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LAW REVIEW

"GERRYMANDERED"

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The right to vote, though central to citizenship in any liberal democracy, remains among the most unstable and insecure rights in the United States. Ironic for a country founded on "the consent of the governed"[1] that the right to vote at the outset would not fully extend to all citizens by virtue of their citizenship alone.[2] In fact, the right to vote would not be enshrined in the United States Constitution[3] until after the bloodiest war in American history—the Civil War. Even after the Civil

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[1] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[2] Neither the original Constitution nor the Bill of Rights expressly secured the right to vote. The "right to vote" made its first appearance in the Fourteenth Amendment, section 2—not as a stand-alone express right to all citizens, but as a punitive provision to reduce a state's representation in Congress if the state disenfranchised male citizens aged twenty-one or older. Notably, the age, gender, and even citizenship components of section 2 were listed as contingent features of the "right to vote." *See* U.S. CONST. amend. XIV, § 2; *see also* Daniel R. Correa, *The Slavery Clause and Criminal Disenfranchisement: How the Thirteenth Amendment Informs the Debate on Crime-Based Franchise Restrictions*, 53 LOY. U. CHI. L. J. 89, 96–97 & nn.24–25 (2021).

[3] The Fifteenth Amendment, unlike section 2 of the Fourteenth Amendment, directly tied "the right to vote" to citizenship: "*The right of citizens* of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1 (emphasis added).

War, the right did not extend to all citizens, as states regularly disenfranchised women,[4] adults under the age of twenty-one (even if at eighteen they could be drafted to fight and die for their country),[5] and people who could not afford to pay a poll tax,[6] regardless of citizenship. Constitutional amendments mostly ended express state-disenfranchisement practices based on race, gender, age, and ability to pay; but today, disenfranchisement due to any criminal conviction (even if unrelated to voting)[7]—a practice that has disenfranchised an estimated 5.17 million Americans[8]—deprives citizens of their political efficacy. Indeed, the right to vote in the United States seems precarious.

Even with the right to vote vested in individual citizens, politicians continue to manipulate the electoral system to skew democratic outcomes in the dominant party's favor. Strategic or inadequate polling locations,[9] and disparate early voting

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[4] In Minor v. Happersett, 88 U.S. 162, 176 (1874), the Supreme Court rejected the plaintiff's claim that the Fourteenth Amendment's Equal Protection Clause vested her as a citizen with a right to vote equal to male citizens. In 1920 (52 years after the Fourteenth Amendment was ratified), the Nineteenth Amendment secured for women the right to vote: "*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 sex." U.S. CONST. amend. XIX (emphasis added).

[5] On the heels of the Vietnam War and civil discontent back home, and 103 years after the Fourteenth Amendment was ratified, states ratified the Twenty-Sixth Amendment: "*The right of citizens* of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or by any state on account of age." U.S. CONST. amend. XXVI, § 1 (emphasis added).

[6] Not long after states ratified the Fifteenth Amendment, former slave states ramped up voting restrictions to disenfranchise black citizens, erecting hurdles like property requirements, literary tests, and poll taxes to fence out black voters. *See* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 164 (W. W. Norton & Company 2020) ("By the time disenfranchisement had been completed in the early twentieth century, African Americans' right to vote, enshrined in the Constitution in 1870, had been eliminated throughout the old Confederacy as well as in Oklahoma and Delaware."). The Twenty-Fourth Amendment, ratified 94 years after the Fifteenth Amendment, ended poll taxes for federal elections: "*The right of citizens* to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax." U.S. CONST. amend. XXIV, § 1 (emphasis added). The amendment, however, did not invalidate poll taxes for state elections. The United States Supreme Court eventually held poll taxes in state elections unconstitutional in 1966 (ninety-six years after states ratified the Fifteenth Amendment); *see also* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666–67 (1966).

[7] In Richardson v. Ramirez, 418 U.S. 24, 54 (1974), the Supreme Court held lifetime felony disenfranchisement laws do not violate the Fourteenth Amendment's Equal Protection Clause, pointing to section 2 of the Fourteenth Amendment for support, as it made an exception to its disenfranchisement penalty for "participation in rebellion, *or other crime*.") (emphasis added).

[8] Chris Uggen et al., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, THE SENTENCING PROJECT (Oct. 30, 2020), https://www.sentencingproject.org/app/uploads/2022/08/locked-out-2020.pdf.

[9] Valencia Richardson, *Voting While Poor: Reviving the 24th Amendment and Eliminating the Modern-Day Poll Tax*, 27 GEO. J. POVERTY L. & POL'Y 451, 460, 468 (2020) (discussing the negative impact on low-income voters of polling locations closing in rural areas and consolidating polling locations in urban areas); League of Women Voters of Ohio v. Brunner, 548 F.3d 463, 477–79 (6th Cir. 2008) (holding that plaintiffs pleaded a valid equal protection violation claim based on Ohio's inadequate voting machine allocation at polling places, leading to long wait times of up to twelve hours, inadequate poll-worker training, and misuse of provisional ballots, among other electoral deficiencies).

deadlines[10] provide a few examples. These practices often achieve vote attrition in the dominant party's favor. But when it comes to skewing electoral outcomes, the gerrymander arguably takes the cake as the most pernicious, and certainly most enduring, vote manipulation device available to politicians.

I. WHAT IS A GERRYMANDER?

The notorious gerrymander gets its name from Elbridge Gerry, though its practice predates him.[11] Gerry was a signatory to the Declaration of Independence and the Articles of Confederation following the Revolutionary War, though he did not sign the Constitution because it lacked a bill of rights.[12] In 1812, while serving as the governor of Massachusetts, Gerry proposed redistricting state senate districts to thwart anticipated Federalist Party political gains in the state.[13] Political opponents decried the redistricting plan as overly partisan, pointing to one redrawn district shaped like a salamander.[14] The salamander-like configuration was designed to pack as much Federalist Party voting power as possible into that district.[15] The remaining districts were drawn to ensure Gerry's party—the Democratic-Republican Party—obtained more senate seats.[16] Gerry's plan worked.[17] In Massachusetts's 1812 election, the Democratic-Republican Party maintained control of the state senate, despite the Federalist Party's dominance over the House of Representatives and governorship.[18]

So, gerrymandering is "[t]he practice of dividing a geographical unit into electoral districts, often of highly irregular shape, to give one political party an

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[10] *See* Note, *It's About Time (Place and Manner): Why and How Congress Must Act to Protect Access to Early Voting*, 128 Harv. L. Rev. 1228, 1230–1231 (discussing the negative effects of early-voting restrictions, such as low voter turnout due, in part, to long lines at the polls on election day); *see also* Obama v. Husted, 697 F.3d 423, 426, 437 (6th Cir. 2012) (affirming a preliminary injunction against an Ohio statute that ended early voting for non-military voters the Friday before Election Day, but extended early voting to military voters to the Monday before Election Day, since a significant number of voters—disproportionately specifically female, elderly, lower-income, and black—would be precluded from voting).

[11] *See* Vieth v. Jubelirer, 541 U.S. 267, 274 (2004) (describing the history of partisan efforts to minimize opponents' political power by manipulating political jurisdictions, tracing such efforts to Pennsylvania colony in the early 18th century).

[12] Michael Kasper, *The Almost Rise and Not Quite Fall of the Political Gerrymander*, 27 N. ILL. U. L. REV. 409, 411 (2007).

[13] *See id.*; *see also* Paul V. Niemeyer, *The Gerrymander: A Journalistic Catch-Word or Constitutional Principle? The Case in Maryland*, 54 MD. L. REV. 242, 250–52 (1995).

[14] *See* Kasper, *supra* note 12, at 411. A political cartoon depicting the salamander-shaped voting district first appeared in the Boston Gazette on March 26, 1812. *Cartoon, "The Gerry-Mander", 1813,* SMITHSONIAN, https://www.si.edu/object/cartoon-gerry-mander-1813%3anmah_509530 (last visited Apr. 21, 2024).

[15] M. Christopher Freeman, Jr., *Partisan Gerrymandering and Georgia: Red, White, and Blue or Just Red and Blue?*, 35 GA. ST. U.L. REV. 487, 487–88 & nn.1–4 (2019).

[16] *Id.*

[17] *See* Stephen Ansolabehere & Maxwell Palmer, *A Two-Hundred Year Statistical History of the Gerrymander*, 77 OHIO ST. L.J. 741, 750 (describing Gerry's redistricting plan as a "deliberate, unambiguous, and successful political gerrymander") (citing ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 62–77 (1907)).

[18] *See* Freeman, *supra* note 15, at 487.

unfair advantage by diluting the opposition's voting strength."[19] Gerrymanders need not involve irregular or asymmetrical districts; the definition contemplates any district drawn to unfairly advantage one political party.[20] In practice, gerrymanders enable "legislators to choose their voters rather than voters choosing their representatives."[21] As such, the practice is inimical to representative government, making the practice as democratically objectionable today as it was in 1812, when Elbridge Gerry executed his party's vote-dilution plan.[22]

States determine their own political lines—they draw their own state congressional districts, county lines, and municipal boundaries. States also draw congressional districts for representation in the United States House of Representatives.[23] As long as political boundaries exist, and the power to determine those boundaries lies in politicians tempted by easy reelections or party victories, the gerrymander will persist as another political pathology with which a heterogenous representative democracy like the United States must continuously wrestle.

To wrestle the gerrymander, though, requires recognizing its forms. Politicians employ various gerrymander techniques.[24] These techniques include "cracking," "packing," and "stacking."[25] "Cracking" occurs when a legislature draws district lines in a way that splits political, social, or racial groups from one district, scattering them across multiple districts to dilute their unified voting power.[26] "Stacking" arises when a legislature draws district lines to place a sizeable political, social, or racial minority group with a larger counter group to, again, dilute the minority voting power.[27] "Packing" happens when a legislature draws district lines to place as many people of a particular political, social, or racial group into the fewest possible districts to weaken their overall voting power—Elbridge Gerry's plan, for example.[28]

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[19] *Gerrymandering*, BLACK'S LAW DICTIONARY (11th ed. 2019); Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially Manageable Standard and Other Reform Options for Partisan Gerrymandering*, 46 HARV. J. ON LEGIS. 243, 245 n.16 (2009).

[20] BLACK'S LAW DICTIONARY, *supra* note 19.

[21] Emily K. Dalessio, *Say the Magic Words: Establishing a Historically Informed Standard to Prevent Partisanship from Shielding Racial Gerrymanders from Judicial Review*, 77 WASH. & LEE L. REV. 1907, 1909 (2020).

[22] *See* Niemeyer, *supra* note 13, at 250–52 ("Almost immediately after the plan's enactment, the Federalists claimed that the plan 'would defeat the will of the majority by arbitrary means, and thereby undermine the safety of republican institutions.'").

[23] See U.S. CONST. art I, §4.

[24] *See* Julia Kirschenbaum & Michael Li, *Gerrymandering Explained*, BRENNAN CTR. FOR JUSTICE (June 9, 2023), https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained.

[25] *See* BLACK'S LAW DICTIONARY, *supra* note 19; *see also* Aziz Z. Huq, *Why Judicial Independence Fails*, 115 NW. U.L. REV. 1055, 1056 (2021).

[26] *See* Kirschenbaum, *supra* note 24; United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 144–45 (1977) (providing an example of cracking); Davis v. Bandemer, 478 U.S. 109 (1986) (demonstrating both cracking and packing).

[27] *Stacking*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* Shaw v. Reno, 509 U.S. 630, 670 (1993) (White, J., dissenting) (briefly describing "stacking").

[28] *Packing*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* Kirschenbaum, *supra* note 24.

The gerrymander targets various groups. The most common today, as in Gerry's time, is the political gerrymander, which aims to dilute opposing parties' voting strength. However, partisan gerrymanders differ today from Gerry's partisan plan. After the Civil War, the gerrymander made a pernicious turn, and it never looked back.

II. THE RISE OF RACIAL GERRYMANDERING

The Fifteenth Amendment did not prevent former slave states from disenfranchising black Americans; in some respects, it barely acted as a speed bump to state disenfranchisement efforts. Southern states instituted literacy tests, poll taxes, property requirements, and residency requirements to disempower black Americans.[29] These brazen disenfranchisement efforts were not necessarily due to legislative impotence, as has been the case more recently. In fact, the Reconstruction Congress passed extensive legislation to combat state violations of the Reconstruction Amendments, and the Executive Branch made great efforts to enforce civil rights.[30]

Judicial impotence emboldened Southern states.[31] *Giles v. Harris* provides a particularly damning example.[32] Alabama, like many southern states at the time, held a convention to amend its state constitution with an express purpose: "And what is it we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this state."[33] The Alabama Constitution made any person registered to vote before 1903 an elector for life, while anyone registered after that date would have to meet onerous literacy tests and property ownership requirements, thus excluding many black voters.[34] When Jackson W. Giles applied to register to vote in 1902, the state registrar refused, even though Giles had voted in previous elections.[35]

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[29] Robert J. McWhirter, *The Fifteenth Amendment: Dropping the Musket to Reach the Ballot*, 58 ARIZ. ATT'Y 22, 32 (2021). In Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959), the Supreme Court affirmed literacy tests generally; Congress permanently banned literacy tests in 2000. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437 (as amended and codified at 52 U.S.C. §§ 10301–10310 (formerly 42 U.S.C. §§ 1973–1973b)).

[30] *See* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 67–68, 118, 141–143 (W. W. Norton & Company 2020) (detailing Reconstruction legislation, including Civil Rights Act of 1866, Enforcement Act of 1870, The Enforcement Act of 1871, and Civil Rights Act of 1875). Shortly after the Enforcement Act of 1870, President Ulysses S. Grant signed the U.S. Department of Justice and Civil Rights Enforcement into law, which immediately got to work effectuating the Enforcement Acts. *See* Travis Crum, *Federalizing the Voting Rights Act*, 74 VAND. L. REV. EN BANC 323, 326 (2021).

[31] The United States Supreme Court steadily chipped away at the statutory protections Congress put in place under the Reconstruction Amendments. Eric Foner provides a thorough look at the Court's early Reconstruction jurisprudence. *See* FONER, *supra* note 30, at 166.

[32] Giles v. Harris, 189 U.S. 475 (1903).

[33] Hunter v. Underwood, 471 U.S. 222, 229 (1985) (quoting 3 Official Proceedings of the Ala. Const. Conv. of 1901, at 8 (1940)). Expert testimony revealed that the general tenor of the convention, summarized in a speech by the convention president, was to disenfranchise black Americans. See *Hunter*, 471 U.S. at 230–231.

[34] *Giles*, 189 U.S. at 483–84.

[35] *Id.* at 482.

Giles sued Alabama in federal court, individually and on behalf of more than five thousand black citizens.[36] Invoking both the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment, Giles asked the court to order the board of registrars to enroll him and other similarly situated citizens as registered voters, and to void the voting restrictions in the Alabama Constitution.[37] Giles claimed the state registrar turned him away due to his race, yet "all white men were registered."[38] The Court rejected Giles's claim for relief, as equity could not "enforce political rights."[39] Writing for the majority, Justice Holmes noted two problems raised by the relief sought.[40] First, if the Alabama Constitution should be voided as a fraud upon the United States Constitution, then the Court would be implicated in the unlawful registration scheme if it ordered the state to enroll Giles in its voter list.[41] Second, any judicial order would be an empty form—if Alabamans truly intended to keep black constituents from voting, a court order would not prevent them, as the Court could not supervise the voting.[42]

Southern states were emboldened by the judiciary's unwillingness to intervene in their disenfranchisement efforts.[43] As far as they were concerned, the U.S. Supreme Court had all but rubber-stamped discriminatory state action. A turning point occurred, however, when the Court took up a case involving the infamous Tuskegee, Alabama gerrymander.

Following World War II, black Americans enjoyed moderate affluence in Tuskegee.[44] Black citizens in Tuskegee, many well-educated, sought voter registration in numbers larger than Alabama had seen in the past.[45] The Macon County Board of Registrars responded by delaying the registration process to discourage black citizens from enrolling.[46] When delay tactics failed to thwart registration efforts, Alabama considered abolishing Macon County, but opted instead to "alter, re-arrange, and re-define the boundaries of the City of Tuskegee

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[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.* at 487–88. The distinction between equitable and legal relief underlies the Court's decision to deny Giles the relief he sought. Historically, courts exercising equitable jurisdiction could not enforce rights that were purely political. Political rights often raise purely political questions, which must be resolved by the political branches of government or the people directly. *See* 44 Tex. Jur. 3d *Injunctions* § 67 (2024). To the extent government encroached on political rights, the plaintiffs would have to seek legal relief, i.e., compensatory damages, or maybe declaratory relief (a declaration from the court of the rights of the parties), which does not truly fix the problem.
[40] *Giles,* 189 U.S. at 486–88.
[41] *Id.*
[42] *Id.*
[43] FONER, *supra* note 30, at 166 ("The Democratic press hailed the ruling as an indication that the Court would not interfere with 'a sovereign state's regulation of its elections.'").
[44] *See* Jonathan L. Entin, *Of Squares and Uncouth Twenty-Eight-Sided Figures: Reflections on Gomillion v. Lightfoot After Half a Century*, 50 WASHBURN L.J. 133, 134–38 (2010) (describing the groundwork that led to challenges to Alabama's discriminatory voting laws, such as black employment opportunities at the Veterans Administration hospital and education opportunities at the Tuskegee Institute); Pamela S. Karlan, *The Alabama Foundations of the Law of Democracy*, 67 ALA. L. REV. 415, 418–19 (2015).
[45] Entin, *supra* note 44, at 135.
[46] *Id.*

in Macon County."[47] The Alabama legislature altered Tuskegee's shape "from a square to an uncouth twenty-eight-sided figure," removing from the city limits "all but four or five of its 400 [black] voters without eliminating any white voter."[48]

The citizens who were removed from the city limits sued city and county officials, asking the district court to declare the redistricting law unconstitutional, and enjoin the officials from enforcing the redistricting plan.[49] The plan took the plaintiffs outside incorporated municipal limits, leaving them without previously-enjoyed municipal benefits, such as street improvements and police protection.[50] Most important to the litigation, the plaintiffs alleged they no longer could vote in municipal elections.[51] This meant they could no longer vote for city council or mayoral representation. The district court dismissed the action, concluding the plaintiffs did not state a valid claim for relief because the court could not supervise legislative changes to municipal boundaries, nor change the map itself.[52] The Court of Appeals for the Fifth Circuit affirmed.[53]

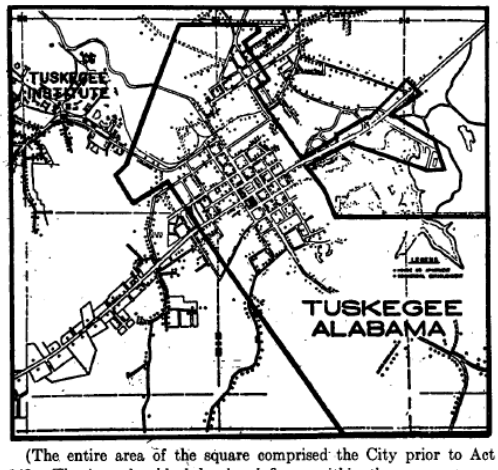
Perhaps surprisingly at the time, the Supreme Court reversed the district court's judgment, holding that the plaintiffs stated a claim for relief under the Fifteenth Amendment.[54] Justice Frankfurter penned the majority opinion, which may have made the Court's decision even more surprising—just fourteen years prior, he authored an opinion in *Colegrove v. Greene*, cautioning that in disputes

[47] *Id.* at 138 & n.47.

[48] Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960). Here is a depiction of the map:

APPENDIX TO OPINION OF THE COURT.

CHART SHOWING TUSKEGEE, ALABAMA, BEFORE AND AFTER ACT 140



(The entire area of the square comprised the City prior to Act 140. The irregular black-bordered figure within the square represents the post-enactment city.)

[49] *Id.* at 340.

[50] Gomillion v. Lightfoot, 270 F.2d 594, 594–95 (5th Cir. 1959).

[51] *Id.* at 595.

[52] *Gomillion*, 364 U.S. at 340.

[53] *Id.* at 341.

[54] *Id.* at 348.

between citizens and state legislatures regarding district drawing, "courts ought not to enter [the] political thicket."[55]

For Justice Frankfurter, *Gomillion* differed from *Colegrove*. The *Colegrove* plaintiffs alleged "legislative inaction" when Illinois failed to reapportion congressional districts, thereby diluting the plaintiffs' voting power.[56] The *Gomillion* plaintiffs, in contrast, alleged that "affirmative legislative action" deprived them of the right to vote.[57] Alabama cloaked its racial disenfranchisement scheme in its municipal line-drawing power. *Gomillion*, in other words, did not involve the state exercising line-drawing power that incidentally inconvenienced the plaintiffs; rather, the line drawing "deprived the petitioners of the municipal franchise and consequent rights and to that end it . . . incidentally changed the city's boundaries."[58] States enjoy extensive power to draw municipal lines, but that power "is met and overcome by the Fifteenth Amendment."[59]

Before moving forward, it is important to note that racial gerrymandering is especially pernicious. Justice O'Connor stated the problem well in *Shaw v. Reno,* responding to the claim that racial gerrymandering does no harm unless it dilutes a group's voting power:

> As we have explained, . . . reapportionment legislation that cannot be understood as anything other than to classify and separate voters by race injures voters in other ways. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole.[60]

Racial gerrymandering impugns human dignity and imposes a badge of inferiority on its targets. It signals that a particular group should not receive equal concern in a polity for no reason other than the color of their skin, no matter their character, qualities, or beliefs, and despite their shared status with all others as citizens.

After *Gomillion,* states were on notice that the judiciary was willing to enter the "political thicket" whenever state political lines were drawn to fence out voters based on race. Not too long thereafter, the judiciary was knee deep in the thicket. Two years later, the Court decided *Baker v. Carr* and held reapportionment claims

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[55] Colegrove v. Green, 328 U.S. 549, 556 (1946). The litigation in *Colegrove* involved an egregious failure by the state to reapportion congressional districts, as required by federal law. The districts in place when the plaintiffs filed suit were based on the 1900 census. Within the 40 years since that census, the population exploded—but the state legislature did nothing to change the districts to provide equal population. The plaintiffs pointed out that the largest congressional district contained 900,000 people, and the smallest contained 112,000—a 9-1 district disparity. *Id.* at 569 (Black, J., dissenting). This meant that the smallest district had the same amount of representation in the House of Representatives as the largest (1 seat each), making the weight of each vote in the largest district substantially weaker than the weight of each vote in the smallest district.

[56] *Id.* at 554.

[57] *Gomillion*, 364 U.S. at 346.

[58] *Id*. at 347.

[59] *Id*. at 345.

[60] Shaw v. Reno, 509 U.S. 630, 650 (1993).

are justiciable under the Fourteenth Amendment's Equal Protection Clause.[61] The decision directly contravened Frankfurter's caution in *Colegrove*, taking another step into the political thicket.[62] Two years after *Baker*, the Court jumped back into the thicket in *Reynolds v. Sims*, holding the Equal Protection Clause requires states to "make an honest and good faith effort to construct districts" with equal population, also known as the one-person-one-vote rule.[63] A year after *Reynolds*, President Lyndon B. Johnson signed into law the Voting Rights Act of 1965 (VRA).[64] Among other voting rights protections, the Act included a preclearance provision that required certain states (mostly southern) to apply to either a federal court or the United States Attorney general for preclearance before those states could change any voting practice or procedure.[65]

Of course, none of the aforementioned steps by the Court or Congress stopped states from pressing boundaries. The gerrymander would gradually adapt to judicial and congressional limitations, sometimes with the aid of the judiciary. For example, in 2013, the Court held the coverage formula in the VRA unconstitutional.[66] The coverage formula identified states, counties, cities, and municipalities subject to preclearance restrictions—the political bodies with the most egregious disenfranchisement records. These political bodies need no longer seek approval by the Attorney General or a federal district court before changing any voting practice or procedure; the Court took one step out of the political thicket.

While the Court remains alert today against discriminatory race-based gerrymandering, it has been less vigilant against partisan gerrymandering. Here is where the gerrymander has evolved into its most elusive form yet—hyperpartisan-race-conscious gerrymandering.

III. THE ROAD TO HYPERPARTISAN GERRYMANDERING

Gomillion marked a shift in electoral law. Federal courts were now willing to police discriminatory race-based mapmaking, and the preclearance provision in the VRA put state mapmaking under federal supervision, so federal courts could review state maps for statutory compliance. This shift in electoral law, though, increased race-conscious district drawing, which merged with preexisting partisan mapmaking goals. As a result, racial gerrymandering became more difficult to detect, exacerbating the political gerrymandering problem and eventually leading to the Court holding political gerrymanders nonjusticiable.

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[61] Baker v. Carr, 369 U.S. 186, 330 (1962).
[62] Justice Frankfurter considered the reapportionment battle purely political and did not believe the judiciary was best situated to resolve political line-drawing problems in any meaningful way: "In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives." *Id*. at 270 (Frankfurter, J., dissenting).
[63] Reynolds v. Sims, 377 U.S. 533, 577 (1964).
[64] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1).
[65] *Id.*
[66] Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013).

A. *The Political Turn in Race-Based Gerrymander Claims*

The VRA called upon states to consider race when drawing district lines. To meet former preclearance standards, the Justice Department often required states to create majority-minority districts—for example, a majority-black district. Objections immediately arose. In *United Jewish Organizations of Williamsburgh, Inc. v. Carey* (*UJO*), the plaintiffs, on behalf of a Hasidic community, sued the state of New York for using racial quotas in its district drawing.[67] After the United States Attorney General rejected New York's 1972 redistricting plan due to "abnormally high" minority concentrations in certain districts, the state revised its plan by changing the size, rather than the number, of those nonwhite majority districts.[68]

The 1974 plan split the Hasidic community from one to two state assembly and senate districts, reassigning part of the community "to an adjoining district," which reduced the community's combined voting power.[69] Race heavily factored into the state's redistricting plan—a legislative staff member testified that his discussion with the Justice Department led him to believe that a population of 65 percent nonwhites would be an approved figure for the district.[70] Nevertheless, the Court held New York did not violate the Fourteenth or Fifteenth Amendment.[71] The VRA required states to consider race when drawing district lines, but the Constitution, according to the Court, does not prohibit a state from considering race when redistricting. Rather, the Constitution only prohibits states from drawing districts to fence voters out on account of their race.[72] Because the plurality opinion lumped the Hasidic community with an indistinguishable "white population," the Court concluded the evidence did not show state efforts to fence out the white population from voting, or to dilute their voting power overall.[73]

The VRA increased minority-elected representatives. But federal pressure for states to increase and make safe majority-minority districts threatened traditional political power structures, which increased district-line-drawing challenges in federal court.[74] The Supreme Court made these new challenges more

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[67] United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).
[68] *Id.* at 151.
[69] *Id.* at 152–53.
[70] *Id.* at 152.
[71] *Id*.
[72] *Id.* at 161.
[73] *United Jewish Orgs. of Williamsburgh, Inc.*, 430 U.S. at 165.
[74] The preclearance provision was not the only VRA provision threatening existing electoral power structures. Section 2 of the Act gave citizens a private right of action against any state, not just those covered under the preclearance procedure, if the state uses a voting practice "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." 52 U.S.C.A. §10301(a). This section made justiciable race-related vote-dilution claims in federal court, and often led to judicially ordered redistricting to create a majority-minority district.

The claim that the VRA threatened existing political power structures does not suggest that it threatened completely to undue existing political power structures. In fact, the Republican Party in the 1980s and 1990s championed safe majority-minority districts, with some scholars claiming Republicans were interested in a "max black" strategy to pack black voters in as few districts as possible to make more seats available to Republicans. *See* Adam B. Cox & Richard T. Holden,

likely after its 1983 decision in *Karcher v. Daggett*, where it held New Jersey's redistricting plan unconstitutional because it did not apportion the population in each district "as near as practicable to population equality," with the difference between the largest district and the smallest being "0.684% of the average district."[75] The *Karcher* opinion heightened the demand on states to make nearly exact equal population districts, which proved difficult for some states with populations spread out between urban, suburban, and rural areas, not all of which share the same political, economic, or social interests.[76] To satisfy the equipopulation demand and the VRA directive to increase majority-minority districts, many states sacrificed compactness in district design, increasing misshaped districts.[77] The Court addressed the increase in race-based district-drawing litigation by shifting its focus from fencing out to the inherently expressed harm of race-based districting.[78]

In *Shaw v. Reno*, the Court reimagined *Gomillion* as a Fourteenth Amendment Equal Protection Clause case and held that racial gerrymandering claims raise expressive harm.[79] The plaintiffs in *Shaw* sued North Carolina government officials and some federal officials when the state created a second majority-black district after the Attorney General rejected the state's first plan for including only one majority-black district.[80] The two majority-minority districts were notably misshaped—one resembled a "Rorschach ink-blot test," the other a 160-mile-long snake no wider than a highway corridor.[81] The district court rejected the plaintiffs' claim because it interpreted the Supreme Court's decision in *UJO* to require plaintiffs to allege that the state adopted its plan to discriminate against white voters on account of their race.[82] In fact, that is precisely what the Court required.[83]

The *Shaw* majority, however, concluded that the plaintiffs' claim materially differed from the *UJO* plaintiffs' claim: the *Shaw* plaintiffs alleged that the state's reapportionment plan was "so irrational on its face that it immediately offend[ed] principles of racial equality."[84] But the *UJO* plaintiffs did not complain about any district shape or allege that the state's mapmaking deviated from acceptable

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Reconsidering Racial and Partisan Gerrymandering, 78 U. CHI. L. REV. 553, 586 n.99 (2011). This claim must have rung especially true after the Republicans won a majority of seats in the United States House of Representatives in 1994. *Id.* at 559–60; *see also* Richard H. Pildes, *Why the Center Does Not Hold: The Cause of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 292–93 (2011).

[75] Karcher v. Daggett, 462 U.S. 725 (1983).

[76] Pildes, *supra* note 74, at 578.

[77] *Id.* at 574–75.

[78] Shaw v. Reno, 509 U.S. 630 (1993).

[79] *Id.* at 645, 650.

[80] *Id.* at 633. North Carolina's redistricting plan followed the 1990 census, from which the state gained a 12th congressional seat in the U.S. House of Representatives.

[81] *Id.* at 635.

[82] *Id*. at 638.

[83] *See Shaw*, 509 U.S. at 658 (White, J., dissenting).

[84] *Id.* at 652.

districting principles.[85] For the majority, the *Shaw* plaintiffs' claims were closer to the plaintiffs' claims in *Gomillion* than in *UJO*.

The harm alleged by the *Shaw* plaintiffs undoubtedly differed from the harms presented in *Gomillion*. The *Gomillion* plaintiffs pointed to the loss of municipal benefits, chief among them the right to vote in municipal elections caused by Alabama's redistricting legislation.[86] The *Shaw* plaintiffs did not claim they lost any benefits or the right to vote due to North Carolina's reapportionment plan—the opinion notes that, of the two challenged districts, none of the plaintiffs resided in District 1, and only three resided in District 12.[87] Rather than strain the gnat to directly analogize the *Shaw* plaintiffs' harm to *Gomillion*, the Court recast in equal protection garb the constitutional harm caused by race-based districting:

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. 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.[88]

The harm under *Shaw* is an "expressive harm," which "results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about."[89]

In his dissent, Justice White recognized the majority's vague articulation of the harm. The *Shaw* plaintiffs' allegations resembled political gerrymandering claims, which, under then-existing standards set out in *Davis v. Bandemer*, required a plaintiff to "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group"—a standard that also applied in early racial gerrymandering cases.[90] District drawing, he argued, inevitably involves partisan aims and considerations that require legislators to be aware of demographic factors (e.g., race, age, economic status, political and

[85] *Id.* at 651–52.
[86] Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960).
[87] *Shaw*, 509 U.S. at 633, 637.
[88] *Id.* at 647.
[89] Pildes, *supra* note 74, at 506–07; *see also* Bush v. Vera, 517 U.S. 952, 984 (1996) (referring to *Shaw*'s harm as "expressive harm"); *id.* at 1053–54 (Souter, J., dissenting) (adopting Professor Pildes' "expressive harm" nomenclature and definition).
[90] Davis v. Bandemer, 478 U.S. 109, 127 (1986). Notably, before the plaintiffs filed their action in *Shaw*, the North Carolina Republican Party and forty-two individual voters—nine of whom were registered Democrats—unsuccessfully sued state officials, alleging the redistricting plan constituted an unconstitutional political gerrymander; *see also* Pope v. Blue, 809 F. Supp. 392, 394 (W.D.N.C. 1992), *aff'd*, 506 U.S. 801 (1992).

religious affiliations) that make political predictions possible.[91] Justice White added that because the Court cannot realistically eliminate these partisan considerations, plaintiffs in gerrymandering cases must show the redistricting plan denied them an equal opportunity to participate in political processes.[92]

A central question underlies Justice White's concern: if the harm caused by race-based districting lies in what it expresses and not in who, what, or how it impacts any person, why should claims related to other types of gerrymandering, such as political gerrymandering, be treated differently? If political gerrymandering strategically lumps people widely separated by geographic and political boundaries, and who have little in common with one another except for how they may have voted in the past or how politicians predict they may vote in the future, does that not express government-backed disdain for the full expression of self-governance by other citizens? Political gerrymandering signals that the citizens whose votes matter most are the ones who draw political lines—elected officials—and since these elected officials are always fewer in number than their constituents, political gerrymandering signals government preference for minority rule by political elites.[93]

Shaw arguably caused more problems than it ever resolved. The Court's opinion opened the door to undermine the VRA's purpose to increase minority-electoral opportunities, given past egregious racial discrimination against voters of color by states and the federal government.[94] Additionally, *Shaw*'s new definition of "expressive harm" introduced further challenges in application because it was neither a precise definition nor offered a precise test. More problematic, as the

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[91] *Shaw*, 509 U.S. at 660–61 (White, J., dissenting). A few years before *Bandemer*, the Court considered a political gerrymander claim, and held that it did not violate the one-person, one-vote rule. Gaffney v. Cummings, 412 U.S. 735, 753 (1973). In reaching its conclusion, the Court noted: "The very essence of districting is to produce a different . . . result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. Politics and political considerations are inseparable from districting and apportionment." *Id.*

[92] *Shaw*, 509 U.S. at 661 (White, J., dissenting).

[93] To the extent political gerrymandering prevents effective majority rule, it may express to the voting population that they are incapable of such rule, or that government rejects true majority rule; either of these expressions might be read to violate the Guarantee Clause, which promises a Republican Form of Government. *See* Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 114 (2000). Another take on expressive grounds argues that political gerrymandering—specifically when misshapen districts are drawn—undermines government legitimacy, which itself is an "expressive harm." Easha Anand, *Finding a Path Through the Political Thicket: In Defense of Partisan Gerrymandering's Justiciability*, 102 CALIF. L. REV. 917, 944 (2014).

[94] *See* ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 203 (Picador 2016). Berman describes how the Court's conservative turn in the 1990s impacted the VRA:

> The Supreme Court—and lower courts as well, now filled with Reagan and Bush appointees—exhibited a new kind of hostility to the VRA. In the years following *Shaw*, eight of seventeen majority-black congressional districts in the South would be redrawn. The legal and political backlash against the VRA, and the law's supporters, continued to grow.

Id.

Court focused on whether race predominately motivated district drawing, rather than solely focusing on the regularity of the district's shape, the line between racial and political gerrymandering began to blur.

This blurring becomes evident in *Hunt v. Cromartie*. In *Shaw v. Hunt* (*Shaw II*), the Court expressly held that North Carolina's twelfth district constituted an unconstitutional racial gerrymander.[95] The state then created a new District 12 plan, which retained its snake-like shape, but reduced the black population to 47%, accounting for 46% of registered voters in the new district.[96] The plaintiffs sued North Carolina, arguing that the new District 12 suffered the same deficiencies as the one in *Shaw* and *Shaw II*. The district court granted summary judgment in the plaintiffs' favor because the evidence showed the same bizarre shape as the original plan, and the legislature drew new District 12 "to collect precincts with high racial identification rather than political identification."[97]

The *Cromartie* Court reversed the lower court's judgment because the evidence did not conclusively demonstrate that the state drew District 12 with an impermissible racial motive.[98] The state's evidence suggested that District 12 was drawn with more political than racial motivations, aiming to keep the district seat under Democratic Party control.[99] An expert affidavit for the state gathered racial demographic, party registration, and election data from precincts in District 12 and surrounding districts.[100] The data showed "a strong correlation between racial composition and party preference," indicating that precincts containing larger black populations overwhelmingly favored the Democratic Party compared to precincts with smaller black populations; this correlation supported both a racial and a political theory underlying the state's plan.[101] According to the state's expert, the new District 12 was better supported by a political, rather than racial, explanation because the state "included the more heavily Democratic precinct much more often than the heavily black precinct" in drawing District 12.[102]

What inevitably arose from the Court's primary focus on intent in gerrymandering cases was what Justice White claimed in his dissent in *Shaw*, and what *Cromartie* demonstrated—districting is inherently political, always including political considerations; and since the VRA requires legislatures to keep race in mind when redistricting, district lines will likely always be drawn with mixed motives.[103] At the time it decided *Cromartie*, the Court still considered political gerrymandering justiciable. Therefore, if race were not the predominant factor,

[95] Shaw v. Hunt, 517 U.S. 899, 899–900 (1996).
[96] Hunt v. Cromartie, 526 U.S. 541, 544 (1999).
[97] *Id.* at 545.
[98] *Id.* at 548–49.
[99] *Id.* at 548–49.
[100] *Id. at* 549.
[101] *Id.* at 550.
[102] *Hunt*, 526 U.S. at 550.
[103] The mixed-motive cases did not take long to arise. Three years after *Shaw*, the Court decided *Bush v. Vera*, 517 U.S. 952 (1996). The Court found race predominated the decision to create these districts and held the districts unconstitutional. *Id.* at 959, 970–71.

plaintiffs might still prove the gerrymander unconstitutional by meeting the test outlined in *Davis*.[104]

Notice, though, that the district challenges *Shaw* created were primarily used to deny majority-black districts, not to deny majority-white districts. Majority-white districts were historically protected through states' disenfranchisement efforts against discreet and insular minority groups, and racial and political gerrymandering that predated the VRA. So long as political gerrymander claims remained justiciable, these claims could potentially be used to disrupt the status quo in majority-white districts. Unsurprisingly, the next step by the Court to address the influx of district challenges was to remove the judiciary from political gerrymander disputes, backstepping out of the political thicket.

B. *The Untimely End to Justiciable Political* Gerrymander *Claims*

The Court first recognized political gerrymander claims as justiciable in *Davis v. Bandemer*. In *Davis*, the plaintiffs challenged a redistricting plan where the Republican Party used multimember districts—districts that send more than one member to the state legislature—to stack and split black voters.[105] The district court determined that the redistricting plan discriminated against these voters because they tended to vote as a bloc for Democratic Party candidates, not because they were black, but still found the plan unconstitutional because it diluted Democratic Party votes in the state.[106] The Supreme Court reversed this decision, holding that the district court applied too strict a standard in finding the districting plan disadvantaged Democratic Party voters.[107] However, the justices could not agree on a workable test to determine when political gerrymandering had crossed a constitutional threshold.

Eighteen years after *Davis*, the Court again addressed a political gerrymander claim in *Vieth v. Jubelirer*. Once again, the Court could not reach a consensus on a judicially manageable standard to apply to identify unconstitutional political gerrymandering.[108] A plurality in *Vieth*, which included Justice O'Connor (who authored *Shaw*), concluded that political gerrymander issues raise nonjusticiable claims because the court lacks a judicially manageable standard to assess such claims and, in any event, these claims raise questions inherently political in nature.[109] In his dissent, Justice Stevens wondered why the Court's racial gerrymander standard could not simply apply to political gerrymander claims when

[104] Davis v. Bandemer, 478 U.S. 109, 127 (1986).
[105] *Davis*, 478 U.S. at 116–17. The lower court determined that black voters were disproportionately impacted by the Republican Party's redistricting plan. Still, the court found that the plan discriminated against these voters "because blacks had a demonstrated and overwhelming tendency to vote as a bloc for Democratic candidates." *Id.* at 161 n.2 (Powell, J., dissenting).
[106] *Id.* at 161 n.2 (Powell, J., dissenting).
[107] *Id.* at 135–136.
[108] Vieth v. Jubelirer, 541 U.S. 267, 290 (2004).
[109] *Id.* at 305–06.

both claims arise under the same context and point to the same pathologies—partisan-motivated districting—and both cause representational harms.[110]

By 2019, eleven years after *Vieth*, the Supreme Court held political gerrymander claims nonjusticiable. In *Rucho v. Common Cause,* the Court considered two separate cases involving state district plans with testimony from North Carolina and Maryland officials.[111] There was no doubt that the dominant party in each state— Republicans in North Carolina and Democrats in Maryland—redrew district maps specifically to produce greater congressional delegation for the party in power, and less for the other party.[112] Both state plans succeeded. Republicans won more seats in North Carolina, and Democrats flipped a targeted seat in Maryland.[113] Based on the evidence, the lower courts in both the North Carolina and Maryland cases held that the states' redistricting plans were unconstitutional.[114]

After noting deficiencies in the many standards lower courts have applied to determine when political gerrymandering went too far, the majority announced its decision:

> Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles[]" does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.[115]

Political gerrymandering, the Court noted, though incompatible with democratic principles, predates the United States Constitution and has been an enduring part of "American political life."[116] The Constitution, the Court reasoned, leaves to the political branches of government the power to exercise discretion in resolving deeply partisan electoral disputes.[117] On this last point, the majority pointed to Congress's power under the Elections Clause and to state legislatures to curb

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[110] *Id.* at 331 (Stevens, J., dissenting):

> The risk of representational harms identified in the *Shaw* cases is equally great, if not greater, in the context of partisan gerrymanders. *Shaw I* was borne of the concern that an official elected from a racially gerrymandered district will feel beholden only to a portion of her constituents, and that those constituents will be defined by race. . . . The parallel danger of a partisan gerrymander is that the representative will perceive that the people who put her in power are those who drew the map rather than those who cast ballots, and she will feel beholden not to a subset of her constituency, but to no part of her constituency at all. The problem, simply put, is that the will of the cartographers rather than the will of the people will govern.

[111] *Rucho v. Common Cause,* 139 S. Ct. 2484 (2019).
[112] *Id.* at 2491–93.
[113] *Id.* at 2510–11.
[114] *Id.* at 2490, 2492.
[115] *Id.* at 2506–07.
[116] *Id.* at 2494, 2507.
[117] *Rucho,* 139 S. Ct. at 2506.

political gerrymanders.[118] With that, the Supreme Court took a giant step out of the political thicket.

Some background on the North Carolina case in *Rucho* demonstrates the progression and evolution of political gerrymandering and how it has gone full circle, returning in hyperpartisan form. North Carolina Districts 1 and 12 were again at issue in *Cooper v. Harris*.[119] After the 2010 census, North Carolina redrew Districts 1 and 12 to make them majority-black districts, pulling black voters from other districts into Districts 1 and 12 to bring the black voting-age population to above 50% in both districts.[120] The redistricting plan brought state and federal challenges from individual plaintiffs and the North Carolina Conference of Branches of the NAACP due to North Carolina packing districts with black voters to diminish their overall voting power in the state and to weaken Democratic Party voting power.[121] This time, in other words, the challenges were coming from black voters and Democratic Party members.

In the federal action against North Carolina, the trial court struck down the redistricting plan as an unconstitutional racial gerrymander because race was the predominate motive in creating the majority-black districts.[122] The Supreme Court affirmed.[123] So, North Carolina went back to the drawing board and eventually

[118] *Id.* at 2507–08.
[119] Cooper v. Harris, 581 U.S. 285, 293–94 (2017).
[120] *Id.* at 295–96. Here is a depiction of the maps for District 1 and 12:

Appendix to opinion of the Court

Congressional District 1 (Enacted 2011)

Appendix to opinion of the Court

Congressional District 12 (Enacted 2011)

[121] The state court actions by the NAACP and individual voters against the 2011 districting plan were ultimately unsuccessful, as the state trial court held the state had a compelling interest in creating the majority-black districts to comply with Section 2 of the VRA, and the North Carolina Supreme Court affirmed. *See* Harris v. McCrory, 159 F. Supp. 3d 600, 609 (2016) (describing state litigation in relation to the federal suit brought by David Harris and Christine Bowser).
[122] *Cooper*, 581 U.S. at 296, 322–23.
[123] *Id.* at 323.

came up with the redistricting plan at issue in *Rucho*, which admittedly accomplished exactly what the original plan set out to do—diminish Democratic Party voting power—even if it meant packing and cracking black voting-age populations and no matter its impact on black voters in the state. In her *Rucho* dissent, Justice Kagen asked the central question underlying this whole charade: "Is this how American democracy is supposed to work?"[124] The majority's answer seems clear: This is how democracy in America works.

While the *Rucho* majority points to Congress's Election Clause power to enact anti-partisan gerrymander legislation and touts state efforts to curb political gerrymandering, these routes are clearly not viable long-term solutions even by the majority's own admission—the history of states controlling electoral law and politics is replete with countless efforts to undermine full and fair democratic participation by all citizens on an equal basis. With respect to Congress, the pathologies that drive state politics produce the candidates that make up Congress, which is likely why no federal laws prohibiting partisan gerrymanders exist today and why citizens should likely not expect such federal legislation in the future.

As for state efforts to curb political gerrymanders, the Court's own reasoning, again pointing to historical state partisanship in electoral processes, reveals that politics as usual will control. If history is not enough to rebuff the Court's reliance on state efforts, consider a recent example—another one out of Alabama! In 2023, the Court decided *Allen v. Milligan*, where Alabama attempted to use racial gerrymandering as a defense against complying with Section 2 of the VRA, which requires states to ensure minority voters have an equal opportunity as other residents to elect representatives of their choice.[125]

Alabama appealed to the Court after a federal district court imposed a preliminary injunction against the state, preventing it from enforcing its redistricting plan.[126] The state's redistricting plan created only one majority-minority district, despite evidence showing traditional districting criteria allowed two majority-black districts.[127] The trial court found that black voters in those districts were politically cohesive and that white voters voted sufficiently as a bloc to defeat the candidates preferred by black voters, and that "Black Alabamians enjoy virtually zero success in statewide elections."[128] The Court affirmed the preliminary injunction.

In response, Alabama argued Section 2 of the VRA is unconstitutional to the extent it requires states to engage in racial gerrymandering, i.e., creating majority-minority districts.[129] New map-making technology makes possible a "race-neutral benchmark," Alabama further argued, by generating possible maps in the millions using only traditional districting criteria without considering race.[130] The average number of majority-minority districts from the map set yields the

[124] *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting).
[125] Allen v. Milligan, 143 S. Ct. 1487, 1501, 1509 (2023).
[126] *Id.* at 1498.
[127] *Id.* at 1502–04
[128] *Id.* at 1505–06.
[129] *Id.* at 1516–17.
[130] *Id.* at 1506.

"race-neutral benchmark."[131] If the state's plan matches the benchmark, it should satisfy Section 2, and according to Alabama, the state could respond to any complaints by simply pointing to the algorithm as the culprit.[132] The Supreme Court rejected Alabama's arguments. The state's constitutional arguments went against settled precedent, and its race-neutral benchmark theory would "require courts to judge a contest of computers when there is no reliable way to determine who wins, or even where the finish line is."[133]

To understand Alabama's race-neutral benchmark argument, one need only appreciate one fact *Rucho* guarantees—computer-generated race-neutral mapmaking would help the state wholly escape judicial scrutiny because the mapmaking scheme would ostensibly become a purely political exercise. But the state's race-neutral argument garnered support from four justices who dissented from the majority opinion in *Allen*.[134] This support likely emboldened Alabama's next move.

After the Court decided *Allen*, Alabama went back to the drawing board . . . but not really. Even knowing the constitutional deficiency in its 2020 redistricting plan, Alabama ignored the judiciary's concerns and redrew a map with only one majority-minority district. The trial court made the following comments when Alabama returned with its "new" map:

> We are disturbed by the evidence that the State delayed remedial proceedings but ultimately did not even nurture the ambition to provide the required remedy. And we are struck by the extraordinary circumstances we face. We are not aware of any other case in which a state legislature—faced with a federal court order declaring that its electoral plan unlawfully dilutes minority votes and requiring a plan that provides an additional district—responded with a plan that the state concedes does not provide that district.[135]

The trial court then appointed a Special Master to do what Alabama could not bring itself to do: draw a remedial map.[136]

The lesson to take from *Allen v. Milligan* might be that history repeats itself. What the future holds for the VRA, Section 2 remains uncertain. What is clear now is that politics as usual will control state redistricting without federal courts policing hyperpartisan gerrymanders. *Rucho*, in short, concedes a stark reality: when it comes to politics and the distribution of political power, democracy in America is gerrymandered.

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[131] *Allen*, 143 S. Ct. at 1516.
[132] *Id.* at 1506.
[133] *Id.* at 1514.
[134] *Id.* at 1519 (Thomas, J., dissenting). (Justices Gorsuch, Barrett, and Alito joined Justice Thomas's dissent attacking the Court's VRA jurisprudence.)
[135] Singleton v. Allen, No. 2:21–CV–1291–AMM, 2023 WL 5691156, at *4 (N.D. Ala. Sept. 5, 2023).
[136] *Id.* at 233.

IV. CONCLUSION: AN ENDURING PROBLEM

This article started with a political gerrymander example from 1812 and ended with a 2019 United States Supreme Court case which held that courts could do nothing to curb the practice. The Court is slowly backpedaling out of the political thicket. Litigants fighting against political gerrymanders must seek relief in the very states engaged in the hyperpartisan actions at issue. Maybe federal legislative action is possible, and maybe more state legislation is possible. Legislative action certainly would prove most impactful in curbing political gerrymanders. But legislative action requires legislative will, and legislative will turns on popular sentiment in the electorate. Perhaps, then, Justice Frankfurter was right: "In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives."[137]

[137] *Carr*, 369 U.S. at 270 (1962) (Frankfurter, J., dissenting).