

Dear Public Law Workshop Participants,

This is a **ROUGH** draft of the beginning of a book project that is in progress (what I have provided is a little less than half of what I have written so far). The book project originated as an invited article for the Supreme Court Review that got a bit away from me and turned into a monstrosity that did not fit into the parameters of the journal. At that point, I had two choices. Narrow it down to fit into the journal or go all in and try to turn the piece into a book project. I decided to pursue the latter. But the piece continues to have the trappings of an article in many places including the introduction. This will not be the introduction for the book. In fact, most of what you see here now will be in much different form later. As you will see, this rough draft has sentences that are too long, too many typos to count and no footnotes to boot. But I place my trust in you that you will not judge me too harshly on the quality of a first draft and that you will focus on the arguments and ideas I seek to advance.

With all those caveats aside, what I have provided you is an account of a problem in the Supreme Court's gerrymandering jurisprudence: the failure to identify a judicially recognizable harm that arises from the practice. Gerrymandering controversies are intimately connected to questions about the nature of judicially protectable rights under the Equal Protection Clause, the justiciability of representational claims, and the role of federal courts in a democracy among others. This term the Court is in the process of deciding what its role should be in adjudicating partisan gerrymandering claims so I hope that this thing I have provided to you at the very least sparks a rich discussion.

Thanks for reading and I look forward to all of your comments, criticism, and general feedback.

All best,
Bertrall

GERRYMANDERING HARMS
BERTRALL ROSS

When it comes to the Supreme Court's gerrymandering jurisprudence, much has been written and yet critical questions remain unanswered. What are the constitutionally cognizable harms of a gerrymander that can be remedied by courts? What are the standards for evaluating when a gerrymander causes constitutionally cognizable harms? Are any of these standards judicially manageable in that they will produce relatively consistent results and not involve the Court in resolving too many gerrymandering disputes?

After a decade hiatus from its docket, review of gerrymandering activity has picked up in the Supreme Court. In the past three terms, the Court has addressed three racial gerrymandering claims, including two in the most recently completed term. In the current term, the Court is reviewing a much-anticipated partisan gerrymandering claim that challengers see as critical to the very functioning of American democracy.

Despite this increase in activity, we do not seem to be any closer to answering questions critical to a coherent gerrymandering jurisprudence that comports with the judicial role in a democracy and constitutional requirements. In the three recent racial gerrymandering cases, the Court has jostled over the application of a two-decade old standard requiring challengers to prove the state drew an individual district with a predominant racial motive. Out of all three of the cases, there was only two vague references to the harm arising from drawing districts with a predominant racial motive and no discussion of how the constitutional standard related to the harm arising from racial gerrymandering.

In the partisan gerrymandering cases, the challengers to the statewide districting plan along with friends of the Court have thrown onto the wall a spaghetti pot full of standards and measures for assessing a gerrymander in hopes that at least one

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of them will stick. Questions about the precise harm from partisan gerrymanders and whether such harms are judicially cognizable constitutional harms appear to be of secondary interest at most. If the oral argument is any indication of the reasoning in the Supreme Court opinions to follow, there will be much debate about standards and measures and much less engagement with the harms that the standards and measures are designed to redress.

Constitutional standards divorced from constitutional harms are empty formulas that will, at best, protect against constitutional harms randomly and, at worst, exacerbate the harms that the standards should be designed to redress. Putting the recent gerrymandering cases aside, the Court has not been entirely missing in action when it comes to defining the harms arising from the practice. But since the mid-1980s case of *Davis v. Bandemer* that found partisan gerrymandering claims justiciable and developed a standard for those claims and the early 1990s case of *Shaw v. Reno* that identified what many consider a new type of racial gerrymandering claim and established a standard for addressing it, the Court has offered vague, confusing, and self-contradictory accounts of the harms. As a result, the standards for assessing gerrymanders that the Court has spent considerable time trying to develop and defend continue to have an empty quality to them.

One reason for the current state of the Court's gerrymandering jurisprudence is that it is, for the most part divorced from its origins. That origin lies in the oft-overlooked *United States v. Carolene Products* footnote four paragraph suggesting a judicial role in scrutinizing state actions that "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" and the judicial embrace of that role in its jurisprudence protecting the fundamental right to vote. The Court has not entirely ignored this jurisprudence in its cases addressing racial and partisan gerrymandering. In fact, the cases are littered with selective quotes from the fundamental rights cases of the past. But such selective quoting without more has only bred misunderstandings about these early cases, as the Court has

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tended to draw the wrong lessons from the past.

There are three lessons from this foundational jurisprudence that should guide the Court's current gerrymandering jurisprudence. First, the only constitutional harms from state districting practices that the Court has recognized are deprivations of individuals' participatory rights. The Court has never struck down a state districting practice simply because of the harms they imposed on democratic structure or output. The Court has rightly recognized that beyond the requirement that states maintain a Republican Form of Government, the Constitution does not provide any guidance on what principles of democracy are mandated under the document. As a result, the Court has only redressed alleged democratic structural and output harms indirectly when state districting practices also imposed participatory harms on individuals.

The Court first established the right to vote as fundamental in a case reviewing a constitutional challenge to a state districting practice that created or maintained unequally apportioned districts. While the selective quotes in the Court's current gerrymandering jurisprudence tend to focus on its early recognition of fair and effective representation as a constitutional principle, the Court did not strike down mal-apportioned districts simply because they imposed the democratic harm of undercutting majority rule. Rather, the harm the Court deemed within its power to redress was the denial to individuals of their equal participatory rights arising from the fact that the votes of individuals in over-populated districts weighed less than the votes of individuals in under-populated districts. The requirement that states draw districts guaranteeing the equal weighting of individual votes had the consequentialist effect of advancing the democratic good of majority rule.

The second lesson from the Court's early cases is that the Court intended its fundamental rights jurisprudence under the Equal Protection Clause to be distinct from its antidiscrimination jurisprudence under the Equal Protection Clause. The focus of the fundamental rights prong of Equal Protection is on protecting inputs into the democratic process that are critical to the proper

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operation of representative government. Under this doctrine, there is no relevant distinction between practices that deny or abridge the fundamental rights of historically marginalized minorities or members of one of the two dominant political parties. Further, the motivation for the districting practices is only relevant insofar as that motivation implicates individual participatory rights. What matters in most cases is not the motivation underlying the districting practices, but rather whether the districting practice operates in a way such that it produces or perpetuates participatory harms.

The distinction between the two prongs of the Court's Equal Protection Clause is clearly set forth in the cases reviewing mal-apportioned districts. The Court in those cases required states to draw equi-population districts that complied with the one-person, one-vote standard. The Court originally employed the standard to protect urban voters who were not as a class considered a historically marginalized minority. Further, the Court held states liable for violations of the one-person, one-person standard without any proof that the mal-apportioned districts were drawn on the basis of an impermissible motivation.

Additional evidence of the distinct constitutional approach underlying the fundamental rights prong can be found in the Court's articulation of the standard relevant to adjudicating claims that multi-member districts imposed participatory harms. For a successful claim, the challenger would have to prove that "designedly or otherwise, a multi-member constituency apportionment scheme ... would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." There are two notable features of this standard. First, it does not require the challenger to prove that the state established or maintained a multi-member scheme on the basis of an impermissible purpose. It only requires that the challenger prove that the scheme designedly or *otherwise* would operate to produce the participatory harm. Second, the standard did not distinguish between harms to racial elements ordinarily considered suspect and harms to political elements not considered suspect in the Court's Equal Protection antidiscrimination jurisprudence. These two standards

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established in the early cases and that continue to be applied in current doctrine reveal clear distinctions between the Court's two equal protection doctrines.

The third lesson from the Court's early cases is less explicitly laid out in the case as the other two, but it logically follows from the development of the fundamental rights doctrine. Whereas the courts lack authority, due to the absence of constitutional instruction, to redress harms arising from the structure and output of the democratic process, the states and Congress retain broad authority under the Constitution to redress such harms. The Court in its fundamental rights doctrine denied itself the authority to advance a conception of democracy through its review of districting practices that do not produce an individual participatory harm. But the Court said nothing about the authority of the states and Congress pursuant to their authority under Article I, Section 4 to engage in districting practices that advance democratic principles and that are designed to produce particular democratic outputs when those practices do not impose individual participatory harms. Importantly, the Court has not struck down districting practices that do not cause or perpetuate individual participatory harms indicating that the districting authority of the states and Congress to advance democratic principles and promote certain democratic outputs is otherwise unconstrained.

These lessons from the past are directly relevant to the gerrymandering controversies of the present. What they indicate is that the Court should only consider participatory harms to be judicially cognizable. Challengers have persuasively argued that gerrymanders violate democratic principles of proportionality and partisan symmetry, produce democratic harms of polarization through the construction of safe districts and uncompetitive districts. But the Constitution does not mandate proportionality, partisan symmetry, or competitiveness and they should not be considered constitutionally cognizable harms. Instead, the onus is on the challengers to prove that participatory harms either arise from the gerrymandered districts or are perpetuated by the gerrymandered districts. Only to the extent that the Court can redress participatory harms can

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democratic principles be advanced through adjudication.

The lessons further indicate that the distinction that the Court has drawn in its current doctrine between partisan and racial gerrymandering is misguided. Regardless of whether districts are drawn on a partisan or racial basis or to favor a political party or racial group, the fundamental rights doctrine indicates that the Court should treat the two types of claims in the exact same way. The relevant distinction under the fundamental rights doctrine is not between race and partisanship as a basis for drawing district lines, but instead between challenges to individual districts and statewide plans. The Court has vaguely recognized a potential participatory harm to members of the minority group in a gerrymandered individual district that is not applicable to a statewide plan.

Finally, the lessons from the Court's foundational jurisprudence indicate that states currently have authority to gerrymander at the individual and statewide level to impose democratic harms or advance democratic principles up to the point that the Court decides such gerrymandering impose participatory harms. This not only means the obvious that states can gerrymander in a way that denies proportional representation, partisan symmetry, or competitive districts up to the point where such gerrymandering imposes participatory harms. But also that states can engage in gerrymandering to advance proportional representation, partisan symmetry, or competitive districts up to the point where such gerrymandering imposes participatory harms. And further, pursuant to Article I, Section 4 of the Constitution, Congress can override state gerrymandering and force states to draw individual districts or statewide maps to advance proportional representation, partisan symmetry, or competitive districts up to the point where such district or map drawing imposes participatory harms.

To advance the claims in this introduction, the rest of the Article proceeds in four parts. In Part I, I describe the current confused state of the Court's gerrymandering jurisprudence focusing on the vague and contradictory accounts of the harms in the recent cases. In Part II, I return to the foundations of the

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Court's current gerrymandering jurisprudence and identify the three major lessons from those cases. Finally, in Part III, I present a case for how those lessons should be applied to bring coherence to the Court's gerrymandering jurisprudence.

I conclude this introduction with a note on methodology. The analysis that follows is not limited to examining the reasoning in the case law that is at the core of the Court's fundamental rights and gerrymandering jurisprudence. It also incorporates arguments from merit and amicus briefs. This methodology of doctrinal analysis that incorporates briefs reveals something that should be obvious to lawyers: much of the reasoning in case law is in response to arguments set forth in the briefs. A problem that arises from omitting the arguments the briefs in the case law analysis is that we can lose sight of the broader parameters of the debate and, specifically, the sides of the debate that the Court only implicitly embraces and rejects. This case-brief methodology will guide my analysis of the Court's gerrymandering jurisprudence of the past and present.

**I. The Confusing State of the Court's Current
Gerrymandering Jurisprudence**

Legislative districts are the primary vehicles of representation in the United States. With the exception of the United States Senators, every federal and state legislative representative is selected through district-based elections. Every ten years after the census is released, states must re-draw their congressional and state districts to comport with the constitutional requirement of equipopulation districts. In most states, the state legislature, often with the required acquiescence of the governor, draws both congressional and state district maps. In a small number of states, independent redistricting commissions comprised of citizens or judges draw the district maps.

Where state legislatures retain the authority to draw districts, the goal is usually not merely equipopulous districts. Rather, the goal is to draw equipopulous districts that advantage particular groups and themselves. When one party controls the districting process, district line drawing is often used as a tool to advantage

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the controlling party. The controlling party secures these advantages by drawing districts in ways that provide it with the opportunity to win a greater percentage of legislative seats than percentage votes in elections conducted under the map. Packing voters that typically favor the minority party so that they comprise a super-majority in a few districts and dispersing the rests of these voters into the other districts where they comprise a minority usually does the trick of securing partisan advantage for the controlling party.

State legislatures also draw districts to comply with the Voting Rights Act, which has as its objective the protection of the voting and representational rights of historically marginalized racial minorities. For the last three redistricting cycles, the Department of Justice enforcing Section 5 of the Voting Rights Act required southern states with a history of voting discrimination to draw districts to provide racial minority groups with a proportionate opportunity to elect candidates of their choice. This meant drawing districts comprised of a majority of racial minority group members (majority-minority districts). Other states not subject to Section 5 of the Voting Rights Act also drew majority minority districts favorable to a particular racial minority group to avoid potential liability under Section 2 of the Voting Rights Act, a provision of the Act that individuals can enforce through private causes of action.

Finally, state legislatures draw districts to favor the re-election prospects of its members through the construction of safe districts with a partisan composition that is often extremely advantageous to the incumbent. When one party controls the process, the focus is usually on drawing safe districts for members of the controlling party. When control over districting is split between the two parties, legislators sometimes agree to a sweetheart bipartisan districting arrangement that provides safe districts for the maximum number of incumbents possible while complying with the Voting Rights Act and the constitutional equipopulation requirement.

Accompanying every decennial drawing of district lines are three types of constitutional challenges brought against states'

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districting arrangements. The first type of constitutional challenge that the Supreme Court has more frequently reviewed, and mostly accepted, has been against states for considering race or giving too much consideration to race in drawing specific districts to provide racial minority group members with an opportunity to elect candidates of their choice. These are racial gerrymandering claims. The second type of constitutional challenge that the Supreme Court has much less frequently reviewed, and thus far universally rejected, has been against states for considering partisanship or giving too much consideration to partisanship in drawing statewide district maps to give one party a representational advantage disproportionate to the votes that its candidates receive. These are partisan gerrymandering claims. A third type of challenge that has been wholly missing from the Supreme Court's jurisprudence since the 1970s have been challenges to bipartisan sweetheart gerrymanders.

Since the last decennial round of redistricting following the 2010 census, the Court has decided three racial gerrymandering cases and is reviewing a partisan gerrymandering claim during the current term. As I show in the next section, what is striking about the recent racial gerrymandering cases and the oral argument for the partisan gerrymandering claim in the Supreme Court is the dearth of analysis of the constitutionally cognizable harm that arises from gerrymandering. This omission would be justified if the Court in prior racial and partisan gerrymandering cases had clearly defined the constitutionally cognizable harm and developed a constitutional test that is clearly focused on identifying the harm. But as I show in the second section in this Part, this has not been the case. In the racial gerrymandering cases, the Court in past cases has only offered a vague and confusing account of the harms. The harms identified in those cases are either not remedied by the test developed to evaluate the harm, do not comport with the standing requirement that the Court has established for racial gerrymandering claims, or are not applicable to the recent racial gerrymandering cases that differ in a fundamental way from the racial gerrymandering cases of the past. In the partisan gerrymandering cases, the problem has been less the Court's vague and confusing account

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of the harm, but rather a judicial unwillingness to robustly embrace any harms or show that the harms are constitutionally cognizable.

I conclude this Part with an explanation of why identifying the constitutionally cognizable harm arising from gerrymandering is important. I focus on the value of a clear constitutionally cognizable harm for both the development of a suitable constitutional standard the defense of a legitimate constitutional role for the Court in adjudicating gerrymandering claims.

A. The 2010 Gerrymander

The 2010 round of redistricting differed from the ones that came before it in terms of the party in control in most states and the development and use of technology to draw district maps. Prior to the 2010 election when many question the ongoing viability of the Republican Party as a national party, the Republican State Leadership Committee (RSLC) formulated a strategy labeled the REDistricting MAjority Project (REDMAP) “to keep or win Republican control of state legislatures with the largest impact on Congressional districting.” The RSLC raised and spent \$30 millions dollars¹ in typically low money state legislative races and the strategy proved effective in securing control for the Republican Party of state legislatures responsible for drawing state and federal legislative district lines.

According to data collected by the RSLC, Republicans increased their control over districting from 98 jurisdictions in the 2000 round of redistricting (and five in the 1990 round of redistricting) to 193 in the 2010 round of redistricting. Democratic control declined from 135 jurisdictions in the 2000 round of redistricting (and 172 in the 1990 round of redistricting) to 44 in the 2010 round of redistricting. The number of jurisdictions where the two parties had split control also declined from 161 in the 2000 round of redistricting (and 240 in the 1990 round of redistricting) to 103 in the 2010 round of redistricting.

¹ much of it after the Supreme Court’s campaign finance decision in Citizens United striking down independent campaign expenditure limits and the D.C. Circuit’s decision in Speech Now

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In terms of state legislative chambers, Republican control increased from 36 chambers prior to the 2010 election to 55 chambers after the 2010 election and Democratic control decreased from 60 chambers prior to the 2010 election to 40 chambers after the 2010 election. Two chambers remained tied.

Republicans controlled both legislative chambers in 21 of the 37 states where the state legislature drew congressional district lines accounting for 40 percent of the federal congressional. Democrats controlled both legislative chambers in only nine of the states comprising ten percent of the congressional districts. The two parties split state legislative control in two of the states and one states, Nebraska, had a unicameral nonpartisan legislature that was responsible for drawing congressional districts. The remaining thirteen states either had only one congressional district or used independent or politician commissions to draw district lines. Similarly, Republicans controlled both legislative chambers in 21 of the 37 states where the state legislature drew state legislative district lines, Democrats controlled both legislative chambers in nine states, 6 states were split, and the remaining state was Nebraska, the unicameral nonpartisan legislature that also drew state legislative districts. In the remaining states, independent or politician commission drew district lines.

Many of the state legislatures under unified party control did what others of the past had done, which was to try to obtain maximum partisan advantage in the drawing of district maps. But this time, in addition to the Republicans newfound dominance over state legislatures, technology had evolved in such a way to make maximizing partisan advantage something closer to a science. The combination of data about voters' behavior and preferences, mapping tools, and expert quantitative assessments about how to secure durable partisan advantage allowed state legislatures to draw some of the most gerrymandered districts in history. In an era in which voters generally vote consistently along a party line in presidential and house races, the disparity between the percentage of votes that President Obama received in the 2012 election and the number of House seats that Democrats won in certain states in that

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election demonstrates the effectiveness of the Republican gerrymander.

In the 2012 election, President Obama won Pennsylvania by more than 5 percentage points and yet Democrats won only five of the 18 congressional House elections. President Obama won Virginia by 3 percentage points and yet Democrats took only three of the 11 congressional House seats. In North Carolina, President Obama lost by 1.6 percentage points, but House Democrats lost even bigger as they were only able to secure four of the 13 seats. In Wisconsin, President Obama won by more than 6 points, but Democrats only won only 3 of the 8 seats. The most egregious disparity can be found in Michigan, a state that President Obama won by nearly 10 points and yet Democrats took only 5 of the 14 seats. These five states shared a common feature: Republican-controlled legislatures drew the district lines. Republicans were certainly not alone in seeking maximum partisan advantage through the drawing of district lines.

The vote tallies from congressional elections in these states suggests that Republicans secured their partisan advantage by packing Democrats into a few districts and dispersing the rest of them into the other districts where they were guaranteed minority status. In the five contests that Democrat House members won in Pennsylvania, the margins of victory were 24, 38, 54, 70, and 83 percentage points. In Virginia, Democrats won by margins of 25, 34, and 62 percentage points. In North Carolina, Democrats won by margins of 41, 45, and 49 percentage points with one election uncontested. In Wisconsin, Democrats won by margins of 28, 36, and 47 percentage points. And in Michigan, Democrats won by margins of 24, 28, 39, 66, and 69 points. In each of these states, the margins of victory for Republicans were generally much smaller than that of Democrats suggesting that Republicans effectively used their control over the districting process to distribute Republican voters more efficiently than Democratic voters.

In the few states where the Democrats had full districting authority, they certainly took advantage. For example, in Maryland, a state where President Obama won by nearly 25

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points, Democrats gave themselves an even bigger advantage in congressional House elections as they won seven of the eight seats. In the northeastern states of Connecticut, Rhode Island, and Massachusetts, Democrats won all of the Congressional seats despite the fact that Mitt Romney won between 35 and 40 percent of the votes in these states. Partisan advantage in Maryland was secured in part by packing Republicans into the one district where the Republican candidate won the seat by a margin of nearly forty percentage points. In Connecticut, Rhode Island, and Massachusetts, the Democratic-controlled legislatures dispersed Republicans into districts so that they were a minority in all of the Districts.

The problem with partisan gerrymandering, however, from the perspective of the Democratic Party was that they controlled many fewer state legislatures than the Republicans and were therefore limited in the partisan advantage that they could secure through districting. As a whole, Republicans won 33 more seats than Democrats in the 2012 election (nearly 54 percent of the seats in the House) despite winning only 49 percent of the votes in congressional races nationwide. The Republicans crowed about the “firewall” that they constructed “through the redistricting process that paved the way to Republicans retaining a U.S. House majority in 2012.” Democrats and their supporters responded by turning to the courts for relief from the gerrymandering.

Challengers to the Republican gerrymanders pursued two litigation strategies to persuade courts to strike down the districting arrangements. They targeted gerrymanders as unconstitutional racial gerrymanders in some states and as unconstitutional partisan gerrymanders in another. Racial gerrymandering challenges to Alabama, Virginia, and North Carolina reached the Supreme Court and the Court struck down districts in each of the states as unconstitutional under the Fourteenth Amendment Equal Protection Clause. In these cases, the majority and dissenting opinions engaged in a robust debate about how the racial gerrymandering standard should apply, but failed to offer any developed account of the judicially cognizable constitutional harm that arose from the racial gerrymander that

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the standard was designed to expose. The Court failed to engage the harms despite the assertions of the harms in the briefs to the Court. A partisan gerrymandering challenge to the Wisconsin districting arrangement has also reached the Supreme Court with prognosticators speculating that the Court may strike down the entire districting map as unconstitutional under the Fourteenth Amendment. Similar to the racial gerrymandering cases, the justices in oral argument spent most of their time debating the manageability and appropriateness of proposed standards for evaluating partisan gerrymandering and almost none of the time discussing whether the harms from gerrymandering are constitutionally cognizable by the Court. In the next section, I turn to these cases.

B. The Racial Gerrymandering Challenges in Alabama,
Virginia, and North Carolina

1. The Context of the Racial Gerrymanders

States do not have unfettered discretion to draw districts as they please. The Court has established three constitutional requirements for states in the drawing of districts. According to two requirements developed in the 1960s, states have to draw equal population districts that provide for the fair and effective representation of racial and political elements. Under a third constitutional mandate established three decades later, states are prohibited from drawing district lines with a predominant racial motive. In addition to the constitutional requirements, states are also constrained by federal statutes. Federal reapportionment acts limit states to drawing contiguous, single-member congressional districts. The federal Voting Rights Act (VRA) prohibits states from drawing districts that deny racial minority groups an equal opportunity to elect candidates of their choice. Finally, many states have constrained their own districting authority. The typical statute requires states to draw districts that are contiguous, reasonably compact, and follow political subdivision lines when constitutionally feasible.

States and jurisdictions with a history of voting discrimination, as defined by the VRA, have been subject to a unique

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redistricting obligation under Section 5 of the Act since the 1970s. All state redistricting actions can be challenged as denying racial minorities an equal opportunity to elect candidates of their choice under section 2 of the VRA. But under Section 5 of the VRA only states and jurisdictions with a history of voting discrimination, labeled covered jurisdictions, have to obtain preapproval from the federal Department of Justice or the District Court for the District of Columbia for their redistricting plans. To secure such preapproval, covered jurisdictions have the burden of proving that their redistricting plans do not have the purpose and will not have the effect of denying or abridging the vote of racial minorities. Since the 1990s round of redistricting, the Department of Justice has only preapproved districting plans that provide racial minorities with a proportionate opportunity to elect candidates of their choice. This meant that covered states had to draw a number of districts proportionate to the minority population in the state that contained a sufficient number of voting age minorities, usually a majority, to essentially guarantee the minority group an opportunity to elect its preferred candidate.

From the very beginning, operatives in the Republican Party saw Section 5 of the VRA as an opportunity for partisan advantage. Most of the covered jurisdictions were in the South. In these southern jurisdictions, African Americans were the predominant racial minority group and they overwhelmingly voted for Democratic candidates in elections. The requirement under Section 5 of the VRA that covered jurisdictions draw majority minority districts to ensure that group's opportunity to elect its preferred candidate gave legal license to the packing strategy that Republicans sought to employ to their partisan advantage. In the 1990 and 2000 rounds of redistricting, Democrats either controlled or shared control in most of the legislatures responsible for drawing districts in covered jurisdictions. Even though packing African Americans into fewer districts went against the partisan interests of Democrats who might have wanted to disperse African Americans more broadly so that the party could control more districts, the state legislatures had a legal obligation to comply. Democratic state legislatures knew they had to comply for political reasons as

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well. Democrats risked losing the support of African Americans if they failed to secure seats for members of the group in legislative bodies through the drawing of majority minority districts.

In the 1990 and 2000 rounds of redistricting, Democrats were unable to avoid the partisan costs from the drawing of opportunity to elect congressional districts. Due to the size and relatively small number of congressional districts in covered states, the drawing of a few majority minority districts came at the cost of drawing several more predominantly white, mostly Republican districts. In part because of covered states compliance with the VRA, Republicans gained and maintained a majority of congressional seats. But Democrats in the 1990 and 2000 districting rounds had been able to maintain a majority of state legislative seats in those two districting rounds while complying with the Section 5 mandate by creating majority minority districts with the minimum number of African Americans necessary to guarantee the election of minority preferred candidates and dispersing other African Americans into other districts for partisan advantage.

The successful Republican REDMAP strategy changed all of that. By the 2010 round of redistricting, Republicans gained control of most of the covered state legislatures. In 2010 redistricting round, Republican controlled legislatures interpreted Section 5 of the VRA to require the creation of minority opportunity to elect districts with a percentage of racial minorities that exceeded a majority, sometimes by a large margin. The Republican redistricting strategy preserved a proportionate number of districts in which African Americans had an opportunity to elect their preferred candidate, but it dramatically reduced the number of districts in which Democratic voters could elect Democrats to the detriment of the substantive political interests of African Americans.

2. Racial Gerrymandering in the Courts: An Intense Focus on Standards

African Americans and their allied civil rights groups and

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partisan representatives in covered jurisdictions turned to the courts for relief. But the challengers to the districting arrangements found themselves in an awkward litigation position. The primary legal basis for racial minority challenges to districting arrangements in the past, Section 2 of the VRA, was not viable because the states through the drawing of a proportionate number of majority-minority districts had complied with the statutory requirement. A constitutional claim that the states had denied African Americans fair and effective representation in the political process seemed to be unavailable for the same reason. There was no question that the states had drawn equipopulation districts so the challengers did not have that constitutional claim as an option.

African Americans and their allies therefore turned to the only legal claim available, the constitutional claim that the state had engaged in an unconstitutional racial gerrymandering by drawing districts with a predominant racial motive. There is a bit of an irony to African Americans advancing a racial gerrymandering claim. In the 1990s, when white voters and their allies brought racial gerrymandering claims against covered states for drawing majority minority districts, African American voters and their allies defended the practice in amicus briefs to the court. Twenty years later, some of the same defenders of majority minority districts in the past were now bringing racial gerrymandering claims against states for drawing majority minority district, albeit supermajority minority districts in some cases. In a story of strange bedfellows, the mostly conservative opponents of racial gerrymanders in the 1990s joined African Americans and their civil rights and Democratic allies in the constitutional attack on the states' drawing of district lines as too race based.

The three cases that have reach the Supreme Court in the last three years involved challenges to Alabama and Virginia's drawing of state legislative districts and North Carolina's drawing of congressional districts. In all of the cases, the challengers claimed that specific districts violated the Constitution because they were drawn with a predominant racial motive. The predominant racial motive standard evolved from two cases

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decided in the 1990s. In *Shaw v. Reno*, the seminal case reviving the constitutional racial gerrymandering claim in a new form, the Court found that challengers to a bizarrely shaped majority-minority district in North Carolina had a cognizable constitutional claim of racial gerrymandering. For the majority in *Shaw*, the bizarre shape of the majority-minority district could be the basis for a claim that the government's decision to draw the district cannot "rationally ... be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification."

Two years after *Shaw*, the Court in *Miller v. Johnson* explained that the bizarre shape of a majority minority district should be considered circumstantial evidence that race was a predominant motive in the drawing of a district. If challengers prove through either direct or circumstantial evidence that the state subordinated traditional districting principles to race in the drawing of district lines, then that state action would be subject to strict scrutiny. The Court in *Miller* and in the racial gerrymandering cases in the decade that followed defined traditional districting principles to include "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interest, incumbency protection, and political affiliation."

In the racial gerrymandering cases following the 2010 round of redistricting, the litigants in their briefs and the justices on the Supreme Court engaged extensively the predominant motive standard. In the first two cases, a unified Court resolved a dispute between the parties about features of the predominant motive standard and in the third case, a divided Court resolved a dispute between the parties about the application of the predominant motive standard. In contrast to their extensive engagement with the standard, the parties and the Court focused little attention on identifying the constitutionally cognizable harm that the predominant motive standard was supposed to root out or redress in the cases.

In the first racial gerrymandering case to reach the Supreme

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Court following the 2010 redistricting round, *Alabama Legislative Black Caucus v. Alabama*, the Alabama Legislative Black Caucus challenged the state's drawing of legislative districts that comprised of percentage of African Americans that exceeded a majority. The challengers argued that race was the predominant factor in the drawing of the state legislative districts. The district court held, and the state argued in its defense of the state legislative districts, that the state legislature had prioritized satisfying the constitutional requirement of equal populated districts along with race in the drawing of the districts. The Alabama Black Caucus did not object to the state's contention that it had prioritized the constitutional requirement, but noted that the compliance with the constitutional equipopulation requirement had not been considered a traditional districting principle in prior applications of the predominant motive test. If the Court had considered the constitutional equipopulation requirement to be a traditional districting principle, the challenger explained, it should have rejected all past racial gerrymandering challenges because states have always prioritized meeting the constitutional requirement when drawing districts.

The Supreme Court in *Alabama Legislative Black Caucus* agreed with the challengers to the state legislative districts. The Court explained, "an equal population goal is not one factor among others to be weighed against the use of race to determine whether race "predominates." Instead, "it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination of how equal population objectives will be met." The Court concluded, race is a predominant racial motive when it is primary consideration in the drawing of district lines over traditional race-neutral districting principles that include "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interest, incumbency protection, and political affiliation." The Court remanded the case to the district court for consideration under the proper predominant motive test.

In the second racial gerrymandering case, *Bethune-Hill v.*

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Virginia Board of Elections the parties again spent considerable time debating the nature of the standard. The challengers argued that the state legislature racially gerrymandered districts when it used a racial target of 55 percent African American for specific state legislative districts to comply with Section 5 of the VRA. The state defended the districts and the racial targets used to construct them. The state argued successfully to the district court that the use of race was permissible because the state legislature also complied with the traditional districting principles of compactness, contiguity, and respect for political subdivisions when drawing the districts. The essence of the state's defense was that so long as the legislature did not draw bizarrely shaped majority minority districts, it could explicitly rely on a racial target in the drawing of the district.

The challengers disagreed with, and the Court ultimately rejected, the state's interpretation of the predominant motive test. The Court explained, while *Shaw* suggested that a district's bizarre shape was a threshold requirement for a racial gerrymandering claim, *Miller* had revised the standard to make clear that district shape was merely circumstantial evidence that could support a racial gerrymandering claim. A challenger could prove a predominant racial motive on the basis of direct evidence along with other circumstantial evidence or no circumstantial evidence at all. As the Court explained, "[t]here may be cases where challengers will be able to establish racial predominance in the absence of an actual conflict by presenting direct evidence of the legislative purpose and intent or other compelling circumstantial evidence." Thus, the Virginia legislature's decision to draw compact and contiguous districts did not immunize it from a constitutional racial gerrymandering claim when there was direct evidence of the legislature's use of race to draw district lines.

In the third racial gerrymandering case, *Cooper v. Harris*, the dispute did not center on the nature of the predominant motive standard, but rather on how the district court applied the standard to the particular controversy. The district court held on the basis of direct and circumstantial evidence that race predominated over politics in the North Carolina legislature's

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decision to draw two congressional districts. This was a very tricky issue for the Court. The high correlation between race and partisan voting in North Carolina made it difficult for the Court to separate out the racial and partisan motivations underlying the drawing of district lines. As discussed earlier, Republican-controlled legislatures like the one in North Carolina, had a strong partisan interest in packing mostly Democratic African Americans into a few districts for the partisan advantage it would produce in the surrounding districts. But of course, the Republican efforts to secure partisan advantages also implicated the use of race as the North Carolina legislature explicitly relied on racial variables in the drawing of the majority minority districts. Was race or politics the predominant motive? In an earlier racial gerrymandering case involving the same question, the Court resolved the issue by looking to the challenger's alternative district map indicating that the same partisan advantage could be secured through the drawing of district lines that relied less on race. In *Cooper*, the challenger to the gerrymander did not produce alternative maps. The district court nonetheless found on the basis of direct evidence that the legislature set a racial quota for the districts and circumstantial evidence of district shape that race was the predominant motive in the drawing of the two majority-minority districts.

The briefs to the Supreme Court debated extensively the race versus politics question and the Supreme Court did as well. Justice Kagan, writing for a majority of the Supreme Court, applied the clear error standard and affirmed the lower court's determination that race predominated over partisanship and other traditional districting criteria in the legislature's drawing of the two districts. Justice Kagan conceded that it was a close call as to whether partisanship or race predominated, but she ultimately ultimately determined, "[t]he evidence offered at trial, including live witness testimony subject to credibility determinations, adequately support[ed] the conclusion that race, not politics, accounted for the district[s]' configuration." Applying strict scrutiny, the Court struck down both districts as unconstitutional racial gerrymanders.

The dissent in an opinion authored by Justice Alito vehemently

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disagreed with the lower court's interpretation of the evidence and argued that the court had committed clear error in finding that race predominated over politics in the drawing of the two districts. For the dissent, the challenger's failure to produce an alternative map that would serve the legislature's partisan objectives without the same racial effect critically undermined the racial gerrymandering claim. Given the high correlation between racial identification and partisan affiliation in North Carolina, the dissent argued that without the alternative map it was impossible to disentangle the two potential motives for the district line drawing. In the absence of an alternative map, the presumption of good faith that applies to district line drawing requires judicial deference to the legislature's determination race was not the predominant motive in the drawing of the districts. In addition to criticizing the challenger's failure to produce an alternative map, the dissent also extensively disputed the district court's interpretation of the direct evidence. Justice Alito argued that the evidence only showed that "race played some role in the districting process" not that race was the legislature's predominant motive. The districting decisions should have therefore been subject to rational basis review not strict scrutiny.

3. Racial Gerrymandering in the Court: Relative Inattention to
Racial Gerrymandering Harms

The briefs' and the Court's extensive engagement with the predominant motive standard in the three recent racial gerrymandering cases can be contrasted with their inattention to the constitutionally cognizable harm arising from the gerrymandering. There is very little discussion in the briefs and virtually no discussion in the judicial opinions about the constitutionally cognizable harm that the predominant motive test is designed to root out or redress.

The most obvious constitutional harm that follows from the Court's equal protection antidiscrimination jurisprudence is a classification-based harm from the government's use of race. As the Court has explained in several cases, racial classifications are "by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Such classifications,

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the Court has repeatedly said, “threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.” Yet, the challengers and the progressive civil rights groups in their friends of the Court, for the most part, proved reluctant to embrace the classification harm as the relevant constitutionally cognizable harm underlying the predominant motive test.

The briefs in the *Bethune Hill* case that deviated from the apparent strategy to underplay the classification harm exposed the danger associated with the challengers’ embrace of the harm. The brief for the appellants quoted the anti-classification language from the Court’s equal protection jurisprudence regarding the odiousness of racial classifications arising from their stigmatizing effect and potential to incite racial hostility. The amicus brief of the NAACP and the Virginia NAACP went further in describing the stereotyping harms from the use of racial quotas. Such use of racial quotas, the NAACP explained, “treats all black voters as valuing the same issues, belonging to a single race-based community of interest, and needing continued and in some cases increased government intervention in their communities to elect candidates of choice.”

The danger with *Bethune Hill* and the NAACP’s arguments from the progressive civil rights perspective is that it would require the very result that the NAACP’s arch nemesis, the conservative Pacific Legal Foundation, advocated for in its amicus brief to the Court in *Alabama Legislative Black Caucus*. The Pacific Legal Foundation concurred with *Bethune Hill* and the NAACP in describing the harm from the government’s use of race as a classification-based harm. Judicial recognition of the harm from racial gerrymandering as a classification harm would threaten not only the constitutionality of state actions packing racial minorities into legislative districts. It would also threaten the constitutionality of any state actions to draw districts to provide racial minorities with a reasonable opportunity to elect their candidate of choice under the Voting Rights Act. Civil rights groups’ defense of the constitutionality of the Voting Rights Act and the minority opportunity to elect districts mandated under the Act would be critically undermined if the Court embraced the

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classification harm as the constitutionally cognizable harm.

The challengers and their friends of the Court therefore avoided reference to the potential classification-based harms from racial gerrymandering because they probably recognized the pitfalls associated with judicial embrace of that harm. Instead of advancing the classification-based harm, the dominant strategy of the challengers was to focus the Court's attention on the vote dilution harm from the racially gerrymandered districts. The challengers argued that the constitutionally cognizable racial gerrymandering harm arose from packing racial minorities into districts to the point where their numbers exceeded what was legally necessary to provide them with the opportunity to elect representatives of their choice.

The focus on the vote dilution harm from packing had two benefits from the perspective of the challengers. First, it provided a basis for challengers to defend the constitutionality of minority opportunity to elect districts mandated under the VRA. According to the challengers, the opportunity to elect districts mandated under the VRA only required states to draw districts with a percentage of minorities necessary for the racial minority group to have an opportunity to elect their candidate of choice. Packed districts were an unconstitutional deviation from the VRA requirements. Second, the vote dilution harm had the benefit of a constitutional pedigree. In the 1960s, the Supreme Court established a constitutional prohibition on districting arrangements that deny to racial or political elements fair and effective representation in the political process. In the 1970s, the Court appeared to translate the prohibition on the denial of fair and effective representation into a requirement that states draw districts to provide racial minority groups with the opportunity to elect candidates of their choice. This latter requirement emerged as the essence of a vote dilution claim.

In the face of the challengers' assertion of harms, the Court in its three racial gerrymandering opinions did not at all engage the claim of vote dilution harm from racial gerrymandering. In fact, in the three cases, the Court only once referenced any harm arising from the practice in its majority opinion. In *Bethune Hill*,

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the Court described the practice of racial gerrymandering as a form of racial sorting. It then quoted *Shaw v. Reno* in explaining, “[t]he harms that flow from racial sorting ‘include being personally subjected to a racial classification as well as being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group.’” The Court never explained why it was necessary for the legislature to have a predominant racial motive to cause the racial classification harm. As noted in Justice Thomas concurrence in *Cooper v. Harris*, under an anti-classification approach, “North Carolina’s concession that it created the district as a majority-black district [should be] by itself sufficient to trigger strict scrutiny.” The Court also never explained whether and how the parties bringing the racial gerrymandering claims experienced the harm from the classification.

4. Looking to the Past for the Racial Gerrymandering Harm:
Confusion and Contradiction

There is an account of the harms from racial gerrymandering in the Court’s jurisprudence. In the seminal racial gerrymandering case of *Shaw v. Reno* decided twenty years before the recent spate of cases, the Court offered a much more expansive description of the harms arising from the districting practice. Importantly, however, the Court in *Shaw* was only reviewing a racial gerrymandering claim that had only proceeded to the motion to dismiss stage. Since the only question for consideration was whether the parties challenging the districts had stated a cognizable claim, the Court only described the potential harms that could arise from racial gerrymandering. Neither in *Shaw* nor in the racially gerrymandering cases decided in the decade that followed did the Court assess whether racial gerrymandering actually caused the harms described.

But even assuming that racial gerrymandering caused the harms described in *Shaw*, the Court’s account of the harms raised more questions than it answered. Were the harms constitutionally cognizable? What was the relationship between the constitutional standard and the harm? What was the relevance of the harms described in *Shaw* to the recent racial

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gerrymandering claims?

The Court in *Shaw* employed reasoning from its surrounding equal protection jurisprudence finding any government use of race to be presumptively unconstitutional. Quoting from its colorblindness jurisprudence, the Court explained, “[c]lassifications of citizens solely on the basis of race ‘are by their nature odious to a free people whose institutions are founded upon the doctrine of equality.’” The harm from such classifications is that “they threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.” From this starting point in its anti-classification jurisprudence, the Court speculated about the potential harms that might arise from the government’s use of race in districting. These harms include a stereotyping harm arising from the reinforcement of the “perception that members of the same racial group ... think alike, share the same political interests, and will prefer the same candidates at the polls.” Such a stereotype, the Court explained, “may exacerbate the very pattern of racial bloc voting that majority-minority districting is sometimes said to counteract” and contribute to political polarization along racial lines. Finally, the use of race might lead representatives of the racially gerrymandered districts to believe that “their primary obligation is to represent only members of that group, rather than their constituency as a whole.”

The Court concluded its account of the harms with a striking analogy between racially gerrymandered districts and South African apartheid; a system of racial oppression that was particularly salient in the early 1990s. According to the *Shaw* majority, “[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.”

The basic problem with the Court’s description of the racial gerrymandering harm in anti-classification terms is that the standard for adjudicating racial gerrymandering claims does not actually prohibit districting that causes the harm. The Court

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beginning with the 1976 case of *Washington v. Davis* has held that when challengers prove that race was one of the motivations behind a facially neutral state action that disparately harms a racial minority group, it will be treated as a presumptively unconstitutional racial classification. This discriminatory intent standard suggests that when race is a motivation for a state action, the stereotyping, stigmatization, and racial hostility harms from racial classifications follow.

But in the racial gerrymandering context, the challenger to a district is subject to a standard requiring proof that race was more than just one of the motives underlying the drawing of the district. Instead, the standard implicit in *Shaw* and made explicit two years later in *Miller v. Johnson* requires that the challenger prove that a state was *predominantly* motivated by race in drawing the district. Only when the challenger demonstrates a predominant racial motive in the drawing of the district will the Court treat facially neutral district line drawing as a racial classification subject to strict scrutiny.

If it is true, as the Court suggests in its discriminatory intent jurisprudence, that any racial motivation produces the harms from racial classifications, then why doesn't the Court treat as presumptively unconstitutional any use of race in districting? As justification for its predominant racial motive standard for racial gerrymandering, the Court has explained that states are inevitably aware of race in the drawing of district lines. Thus, even if state officials were required to remove race as a factor for consideration in drawing district lines, they are likely to be aware of the racial demographics of the state and this awareness is likely to influence their district line drawing.

The problem with this justification for a predominant motive standard in the districting context is that it also applies to other state actions that the Court has subjected to the easier to prove discriminatory intent standard. State actors that engage in employment, admission, or contracting decisions are often as likely to be aware of applicants' race as state district line drawers are to be aware of the racial demographics of the state. Just to take one example, state actors when making employment

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decisions are often aware of race when hiring and inevitably aware of race when promoting or firing. At hiring, state employers can learn or make assumptions about the race of the applicant through their names on the application or interviews. When promoting or firing, state employers are inevitably aware of the race of the employees subject to the decisions. Despite the state's awareness of race in employment decisions, the Court does not subject state's facially neutral employment actions to a predominant racial motive test. Instead, the Court has distinguished race aware decisions from race conscious decision by only subjecting state employers to liability when there is evidence that employment action "at least in part 'because of,' not in spite of its adverse effects upon an identifiable group." Thus, race, must be a motivating factor for the employment decision, but it need not be the predominant motivating factor.

If districting cannot be distinguished from other state decisions in terms of the state's inevitable awareness of race, then can the predominant motive standard be justified as a tool to redress classifications harms. One way to answer this question is to look at the harms themselves. Returning to the three judicially identified harms from gerrymandering, a stereotyping harm, a representation harm, and a segregation harm, only the representation harm survives as a unique constitutionally cognizable harm that might arise from the state using race as a predominant racial motive. Focusing first on the stereotype and segregation harm, the Court has said that the stereotype harm arises from any government use of race in non-districting contexts. If that is the case, then the stereotype harm from districting should arise from any government use of race that would be manifested in race as one of the motives, not the predominant motive, in a districting decision.

The segregation harm that the Court analogizes to apartheid is not a constitutionally cognizable harm in the form that it takes in the districting context. As several scholars have pointed out, the use of race in districting does not segregate in the conventional legal sense that the Court has identified mostly prominently in the school's context. Whereas the school segregation law invalidated in *Brown v. Board of Education* had

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the effect of creating separate racially homogenous schools, the districting decision scrutinized in *Shaw* led to the creation of a district that was barely a majority black.

More importantly, it is difficult to translate the Court's account of the segregation harm arising from the government's use of race in the school context to the districting context. For the Court in *Brown*, the use of race to segregate schools generated within black schoolchildren "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." While the Court in *Brown* was less explicit on this point, that sense of inferiority uniquely felt by black schoolchildren segregated into colored-only schools arose from the fact that it was an all white state actor doing the segregating. It was no accident that the Court failed to attribute a sense of inferiority to white schoolchildren even though they were also segregated into racially homogenous schools. The all white state actor intended through the law to ascribe to white schoolchildren feelings of superiority. Thus, even if we were to accept the state's predominant use of race to create a majority-minority district as a form of segregation, it is difficult to identify the judicially cognizable segregation harm from the state action. It is doubtful that either the white challengers to the use of race in drawing districts in *Shaw* or the black challengers to the government's use of race to draw districts in the recent racial gerrymandering cases can legitimately claim and empirically prove that the state action creates within them a sense of inferiority. In the absence of an alternative identified by the Court, there does not seem to be a clear judicially cognizable harm from the use of race in districting to "segregate."

What is left of the harms identified in *Shaw* is a representational harm. This harm from the state's predominant use of race in drawing districts arises from the message that overly race conscious districting sends to the elected representative. As the Court explains, "[w]hen 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

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whole.” Unlike the stereotyping harm, the representational harm might uniquely arise from the government’s use of race as a predominant factor rather than only one factor. It might be that when race is one of many motivating factors along with politics, geography, and incumbency advantage, for example, in the drawing of district lines, the representative might not sense that their primary obligation is to represent a particular racial group. But when race is the predominant factor, it might lead the representative to conclude that her primary obligation is to represent the group for whom the district is primarily drawn for. It is important to emphasize that the Court identified a possible representational harm from racial gerrymandering. Thus far, there is no empirical proof that representatives of districts drawn with a predominant racial motive legislate any differently than representatives of districts without such a motive. But the absence of empirical support has rarely served as a constraint on the Supreme Court’s recognition of constitutional harms.

The representational harm not only provides a basis for making sense of the predominant racial motive standard, but it can also make sense of the standing requirements for a racial gerrymandering claim in a way that the leading scholarly account of the harm cannot. Two years after *Shaw*, the Court in *United States v. Hays* held that only individuals residing in the district have standing to bring a racial gerrymandering claim against the state’s drawing of the district. This limitation of standing to district residents undercuts the leading scholarly account of the racial gerrymandering harm as an expressive harm. According to Richard Pildes and Richard Niemi, when the government “use[s] race in the redistricting context in a way that subordinates all other relevant values, the state has impermissibly endorsed too dominant a role for race.” “The constitutional harm,” the scholars continue, “must lie in this endorsement itself: the very expression of the kind of value reductionism becomes the constitutional violation.”

The expressive harm that Pildes and Niemi ascribed to racial gerrymandering was not novel to the Court’s constitutional jurisprudence. Prior to *Shaw*, the Court in its First Amendment Establishment Clause jurisprudence recognized an expressive

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harm from religious displays on government property as a constitutionally cognizable harm when it amount to an endorsement of religion. According to Justice O'Connor's concurrence in *Lynch v. Donnelly*, which established the endorsement claim, "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." To prove unconstitutional endorsement of religion, the challengers has to prove that the state's "actual purpose is to endorse or disapprove of religion" and that "the practice under review in fact conveys a message of endorsement of disapproval." If the racial gerrymandering harm is merely an expressive harm similar to that arising from the state endorsement of religion, then the standing requirements for bringing an endorsement claim should be similar to those for bringing a racial gerrymandering claim. But the two standing requirement are different. In a religious endorsement case, a person has standing to bring a claim if she has seen the religious display and has thus received the message of government endorsement or disapproval of religion. But in a racial gerrymandering case, only a subset of people who have seen the district lines or is aware of the predominant racial motive underlying the drawing of the districts has standing to bring a claim. This standing limitation suggests that those in the district experience a harm distinct from those outside of the district. And it is hard to imagine that distinction turning on the expressive nature of the harm from the line drawing since those individuals in the adjacent districts are as much subject to the expressive harms as those in the district.

Unlike the expressive harm from racial gerrymandering, the representational harm can be reconciled with the standing limits set in *Hays*. Assuming the existence of a representational harm, it is the white residents in the district that uniquely experience the harm in a racially gerrymandered district. If the representative of the racial gerrymandered district feels an obligation to represent the African American members of the district for whom the legislature drew it for, the white residents in the district will be left unrepresented. One could argue that

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the feeling of being unrepresented is a normal feature of democratic politics. After all, those who support the losing candidate in any district election (or any election for that matter) are always going to feel unrepresented and yet the Court has made clear that losing elections is not a constitutional harm. While the Court does not offer one, there is an explanation for why lack of representation from the state drawing districts with a predominant racial motive differs from lack of representation from simply losing elections.

When democratic politics operate properly, ordinary losers in one election are not consigned to the status of permanent losers in the district. In the pluralist marketplace, there is always the possibility that ordinary losers in one election can build the necessary coalitions with members of other groups and emerge as part of the majority, winning coalition in the next election. As a result, representatives concerned about re-election have the proper incentives to attend to the interests of even the losers in the past election. But in districts drawn with a predominant racial motive, the representatives' perception that the district is drawn to advance the interest of one group might not recognize an electoral benefit from attending to the needs of the other people that filled the district ("the filler people"). In fact, to the extent that the legislature draws a district for a particular group, the representative might assume that the group for whom the district is drawn for has interests distinct from and perhaps even opposed to other members of the district. As a result, the representative might think that it is counter-productive for her re-election prospects to represent the filler people. The representational harm from drawing district with a predominant racial motive therefore arises from the representatives' sense that he has no obligation to attend to or consider the views of the filler people.

A problem, however, with the account of the representational harm as the constitutionally cognizable harm is that it is not a harm applicable to the challengers in all of the racial gerrymandering cases. While the harm certainly might be applicable to the white challengers of the majority minority districts in the cases decided in the 1990s and the early 2000s, it

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is not at all applicable to the black challengers of the packed districts in the recent racial gerrymandering cases. Following the logic of the representational harm, to the extent that the packed district was drawn with a predominant racial motive, the representative will perceive that her primary responsibility is to represent members of the group packed into the district. For those members of the group packed into the district, a representational harm claim does not seem viable. In the absence of any other constitutionally cognizable harm, the members of the group packed into the district should not have standing to bring a racial gerrymandering claim.

What about the vote dilution harm from packing? As described above, the primary basis for challengers' racial gerrymandering claims in recent cases is that the state predominantly used race to pack African Americans into a few districts diluting their political power in the surrounding districts. The Court in the recent racial gerrymandering cases was silent on whether vote dilution was a constitutionally cognizable harm arising from states drawing districts with a predominant racial motive. In *Shaw* and its immediate progeny, the Court only addressed vote dilution as part of its defense of the racial gerrymandering claim as a claim distinct from the vote dilution claim. The dissenters in *Shaw* and the cases that followed argued that the white challengers to the majority minority districts had not been harmed because the group's vote had not been diluted. The dissenters pointed to the fact that even after the state's drawing of majority minority districts, whites as a group retained a proportionate opportunity in the state to elect candidates of their choice. The *Shaw* majority did not disagree with the dissent on this point, but held that the white challengers suffered a constitutionally cognizable harm distinct from vote dilution recognized in the case.

Unfortunately, over twenty years later, we still do not have a clear sense of the judicially cognizable constitutional harm from racial gerrymandering. For different reasons, each of the four harms recognized by the Court or scholars fails as a satisfactory account of the harm. The apparent classification harms from racial gerrymandering does not comport with the predominant

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racial motive standard. The so-called segregation from race conscious districting does not produce the harm found constitutionally cognizable in the Court's past equal protection segregation jurisprudence. Any expressive harm appears to be inconsistent with the standing requirements establishment for racial gerrymandering claims. And finally, the representational harm is not applicable to the African American challengers in the recent racial gerrymandering cases. And finally, the Court has made clear that the harm from racial gerrymandering is not vote dilution.

The Supreme Court's failure to either identify the judicially cognizable constitutional harm or the relationship between the harm and the constitutional standard is not unique to its racial gerrymandering jurisprudence. We see a similar pattern in the Court's partisan gerrymandering jurisprudence.

C. Partisan Gerrymandering: Many Harms, Many Standards,
No Direction

Partisan gerrymandering claims are distinct from racial gerrymandering claims in two respects. First, and most obviously, political groups - invariably parties, thus far - are the source of partisan gerrymandering claims while racial groups are the source of racial gerrymandering claims. Because the Court treats these two groups differently in its equal protection antidiscrimination jurisprudence, the Court in its modern partisan gerrymandering jurisprudence treats such claims as almost entirely unrelated to racial gerrymandering claims. Second, partisan gerrymandering claims have consistently targeted statewide maps while racial gerrymandering claims have invariably challenged the drawing of individual districts. While this distinction has been less the focal point in the Court's partisan gerrymandering jurisprudence, it is more relevant to understanding the Court's failure to identify a constitutionally cognizable harm and a standard that relates to the harm.

While the distinctions between the two types of gerrymandering has led the Court to consciously develop a partisan gerrymandering jurisprudence mostly separated from its

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racial gerrymandering jurisprudence, the two sets of doctrine share features in common. First, as in the racial gerrymandering cases, both the litigants in their briefs and the justices in their opinions resolving partisan gerrymandering disputes have devoted considerable attention to the constitutional standard. In the racial gerrymandering cases, the focus has been on how the predominant motive standard should be applied. In the partisan gerrymandering cases, the fixation has been on what the standard should be and what the standard measures. Second, as in the racial gerrymandering cases, litigants and justices pay much less attention to questions surrounding the harms. The partisan gerrymandering jurisprudence, like its racial gerrymandering counterpart, provides mostly cursory accounts of the judicially cognizable harm and even less when it comes to relating the judicially cognizable harms to the many standards proposed.

1. The Search for the Elusive Partisan Gerrymandering Standard

Over thirty years ago, the Justice Byron White writing for a plurality of the Court in *Davis v. Bandemer* found partisan gerrymandering claims justiciable for the first time. A group of Democrats challenged Indiana's state districting plan because it allegedly diluted the party's political power by depriving the party of the opportunity to secure state legislative seats in proportion to the percentage of votes for Democratic candidates in recent the most recent election. Analogizing to prior racial gerrymandering cases, which addressed both challenges to the states' use of race in drawing districts and the states' maintenance of multimember districts alleged to dilute racial minorities' voting power, the Court held that partisan gerrymandering claims are also justiciable. In the prior racial gerrymandering cases, the Court repeatedly asserted "that districting that would 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population, would raise a constitutional question." While the gerrymandering claim in *Bandemer* was unique in that political group rather than a racial group submitted it, for the Court that fact did not "distinguish [the claim] in terms of justiciability.

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But just as the plurality opened the door to partisan gerrymandering claims, it appeared in its development of a standard for adjudicating such claims to close it most of the way. Employing the Court's traditional equal protection formula, the plurality required the challenger to prove that an improper intent motivated the state in its drawing of the statewide map and that the statewide map had an adverse effect. If the challengers could prove discriminatory intent and effect, then the burden would shift to the state to satisfy the rigorous requirements of strict scrutiny.

To prove an improper intent, the challenger merely had to prove that a partisan motivation underlay the statewide maps. Insofar as state legislatures have drawn the map, the *Bandemer* plurality explained, such a showing should be easy. But proving adverse effect would be an entirely different story. The plurality rejected the district court's determination that denial to Democrats of legislative seats in proportion with votes for Democratic candidates would be sufficient to demonstrate adverse effect. "Our cases," Justice White explained, "clearly foreclose any claim that the Constitution requires proportional representation." Instead, the plurality drawing from the past racial gerrymandering cases, held that members of the political group would have to prove that they have "less opportunity to participate in the political processes and to elect candidates of their choice." A statewide plan will only be found to violate the Equal Protection Clause "where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively." Only "evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process" will satisfy this standard.

The difficulty of proving an unconstitutional partisan gerrymandering under the *Bandemer* plurality's standard was not immediately apparent. In fact, Justice Sandra Day O'Connor in her concurring opinion predicted that the standard would "open[] the door to pervasive and unwarranted judicial superintendence of the legislative task of apportionment."

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Ultimately, however, it would be Justice O'Connor's prediction that would prove unwarranted. In the seventeen years between *Bandemer* and the next partisan gerrymandering case to reach the Supreme Court, *Vieth v. Jubrilier*, the courts rejected every claim of unconstitutional partisan gerrymandering. Partisan districting practices therefore proceeded unchecked after the 1990 round of redistricting and reached new levels during the 2000 round of redistricting.

An aggressive partisan gerrymander in Pennsylvania after the 2000 round of districting and an unprecedented mid-decade redistricting for partisan advantage in Texas brought the Court back in to the districting controversy. In *Vieth v. Jubilirer*, the parties challenging the statewide map in Pennsylvania pushed for a new standard for adjudicating partisan gerrymandering claims that would lead courts to find some districting practices unconstitutional. The challengers argued that the standard should combine the intent test from the modern racial gerrymandering jurisprudence with an adverse effects test premised on the lack of partisan symmetry. Under the test, challengers to a partisan gerrymander would have to prove that the state was predominantly motivated by partisanship in their drawing of the statewide map and that the map "could consistently prevent [challengers'] party from wining a majority of seats even if the [party's] candidates repeatedly earned a narrow majority of votes statewide."

Justices on the Court joined the challengers to the statewide plan in *Vieth* in proposing alternative standards for adjudicating partisan gerrymandering claims. Justice Stevens reasoned that the Court's prior standing determination in the racial gerrymandering cases required dismissal of the challenge to the statewide plan. But the standing requirement did not act as a barrier to judicial review of challenges to specific districts. Similar to the challengers, Justice Stevens argued that the Court should review challenges to specific districts under the predominant intent standard established in the racial gerrymandering cases. Insofar as Justice Stevens' partisan gerrymandering standard focused on specific districts, the object was not to redress partisan asymmetry, a harm that can only be

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detected at the statewide level. Instead, as in the racial gerrymandering cases, the focus of the predominant intent standard was on redressing the representational harm to partisan minorities in unconstitutionally gerrymandered districts. This representational harm from districts drawn with a predominant partisan motivation arises from elected representatives' perception that her primary obligation is to represent members of the group for whom the district is drawn for. When a district is drawn with the predominant motivation of protecting or advancing the interest of Republicans, then the representative of that district might feel that her primary obligation is to only represent the interests of Republicans. Further, due to the potential of a primary challenge that might result from representing Democrats in the district, that elected official might conclude that it might be too costly electorally to even consider the interests of Democrats in her representative role.

Justice Souter joined by Justice Ginsburg agreed with Justice Stevens that the focus of a partisan gerrymandering claim should be on specific districts rather than the statewide map. For Justice Souter, the key was developing a workable standard to redress a districting map that denied to groups the "right to fair and effective representation" in the political process. Justice Souter conceded the permissibility of political parties' gaining some political advantage from drawing district lines. However, there is a point when partisan district line practices reach an "extremity of unfairness" that requires judicial intervention. To identify when districting practices have reached an extremity of unfairness, Justice Souter proposed a burden-shifting test analogous to that used to address employment discrimination claims under Title VII of the Civil Rights Act. Under this standard, the challengers to the partisan gerrymandering would have to "satisfy elements of a prima facie cause of action. The burden would then shift to the States to both "rebut the evidence supporting the plaintiff's case" and "to offer an affirmative justification for the districting choices." On the basis of the workability of a similar burden-shifting standard in the Title VII, Justice Souter argued that the proposed standard would also offer a judicially manageable approach for addressing partisan

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gerrymandering claims.

Justice Breyer offered yet another standard for addressing partisan gerrymandering claims. Similar to the standard proffered by the challengers and unlike those proffered by Justices Stevens and Souter, Justice Breyer articulated a standard applicable to a statewide plan. Justice Breyer argued that the focus of a partisan gerrymandering claim should be on whether there is unjustified entrenchment. Unjustified entrenchment occurs when “a minority’s hold on power is purely the result of partisan manipulation and not other factors.” The opportunity for a minority party to entrench itself in power, Justice Breyer explained, are rare given the democratic checks to such entrenchment through partisan gerrymandering. These include the opportunity for the majority to elect a Governor who, in most states, can veto a legislative districting plan that entrenches a minority in power. Further, Congress also has the power under Article I, Section 4 of the Constitution “to revise the State’s districting determinations.” Finally, voters in some states can, through the initiative process, place district line drawing responsibility in an independent body. But there will be rare cases where democracy does not function as a check on unjustified entrenchment. In those rare instances that Justice Breyer identifies in three different scenarios of constitutionally suspect district line drawing, the Court should step in and invalidate the statewide plan.

Despite the extensive efforts of the parties to the case and the justices in dissent, a majority of the Court in *Vieth* rejected all of the proffered standards for adjudicating partisan gerrymandering claims. Justice Scalia, writing for a plurality of four justices, argued that partisan gerrymandering claims should be considered non-justiciable for two principal reasons. First, Justice Scalia argued, consistent with Justice Breyer, that the authority to remedy partisan gerrymandering has been constitutionally committed to Congress through Article I, Section 4. But contrary to Justice Breyer, Justice Scalia determined that the authority to revise districting determinations belonged exclusively to Congress leaving no role for the courts. “Sometimes,” Justice Scalia explains, “the law is that the judicial

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department has no business entertaining the claim of unlawfulness – because the question is entrusted to one of the political branches or involves no judicially enforceable rights.” Reinforcing the point that partisan gerrymandering is not the business of the courts, Justice Scalia advance as his second argument for non-justiciability the claim that “no discernible and manageable standards for adjudicating partisan gerrymandering claims have emerged.” Justice Scalia extensively reviewed the proposed gerrymandering standards. He argued that the standards, specifically those advanced by the challengers, Justice Souter, and Justice Breyer, could not be managed judicially because they could not be consistently applied. The vagueness of the proposed standards, Justice Scalia argued, would require courts to make discretionary and unguided quantifying judgments that are ill suited to their role.

Scholars and courts often narrowly construe concerns about judicial manageability as being about the clarity, objectivity and consistent applicability of the standard itself. But for Justice Scalia, the concern extended beyond these narrow concerns. The lack of judicial manageability of the proposed standards had as much, or even more, to do with the lack of a relationship between the proposed standards and any judicially cognizable constitutional harm. Justice Scalia criticized the challenger for a standard that evaluated the constitutionality of partisan district line drawing according to a partisan symmetry requirement. The justice analogized partisan symmetry as proportionality and noted that the Court had previously rejected a standard that would find unconstitutional effect on the basis of lack of proportionality because the Constitution does not require proportionality.

Justice Scalia also rejected Justice Stevens’ predominant intent standard drawn from the racial gerrymandering cases because classifications on the basis of partisanship, unlike classifications based on race, are presumptively constitutional under the Equal Protection Clause. Justice Stevens’ effort to link his standard to a First Amendment harm is similarly unsuccessful in Justice Scalia’s eyes. Under the First Amendment, Justice Scalia argued, “all considerations of political affiliation in

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districting” would be rendered unlawful if such a claim were sustained. Such a construction of the First Amendment would not only be inconsistent with past assertions by the Court about the permissibility of partisan considerations in drawing districts lines but also Justice Stevens’ standard, which renders unlawful only the predominant consideration of political affiliation in district line drawing.

Finally, Justice Scalia criticized the Souter and Breyer standards for their failure to test for a constitutional harm. “No test,” Justice Scalia explained, “can possibly be successful unless one knows what he is testing for.” Justice Souter’s extremity of unfairness and Justice Breyer’s unjustified entrenchment standard failed this requirement. Since the Constitution does not provide a baseline for the minimal degree of influence and representation that political groups are entitled to, courts have no basis for assessing when a districting practice crosses the line to being unconstitutional.

Justice Kennedy, as the pivotal fifth justice in *Vieth*, agreed with Justice Scalia that none of the standards proposed satisfied the requirement of judicial manageability. But Justice Kennedy refused to go along with the plurality’s determination that partisan gerrymandering should be considered non-justiciable. For Justice Kennedy, districting had a clear objective: establishing “fair and effective representation for all citizens.” Courts have, however, fallen short in identifying “any agreed upon model of fair and effective representation” or “rules to confine judicial intervention.” But just because courts have not yet identified a justiciable standard for evaluating when districting practices are unfair, doesn’t mean that no such standard will emerge. “Where important rights are involved,” Justice Kennedy explained, the impossibility of full analytical satisfaction is reason to err on the side of caution.”

While Justice Kennedy diverges from Justice Scalia in his justiciability determination, he shares with Justice Scalia a similar concern about the judicial manageability of the proposed standards. Even more than Justice Scalia, Justice Kennedy’s focus in terms of manageability is on the relationship between

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any standard and a judicially cognizable constitutional harm. Suitable standards for measuring the constitutional burden from partisan gerrymandering require a determination of the constitutional burden arising from unfairness. Justice Kennedy agrees with Justice Scalia that neither the classification of political groups nor the lack of proportionality from the districting practices can be the constitutional burden. But rather than stopping there, Justice Kennedy identifies the First Amendment as a potential source of constitutional burdens from partisan gerrymandering. Specifically, the justice points to the harms to individual's associational rights and viewpoints that might arise from an apportionment that "has the purpose and effect of burdening a group of voters' representational rights." Since the harm does not arise merely from the states' use of political classifications, but rather the states' use of political classifications to burden representational rights, Justice Scalia's concern that any use of partisanship in districting would have to be found unconstitutional misses the mark. What is of relevance is not the classification, but instead the representational harm. The key then, according to Justice Kennedy, is to identify a workable standard to measure the representational harm.

From Justice Kennedy's opening in *Vieth* came the emergence of a method for measuring representational harm. In *League of United Latin American Citizens (LULAC) v. Perry*, a case addressing a challenge to Texas's unprecedented mid-decade redistricting for Republican partisan advantage, five justices indicated their willingness to consider partisan symmetry as a measure of fairness. This was surprising given that a majority of the Court in *Vieth* had rejected the challenger's proposed standard that used partisan symmetry as the baseline to measure discriminatory effect and none of the justices in dissent embraced partisan symmetry as a measure in their alternative standards. But in *LULAC*, an amicus brief from political scientists persuaded the justices to reconsider the value of partisan symmetry as a baseline for evaluating partisan districting practices. The distinction that the political scientists drew between partisan bias arising from partisan asymmetry and disproportionality seemed to have the most persuasive effect on the justices' thinking. In *Vieth*, Justice Scalia had dismissed

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partisan symmetry as simply another measure of proportionality that the Court had rejected in its prior jurisprudence. But the political scientists demonstrated that partisan symmetry does not require proportionality. Instead, it requires that states treat “similarly-situated political parties equally, so that each receives the same fraction of legislative seats for a particular vote percentage as the other party would receive if it had received the same percentage.” Thus, while a statewide map that gave Republicans 70% of the seats with 55% of the votes would violate the proportionality standard, it would not necessarily violate the partisan symmetry standard. Only if the Democrats under the same statewide map would not receive 70% of the seats with 55% of the votes would the map violate the partisan symmetry standard. Such a statewide map that treats Republicans more favorably than Democrats suffers from partisan bias.

Justice Kennedy writing for the ___ in *LULAC* was not completely sold on the partisan symmetry standard. He was concerned about the hypothetical nature of the standard that “depend[ed] on conjectures about where possible vote-switchers will reside.” Further, the partisan symmetry standard does not provide a basis for determining when partisanship was too much of a consideration in drawing the map. If some partisan advantage is permissible in district line drawing, then presumably perfect partisan symmetry is not required. But if perfect partisan symmetry is not required, then what level of partisan asymmetry violates the Constitution? Even after identifying these two weaknesses with the standard, Justice Kennedy was unwilling to entirely discount “its utility in redistricting planning and litigation.” But he was unwilling to consider “asymmetry alone [to be] a reliable measure of unconstitutional partisanship.”

Justice Souter joined in his opinion by Justice Ginsburg was similarly open but ultimately noncommittal on the partisan symmetry standard as a measure of unconstitutional effect. He suggested, “further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review.” Finally, Justice Stevens joined in his opinion by

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Justice Breyer proved to be the most bullish about partisan symmetry as a measure of unconstitutional effect. The widely accepted partisan symmetry standard, Justice Stevens asserted “is undoubtedly ‘a reliable standard’ for measuring a ‘burden on the complainants’ representative rights.’”

Despite the embrace, albeit lukewarm, of partisan symmetry as a judicially manageable standard in *LULAC*, it would be another decade before a party challenged a state districting practice for being inconsistent with the standard. In *Whitford v. Gill*, litigants armed with a new measure of partisan symmetry designed to be responsive to Justice Kennedy’s concern in *LULAC* challenged Wisconsin’s statewide map that advantaged Republicans. This new measure, the efficiency gap, used actual votes rather than modeled hypothetical votes to assess partisan symmetry. Specifically, the efficiency gap measured partisan symmetry through a comparison of each party’s wasted votes in a state. A wasted vote is either a losing vote or a vote in excess of what is necessary to win in a district. The difference between the parties’ wasted votes divided by the total votes casts in the state provides an efficiency test score that is a measure of partisan symmetry. In addition to providing a measure that looks at actual votes, the progenitors of the efficiency gap also responded to Justice Kennedy’s second criticism of the partisan symmetry standard by identifying a point at which partisan gerrymandering has gone too far. Through a historical analysis of the effects of past efficiency gaps, the authors were able to identify when partisan gerrymandering would likely function to entrench partisan gains during the decade of the map’s operation. The challengers found that Wisconsin’s map evinced a high efficiency gap that was an outlier by historical standards and would likely entrench majority Republican control over the state legislature over the course of the decade.

The three-judge district court that heard the challenge became the first court since *Davis v. Bandemer* to strike down a statewide map as an unconstitutional partisan gerrymander. The court held that the Republican-controlled state legislature that drew the map was motivated by an impermissible intent of

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entrenching the Republican party in power. The Court also determined that the statewide map produce an unconstitutional degree of partisan asymmetry according to the traditional measure of partisan bias and the new measure, the efficiency gap. And finally, the Court found that the state had failed to provide a legitimate justification for the map.

Whitford v. Gill thus cemented partisan symmetry as the leading standard for evaluating partisan gerrymandering. The staying power of the standard will depend on whether a majority of the Court follows the path of the three-judge district court. The oral argument in the case suggested that Justice Kennedy, the presumptively pivotal justice in the case, might be receptive to the standard. But one thing that will need to be resolved is the judicial manageability of the partisan symmetry standard. Such a resolution requires that the court look beyond its narrow focus in the oral argument on whether the standard can be consistently applied. Instead, the Court will need to identify the judicially recognized constitutional harm that the partisan symmetry standard is testing for.

Litigants and judges seemed to have assumed that Justice Kennedy's recognition of a First Amendment basis for a gerrymandering claim in *Vieth* resolved the broader judicial manageability concern. But neither Justice Kennedy nor anyone else has explained why a high degree of partisan asymmetry produces a constitutional harm. This is not due to the failure to identify harms that arise from partisan gerrymandering; litigants, courts, and scholars have identified several harms. Instead, it is due to the failure to identify the relationship between the harms and the Constitution and the relationship between any judicially recognized constitutional harms and the partisan symmetry standard. In the next section, I describe the harms said to arise from partisan gerrymandering. I then show that these harms either lack a clear grounding in the Constitution or that they are not clearly related to the leading partisan symmetry standard for evaluating the constitutionality of partisan districting practices.

2. Harms in Search of the Constitution and a Standard

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There is no shortage of harms that partisan gerrymandering is said to cause. But there is a shortage of analysis about how the harms relate to the Constitution and how standards for adjudicating partisan gerrymandering test for the harms. As I showed in the prior section, litigants and justices have promulgated many standards for adjudicating partisan gerrymandering claims. But for purposes of this section, the focus will be on the latest leading standard for adjudicating partisan gerrymandering, partisan symmetry.

In this section, I argue that the harms thus far identified have either not been judicially recognized as constitutional harms, do not relate to the partisan symmetry standard, or both. I draw accounts of partisan gerrymandering harms from the briefs of cases litigated in the Supreme Court both presently and in the past.

I start with the asserted partisan gerrymandering harms that both the Court has yet to recognize as judicially remediable constitutional harms and that the partisan symmetry standard does a poor job testing for. Included in this first category are electoral competitiveness harms from partisan gerrymandering that contribute to polarization, entrenchment, and lack of accountability. These harms arise from a form of gerrymandering, incumbent-protective gerrymandering, that the Supreme Court has not yet directly addressed. Incumbent-protective gerrymandering comprise of actions by state legislatures to draw districts for the purpose of increasing the odds that incumbents will be re-elected. The drawing of districts to produce “safe seats” for incumbents usually requires packing enough voters of the incumbents’ party into a district to ensure that there will not be viable challenge from the other party in the general election. Incumbent-protective gerrymandering therefore leads to the creation of uncompetitive districts in which the incumbent candidate or the candidate from the incumbent’s party is heavily favored to win.

By reducing the competitiveness of general elections in districts, incumbent-protective gerrymandering increases the polarization of politics. In safe seat districts, the only potentially

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competitive election is usually the primary election. In primary elections, the enthusiastic and electorally active base of the party that is generally more ideologically extreme than the mainstream of the electorate usually controls the outcome. Incumbents concerned about primary election challenges will therefore seek to take political positions consonant with the more ideologically extreme base of the parties. And since the incumbent in a safe district usually does not have to worry about a general election challenge, her electoral incentives are to maintain this ideologically extreme position through the general election and into the process of governing. To the extent that safe seat districts produce more ideologically extreme representatives, the result is a more polarized political process in which opportunities for political compromise are limited by how far apart representatives are ideologically in the legislative body. Polarization thus contributes to democratic dysfunction as the absence of common ground between representatives acts as an obstacle to lawmaking.

In addition to contributing to polarization, safe seat districts can serve to entrench both the party in power in the districts and at the statewide level. This entrenchment can undercut the representative's accountability to the median voter in the district. A representative worried about a primary challenge and unconcerned about a general election challenge will focus on being accountable to the base of the party that might only comprise 20-30 percent of the electorate.

Social scientists have provided an empirical basis for the competitiveness-related harms from partisan gerrymandering. But the problem is that these harms lack a direct link to the Constitution itself. The Court has never recognized the lack of electoral competitiveness and the related concerns about polarization, accountability, and entrenchment as judicially remediable constitutional harms. In fact, the Court in *Vieth* refused to consider lack of competitiveness and the unjustified entrenchment it produces to be judicially remediable constitutional harm.

However, just because these competitiveness-related partisan

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gerrymandering harms have not been judicially recognized in the past does not mean that they could not be judicially recognized in the future. However, even if the Court recognizes these harms as judicially remediable constitutional harms, there is a second obstacle: the lack of relationship between the harms and the leading standard for evaluating partisan gerrymandering. Partisan symmetry was not designed to measure electoral competitiveness. As evidence supporting this point, analyses of the newest measure of partisan symmetry, the efficiency gap, show that the measure does not distinguish between very competitive and entirely uncompetitive districts. To the extent that polarization, lack of accountability, and entrenchment arise from uncompetitive elections, the partisan symmetry standard will not provide a particularly accurate appraisal of these harms either.

A second category of harms is judicially remediable and related to the leading partisan symmetry standard but do not clearly arise from partisan gerrymandering. These are the First Amendment harms in the form of viewpoint discrimination and associational expression that Justice Kennedy first recognized in his concurrence in *Vieth*.

The Court has certainly recognized constitutional prohibitions on viewpoint discrimination, associational freedom, and associational expression in its First Amendment jurisprudence. Supreme Court findings of unconstitutional viewpoint discrimination have arisen in cases where groups or individuals have been discriminatorily denied access to a government-controlled forum for their speech or government protection for their speech because of the viewpoint expressed. In these cases, the Court has explained that “[g]overnment may not regulate speech based on its substantive content or the message it conveys’ and that the “[t]he First Amendment forbids the government from regulating speech in ways that favor some viewpoints at the expense of others.” If, as the Court has held, voting is a form of expression then the viewpoint discrimination prohibition should be understood as a prohibition on favoring one individual’s vote at the expense of another on the basis of its viewpoint or partisan direction.

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Partisan gerrymandering does not discriminate by denying to voters the opportunity to express their view through the ballot on the basis of their viewpoints. Democrats, Republicans, and Independents can also express their views through their vote and no one is advantaged or disadvantaged in their ability to express themselves through the vote. But partisan gerrymandering does intentionally discriminate against certain individuals being able to translate their votes into favorable outcomes. When a state draws districts in a way that favors Democrats over Republicans, the supporters of the Republican Party are discriminated against in their ability to use their vote to elect their preferred candidate. This discrimination can extend to the statewide level. If Democrats intentionally draw districts to give themselves partisan advantage statewide, members of the Republican Party have been discriminated against in their ability to use their votes collectively to elect a legislature controlled by Republicans.

Should partisan gerrymandering be considered unconstitutional viewpoint discrimination? A starting point to answering this question requires the recognition that the Court has consistently held that partisanship is a permissible and inevitable factor for states to consider in districting. Thus, avoiding a viewpoint discrimination claim by removing intentionality in drawing district lines is not considered a viable path forward. Since partisanship is a permissible and inevitable factor in districting, a judicial embrace of a viewpoint discrimination claim would put states in an untenable position. Presumably, any loser in an election could successfully argue that the use of partisanship in districting discriminated against their viewpoint by denying to the loser the opportunity to translate their vote into favorable outcomes. To avoid viewpoint discrimination liability, the state would presumably have to draw districts in a way that guarantees every individual's vote will translate into a favorable outcome, an obvious impossibility.

The challenges associated with judicial recognition of an individual viewpoint discrimination explains the decision of Justice Kennedy in *Vieth* and the proponents of the First Amendment claim in *Whitford* to add an associational element to

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the claim. The principal First Amendment argument is that members of the minority party should have a symmetric opportunity to translate their votes into preferred outcomes. Under this characterization, the harm arises when partisan gerrymandering denies to party associations the symmetric opportunities to elect their preferred candidates at the statewide level.

This characterization of the harm accords with the First Amendment recognition of a group right to expression. The freedom of individuals to associate and express views as an association is a right protected under the First Amendment. And there is some intuitive appeal to the idea that advantaging one group's votes at the expense of another's through partisan gerrymandering infringes on the disadvantaged group's associational expression rights. The challenge with an associational expression claim against partisan gerrymandering, however, is with proving that individuals by voting for particular candidates in a district have associated with the party and are therefore entitled to protection against certain statewide results. In district-level elections, some people do seem to be engaging in partisan associational expression when they vote as they consistently engage in straight ticket voting regardless of the candidates. A case can be made that the Court should consider these individuals a part of the party association entitled to First Amendment protection from partisan gerrymandering.

Others, however, vote for the candidate and not the party. In any election, these individuals might engage in split ticket voting dividing their vote between candidates of different parties up and down the ballot. Alternatively, these individuals might shift their support for the parties from one election to the next depending on the relative attractiveness of the candidates. In the absence of anything else that connects these individuals to each other or the party, the argument that the Court should consider these individuals to be a part of the party association entitled to First Amendment protection from partisan gerrymandering is rather weak. Since statistics about votes cast do not distinguish between the two types of voters, it will be difficult for any measure of partisan symmetry to accurately

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assess when partisan line drawing infringes on a group's freedom of association. And even if it were possible to statistically differentiate between the two types of voters, it is hard to imagine a remedy that would protect the fraction of voters that are said to belong to the party association.

Unless the Court is willing to reverse course and decide that partisanship is not a permissible consideration in drawing district lines or to accept loose associational claims that will invite similar claims from many other groups, it is hard to connect the First Amendment to partisan gerrymandering. Justice Kennedy gestured at a path forward when he explained in *Vieth* that partisanship is generally an appropriate consideration in drawing district lines. However, when partisanship "is used to burden a group's representational rights ... there would likely be a First Amendment violation, unless the State shows some compelling interest." This assertion simply begs the question. A determination of whether a gerrymander burdens a group's representational rights requires a constitutional baseline of fair representation that, as I discuss next, the Court has thus far failed to recognize as judicially enforceable.

The final category of harms comprise of harms to fair and effective representation in the political process. These harms, which include minority rule, vote dilution, and disproportionate representation arise from partisan gerrymandering and have a close relationship to the partisan symmetry standard. But they have not been recognized as judicially remediable constitutional harms.

Examples abound of statewide maps drawn to provide the party that receives a minority of the votes statewide, a majority of the seats in the state legislature or in the state's congressional delegation. Such minority rule is just one example of unequal representation that can arise from a state legislature's drawing of a statewide map. State legislatures can also draw maps to give the party in control a percentage of seats that exceeds the percentage of votes it receives in an election. Both minority rule and disproportionate party representation can result in representation that is not responsive to the preferences of the

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electorate.

Partisan symmetry does measure of minority rule and disproportionality. But contrary to the conventional account, the Court has recognized neither minority rule nor disproportionality as judicially remediable constitutional harms. As I develop further in Part II, the actual constitutional harm that the Court is remedying in the one-person, one-vote and vote dilution cases is not the democratic harms related to fair and effective representation, but rather the individual rights-based harms related to fair and effective participation in the political process. To the extent that minority rule and disproportionate representation do not arise from the deprivation of individuals' participatory rights, the Court has not yet treated those harms as judicially remediable constitutional harms.

* * *

The racial and partisan gerrymandering cases leave us with confusing and unsatisfactory accounts of the judicially recognized constitutional harm that arises from the practices or how the harms relate to the standards for adjudicating gerrymandering claims. One explanation for the current doctrinal confusion about the harms from gerrymandering is a recency bias that often plagues common law judicial development of the Constitution. Like stock market participants evaluating their portfolio on the basis of recent results lose perspective on the fundamentals of the market, the Court evaluating gerrymandering claims on the basis of recent cases has lost perspective on the doctrinal foundation for these claims that can provide guidance on the judicially remediable harms. The roots of the Court's racial and partisan gerrymandering jurisprudence are not to be found in *Shaw v. Reno* and *Davis v. Bandemer*. Instead, they are to be found in judicial determinations prior to the adoption of the Fourteenth Amendment about its role and limits in adjudicating questions about democratic rights and structure. Excavating this jurisprudential past offers guidance on how the Court should address the gerrymandering claims of the present.

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III.

“The judiciary ... has no influence over either the sword of the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment.” Alexander Hamilton’s famous defense in Federalist Paper 78 of the judicial power has generally stood the test of time. Courts lacking a military arm or a political constituency are reliant on other branches of government to carry out and comply with its decisions. The acquiescence of the other branches depends on sound judgments by courts about the reach and exercise of its power. When the court overreaches or exercises power arbitrarily or inconsistently, the other branches might resist. If the other branches resist, as historical examples reveal, courts are powerless to compel. Courts can avoid resistance from the other branches by building up and maintaining its legitimacy in the eyes of the people. The people viewing the courts and its actions as legitimate can act as a democratic constraint on resistance from the other branches. Such legitimacy is earned through courts exercising power judiciously.

An element of courts exercising power judiciously has been leaving certain legal controversies to be resolved outside of the courts. This includes legal controversies arising under the Constitution that involve constitutional harms. The Supreme Court in *Marbury v. Madison* asserted its authority to determine what the Constitution requires. Nearly two centuries later, the Court responding to state resistance to the desegregation mandate established in *Brown v. Board of Education* went further and claimed supreme authority over constitutional meaning determinations. The Court in claiming judicial supremacy over constitutional meaning exaggerated its role in constitutional meaning determinations to counter state resistance to *Brown*. But since *Marbury*, the Court has recognized limits to its role in resolving constitutional controversies. One set of limits are grounded in the Constitution itself that has been read to require standing for the parties challenging the state action and a legal controversy that is ripe and not moot. The other two limits are

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grounded in legitimacy concerns arising from the constraints on an unelected, unaccountable judiciary in a republican democracy.

A second constraint on Supreme Court resolutions of constitutional controversies was initially identified by Robert Dahl who argued that the “policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities.” This concordance of policy views arises in part from the fact that judges are typically from the same class and segment of society as lawmakers. But it also arises from judicial concerns about preserving its legitimacy with the other branches of the government responsible for enforcing the decisions of the court and the People who are responsible for selecting the lawmakers in the other branches. Thus, when particular resolutions of constitutional controversies is outside of the democratic mainstream, the Court typically avoids those resolutions even if they are more consistent with principles and values underlying the Constitution. In the past, we have seen avoidance of the more constitutionally appropriate resolution in constitutional controversies involving segregation, marriage, and sexual autonomy, to name of view.

The judicially constructed political questions doctrine imposes a third constraint on Supreme Court resolutions of constitutional controversies. The political questions doctrine has been applied to constitutional controversies committed to the other branches of government, constitutional controversies that are not suitable for judicial resolution because they are so politically charged, or both. An example of constitutional controversies the Court has said requires resolution in another branch includes issues of foreign affairs. Article I and II commits authority over war, commerce with foreign nations, diplomatic relationships to the other branches of government with the judicial role limited in Article III to resolving cases and controversies. On the basis of these constitutional articles, the Court in the early twentieth century case of *Oetjen v. Central Leather Co.*, the Court explained, “[t]he conduct of foreign relations of our government is committed by the Constitution to the executive and legislative ... departments of the government, and the propriety of what

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may be done in the exercise of this political power is not subject to judicial inquiry or decision.”

An example of constitutional controversies so politically charged that they require resolution outside the courts are those involving claims of democratic harms from the structure and operation of democratic politics. These democratic harms often implicate the form and degree of democratic representation from the structure and operation of democratic politics. These politically charged controversies first arose under the Article IV, Section 4 guarantee of a Republican form of Government and later under the Fourteenth Amendment Equal Protection Clause.

Judicial resolution of these controversies threatens the legitimacy of courts because they can involve courts in partisan contests that determine the winners and losers in democratic politics. If the other branches of government or the People perceive courts to be taking sides in partisan controversies, the courts lose their appearance of impartiality that is central to its legitimacy as an unelected, unaccountable institution in a democracy.

While the Court has consistently avoided resolving controversies implicating democratic harms related to structure, operation, and representation, it has asserted a role for itself under the Fourteenth and Fifteenth Amendment in resolving controversies implicating the right to vote. While the right to vote clearly implicates democratic structure, operation, and representation, it is distinct in that it is a right belonging to the individual. Two features appear to differentiate democratic harms from right to vote participatory harms in terms of their justiciability. The first feature is a distinction in terms of the availability of constitutional baselines. To redress democratic harms, the Court has to involve itself in determinations about proper democratic structure, operation, and forms and degree of group or interest-based representation for which it lacks a clear constitutional baseline. To redress harms related to the right to vote, the Court can lean on familiar constitutional principles of individual equality and non-discrimination that guides its jurisprudence in other areas.

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The second feature is a distinction in the degree of involvement in partisan contests. Resolving controversies raising democratic harms are more likely to directly involve courts in partisan contests than controversies addressing the individual right to vote. Judicial decisions on structure and operation of democratic politics can directly determine which group or interest gets represented and to what degree while judicial decisions on the right to vote are more indirect in their democratic effect because of the intermediary variable of elections. Even if the court grants individuals the vote or an equal vote, the decision on who wins and loses in politics is determined by the votes of the People through the democratic structure constructed by the People's representatives.

Although the relationship between judicial determinations on the right to vote and who wins and loses in democratic politics is indirect, there is nonetheless a relationship between the right to vote and democratic structure, operation, and representation. A challenge for the Supreme Court in its jurisprudence has been differentiating between non-justiciable controversies implicating democratic harms and justiciable controversies implicating the right to vote. While the boundary between controversies implicating what I label democratic representational harms and controversies implicating what I label democratic participatory harms has not always been crystal clear, it is one that the Court has consistently tried to maintain in its constitutional jurisprudence.

In the following sections, I show how the Court has consistently maintained a boundary of justiciability between democratic harms and participatory harms in its early gerrymandering jurisprudence. I start with an analysis of the construction of the justiciability boundary in early cases addressing controversies under the Republican Form of Government Clause and the Equal Protection Clause. I then shift to examining how the Court addressed challenges to individual district line drawing, mal-apportionment, and vote dilution focusing on the nature of the harms that the Court said arose from these districting practices. The ultimate goal of this Part is

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to use the Court's boundary of justiciability to provide guidance on what harms the Court should consider judicially remediable in the current racial and partisan gerrymandering controversies.