madison recognized the impossibility of remedying the causes of factions, which he believed to be inherent in human nature, but argued instead for controlling their effect: “[T]he majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression.” Madison believed the system of representation set up by the Constitution would prevent such majority tyranny. He proposed that the variety of interests and par-

210. The Federalist No. 10, at 49 (James Madison) (Willey Book Co. ed., 1901); see Ely, supra note 65, at 80; Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 39-45 (1985); Sue Chrisman, Commentary, Evans v. Romer: An “Old” Right Comes Out, 72 Denv. U. L. Rev. 519, 533 (1995); Norman R. Williams II, Note, Rising Above Fractionalism: A Madisonian Theory of Judicial Review, 69 N.Y.U. L. Rev. 963, 963 (1994); see also Note, A Madisonian Interpretation of the Equal Protection Doctrine, 91 Yale L.J. 1403, 1422 n.73 (1982) (“Madisonian process-based theory... comports with the constitutional text, the intent of the Framers, and the structure and relation of various constitutional clauses. ... [S]econd, it represents the political theory of the man who largely designed the Constitution. Thus a Madisonian process-based theory must necessarily be an [originalist] theory...”). This is further evidenced by the fact that “Madison's Federalist Papers were widely read by those who ratified the Constitution.” Id. For the argument that one should look to the intention of the Ratifiers, not the Framers, see Charles A. Lofgren, The Original Understanding of Original Intent?, 5 Const. Commentary 77, 77-78 (1988).

211. The Federalist No. 10, supra note 210, at 45. Under this definition, Madison's view of “faction” would certainly apply to racial classifications, considering the history and current social reality of racial minorities in the United States. See Natapoff, supra note 10, at 752. Dean Jamin B. Raskin has similarly argued that multiculturalism is consistent with the American political ethic, noting that “[a]lthough Madison was concerned about protecting the economic elite and propertyed class from the tyranny of the mob... his views could be transposed to the nation's struggle over race.” Raskin, supra note 10, at 749.

212. The Federalist No. 10, supra note 210, at 47; see Ely, supra note 65, at 153 (arguing that “[r]ace prejudice, in short, provides the 'majority of the whole' with that 'common motive to invade the rights of other citizens' that Madison believed improbable in a pluralistic society” (quoting Frank L. Goodman, De Facto School Segregation: A Constitutional and Empirical Analysis, 60 Cal. L. Rev. 275, 315 (1972))).

213. The Federalist No. 10, supra note 210, at 45-46.

214. Id. at 48.

215. See id. at 49-51.
ties included in the republic would render it unlikely that the majority would unite to deprive other citizens of their rights.216

According to John Hart Ely, the Framers of the Constitution expected those elected to represent the interests of all the people and attempted to protect the interest of minorities in two ways.217 First, the Framers structured the Constitution to allow a variety of voices to be heard so that no majority coalition could control the political process permanently.218 Second, the Bill of Rights provided the people with a number of individual protections.219 These two methods, however, were soon recognized as insufficient for protecting the minority from the destructive will of the majority.220 To preserve Madison's concept of a republican form of government, then, the existing theory of representation had to be expanded to guarantee that a representative would not sacrifice the interests of the minority of her constituents to the interests of the majority.221 Ely asserts that "[t]he Fourteenth Amendment's Equal Protection Clause is obviously our Constitution's most dramatic embodiment of this ideal. Before that amendment was ratified, however, its theory was understood, and functioned as a component . . . of the concept of representation that had been at the core of our Constitution from the beginning."

Professor Sunstein similarly posits that the Equal Protection Clause "is best understood as an attempt to impose on government a particular conception of politics, with powerful Madisonian overtones."223

216. Id. at 50.
217. Ely, supra note 65, at 79.
218. Id. at 80.
219. Id. at 79.
220. Id. at 81 (explaining that under the model of pluralism, a majority, construed as a number of cooperating minorities, may fail to protect a minority which the majority views as different where the majority has the ability to, and interest in, advantaging itself at the expense of that minority). For example, prior to the enactment of the Fourteenth Amendment, but after the ratification of the Thirteenth Amendment, the Southern states continued to disregard black emancipation and did so under Southern statutes. See Kaczorowski, supra note 195, at 874-75.
221. Ely, supra note 65, at 82.
222. Id. Judge Posner, in evaluating Ely's Democracy and Distrust, explained that Ely's theory rests on the premise that the Constitution's "basic purpose—also that of the amendments from the Bill of Rights to the present—is to create a system of government in which elected representatives will do a sincere and competent job of representing the interests of all the people." Posner, supra note 65, at 643. Although Judge Posner claimed he remained unconvinced that Ely's theory accurately applied to every constitutional provision, he recognized that "the equal protection clause . . . fit[s] his model without strain." Id. at 644.
223. Sunstein, supra note 210, at 30. Sunstein suggests that "Madisonian Republicanism" is really an "intermediate position" between the traditional republicanism espoused by the Anti-federalists and interest-group pluralism. Id. at 47-48. For example, Madison rejected the traditional republican model which argued that direct participation in small republics would prevent faction and tyranny of the majority. Madison also rejected the conception of politics as a process consisting only of tradeoffs between competing factions. Id. at 46-47. Sunstein further asserts that the Equal Protection Clause may be viewed as a rejection of the pluralist view of politics be-
This political process reading of the Equal Protection Clause and, additionally, the suggestion that judicial intervention is appropriate to ensure access to the political process, was perhaps most famously expressed by Justice Stone in footnote four of the Court’s opinion in *United States v. Carolene Products Co.* Justice Stone noted that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”

As explained by Professor Klarman “[e]qual protection, from a political process perspective, principally concerns judicial solicitude for groups unable to fend for themselves in the political trenches because of disenfranchisement, blatant prejudice, negative stereotyping, or some combination thereof.”

As noted above, the Supreme Court’s evaluation of equal protection claims in the voting rights cases preceding *Shaw I* was consistent with the political process theory of equal protection. In *Reynolds v. Sims*, the Court found that “the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators” and found that the Equal Protection Clause would be violated where the weight of a vote was diluted because of race or place of business. In both *White v. Regester* and *Whitecomb v. Chavis*, the Court held that plaintiffs had to establish that the political processes leading to nomination and election were not equally open to participation by the group in question to establish

\[\text{cause it recognizes the evil of distributing "resources or opportunities to one group rather than another solely because those benefited have exercised the raw power to obtain governmental assistance." Id. at 50-51.}\]

\[224. 304 U.S. 144 (1938). Ely maintains that footnote four “suggests that it is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open.” Ely, supra note 65, at 76. Ely additionally notes that footnote four contemplates the Court’s role in monitoring how majorities treat minorities. Id.; see Klarman, supra note 206, at 310 (asserting that political process theory was first clearly stated by Justice Stone in footnote four and later expanded by Ely into a “full-blown constitutional theory”).\]

\[225. Carolene Products, 304 U.S. at 153 n.4.\]

\[226. Klarman, supra note 206, at 310.\]

\[227. 377 U.S. 533 (1964).\]

\[228. Id. at 566; see also Bruce Ackerman, *A Generation of Betrayal?*, 65 Fordham L. Rev. 1519, 1523 (1997) (noting that *Reynolds v. Sims* "can be rationalized in *Carolene* terms"); Klarman, supra note 206, at 258-263 & n.236 (arguing that political process theory motivated the Court to enter the apportionment cases beginning with *Baker* and guided a number of their later decisions including *Reynolds* and *UJO*).\]

\[229. 412 U.S. 755 (1973).\]

\[230. 403 U.S. 124 (1971).\]
an equal protection violation.\textsuperscript{231} Likewise, in \textit{United Jewish Organizations of Williamsburgh, Inc. v. Carey},\textsuperscript{232} ("UJO") the Court found that the plaintiffs failed to establish an equal protection claim because the white population was not fenced out from the political process or their vote unfairly diluted.\textsuperscript{233} Similarly in \textit{Davis v. Bandemer},\textsuperscript{234} the Court held that an equal protection violation would be established only where "a particular group has been unconstitutionally denied its chance to effectively influence the political process."\textsuperscript{235} In \textit{Shaw I}, however, the Court applied strict scrutiny to a districting plan which was beneficial to racial minorities.\textsuperscript{236} This application of strict scrutiny to an affirmative action program is contrary to the political process theory because in these programs it is the white majority disadvantaging itself to advantage the minority. Whites "can amply defend themselves in the political arena, and thus should not qualify for special judicial protection."\textsuperscript{237}

\textbf{B. Step II of Fidelity: Translating the Equal Protection Clause in the Context of Voting Rights}

This part first shows that the \textit{Shaw I} Court created a new constitutional claim for racial gerrymandering, or segregating voters in districts on the basis of race, that does not require a showing of discriminatory effects. In so doing, the Court departed from the established understanding of equal protection in voting rights cases: it introduced a changed reading of the Equal Protection Clause. This part applies the second step of Professor Lessig's fidelity theory to demonstrate that this changed reading of the Constitution is unfaithful to the Constitution because it is not supported by a changed presupposition with regard to the Equal Protection Clause. This part notes that \textit{Shaw I} did not provide any justification, or suggest a changed presupposition, to support this new equal protection claim. It merely asserted that a claim of segregating voters on the basis of race is distinct from the prior vote dilution cases, and therefore requires a differ-

\begin{itemize}
\item \textsuperscript{231} \textit{White}, 412 U.S. at 765-66; \textit{Whitecomb}, 403 U.S. at 153; \textit{see also} Issacharoff, \textit{supra} note 85, at 1842-43 (contending that \textit{White} "struck down multimember election practices because of an effective abridgement of ... the right of racial and ethnic minorities meaningfully to participate in the political process").
\item \textsuperscript{232} 430 U.S. 144 (1977).
\item \textsuperscript{233} \textit{Id.} at 164-65.
\item \textsuperscript{234} 478 U.S. 109 (1986).
\item \textsuperscript{235} \textit{Id.} at 132-33.
\item \textsuperscript{236} \textit{Shaw v. Reno}, 509 U.S. 630, 657 (1993).
\item \textsuperscript{237} Klarman, \textit{supra} note 206, at 311 (citing John Hart Ely, \textit{The Constitutionality of Reverse Racial Discrimination}, 41 U. Chi. L. Rev. 723, 735 (1974)); \textit{see also} Natapoff, \textit{supra} note 10, at 755 (arguing that Madison's view of the danger of the majority faction supports the notion that whites may sometimes be treated differently than racial minorities under the Equal Protection Clause because whites are, and have been historically, the majority with control over the political process).  
\end{itemize}
ent analysis. As this part reveals however, the cases are not distinguishable. This part then argues that without evidence of a changed presupposition, this new reading is not faithful to the Equal Protection Clause because, as noted by the dissenting Justices in the Shaw I line of cases, there is no injury to white plaintiffs who have not been shut out of the political process. This part concludes that the Court should return to requiring a showing of discriminatory effects in order to establish an equal protection violation because there has been no changed presupposition to justify the changed reading in Shaw I.

1. The Court's Changed Reading of the Equal Protection Clause in Shaw I

Shaw I and its progeny demonstrate that the Court has strayed from earlier cases where the Court found it permissible to use racial criteria as a basis for drawing district lines. This departure is clearly evidenced when these cases are compared to the Court's earlier UJO decision where it held that "the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with [section] 5." This statement forcefully reveals the Court's later departure because the North Carolina districting plan at issue in Shaw I was, like the plan in UJO, created to comply with section 5. But the Shaw I Court found that districting on the basis of race was impermissible as it "bears an uncomfortable resemblance to political apartheid." In addition, as discussed above, earlier voting rights cases required the plaintiffs to show that they were denied equal access to influence the political processes, in order to establish an equal protection claim based on vote dilution. In Shaw I and Miller v. Johnson, by contrast, the

238. Note that Professor Lessig's translation theory has been used in the past mainly to justify changed readings as faithful where there has been a change in context. See, e.g., Lessig, Understanding Changed Readings, supra note 17, at 453 (asserting that the New Deal was a justified response to changes in economic and social context and "changes in law's understanding of itself"). As Professor Levinson noted, "[Lessig's] primary purpose has in fact been to defend—some might even say offer apologetics for—many of the important changes that have occurred in our constitutional fabric." Levinson, supra note 11, at 1461. Professor Lessig, however, has recognized that there is a negative use of his translation theory. Lessig, Constraint, supra note 17, at 1368. This Note uses Professor Lessig's theory in its negative sense to demonstrate that where there is no changed presupposition, a changed reading must be unfaithful.

240. Shaw I, 509 U.S. at 634-35.
241. Id. at 647.
Court found equal protection violations with a showing of racial gerrymandering or voter segregation on the basis of race.\textsuperscript{244} Furthermore, \textit{Miller} and \textit{Bush v. Vera}\textsuperscript{245} expanded \textit{Shaw I} such that a violation could now be established merely by demonstrating that race was the predominant factor in the creation of district lines.\textsuperscript{246}

The changed reading in \textit{Shaw I} is additionally demonstrated by the Court's failure to cite to precedent which supports its reasoning. In \textit{Shaw I}, the majority cites \textit{Gomillion v. Lightfoot}\textsuperscript{247} and \textit{Wright} as precedent for its decision.\textsuperscript{248} Neither of these earlier decisions, however, supports \textit{Shaw I}. In \textit{Gomillion}, the Alabama legislature passed a statute which altered the shape of Tuskegee from a square to a twenty-eight-sided figure, thereby removing almost all of its African-American voters without removing a single white voter.\textsuperscript{249} Petitioners maintained that the statute violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment and denied them the right to vote in municipal elections in violation of the Fifteenth Amendment.\textsuperscript{250} In \textit{Gomillion}, therefore, the white majority had changed the city lines in order to exclude a racial minority from municipal elections and services. In contrast, the \textit{Shaw I} plaintiffs did not, and could not, assert a similar purpose or effect in the North Carolina districting plan;\textsuperscript{251} in \textit{Shaw I}, the minority group was benefited rather than harmed. In \textit{Wright}, the plaintiffs claimed that New York congressional districts were segregated by race in violation of the Fourteenth and Fifteenth Amendments.\textsuperscript{252} The \textit{Wright} Court found, however, that the plaintiffs failed to show discriminatory intent or that the lines had actually been drawn on racial grounds.\textsuperscript{253} As noted by Justice White in his \textit{Shaw I} dissent, it is difficult "to see how a decision based on a failure to establish discriminatory intent can support the inference that it is unnecessary to prove discriminatory effect."\textsuperscript{254}

Thus, the Court's recognition of racial gerrymander as a new equal protection claim marks a changed reading of the Equal Protection Clause because prior to \textit{Shaw I} the Court found it permissible to draw district lines on the basis of race. The \textit{Shaw I} Court also departed from its earlier voting rights cases by no longer requiring a showing of discriminatory effect to implicate the Fourteenth Amendment.\textsuperscript{255} Fi-

\textsuperscript{244}. \textit{See Shaw I}, 509 U.S. at 649, 657-658; \textit{Miller}, 115 S. Ct. at 2482, 2485.
\textsuperscript{245}. 116 S. Ct. 1941 (1996).
\textsuperscript{246}. \textit{Miller}, 115 S. Ct. at 2488; \textit{Bush}, 116 S. Ct. at 1953.
\textsuperscript{247}. 364 U.S. 339 (1960).
\textsuperscript{248}. \textit{Shaw I}, 509 U.S. at 644-46.
\textsuperscript{249}. \textit{Gomillion}, 364 U.S. at 340-41.
\textsuperscript{250}. \textit{Id}. The Court was only deciding whether the petitioners could bring this claim under the Constitution, rather than the truth of petitioners' allegations. \textit{Id}. at 341.
\textsuperscript{251}. \textit{Shaw I}, 509 U.S. at 669 (White, J., dissenting).
\textsuperscript{252}. \textit{Wright}, 376 U.S. at 56.
\textsuperscript{253}. \textit{Id}.
\textsuperscript{254}. \textit{Shaw I}, 509 U.S. at 669 (White, J., dissenting).
\textsuperscript{255}. \textit{Id}. at 649.
nally, that the Court’s reading of the Fourteenth Amendment has changed is further evidenced by its failure to cite to precedent which supports its *Shaw I* decision.

2. The *Shaw I* Court’s Failure to Assert a Changed Presupposition to Justify Its Changed Reading of the Equal Protection Clause

Having established that a changed reading has occurred, under Professor Lessig’s fidelity theory, the new reading must follow a change in context for it to remain faithful to the original meaning of the Fourteenth Amendment. Under an originalist approach, the Court’s changed reading would be unfaithful simply because it departed from the original understanding; Professor Lessig’s theory, however, recognizes that changed readings are sometimes necessary to preserve the original meaning of the text.256 The *Shaw I* Court, nonetheless, failed to justify its changed reading of the Equal Protection Clause as following a changed presupposition. Rather, the Court attempted to distinguish the claim of racial gerrymander as distinct from the vote dilution claims presented in the earlier voting rights cases. The majority found a violation of the Equal Protection Clause because the district lines in question were drawn so unconventionally that they could only have been drawn on the basis of race and with complete disregard for traditional districting criteria.257 The Court contended that a claim that district lines were drawn to segregate voters on the basis of race “threatens special harms that are not present in our vote-dilution cases. It therefore warrants different analysis.”258 The Court held that strict scrutiny would be applied where district lines were created on the basis of race.259 The Court distinguished *UJO*, finding that “*UJO*’s framework simply does not apply where, as here, a reapportionment plan is alleged to be so irrational on its face that it immediately offends principles of racial equality.”260

Justice White’s dissent in *Shaw I* reveals, however, that *Shaw I* is not distinct from the earlier voting rights cases and therefore required a changed presupposition to be a faithful reading of the Equal Protection Clause. Justice White maintained that the *Shaw I* appellants failed to allege a cognizable injury because prior to *Shaw I* there were only two types of state voting practices which were found to violate the Constitution: (1) a denial of the right to vote; or (2) vote dilution in violation of the Equal Protection Clause which requires a showing that the challenged districting has both the intent and effect of restricting a political or racial group’s influence on the political pro-

256. See *supra* text accompanying notes 19-21.
258. Id. at 649-50.
259. Id. at 644.
260. Id. at 652.
cess. Justice White, who wrote the majority opinion in *UJO*, argued further that the facts of *Shaw I* "mirror those presented in [*UJO*]" and noted that five of the Justices in *UJO* found that the plaintiffs could not claim an equal protection violation because "members of the white majority could not plausibly argue that their influence over the political process had been unfairly canceled." Thus, "it is irrefutable that appellants in this proceeding likewise have failed to state a claim."  

The dissenters in *Shaw I* also criticized the majority for creating a new constitutional claim—"race-conscious redistricting that 'segregates' by drawing odd-shaped lines"—as somehow distinct from a claim of vote dilution—"race-conscious redistricting that affects groups in some other way." The dissenters pointed out that the plaintiffs in *UJO* had made claims similar to those of the plaintiffs in *Shaw I*. The *UJO* plaintiffs claimed that the New York districting plan violated the Fourteenth and Fifteenth Amendments because the district lines were drawn only on the basis of race. This demonstrates that the "analytically distinct claim" recognized by the *Shaw I* majority was available to the *UJO* Court but was rejected because the plaintiffs could not show discriminatory effect. Therefore, "[t]he fact that a demonstration of discriminatory effect was required in [*UJO*] was not a function of the kind of claim that was made. It was a function of the type of injury upon which the Court insisted."  

The Court in *Miller*, *Shaw II*, and *Bush* simply expanded *Shaw I* without providing any further justification for the Court's departure from the earlier voting rights cases. The *Miller* Court again took pains to distinguish *UJO* as a vote dilution case: as "explained in *Shaw*... [*UJO*]'s analysis does not apply to a claim that the State has separated voters on the basis of race." The dissenters noted that under *Shaw I* the *Miller* plaintiffs failed to state an equal protection claim because in *Shaw I* the violation was the disregard of traditional districting criteria so that race was ultimately the only consideration. The Georgia districting plan at issue in *Miller* followed traditional districting factors. The *Miller* Court, however, expanded *Shaw I* to find an equal protection violation simply where race was the predominant

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261. *Id.* at 659-60 (White, J., dissenting).
262. *Id.* at 658 (White, J., dissenting). Justice White also notes that the Court in *Whitecomb*, *White*, and *Davis* similarly required plaintiffs to show they were excluded from effectively influencing the political process in order to establish an equal protection claim. *Id.* at 661-63.
263. *Id.* at 665.
264. *Id.* at 667.
266. *Shaw I*, 509 U.S. at 668 (White, J., dissenting) (quoting the majority).
267. *Id.*
269. *Id.* at 2502 (Ginsburg, J., dissenting).
270. *Id.* at 2502-04.
consideration in the creation of a districting plan. Following Shaw I then, the majority subjected the districting plan to strict scrutiny and found the plan was not narrowly tailored to further a compelling state interest. In Shaw II and Bush the Court found that, under Shaw I and Miller, the contested districting plans were subject to strict scrutiny and in both cases found the districts were not narrowly tailored to further a compelling state interest. The Shaw I Court did not assert that a presupposition had changed in the time between UJO and Shaw I to justify its changed reading as faithful. It simply asserted that a claim of racial gerrymander was distinct from a claim of vote dilution and therefore required a different analysis. As seen above, however, a claim of racial gerrymander is not distinct from the earlier vote dilution claims. Accordingly, the Court's changed reading of the Equal Protection Clause is unfaithful and invalid because there is no evidence of a changed presupposition.

3. The Court Should Return to Requiring a Showing of Discriminatory Effect to Establish an Equal Protection Claim

As discussed above, classifications based on race to ensure racial minorities equal access to the political process comport with the original understanding of the Fourteenth Amendment. In keeping with this understanding, the pre-Shaw I voting rights cases required a showing of discriminatory effect to establish an equal protection claim in violation of the Fourteenth Amendment. The reading of the Equal Protection Clause in the Shaw I line of cases, allowing members of the white majority to bring equal protection claims without a showing that the contested districting plan has any discriminatory effect, therefore departs from the earlier cases and is not faithful to the Fourteenth Amendment. The Miller dissenters noted that racial minorities have historically been denied fair representation in the political process which should entitle them to equal protection rights. These rights should not be extended, however, to a majority that has not been denied access to the political process. Justice Stevens asserted further in his Miller dissent that respondents had alleged no legally cognizable injury without a claim of vote dilution and, additionally, that a district plan drawn to promote fair representation of different groups cannot constitute an equal protection violation. In Bush,
the dissenters similarly argued that the pre-Shaw I equal protection violation was the denial of the opportunity to influence the political process which was not present in Shaw I and its progeny.279

The Supreme Court should return to their policy of requiring a plaintiff to demonstrate the discriminatory effect of a contested districting plan to establish an equal protection violation regarding voting rights. Shaw I and its progeny allow plaintiffs to establish an equal protection claim without demonstrating an injury. Returning to the approach espoused prior to Shaw I, the Court should instead require a showing that the plaintiff was denied equal opportunity to influence the political processes. Such a requirement would be faithful to the original understanding of the Equal Protection Clause.

**Conclusion**

The Court departed from its earlier reading of the Equal Protection Clause in voting rights cases beginning with Shaw I. After Shaw I and its progeny, an equal protection claim can be established by showing that racial considerations were the predominant factor in the creation of district lines. This is a significant departure from its pre-Shaw I voting rights cases where, in order to establish a violation of the Equal Protection Clause, a petitioner had to show that a districting plan had the effect of denying them equal opportunity to influence the political process. A review of the original understanding of the Fourteenth Amendment strongly suggests that the Equal Protection Clause was not intended to prohibit all racial classifications and, further, that it implemented a certain concept of representative government. Further, the Court did not justify its changed reading as responding to a change in context which, under Professor Lessig's translation theory, could allow the new reading to nonetheless remain faithful to the original meaning of the text. The Court's changed reading of the Equal Protection Clause is therefore not a faithful reading of the Fourteenth Amendment. As a result, the Court should return to requiring a showing of discriminatory effect to establish an equal protection violation.

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