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“ABRIDGE” TOO FAR: RACIAL GERRYMANDERING, THE FIFTEENTH AMENDMENT, AND SHAW V. RENO

N. Jay Shepherd*

The right of citizens of the United States to vote shall not be denied or abridged . . . on account of race . . . .

Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief . . . that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.

The joke goes that if you were to drive “down the interstate with both car doors open, you’d kill most of the people in the district.” The interstate is I-85, the district is North Carolina’s Twelfth Congressional District, and most of the people in the driver’s way would be black. But to the voters of North Carolina, black and white, this is no joke; this is the product of the Supreme Court’s approach to racial gerrymandering.

Gerrymandering is the drawing of electoral districts to benefit or disadvantage a particular group. The district at issue in Shaw v. Reno, *
NORTH CAROLINA
showing Twelfth Congressional District

North Carolina's Twelfth, was drawn expressly for the purpose of creating a second congressional district where blacks constituted a majority of the population. Because the 1990 census revealed that approximately twenty percent of North Carolina's voting-age population was black, the Attorney General of the United States required that two of the state's twelve representatives be black. To ensure this result, the legislature redrew the electoral map to create a second black-majority district, which became District 12. In order to comprise a black majority, the district extends for 160 miles in a serpentine fashion, winding through ten different counties "until it gobbles in enough enclaves of black neighborhoods." At times it is no wider than the Interstate 85 corridor; in one instance, it intersects with two other districts at a single geometric point.

In *Shaw*, the Supreme Court held that the Twelfth District was so irregularly shaped that it could only be viewed as an effort to segregate races for electoral purposes. The plaintiffs in the case were five residents of North Carolina, two from the Twelfth District and three from a neighboring district. The plaintiffs, all of whom were white, sued state and federal officials claiming violations of the Fourteenth and

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7 Shaw, 113 S. Ct. at 2820. The legislature's original redistricting plan already contained one majority-black district. *Id.*
8 *Id.*
9 *Id.* The drawing of the Twelfth District had already been the subject of an earlier lawsuit. *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C.), aff'd, 113 S. Ct. 30 (1992). In *Pope*, the North Carolina Republican Party alleged that the district was an unconstitutional partisan gerrymander, drawn to benefit incumbent Democrats. The lower court dismissed the case, and the Supreme Court affirmed the dismissal. *Id.* For a discussion of the different types of gerrymandering, see infra part IIA.
11 *Id.* at 2821.
12 *Id.* at 2832.
13 *Id.* at 2821.
14 The Court noted that nowhere in their claim did the plaintiffs indicate their race. *Id.* at 2824. The district court had noted this as well, calling it "puzzling." *Shaw*, 808 F. Supp. at 470. The lower court took judicial notice of the plaintiffs' race, calling it "critical" to their claim. *Id.* In doing so, however, the court admitted that it may have been performing a disservice to the plaintiffs' intentions and legal cause. *Id.* In the sentence immediately following the judicial notice, the court stated that "[c]onstrued as a challenge by white voters . . . the complaint fails to state a legally cognizable claim." *Id.*

While the majority of the Court decided the case without referring to the plaintiffs' race, the dissenting members incorporated that factor in their opinions. See *Shaw*, 113 S. Ct. at 2838 (White, J., dissenting) ("to discriminate against members of the majority group"); *id.* at 2843 (Blackmun, J., dissenting) ("a challenge by white voters"); *id.* at 2847 n.6 (Souter, J., dissenting) ("the difficulty the white plaintiffs would have here").
Fifteenth Amendments. The district court dismissed their case for failure to state a cognizable claim, and the Supreme Court noted probable jurisdiction. In a 5–4 decision written by Justice O'Connor, the Court reasoned that state legislation that expressly distinguished citizens by race had to be narrowly tailored to further a compelling government interest. The Court held that the Twelfth District was so bizarrely drawn that the only rational explanation was a desire to segregate voters by race. Because it was possible that such segregation violated the plaintiffs' equal protection rights under the Fourteenth Amendment, the Court concluded that the plaintiffs had stated a cognizable claim.

The Court declined, however, to determine whether the district itself was an unconstitutional gerrymander. Although the majority

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15 808 F. Supp. at 468.

The Fourteenth Amendment provides in pertinent part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. For further discussion of the Fourteenth Amendment and its application to voting rights claims, see infra part III.B. The Fifteenth Amendment provides:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV. For further discussion of the Fifteenth Amendment, its background, and cases decided under it, see infra part II.A.

16 808 F. Supp. at 473.


18 Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas joined the opinion of the Court. 113 S. Ct. at 2819. Justice White authored a dissenting opinion, joined by Justices Blackmun and Stevens. Id. at 2834. Justices Blackmun, Stevens, and Souter each filed separate dissents as well. Id. at 2843, 2845.

19 Id. at 2825.

20 Id. at 2832. While it was clear that the intent of the North Carolina legislature was to create a second majority-black district, see id., the actual legislation was facially race neutral. Id. at 2828.

21 Id. at 2828. The district court had ruled that the equal protection claim under the Fourteenth Amendment essentially subsumed the plaintiffs' Fifteenth Amendment claim. Id. at 2822 (citing Shaw v. Barr, 808 F. Supp. 461, 468–69 (E.D.N.C. 1992)). The Supreme Court apparently accepted this reasoning, for it declined to rule on the plaintiffs' Fifteenth Amendment claim. See id. at 2832.

22 Id.

23 Id. The Supreme Court traditionally attempts to avoid ruling on constitutional issues. See, e.g., City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 284 (1982) (noting Court's policy of avoiding unnecessary adjudication of federal constitutional questions). In Shaw, however, the
opinion is replete with antigerrymandering rhetoric, it fails to punctuate this rhetoric with appropriate holdings. Moreover, the Court took no position on the plaintiffs’ Fifteenth Amendment claim, suggesting that the Fourteenth Amendment was more appropriate to the resolution of the case. This Note argues that the Supreme Court erred in failing to find North Carolina’s racial gerrymander unconstitutional under the Fifteenth Amendment. Gerrymandering abridges the voting rights of the citizens affected by it. Racial gerrymandering abridges these rights based on race. The Fifteenth Amendment explicitly prohibits the abridgement of the right to vote based on race. Therefore, racial gerrymandering violates the Fifteenth Amendment. Although this case gave the Court the chance to resolve the question of race-based redistricting, the Court instead left the issue unsettled.

Part II of this Note describes the theory and practice of gerrymandering, examining the various goals and methods of gerrymandering. Part III discusses the constitutionality of racial gerrymandering as

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24 Compare 113 S. Ct. at 2827 (“[Racial gerrymandering] bears an uncomfortable resemblance to political apartheid.”) and id. at 2828 (“[Racial gerrymandering] reinforces racial stereotypes and threatens to undermine our system of representative democracy . . . .”) with id. at 2824 (calling “wise” the plaintiffs’ concession that “race-conscious redistricting is not always unconstitutional”) and id. at 2828 (“[W]e express no view as to whether ‘the intentional creation of majority-minority districts, without more’ always gives rise to an equal protection claim.”) (citation omitted).

25 Id. at 2832.

26 Id. at 2825–26. The Court noted with approval Justice Whittaker’s concurrence in Gomillion v. Lightfoot, the leading racial gerrymandering case decided under the Fifteenth Amendment. Id. (citing Gomillion v. Lightfoot, 364 U.S. 339, 349 (1960) (Whittaker, J., concurring)). Justice Whittaker suggested that that case should have been decided under the Equal Protection Clause of the Fourteenth Amendment. Id. The Shaw Court then concluded—incorrectly—that Gomillion stood for the proposition that racial gerrymandering violated the Fourteenth Amendment. Shaw, 113 S. Ct. at 2826. For a more detailed discussion of Gomillion and the Fifteenth Amendment, see infra notes 108–13 and accompanying text.

27 See infra notes 61–65 and accompanying text.

28 See infra notes 260–65 and accompanying text.

29 U.S. Const. amend. XV, § 1, supra note 15.

30 See, e.g., Dave Kaplan, Constitutional Doubt is Thrown on Bizarre-Shaped Districts, 51 Cong. Q. Wkly. Rep. 1761, 1761 (1993) (“The Supreme Court on June 28 invited a new wave of lawsuits challenging the constitutionality of districts drawn to ensure the election of minorities.”); Carol M. Swain, Black Majority Districts, a Rotten Litmus Test, Wall St. J., Dec. 27, 1993, at 6 (the Court in Shaw “left observers with no real standards with which to evaluate districting plans”); Gayle Pollard Terry, Perspective on Civil Rights; the True Concern is Racial Justice, L.A. Times, July 27, 1993, at B7 (interviewing Lani Guinier about Shaw v. Reno) (“What I find most disturbing about this court’s opinion is that it seems uninterested in any remedy.”). But cf. Hays v. Louisiana, 839 F. Supp. 1188, 1193 (W.D. La. 1993) (“[T]he roadmap sketched by the Court—as helpful as it is—leaves some questions to be answered in cases such as this.”).
determined by the Supreme Court in the cases leading up to Shaw v. Reno. This section analyzes the two distinct currents of racial redistricting law under the Fifteenth and Fourteenth Amendments respectively. Part IV discusses Shaw, with an analysis of the majority and dissenting opinions. Finally, Part V applies the Fifteenth Amendment to Shaw and argues that all racial gerrymandering, whether "invidious" or "benign," is unconstitutional under the Fifteenth Amendment.

II. GERRYMANDERING: THEORY AND PRACTICE

A. Gerrymandering Defined

Because gerrymandering is a term that conveys different meanings and different connotations,31 a brief definitional discussion is in order. One dictionary defines the term as "to divide (an area) into political units in an unnatural and unfair way with the purpose of giving special advantages to one group."32 Some commentators limit the term to redistricting for a political party's advantage.33 This usage reflects the original meaning of the term, which was coined in 1812 to describe a Massachusetts district drawn to the advantage of Governor Elbridge Gerry's party.34 The term is commonly used today, however, to describe redistricting done for the advantage or disadvantage of a particular group—partisan, racial, or otherwise.35

This Note focuses on racial gerrymandering as opposed to partisan gerrymandering. Although the methods of gerrymandering are

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31 Elmer C. Griffith, The Rise and Development of the Gerrymander 15 (Arno Press 1974) (1907). "The word gerrymander is one of the most abused words in the English language. . . . It has been made the synonym for political inequality of every sort." Id.


33 See, e.g., id. (first definition at "gerrymander" entry) ("to divide (a territorial unit) into election districts . . . with the purpose of giving one political party an electoral majority in a large number of districts"); David Butler & Bruce Cain, Congressional Redistricting: Comparative and Theoretical Perspectives 158 (1992) (glossary) ("The drawing of constituency boundaries deliberately to secure party advantage."); Griffith, supra note 31, at 21 ("the formation of election districts . . . with boundaries arranged for partisan advantage"); Polsby & Popper, supra note 6, at 301 ("any manipulation of district lines for partisan purposes").

34 Griffith, supra note 31, at 16-17. The district, located in northeastern Massachusetts, vaguely resembled a salamander: hence the term, combining Gerry's name with the word "salamander." See id. at 17. For a fuller discussion of the history of the term, see id. at 16-20. A note on pronunciation: while Governor Gerry's surname was pronounced with a hard g, the term gerrymander is more commonly pronounced with a soft g. See Webster's, supra note 32, at 952 (entry at "gerrymander").

35 See, e.g., Alexander J. Bott, Handbook of United States Election Laws and Practices 200 (1990); Butler & Cain, supra note 33, at 33-34; Polsby & Popper, supra note 6, at 301.
basically the same whether the groups affected are racial or partisan,\textsuperscript{36} only racial gerrymandering presents a Fifteenth Amendment issue.\textsuperscript{37} Political gerrymandering cases, which the Supreme Court only recently held as justiciable under the Equal Protection Clause,\textsuperscript{38} are beyond the scope of this Note.\textsuperscript{39}

B. Goals and Methods of Gerrymandering

There are basically two gerrymandering techniques: “packing” and “cracking.”\textsuperscript{40} Packing involves concentrating voters of a particular group into one district, thus assuring victory for the group in that district but defeat in the remaining districts.\textsuperscript{41} Suppose, for example, that a state has five districts, three controlled by Party A and two controlled by Party B. Suppose further that Party A controlled the redistricting process and wanted to weaken Party B’s electoral power. The districting authority could draw new boundaries so that most of the Party B voters were placed in the same district: District 1. Party B would have a supermajority in this district and would almost certainly win the seat. In each of the four remaining districts, however, Party A voters would vastly outnumber Party B voters, allowing Party A to easily win those seats. Because only a simple majority is required to win a district,\textsuperscript{42} each B vote beyond the necessary majority in District 1 would be wasted.\textsuperscript{43} Packing is most effective when voters of the targeted group (Party B, in this example) are naturally dispersed.\textsuperscript{44}

When the targeted voters are already concentrated, the alternate technique of cracking is more effective. Cracking involves dispersing a

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\textsuperscript{36} Compare Shaw, 113 S. Ct. at 2840 (White, J., dissenting) (describing various methods of racial gerrymandering) with Polsby & Popper, supra note 6, at 303–04 (describing various methods of partisan gerrymandering).


\textsuperscript{40} See Shaw, 113 S. Ct. at 2840 (White, J., dissenting); Voinovich v. Quilter, 113 S. Ct. 1149, 1155 (1993); Michael D. McDonald & Richard L. Engstrom, Detecting Gerrymandering, in Political Gerrymandering and the Courts 178, 178–79 (Bernard Grofman ed., 1990); Polsby & Popper, supra note 6, at 303–04. "Stacking," another contribution to prosody by political scientists, has various and conflicting meanings, and will not be addressed in this Note. Compare Shaw, 113 S. Ct. at 2840 (White, J., dissenting) (defining "stacking" as burying a large minority population within a larger white population) with Polsby & Popper, supra note 6, at 303 (equating "stacking" with "packing").

\textsuperscript{41} Voinovich, 113 S. Ct. at 1155; McDonald & Engstrom, supra note 40, at 178–79.

\textsuperscript{42} This example assumes a two-party system.

\textsuperscript{43} See Andrew Hacker, Congressional Districting: The Issue of Equal Representation 55–57 (1986); McDonald & Engstrom, supra note 40, at 178–79.

\textsuperscript{44} See Voinovich, 113 S. Ct. at 1155; McDonald & Engstrom, supra note 40, at 178–79.
particular group of voters throughout many districts so that they cannot form a majority in any of the districts.\textsuperscript{45} Using the above example, suppose Party \textit{B}'s voters were concentrated in the two easternmost districts, where they constituted comfortable majorities over Party \textit{A}'s voters. The districting authority, under Party \textit{A}'s control, could draw new boundaries so that \textit{B}'s voters were divided among all five districts. In each district, Party \textit{A}'s voters would form a majority and would win the seat.\textsuperscript{46}

Gerrymandering is far more complicated than these examples suggest, as the districting authority must consider many demographic, geographic, and political factors.\textsuperscript{47} In response to this complexity, legislatures use computer technology to make gerrymandering easier and more efficient.\textsuperscript{48} Technological breakthroughs, mainly in computer software, now allow any interested group to feed demographic data into a personal computer and have the computer map out districts that suit the group's agenda.\textsuperscript{49} Data from the U.S. Census Bureau is now readily accessible by computer.\textsuperscript{50} The Bureau's Topologically Integrated Geographic Encoding and Referencing (TIGER) system gives census information in a street-by-street format, allowing districting authorities to include or exclude people in fantastic detail.\textsuperscript{51} Some commentators suggest that the new, high-technology methods of redistricting remove the process from partisan politics.\textsuperscript{52} They reason that if technicians enter the data and computers make the mapping decisions, the process involves no politics.\textsuperscript{53} Quite to the contrary, however, technological advances have made it more likely that politicians will draw districts for political gain.\textsuperscript{54} The districting authority simply gives

\textsuperscript{45} Voinovich, 113 S. Ct. at 1155; McDonald & Engstrom, \textit{supra} note 40, at 179.

\textsuperscript{46} This is easier to visualize if the state is rectangular and was originally divided into five districts of equal size running east to west. Party \textit{B}'s voters are concentrated in the easternmost two districts. If the redistricting created five rectangular districts, each running the length of the state from east to west, Party \textit{B} voters would constitute a minority in the eastern two fifths of each district.

\textsuperscript{47} BUTLER & CAIN, \textit{supra} note 33, at 65-66.

\textsuperscript{48} See \textit{id.} at 60-61; Gordon E. Baker, \textit{The Unfinished Reapportionment Revolution,} in \textit{Political Gerrymandering and the Courts,} \textit{supra} note 40, at 11, 23.


\textsuperscript{50} See Donovan, \textit{supra} note 49, at 1917; BUTLER & CAIN, \textit{supra} note 33, at 60-61.

\textsuperscript{51} BUTLER & CAIN, \textit{supra} note 33, at 60.

\textsuperscript{52} Anderson & Dahlstrom, \textit{supra} note 49, at 76.

\textsuperscript{53} Id. \textit{But see} BUTLER & CAIN, \textit{supra} note 33, at 64 ("Redistricting choices are about more than mere numbers and shapes—they concern political power, fairness, and values of representation.").

\textsuperscript{54} See Polsby & Popper, \textit{supra} note 6, at 303.
its desired criteria—such as more blacks or fewer Democrats—to the technicians, who program the computers accordingly. As the following section will demonstrate, making gerrymandering more efficient does not make it more democratic.

C. Gerrymandering and the Abridgement of Voters’ Rights

Throughout our nation’s history, state legislatures—primarily in the South—have employed various means to disenfranchise blacks. Initially, franchised whites resorted to violence and other direct means to deny blacks their right to vote. Later, they used indirect and ostensibly neutral methods such as multimember districts and grandfather clauses to abridge the voting rights of black citizens. One such method was racial gerrymandering, where officials redrew electoral districts using race as the primary criterion. In Mississippi, for example, the anti-Reconstruction legislature once drew a “shoestring” congressional district that segregated most of the area’s black voters, guaranteeing white majorities in the five surrounding districts.

Gerrymandering abridges the rights of the affected voters by taking away a portion of their ability to select their representatives. A simple hypothetical will demonstrate this fact: in an ungerrymandered congressional district, voters determine the result of an election themselves. Although a candidate is subject to certain legal qualifications, such as age and citizenship restrictions, no other person or body has any say over which candidate is elected. The voters of this district

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57 Bardolph, supra note 56, at 57–58. Techniques ranged from the obvious (such as stealing ballot boxes) to the ingenious (such as giving black voters ballots printed on tissue paper, which a blindfolded official fished out after counts showed “too many” votes cast). Id. at 58.
58 See, e.g., Rogers v. Lodge, 458 U.S. 613, 616-17 (1982) (multimember districts held unconstitutional where they dilute minority voting power); Guinn v. United States, 238 U.S. 347, 368 (1915) (grandfather clauses that dilute minority voting power held unconstitutional).
60 See Shaw, 113 S. Ct. at 2823 (quoting Eric Foner, Reconstruction: America’s Unfinished Revolution, 1863–1877, at 590 (1988)). This gerrymander used the same packing technique as the example in part II.B above. See supra notes 41–44 and accompanying text.
61 See Polsby & Popper, supra note 6; see also Gomillion, 364 U.S. at 347.
possess 100% of the power to choose which candidate will win; no other person or government body can affect the election's outcome. 62

Compare this situation to an election in which a person or authority seeking partisan gain has drawn the districts. Gerrymandering will influence the outcome of this election to a certain extent—we can label this extent as $X\%$, where $X$ is a certain percentage of the total power to determine the election's result. Instead of having 100% of the power to determine the outcome of the election, the voters now have 100% minus $X\%$ or $(100 - X)\%$ of this power. As the effectiveness of the gerrymander ($X\%$) increases, the influence of the actual voters $(100 - X)\%$ decreases. Gerrymandering, therefore, reduces the power of voters to choose their representatives.

Article I of the Constitution requires that members of the House of Representatives be chosen "by the People." 63 The Supreme Court has held that this clause grants qualified citizens a constitutional right to vote. 64 By taking power away from the electorate through gerrymandering, the districting authority abridges the voting rights of each individual voter. 65

III. THE CONSTITUTIONALITY OF RACIAL GERRYMANDERING

Having examined the theory and practice of gerrymandering in general, this Note now focuses on the constitutionality of redistricting by race. The Supreme Court has followed two different paths in its adjudication of racial gerrymandering and vote dilution cases: one utilizing the Fifteenth Amendment, and the other using the Equal Protection Clause of the Fourteenth Amendment. Because the Fifteenth Amendment specifically covers race and the right to vote, we will first consider that amendment and the cases decided under it.

62 An excellent example of this can be found in the election of the representative in a single-district state, such as Alaska. No one can gerrymander the candidate's district because it encompasses the entire state—there are no district lines to manipulate. Although there are constitutional and legal prerequisites, such as American citizenship and being at least twenty-five years of age, U.S. Const. art. I, § 2, cl. 2, no districting authority can redraw district lines to benefit or disadvantage a particular group or candidate. The voters of Alaska therefore possess 100% of the power to choose their representative.

63 U.S. Const. art. I, § 2, cl. 1.

64 Reynolds v. Sims, 377 U.S. 533, 554 (1964); Ex parte Yarbrough, 110 U.S. 651 (1884).

65 See Reynolds, 377 U.S. at 555. The Court in Reynolds stated: The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Id. (footnote omitted).
A. The Fifteenth Amendment

1. Background and Passage

The most enduring results of the Civil War were the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, which sought to abolish slavery and eliminate its effects. The scope of the Thirteenth Amendment was limited to fulfilling the Union's war aim of ending slavery. By contrast, the Fourteenth Amendment had the much broader purpose of federalizing and constitutionalizing political rights. One of the rights the Framers of this Amendment sought to protect was the right to vote. Section 2 of the Fourteenth Amendment threatened states with reduced representation in Congress if they failed to extend the franchise to blacks. This section, written by northern Republicans, was not self-executing. Because Congress failed to implement this provision with enforcement legislation, the section weapon for compelling black suffrage was never used.

The relatively weak language regarding suffrage in the Fourteenth Amendment was a result of the Republicans' tenuous hold on Congress.

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66 The full text of the Thirteenth Amendment, which abolished slavery, reads as follows:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

Section 2. Congress shall have the power to enforce this article by appropriate legislation.

U.S. Const. amend. XIII.

67 See supra note 15.

68 See supra note 15.


70 See U.S. Const. amend. XIII; see also Earl M. Maltz, Civil Rights, the Constitution, and Congress, 1863–1869, at 13–14 (1990); Stephenson, supra note 69, at 48–49.

71 See U.S. Const. amend. XIV; see also Richard Claude, The Supreme Court and the Electoral Process 45 (1970); Stephenson, supra note 69, at 48–49.

72 U.S. Const. amend. XIV, § 2, which reads as follows:

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Id. See Claude, supra note 71, at 50–51; Stephenson, supra note 69, at 49.

73 See U.S. Const. amend. XIV, § 2.

74 See Claude, supra note 71, at 50.

75 Id. at 50–51.
and the White House at the time of the Amendment’s passage. Because a more powerful provision might have doomed the passage of the entire Amendment, the Republicans decided not to insist on black suffrage. After the Republicans nearly lost their majority in the 1868 congressional elections, however, they determined that the benefits of granting suffrage to blacks (who would likely vote Republican) outweighed the risk of losing the support of some white voters.

The Fifteenth Amendment originated as a variety of Republican proposals in both chambers of Congress, with the sharpest division over whether to limit the Amendment to suffrage or to include a right to hold elective office as well. As proposals gained support on Capitol Hill, Republicans in the two chambers took opposite sides of this division, with the more liberal Senate favoring the broader provision. In conference committee, the House backers forced the Senate to drop the officeholding provision and adopt the more restrained language found in the final form of the Amendment. On February 26, 1869, the Senate passed the House version of the Amendment and sent it to the states for ratification. Within just over a year, three fourths of the states ratified the Amendment, making it part of the federal Constitution. Under the language of the Amendment, states were no longer allowed to deny or abridge the voting rights of citizens based on race.

2. Fifteenth Amendment Cases

In spite of the ratification of the Fifteenth Amendment and the presence of federal troops in the South, many southerners actively

76 Stephenson, supra note 69, at 49–50.
77 See MALTZ, supra note 70, at 89–90; Stephenson, supra note 69, at 49.
78 Stephenson, supra note 69, at 50. Ironically, the Republicans were more concerned with obtaining suffrage for blacks in the North, rather than in the South. The Reconstruction Act of 1867 made suffrage for blacks in southern states a condition for reentry into the Union. 14 Stat. 428 (1867). While a constitutional amendment would permanently guarantee suffrage for southern blacks, it would also grant suffrage to blacks in all northern states, which were not subject to the Reconstruction Act. See William Gillette, The Right to Vote: Politics and Passage of the Fifteenth Amendment 46 (1969); Stephenson, supra note 69, at 50. Presumably, the northern blacks would then align themselves with the Republican Party. Gillette, supra, at 46.
79 See MALTZ, supra note 70, at 146; John M. Mathews, Legislative and Judicial History of the Fifteenth Amendment 22–23 (1909); Stephenson, supra note 69, at 51.
80 MALTZ, supra note 70, at 147; Gillette, supra note 78, at 59.
81 CLAUDE, supra note 71, at 52.
82 Id.; U.S. Const. amend. XV, § 1.
83 See Mathews, supra note 79, at 34; Cong. Globe, 40th Cong., 3d Sess. 1641 (1869).
84 Gillette, supra note 78, at 81; Mathews, supra note 79, at 75.
85 U.S. Const. amend. XV, § 1, supra note 15.
undermined black suffrage. When the Compromise of 1877 removed the troops from the former Confederacy and signaled the end of Reconstruction, the federal government had effectively abandoned the goals of black suffrage. Southern whites employed fraud, violence, and various electoral schemes (such as at-large elections and racial gerrymandering) to disenfranchise blacks. Although the Fifteenth Amendment is self-executing, Congress began to combat disenfranchisement by using the enforcement power granted it by section 2. For example, the Enforcement Act of 1870 established criminal penalties for intimidating voters, and the Civil Rights Act of 1875 provided for social rights as well as political rights. The enforcement legislation was soon eviscerated, however, by unfavorable Supreme Court decisions narrowly construing the Fifteenth Amendment. After these setbacks, Congress eschewed further civil rights legislation for more than eight decades. During this period, hope for advancing black suffrage through Congress and the Supreme Court faded. Not until 1915 did the Fifteenth Amendment win its first major Supreme Court victory: Guinn v. United States. In that case, the Court held that a “grandfather clause” that deprived illiterate blacks of the right to vote was unconstitutional under the Fifteenth Amendment.

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87 See Bardolph, supra note 56, at 57; Davidson, supra note 86, at 10.
88 Bardolph, supra note 56, at 57; Davidson, supra note 86, at 10.
89 South Carolina v. Katzenbach, 383 U.S. 301, 325 (1966) (section 1 “has always been treated as self-executing”); Guinn v. United States, 238 U.S. 347, 363 (1915) (“the command of the Amendment was self-executing”); see also Gillette, supra note 78, at 162; Mathews, supra note 79, at 76–77; Emma C. Jordan, The Future of the Fifteenth Amendment, 28 How. L.J. 541, 542 (1985). But see J. Morgan Kousser, The Voting Rights Act and the Two Reconstructions, in Controversies in Minority Voting, supra note 86, at 135, 136–37 & n.6 (suggesting that it was “naive to believe that the right to vote was self-executing . . . as some scholars carelessly charge”).
90 See Claude, supra note 71, at 54; Mathews, supra note 79, at 79; Jordan, supra note 89, at 549; Kousser, supra note 89, at 138–39.
92 See Claude, supra note 71, at 54.
93 18 Stat. 335 (1875).
94 See generally Bardolph, supra note 56, at 54. For a discussion of these and other attempts at early civil rights legislation, see id. at 45–72.
95 See, e.g., United States v. Reese, 92 U.S. 214 (1876) (declaring unconstitutional key provisions of the Enforcement Act of 1870); The Civil Rights Cases, 109 U.S. 3 (1883) (declaring unconstitutional key provisions of the Civil Rights Act of 1875).
96 See Bardolph, supra note 56, at 72.
97 See id. at 72, 144.
98 238 U.S. 347 (1915).
99 Id. at 367.
An amendment to the Oklahoma Constitution included a provision that required a literacy test for voters; an exception was made, however, for people who either had had the franchise on January 1, 1866, or were directly descended from such people.100 Because this date preceded the passage of the Fifteenth Amendment, the only people covered by the grandfather clause were white males.101 Consequently, the law required blacks to pass a literacy test before gaining the franchise, whereas whites were exempt.102 The Court reasoned that despite the lack of explicit racial language in the grandfather clause, the purpose of the clause was to circumvent the rights guaranteed by the Fifteenth Amendment.103 Because the Fifteenth Amendment is self-executing, the Supreme Court could render the Oklahoma provision void without congressional action.104

Following this important precedent, the Supreme Court invoked the Fifteenth Amendment in a handful of cases to nullify other practices designed to undermine black suffrage.105 As this line of jurisprudence developed, the Court examined disenfranchisement methods of increasing complexity and sophistication.106 The Court maintained that the Fifteenth Amendment also covered these methods: “The Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race.”107

In 1960, in *Gomillion v. Lightfoot*,108 the Supreme Court applied the Fifteenth Amendment in holding unconstitutional one of the most sophisticated disenfranchisement techniques: racial gerrymandering.109 The Alabama legislature had redrawn the boundaries of the city of Tuskegee, changing its shape from a square to an “uncouth
twenty-eight-sided figure." The effect of this alteration was to remove from the city all but four or five of Tuskegee’s black residents, while retaining every single white resident. In striking down the scheme, the Court reasoned that the special discriminatory treatment of black voters violated the Fifteenth Amendment by denying them their right to vote in the city.

Unlike in later cases, the Court in Gomillion applied only the Fifteenth Amendment to the racial gerrymandering. In Wright v. Rockefeller, the Court used both the Fifteenth and the Fourteenth Amendments in determining that a congressional redistricting was not an unconstitutional gerrymander. A New York statute had redrawn several Manhattan districts, removing minorities from one district and segregating them into another district. While all the Justices agreed that the plaintiffs had stated a constitutional claim, they disagreed on whether the plaintiffs had proved their claim. The dissenters contended that the strangely shaped districts could only be explained in racial terms, while the majority felt that the plaintiffs had failed to meet their burden of proof.

Soon after the Supreme Court decided Wright, Congress passed the Voting Rights Act of 1965, which took its operative language

110 *Id.* at 340.
111 *Id.* at 341.
112 *Id.* at 346. The Court also held that the issue was not a political question, despite the characterization of the redrawing of municipal boundaries as political. *Id.* at 346–47. “While in form this is merely an act redefining metes and bounds, ... the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights.” *Id.* at 347.
113 *Id.* at 346. In his concurrence, Justice Whittaker wrote that the Court should have used the Fourteenth Amendment’s Equal Protection Clause instead of the Fifteenth Amendment to decide this case. *Id.* at 349 (Whittaker, J., concurring). He argued that moving voters from one district to another did not abridge their right to vote, although it did involve a racial segregation in violation of the Equal Protection Clause. *Id.* It is important to note that the Court adopted Justice Whittaker’s reasoning in later cases as it abandoned Fifteenth Amendment adjudication of racial gerrymandering cases. See Shaw v. Reno, 113 S. Ct. 2816, 2826 (1993).
115 *Id.* at 56.
116 *Id.*
117 *Id.; id.* at 58 (Harlan, J., concurring); *id.* at 59–62 (Douglas, J., dissenting).
118 *Id.* at 56–58; *id.* at 59 (Douglas, J., dissenting).
119 *Id.* at 59 (Douglas, J., dissenting).
120 *Id.* at 58.
121 Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1993)). The Act required preclearance of all tests and barriers to voting in certain districts around the country, mostly in the South. Voting Rights Act § 5. Section 2 of the Act prohibited the use of any tests or other procedures designed to discriminate against minority voters. *Id.* § 2. The basis for the Act was the second section of the Fifteenth Amendment, which
directly from the Fifteenth Amendment. The Supreme Court upheld the constitutionality of the Act in *South Carolina v. Katzenbach*, ruling that the Fifteenth Amendment supersedes discriminatory exertions of state power. In that case, South Carolina had desired to change its election laws without following Voting Rights Act procedures. The Court denied South Carolina’s claim, reasoning that Congress had faithfully exercised its enforcement power under the second section of the Fifteenth Amendment.

With the arrival of the Voting Rights Act and the Court’s shift to Fourteenth Amendment adjudication of racial gerrymandering cases, the Fifteenth Amendment ceased to be an effective means of challenging racial vote dilution. In 1980, the Court further marginalized the Amendment by requiring that a plaintiff prove the existence of racially discriminatory intent to prevail in a Fifteenth Amendment challenge. In *City of Mobile v. Bolden*, black citizens challenged the city’s at-large electoral system, charging that it violated the Fifteenth Amendment. In a splintered plurality opinion, Justice Stewart contradicted past interpretations of the Fifteenth Amendment by asserting that it concerned only acts of purposeful discrimination.


Section 2 of the Act provides in pertinent part:

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

Voting Rights Act, § 2(a) (emphasis added); cf. U.S. Const. amend. XV, § 1, supra note 15 (citizens’ right “to vote shall not be denied or abridged . . . on account of race”); see Chill, supra, note 107, at 654.

123 Id. at 325.
124 Id. at 308.
125 Id. at 337; see U.S. Const. amend. XV, § 2, supra note 15.
126 See infra part III.B.


129 Id. at 58 (plurality opinion of Stewart, J.). The plaintiffs also charged that the scheme violated the Equal Protection Clause of the Fourteenth Amendment. Id. The Court required that the plaintiffs show evidence of purposeful discrimination to prevail in this claim. Id. at 66 (plurality opinion of Stewart, J.).

In an at-large electoral system, each candidate runs citywide instead of running for individual wards. Each voter casts ballots for each of the council seats, rather than for just his or her own ward. Because the citywide majority chooses all the candidates, such a system tends to decrease the influence of minority groups. For a further discussion of at-large voting systems, see generally Bott, supra note 35, at 204-07.

130 *Mobile*, 446 U.S. at 62 (plurality opinion of Stewart, J.); see Jordan, supra note 128, at 428. Justice Stewart based his opinion, which only three other justices joined, on creative interpreta-
In response to the *Mobile* decision,\(^{132}\) Congress passed the 1982 amendments to the Voting Rights Act, articulating a results test instead of the Court’s purposeful discrimination test.\(^{133}\) The Supreme Court upheld the amended Act in *Thornburg v. Gingles*,\(^{134}\) putting to rest the *Mobile* notion that purposeful discrimination is a requirement for proving a Voting Rights Act violation.\(^{135}\) The Court has yet to set aside, however, the *Mobile* plurality’s holding that the Fifteenth Amendment applies only to acts of purposeful discrimination.\(^{136}\) The Supreme Court apparently believes that the Fifteenth Amendment is no longer an effective weapon for combating the denial or abridgement of the right to vote, and favors instead the Voting Rights Act and the Equal Protection Clause.\(^{137}\)

### B. Minority Vote Dilution and the Equal Protection Clause

Justice Whittaker’s concurrence in *Gomillion v. Lightfoot* foreshadowed the analysis that would dominate minority vote dilution cases in

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(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

\(^{134}\) 478 U.S. 30 (1986); see infra notes 156–59 and accompanying text.

\(^{135}\) 478 U.S. at 43–44.

\(^{136}\) See *Jordan*, supra note 128, at 392 & nn.6–7.

\(^{137}\) See id. at 392; see also *Shaw v. Reno*, 113 S. Ct. 2816, 2825–26 (1993) (asserting that Fourteenth Amendment review is more appropriate than the Fifteenth Amendment review used by the Court in *Gomillion*); *Voinovich v. Quilter*, 113 S. Ct. 1149, 1158 (1993) (after upholding an Ohio redistricting plan under the Voting Rights Act, the Court finds no need to apply the Fifteenth Amendment to the case).
the years to follow. In his opinion, Justice Whittaker argued that the Court should have used the Equal Protection Clause of the Fourteenth Amendment instead of the Fifteenth Amendment to overturn the racial gerrymander. The Court was reluctant to use the Fourteenth Amendment because it had previously ruled that redistricting issues were nonjusticiable political questions. The Court sidestepped this obstacle by casting the Gomillion dispute as a Fifteenth Amendment voting rights case instead of a Fourteenth Amendment redistricting case. This reasoning, however, persuaded neither Justice Whittaker nor later Court majorities.

Two years after Gomillion, the landmark Baker v. Carr decision obviated the need for such judicial legerdemain. In this case, the Court held that people who were underrepresented because of malapportionment had a cognizable claim under the Equal Protection Clause. The plaintiffs argued that they had been underrepresented because the Tennessee legislature had failed to reapportion districts in over sixty years, despite significant population changes during that period. The Court reasoned that the plaintiffs had a right to vote free of arbitrary impairment by the state, and therefore had standing to sue under the Equal Protection Clause.

In the years following Baker v. Carr, the Supreme Court issued a series of decisions that shaped voting rights jurisprudence under the Equal Protection Clause and formulated the "one person, one vote" standard. The Court also began to use the Equal Protection Clause to adjudicate claims of racial vote dilution. The Court moved further

\[138\text{ See }364\text{ U.S. }339, 349 (1960) \text{(Whittaker, J., concurring); see also Shaw, 113 S. Ct. at 2825-26.}\]
\[139\text{ Gomillion, }364\text{ U.S. at 349 (Whittaker, J., concurring).}\]
\[140\text{ Id. at 346; Colegrove v. Green, }328\text{ U.S. 549 (1946).}\]
\[141\text{ See Claude, supra note 71, at 152.}\]
\[142\text{ Gomillion, }364\text{ U.S. at 349 (Whittaker, J., concurring); see Shaw, 113 S. Ct. at 2825-26 (1998).}\]
\[143\text{ 369 U.S. 186 (1962).}\]
\[144\text{ Id. at 209.}\]
\[145\text{ Id. at 192.}\]
\[146\text{ Id. at 208.}\]
\[147\text{ See, e.g., Kirkpatrick v. Preisler, }394\text{ U.S. 526 (1969) (holding that Equal Protection Clause requires states to make good faith effort to achieve precise mathematical equality in population of each congressional district); Reynolds v. Sims, }377\text{ U.S. 533 (1964) (holding that Equal Protection Clause requires both houses of a state legislature to be apportioned on a per capita basis); Gray v. Sanders, }372\text{ U.S. 368 (1963) (holding that county-unit system violates equal protection right to have votes be of equal weight).}\]
\[148\text{ See, e.g., White v. Regester, }412\text{ U.S. 755 (1973) (holding that multimember districts violate Equal Protection Clause where they tend to dilute the voting strength of minorities); Whitcomb v. Chavis, }403\text{ U.S. 124 (1971) (holding that evidence of discriminatory result or intent is necessary to prevail in equal protection claim of minority vote dilution).}\]
away from its Fifteenth Amendment analysis in *Gomillion* and *Wright*, until finally, in 1977, it held that some forms of racial gerrymandering did not violate the Fourteenth Amendment.

In *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, the Court held that a redistricting authority could use racial criteria in drawing districts. In this case, a New York redistricting law split a Hasidic Jewish community in order to create nonwhite majorities in three state senate districts. Members of the Hasidic community sued the state, claiming that this race-based redistricting violated their Fourteenth and Fifteenth Amendment rights. The Court held in favor of the state, ruling that the legislature could create minority-majority districts in order to ensure that these minorities were able to elect candidates of their choice.

After Congress amended the Voting Rights Act in 1982, the Court promulgated a three-pronged test for minority vote dilution cases. In *Thornburg v. Gingles*, the Court held that members of a minority group claiming vote dilution by redistricting had to prove three threshold conditions: (1) the minority group must be large enough and compact enough to constitute a majority in a single-member district, (2) the minority group must be politically cohesive, and (3) the white majority must vote sufficiently as a bloc to usually be able to defeat the minority candidate. It was against this backdrop that the Supreme Court decided *Shaw v. Reno*.

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151 See *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) (plurality opinion) [hereinafter *UJO*].
152 *Id.* at 162 (plurality opinion).
153 *Id.* at 152 (plurality opinion).
154 *Id.* (plurality opinion).
155 *Id.* at 162, 158 (plurality opinion). The Court equated “candidates of their choice,” which it drew from section 2 of the Voting Rights Act, with candidates of the same race as the voters. *See id.* at 165. The Court also held that it was reasonable for the state to draw a district with a supermajority (65%) of black citizens. *Id.* at 164. According to the Court, a 65% supermajority was needed for a black representative to be elected. *Id.* at 162. Assuming that white candidates need only just over 50% to win, the Court’s racial logic suggests that 65 blacks are the equivalent of 50 whites, or that a black citizen is worth 77% of a white citizen. Although this is numerically greater than the three-fifths ratio in the original Constitution, it is by no means a valid standard of equality. *See U.S. CONST. art. I, § 2, cl. 3 (before ratification of the Fourteenth Amendment).*
158 *Id.* While the *Thornburg* decision was limited to multimember districts, *id.* at 46 n.12, the Court later extended this test to single-member districts. *See Grieve v. Emison*, 113 S. Ct. 1075, 1084 (1993).
IV. Shaw v. Reno

In Shaw v. Reno, the Supreme Court held that the plaintiffs had successfully stated an equal protection claim when they alleged that a redistricting was so irregular that it could only be viewed as an effort to segregate voters by race.\textsuperscript{160} The district at issue, North Carolina's Twelfth Congressional District, was redrawn to contain a black majority.\textsuperscript{161} To accomplish this goal, the legislature had drawn the district in an irregular, serpentine shape stretching for over 160 miles.\textsuperscript{162} The Court held that District 12 was so irregularly shaped that it could only be seen as an attempt to segregate races for electoral purposes.\textsuperscript{163}

A. The Facts of the Case

Population changes revealed by the 1990 census entitled North Carolina to an additional seat in the United States House of Representatives.\textsuperscript{164} When the legislature redrew the electoral map, only one district had a black majority.\textsuperscript{165} Because the population of North Carolina was approximately twenty percent black,\textsuperscript{166} the U.S. Attorney General believed the legislature could have and should have drawn two districts with black majorities.\textsuperscript{167} In response, the legislature enacted a revised plan that included two majority-black districts: District 1, in the eastern part of the state,\textsuperscript{168} and District 12, in the north-central region of the state.\textsuperscript{169} The latter district, which was the subject of the Shaw claim, winds for about 160 miles along the Interstate 85 corridor.\textsuperscript{170} It slices across ten counties and divides numerous towns in its quest to include enough black neighborhoods to constitute a majority-black district.\textsuperscript{171} At times, southbound drivers on Interstate 85 are in a differ-

\textsuperscript{160} Id. at 2832.
\textsuperscript{161} Id. at 2820.
\textsuperscript{162} Id. at 2820–21.
\textsuperscript{163} Id. at 2832.
\textsuperscript{164} Id. at 2819.
\textsuperscript{165} Id.
\textsuperscript{166} Id. at 2820. This figure represents the voting-age population. The remainder is 78% white, 1% Native American, and 1% Asian. Id.
\textsuperscript{167} Id. at 2820. Section 5 of the Voting Rights Act, which requires federal authorization for changes to a state's voting procedures, applied to 40 of North Carolina's 100 counties. Id.; 42 U.S.C. § 1973c.
\textsuperscript{168} The Court described District 1, which was not at issue in Shaw, as a "Rorschach inkblot test." Shaw, 113 S. Ct. at 2820 (quoting Shaw v. Barr, 808 F. Supp. 461, 476 (E.D.N.C. 1992) (Voorhees, C.J., concurring in part and dissenting in part), rev'd sub nom. Shaw v. Reno, 113 S. Ct. 2816 (1993)).
\textsuperscript{169} Shaw, 113 S. Ct. at 2820. See map supra p. 338.
\textsuperscript{170} Shaw, 113 S. Ct. at 2820–21.
\textsuperscript{171} See id. at 2821.
ent district from northbound drivers; in the next county, these districts "change lanes."172

The plaintiffs were five voters affected by this redistricting, two from the new Twelfth District and three from a neighboring district.173 They sued state and federal officials under both the Equal Protection Clause and the Fifteenth Amendment.174 The district court dismissed their action against the state officials for failure to state a constitutional claim.175 In a 2–1 decision, the district court held that the plaintiffs’ Fifteenth Amendment claim was subsumed within their equal protection claim.176 The court then ruled that the decision in United Jewish Organizations of Williamsburgh, Inc. v. Carey barred their equal protection claim.177 The court interpreted UJO as holding that a redistricting scheme only violates white voters’ rights if it is “adopted with the purpose and effect of discriminating against white voters . . . on account of their race.”178 The court reasoned that because the legislature’s purpose was to comply with the Voting Rights Act, and because the plan did not lead to underrepresentation of white voters statewide, the plaintiffs had no equal protection claim.179

In a separate opinion, Chief Judge Voorhees interpreted the UJO plurality as authorizing racial redistricting only when the state used traditional districting principles like compactness and contiguity.180 Because the legislature had failed to follow these principles, there was sufficient probability of unlawful intent to defeat the motion to dismiss.181 The plaintiffs appealed to the Supreme Court, which noted probable jurisdiction.182

B. The Majority Opinion

The Supreme Court in Shaw reversed the district court’s decision, holding that the plaintiffs had stated a cognizable equal protection

173 Shaw, 113 S. Ct. at 2821.
175 Id. at 468. The court dismissed the plaintiffs’ claim against the federal officials because of a lack of subject matter jurisdiction under the Voting Rights Act. Id. at 466–67.
176 Id. at 468–69. The court also found no support for the plaintiffs’ claim that race-based gerrymandering is prohibited by Article I, §§ 2 and 4 of the Constitution, or by the Privileges and Immunities Clause of the Fourteenth Amendment. Id.
177 Id. at 472; see UJO, 430 U.S. 144 (1977) (plurality opinion).
178 Shaw, 808 F. Supp. at 472.
179 Id. at 472–73.
180 Id. at 475–77 (Voorhees, C.J., concurring in part and dissenting in part).
181 Id. at 477 (Voorhees, C.J., concurring in part and dissenting in part).
claim. The majority opinion started by examining the background of voting rights in general and the various ways in which states have denied or abridged these rights in the past. After the Fifteenth Amendment made it unconstitutional for a state to deny or abridge these rights based on race, states began to use various ostensibly race-neutral devices—such as racial gerrymandering—to circumvent the Amendment. In response, the Court decided that such schemes gave rise to a claim under the Equal Protection Clause when they actually diluted minority voting strength.

In Shaw, the plaintiffs did not claim that they had suffered dilution of their voting strength. Instead, they argued that the redistricting was so irregular that it could only be viewed as an effort to segregate voters by race. The Court agreed, holding that the Equal Protection Clause governed their claim.

To reach this conclusion, the Court first compared two different equal protection standards: one triggered by statutes that explicitly classify by race, and the other by statutes that appear race-neutral but are "unexplainable on grounds other than race." As examples of the latter variety, the Court reviewed cases decided under the Fifteenth Amendment instead of the Equal Protection Clause, such as Guinn and Gomillion. The Court noted that Justice Whittaker's concurrence in Gomillion suggested that the Equal Protection Clause was more appropriate to the case than was the Fifteenth Amendment. The Court also noted that it had relied on Gomillion in subsequent Four-

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184 Id. at 2822-23.
185 U.S. CONST. amend. XV, supra note 15.
186 Shaw, 113 S. Ct. at 2822-23.
188 Id. at 2824.
189 Id.
190 Id.
191 Id. at 2825 (citing Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).
192 Id. at 2825-26.
193 Guinn v. United States, 238 U.S. 347 (1915); see supra notes 98-104 and accompanying text.
194 Gomillion v. Lightfoot, 364 U.S. 339 (1960); see supra notes 108-13 and accompanying text.
195 Shaw, 113 S. Ct. at 2826; Gomillion, 364 U.S. at 349 (Whittaker, J., concurring).
teenth Amendment cases. The Shaw majority concluded that Gomillion therefore stood for the principle that redistricting for the purpose of segregating voters by race required close scrutiny under the Equal Protection Clause.

The Court then considered the difficulties of determining whether a redistricting plan purposefully segregated voters by race. In Wright v. Rockefeller, for example, each Justice agreed that the plaintiffs had a constitutional claim in alleging that the redistricting had segregated voters by race. The Justices disagreed, however, on whether the plaintiffs had proven their claim; the majority felt that the plaintiffs had failed to establish that the districts were actually drawn along racial lines, while the dissenters maintained that no other explanation was possible. The Shaw Court concluded that the difficulty in proving a racial gerrymander does not remove it from equal protection scrutiny. Furthermore, the Court suggested that in some instances, proving an unlawful racial gerrymander would not be difficult. If a redrawn district was so irregular that it could not be explained as anything other than an attempt to segregate voters, a court could find that it was an unlawful racial gerrymander. The Court concluded that “appearances do matter” in redistricting cases; districts that concentrate minorities are suspect when legislatures draw them without regard to traditional principles of compactness, contiguity, and respect for political subdivisions.

The Court next discussed the equal protection standard appropriate to racial gerrymandering cases. In cases where state legislation expressly distinguishes among citizens by race, the Clause requires that the law be “narrowly tailored to further a compelling government interest.” The Court stated that this standard also applies to statutes that are ostensibly race neutral but that cannot be explained on other than racial grounds. In other vote dilution cases, however, the Court

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196 Shaw, 113 S. Ct. at 2826; see, e.g., Whitcomb v. Chavis, 403 U.S. 124, 149 (1971).
197 113 S. Ct. at 2826.
198 Id.
199 376 U.S. 52 (1964); see supra notes 114–20 and accompanying text.
200 Shaw, 113 S. Ct. at 2826; see Wright, 376 U.S. at 56; id. at 58 (Harlan, J., concurring); id. at 59–62 (Douglas, J., dissenting).
201 Shaw, 113 S. Ct. at 2826; see Wright, 376 U.S. at 56–58; id. at 59 (Douglas, J., dissenting).
202 113 S. Ct. at 2826.
203 Id.
204 Id. (citing Gomillion, 364 U.S. 339, 341 (1960)).
205 Id. at 2827.
206 Id. at 2828–30.
207 Id. at 2825.
208 Id.
has applied a different standard: the plaintiffs had to prove that "the challenged practice has the purpose and effect of diluting a racial group's voting strength." The Shaw majority distinguished these cases by noting that at-large and multimember voting schemes do not classify voters by race. Classifying citizens by race warrants a different equal protection analysis because it threatens special harms.

It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. . . . When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.

The Shaw majority also distinguished this case from UJO, which it believed both the district court and the dissenters had misinterpreted. The plaintiffs in UJO claimed that the redistricting at issue had diluted their voting strength. Unlike the Shaw plaintiffs, the UJO plaintiffs did not allege that the plan was so irregular that it could only be understood as an attempt to segregate voters by race.

Finally, the Shaw Court held that satisfaction of Voting Rights Act requirements did not obviate the need for constitutional scrutiny of the redistricting plan. The Court based this conclusion on section 5 of the Act and on previous caselaw. The defendant state officials


210 113 S. Ct. at 2828.

211 Id.

212 Id. at 2827. The majority in Shaw disagreed sharply with the dissenters, who did not make this distinction. Id. at 2828; cf. id. at 2840 (White, J., dissenting); id. at 2847–48 (Souter, J., dissenting).

213 430 U.S. 144 (1977) (plurality opinion).

214 Shaw, 113 S. Ct. at 2829; see Shaw v. Barr, 808 F. Supp. at 472–73; Shaw v. Reno, 113 S. Ct. at 2837–38 (White, J., dissenting); id. at 2847–48 (Souter, J., dissenting).

215 See UJO, 430 U.S. at 152 (plurality opinion).

216 See Shaw, 113 S. Ct. at 2829; UJO, 430 U.S. at 152 (plurality opinion).

217 Shaw, 113 S. Ct. at 2831.

contended that the Act required the plan to avoid dilution of black voting strength, but the Court declined to resolve this issue.\textsuperscript{219} Instead, the Court limited its holding to the recognition of the plaintiffs' claim that the redistricting was so irregular that it could only be viewed as an effort to segregate voters by race.\textsuperscript{220} This claim, the Court concluded, warranted the same close judicial scrutiny appropriate to other racial classifications.\textsuperscript{221}

\textbf{C. The Dissenting Opinions}

The four remaining Justices each filed dissenting opinions.\textsuperscript{222} While each dissenter agreed that the Equal Protection Clause was the proper tool for analyzing racial gerrymandering cases, they all rejected the majority's application of a standard that differed from the one used in other vote dilution cases.\textsuperscript{223} Justice White began his opinion by stating that the Court had previously considered two different types of voting rights claims that are cognizable under the Equal Protection Clause.\textsuperscript{224} The first type arises from the outright deprivation of voting rights.\textsuperscript{225} Because this condition was not found in the Shaw case, Justice White declined to examine it further.\textsuperscript{226} The second type of voting rights claim involves practices that diminish the political influence of particular groups.\textsuperscript{227} To prove this type of claim, the plaintiffs must show that the challenged action has both the purpose and the effect of diminishing their influence.\textsuperscript{228} Justice White then argued that racial gerrymandering claims belong to this latter type of claim.\textsuperscript{229}

According to Justice White, this argument found support in the \textit{UJO} decision.\textsuperscript{230} Moreover, he asserted that the facts of this case were

\textsuperscript{219} Shaw, 113 S. Ct. at 2831.
\textsuperscript{220} Id. at 2832.
\textsuperscript{221} Id.
\textsuperscript{222} Id. at 2819; id. at 2834 (White, J., dissenting); id. at 2843 (Blackmun, J., dissenting); id. (Stevens, J., dissenting); id. at 2845 (Souter, J., dissenting). In addition to filing their own dissents, Justices Blackmun and Stevens also joined Justice White’s dissent. Id. at 2834 (White, J., dissenting).
\textsuperscript{223} Id. at 2834 (White, J., dissenting); id. at 2843 (Blackmun, J., dissenting); id. (Stevens, J., dissenting); id. at 2845 (Souter, J., dissenting).
\textsuperscript{224} Id. at 2834 (White, J., dissenting).
\textsuperscript{225} Id. (White, J., dissenting); see, e.g., Guinn v. United States, 238 U.S. 347 (1915) (grandfather clause used to disenfranchise black voters).
\textsuperscript{226} 113 S. Ct. at 2834 (White, J., dissenting).
\textsuperscript{227} Id. (White, J., dissenting); see, e.g., City of Mobile v. Bolden, 446 U.S. 55 (1980) (plaintiffs claimed that at-large voting system diminished their political influence).
\textsuperscript{228} Shaw, 113 S. Ct. at 2834 (White, J., dissenting).
\textsuperscript{229} Id. at 2834–36 (White, J., dissenting).
\textsuperscript{230} Id. at 2837 (White, J., dissenting); see \textit{UJO}, 430 U.S. 144 (1977) (plurality opinion).
analogous to the facts in UJO and that the Court should have followed the reasoning of that case. Justice White argued that because North Carolina did not seek to create District 12 for the purpose of diminishing white voters’ political influence, the plaintiffs did not have a vote dilution claim under the Equal Protection Clause.

Justice White also noted that Gomillion, upon which the majority relied for its equal protection analysis, involved a voters’ rights deprivation claim under the Fifteenth Amendment. This distinction eviscerated the precedential value that the majority ascribed to it. Justice White argued that Gomillion did not involve the segregation of a racial group for voting purposes; instead, the case had stemmed from an effort to deprive black voters of “valuable municipal services.” Similarly, in Shaw, “no racial group can be said to have been ‘segregated’ . . . .”

Justices Blackmun and Stevens filed considerably shorter dissents that primarily echoed Justice White’s opinion. Justice Souter issued a more substantial dissent, arguing that race-based redistricting did not always constitute vote dilution. He then explained why vote dilution cases deserve a more lenient equal protection scrutiny, arguing that race is a legitimate consideration in redistricting under the Voting Rights Act. Justice Souter concluded by criticizing the majority for creating a new cause of action for racial gerrymandering claims.

V. APPLYING THE FIFTEENTH AMENDMENT TO RACIAL GERRYMANDERING

While the Shaw Court vehemently decried racial gerrymandering as a form of “political apartheid,” the Court failed to promulgate a workable means for removing this practice from our political system. The Court opened a Pandora’s box when it insisted that the Equal Protection Clause was a better tool than the Fifteenth Amendment for

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231 113 S. Ct. at 2834 (White, J., dissenting); UJO, 430 U.S. 144 (1977) (plurality opinion) (rejecting claim that the creation of a majority-minority district violated the Constitution).
232 Shaw, 113 S. Ct. at 2838 (White, J., dissenting).
233 Id. at 2839 (White, J., dissenting); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (holding that redrawing of city boundaries segregated voters by race in violation of the Fifteenth Amendment); see supra notes 108–13 and accompanying text.
234 Shaw, 113 S. Ct. at 2839 (White, J., dissenting).
235 Id. at 2838–39 (White, J., dissenting).
236 Id. at 2840 n.7 (White, J., dissenting).
237 Id. at 2843 (Blackmun, J., dissenting); id. (Stevens, J., dissenting).
238 Id. at 2845–46 (Souter, J., dissenting).
239 Id. at 2846–48 (Souter, J., dissenting).
240 Id. at 2848–49 (Souter, J., dissenting).
241 Id. at 2827.
adjudicating racial gerrymandering claims.\textsuperscript{242} To an already complicated process, the \textit{Shaw} decision added further questions such as which equal protection standard a court should use and how the standard should be applied. The Court also had to synthesize conflicting prior opinions. Had the Court chosen to consider the plaintiffs' \textit{Fifteenth Amendment} claim instead, these problems and questions would have become moot.

Contrary to Justice Souter's claims,\textsuperscript{243} the majority did not create a new cause of action under the Equal Protection Clause for racial gerrymandering.\textsuperscript{244} The Court instead noted that there are two different equal protection standards for voting rights cases: one for statutes based on racial classification, and the other for voter dilution cases.\textsuperscript{245} The former includes not only laws that explicitly classify by race, but also classifications that are ostensibly race neutral but that can only be explained as being racially motivated.\textsuperscript{246} The \textit{Shaw} majority held that redistricting plans that are so irregular that they can only be viewed as attempts to segregate voters fall into the racial classification category.\textsuperscript{247} As with explicitly race-based statutes, these gerrymanders warrant close judicial scrutiny.\textsuperscript{248} The Court's holding distinguished racial gerrymandering from other vote dilution claims where the plaintiffs must prove both a discriminatory purpose and a result of minority voting strength dilution.\textsuperscript{249} These other claims concern practices that do not classify voters on the basis of race, such as at-large voting systems or multimember districts.\textsuperscript{250} Rather than creating a new equal protection standard for racial gerrymandering cases,\textsuperscript{251} the Court simply shifted racial gerrymandering claims from the voter dilution category to the racial classification category.

In his dissent, Justice White uncovered the fundamental flaw in the Court's reasoning: that the majority incorrectly relied on \textit{Gomillion} for its equal protection analysis.\textsuperscript{252} Justice White pointed out that \textit{Gomillion} concerned a claim brought under the \textit{Fifteenth Amendment},

\textsuperscript{242}See id. at 2826.
\textsuperscript{243}Id. at 2848 (Souter, J., dissenting).
\textsuperscript{244}See id. at 2824–25.
\textsuperscript{245}Id. at 2824.
\textsuperscript{246}Id. at 2824–25.
\textsuperscript{247}Id. at 2825.
\textsuperscript{248}Id.
\textsuperscript{249}Id. at 2828.
\textsuperscript{251}See Shaw, 113 S. Ct. at 2848 (Souter, J., dissenting).
\textsuperscript{252}See id. at 2839 (White, J., dissenting); id. at 2825–26 (citing Gomillion v. Lightfoot, 364 U.S. 399 (1960)).
rather than under the Equal Protection Clause. While admitting that the Gomillion Court had decided the case on Fifteenth Amendment grounds, the Shaw majority noted that the concurring opinion would have preferred to use the Fourteenth Amendment to adjudicate the claim. The Shaw Court also cited other Fourteenth Amendment decisions that had relied on the Gomillion holding. Making a considerable logical leap, the majority concluded that "Gomillion thus supports [the plaintiffs'] contention that district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause . . . ." This conclusion is not supported by the Gomillion decision.

Perhaps the Court’s confusion stemmed from the Gomillion opinion itself. Justice Frankfurter described the plaintiffs’ claim in Gomillion as one that alleged a denial of the right to vote under the Fifteenth Amendment: "The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, inter alia, the right to vote in municipal elections." But the Fifteenth Amendment covers more than just the denial of the right to vote. "The right of citizens of the United States to vote shall not be denied or abridged . . . on account of race . . . ." The word "abridge" is defined as "to diminish (as a right) by reducing." Had the Gomillion Court held that the racial gerrymander abridged the voting rights of black citizens, the Court’s Fifteenth Amendment analysis may then have been more persuasive.

As noted above, gerrymandering abridges the rights of the affected voters by removing a portion of their ability to select the representatives of their choice. When a legislature redraws districts along

253 See id. at 2839 (White, J., dissenting); Gomillion, 364 U.S. at 341; see also supra notes 108–13 and accompanying text.
254 Shaw, 113 S. Ct. at 2825–26; Gomillion, 364 U.S. at 341; id. at 349 (Whittaker, J., concurring).
255 Shaw, 113 S. Ct. at 2826.
256 Id.
257 See Gomillion, 364 U.S. at 346 (holding that redrawing of city boundaries along racial lines violated the Fifteenth Amendment). But see id. at 349 (Whittaker, J., concurring) ("It seems to me that the decision should be rested not on the Fifteenth Amendment, but rather on the Equal Protection Clause of the Fourteenth Amendment to the Constitution.").
258 Gomillion, 364 U.S. at 340, 341, 347.
259 Id. at 341.
260 U.S. Const. amend XV, § 1 (emphasis added); see supra note 15.
261 Webster’s Third New International Dictionary, supra note 32, at 6. Congress did not discuss the specific meaning of the term during its consideration of the Amendment. Mathews, supra note 79, at 38.
262 See supra notes 61–65 and accompanying text.
263 See Polsby & Popper, supra note 6, at 304; see also Gomillion, 364 U.S. at 347. But see
racial lines, it abridges the rights of voters based on their race. As the Court declared in *Reynolds v. Sims*, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

The Equal Protection Clause overlaps the Fifteenth Amendment in that both provisions guarantee equal treatment of citizens based on race. They are not, however, interchangeable; if they were, there would have been no need to pass the Fifteenth Amendment after the Fourteenth Amendment had been ratified. While the Fourteenth Amendment was passed for the purpose of federalizing civil rights, the Fifteenth was created with the much narrower purpose of guaranteeing suffrage to all men regardless of race. Before subsuming Fifteenth Amendment claims into equal protection claims, a court should first consider that the Fifteenth Amendment was created specifically to protect the right to vote from racially discriminatory practices.

Using the Fifteenth Amendment to adjudicate racial gerrymandering claims would obviate the need to juggle the different standards of equal protection analysis. Instead of having to distinguish between race classification claims and voter dilution claims, a court would only need to determine whether the plaintiffs' voting rights were "denied or abridged . . . on account of race . . . ."

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265 377 U.S. at 555.
266 *Compare* U.S. CONST. amend. XIV, § 1, supra note 15 ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws") with U.S. CONST. amend. XV, § 1, supra note 15 ("The right of citizens . . . to vote shall not be denied or abridged . . . on account of race . . . ."). In fact, the origins of the Fifteenth Amendment lay partly in the Fourteenth Amendment. See *Stephenson*, supra note 69, at 49.
272 See *Guinn v. United States*, 238 U.S. 347, 361 (1915) (Fifteenth Amendment was "adopted to destroy" conditions preventing equality of suffrage); *Mathews*, supra note 79, at 20-21; *Stephenson*, supra note 69, at 50-51.
273 See *Shaw*, 113 S. Ct. at 2823, 2824-25; *id.* at 2834 (White, J., dissenting).
274 U.S. CONST. amend. XV, § 1; *see supra* note 15.
required to show discriminatory intent; they could meet their burden of proof by showing that the statute, though ostensibly race neutral, could not be explained on grounds other than race.\textsuperscript{274}

Applying the Fifteenth Amendment to the facts in \textit{Shaw v. Reno} would have returned the same result without the complicated holding. The plaintiffs alleged that their Fifteenth Amendment right to vote had been abridged by the North Carolina legislature when it redrew the congressional districts along racial lines.\textsuperscript{275} In creating District 12, the legislature packed black voters from ten counties into one snake-like district in order to create a black majority.\textsuperscript{276} By taking away a portion of the voters' ability to select their representatives, the legislature abridged their right to vote.\textsuperscript{277} Because the North Carolina legislature drew this redistricting along racial lines, the legislature abridged the plaintiffs' right to vote on account of race, violating the express language of the Fifteenth Amendment.\textsuperscript{278} Furthermore, by removing black voters from the surrounding districts and packing them into District 12, the legislature limited the amount of influence that these

\textsuperscript{274} See \textit{Shaw}, 113 S. Ct. at 2825; Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960); \textit{Guinn}, 238 U.S. at 363. But see \textit{City of Mobile v. Bolden}, 446 U.S. 55, 65 (1980) (plurality opinion). The \textit{Mobile} Court, contradicting decades of precedent, held that the Fifteenth Amendment required a showing of discriminatory intent to find a violation. \textit{Id.}; see \textit{supra} notes 129-37 and accompanying text. The Supreme Court has yet to set aside the \textit{Mobile} plurality's opinion concerning the Fifteenth Amendment. See \textit{Jordan}, \textit{supra} note 128, at 392 & nn.6-7. Because the opinion failed to get a majority of five Justices, however, it lacks precedential weight. See \textit{Hertz v. Woodman}, 218 U.S. 205, 213 (1910). The Court in \textit{Hertz} stated:

Under the principles of this court ... an affirmance by an equally divided court is between the parties a conclusive determination and adjudication of the matter adjudged, but the principles of law involved not having been agreed upon by a majority of the court sitting prevents this case from becoming an authority for the determination of other cases, either in this or in inferior courts.

\textit{Id.}


\textsuperscript{276} \textit{Shaw}, 113 S. Ct. at 2820-21; see \textit{Voinovich v. Quilter}, 113 S. Ct. 1149, 1155 (1993); \textit{supra} notes 41-44 and accompanying text.

\textsuperscript{277} See \textit{Polsby & Popper}, \textit{supra} note 6, at 304.

\textsuperscript{278} See U.S. Const. amend. XV, § 1. \textit{Supra} note 15. Contrary to Justice White's opinion, it is irrelevant that white voters are still proportionally represented statewide. See \textit{Shaw}, 113 S. Ct. at 2838 (White, J., dissenting). The white voters of District 12 are not represented by the white representatives of the other districts, as these representatives are not accountable to the District 12 voters. Similarly, black voters in the ten white-majority districts are not represented by the black representatives in Districts 12 and 1. It does not matter whether there is the same proportion of black representatives as there are black voters. The important issue in this case is whether the legislature has abridged the power of voters—both black and white—to select the representatives of their choice. As this Note has argued, the legislature has used race to abridge the power of voters to select their representatives. \textit{See supra} notes 260-65 and accompanying text.
voters could wield in Congress. Where they might have influenced the election outcomes in several districts, they can now influence the result only in the Twelfth.

VI. CONCLUSION

The North Carolina legislature violated the Fifteenth Amendment rights of all the voters affected by the racial gerrymander—black and white. Using the Fifteenth Amendment to analyze racial gerrymandering claims would end the confusion of different equal protection standards and replace it with a simple solution that would end the harms created by racially discriminatory redistricting. By treating racial gerrymandering as an unconstitutional abridgement of the right to vote, the Court would further the principles of racial equality set forth by the Framers of the Fifteenth Amendment.

279 See supra notes 41–44 and accompanying text.
280 See supra notes 41–44 and accompanying text.