Gerrymandering Justiciability

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INTRODUCTION

The Supreme Court has gerrymandered its justiciability doctrines in a way that protects the political power of white voters. Comparing the Court's willingness to find racial gerrymanders justiciable with its refusal to find partisan gerrymanders justiciable reveals a lack of doctrinal constraint. That gives the Court the discretionary power to uphold or strike down particular gerrymanders by deeming them racial or partisan in nature. Such discretion is problematic because, when the Supreme Court has exercised discretion in a racial context, it has historically done so to protect the interests of the white majority. And that appears to be what the Court is now doing again in allowing white Republicans to dilute the political power of minority Democrats.

In *Rucho v. Common Cause*, the Supreme Court treated the constitutionality of partisan gerrymandering as nonjusticiable, thereby allowing voting districts to be created with the predominant intent of ensuring a desired political makeup.[1] In *Shaw v. Reno*, the Supreme Court treated the constitutionality of racial gerrymandering as justiciable, thereby prohibiting voting districts from being created with the predominant intent of ensuring a desired racial makeup.[2] But in *Easley v. Cromartie*, the Court held that what appears to be racial gerrymandering can actually constitute partisan gerrymandering.[3] So how does the Court decide whether a particular gerrymander is nonjusticiably partisan or unconstitutionally racial?

Normally, we would expect the Court to ascertain the actual intent underlying adoption of the gerrymander at issue. But that is precisely what *Rucho* indicates the Court lacks the constitutional jurisdiction to do under the political question doctrine that emanates from the Article III case-or-controversy requirement.[4] The correlation between race and politics is so high that no judicially manageable standard is available to distinguish between the two. Nevertheless, the Court must be doing something when it rules on the constitutionality of particular gerrymanders. This Article argues that, as American culture becomes increasingly diverse, and whites become increasingly anxious about the impending loss of their racial majority status, the Supreme Court appears to have gerrymandered its justiciability doctrines in a way that permits it to perform the social function of facilitating efforts by the white majority to preserve its existing political advantage over racial minorities.

More specifically, *Rucho* holds that federal courts cannot prohibit partisan gerrymandering because the Constitution allocates the power to draw voting district

1. 139 S. Ct. 2484 (2019).
2. 509 U.S. 630 (1993).
3. 532 U.S. 234 (2001).
4. *Rucho*, 139 S. Ct. at 2506–07.

lines to the political branches of government.[5] Even when states apportion legislatures in ways that intentionally give extreme and enduring partisan advantage to the ruling political party, the Article III political question doctrine makes that problem nonjusticiable in the federal courts.[6] The lack of judicially ascertainable and manageable standards reveals that the Constitution has delegated the responsibility to remedy such problems to political actors rather than to the federal courts. That is true despite the fact that partisan malapportionment can create structural defects that threaten the viability of democratic self-governance.

But things are different where race is involved. *Shaw* shows that racial gerrymanders are constitutionally justiciable where some voters are disadvantaged by voting district lines that intentionally give an electoral advantage to voters of a particular race.[7] Not only do such claims of discrimination raise legal rather than political questions, but disappointed voters possess Article III standing to have federal courts adjudicate their claims. Despite the abstract nature of such racial discrimination claims, they are sufficient to defeat justiciability objections. Like partisan malapportionment, racial malapportionment can pose structural defects that threaten the viability of democratic self-governance. But this time the defects *do* matter.

It turns out that the arguments on which the Supreme Court relies to support its justiciability distinctions between partisan and racial gerrymandering can be inverted in a way that supports the equally plausible conclusion that partisan gerrymandering claims are justiciable and racial gerrymandering claims are not. Moreover, both the original and the inverted applications of the justiciability rules seem equally faithful to the one-person-one-vote principle that activates our structural commitment to democratic self-governance. Once we recall *Easley*'s recognition that judicially permissible partisan gerrymandering can look like judicially impermissible racial gerrymandering, the distinction between the two becomes quite elusive. Not only can the Supreme Court adopt whichever characterization advances its agenda in particular cases, but the Court can talk about one when its real goal is to affect the other. That lack of doctrinal constraint gives the Supreme Court considerable discretion in applying its justiciability rules, and the decided cases suggest that the Court will exercise its discretion in ways that protect the political advantage the waning white majority still possesses over racial minorities.

In the context of gerrymandering, the Court's justiciability rules typically produce judicial deference to the efforts of whites to maintain or accumulate electoral power, but produce judicial intervention when racial minorities seek remedial apportionment to equalize electoral power. Accordingly, the Court defers on justiciability grounds in cases like *Rucho*, where the Republican majority succeeds in marginalizing the electoral power of both Democrats and nonwhite voters. Although similar deference is also required in cases where Democratic majorities possess the power to engage in partisan gerrymandering,

5. *Id*. at 2506.
6. *Id*. at 2506–07.
7. *Shaw*, 509 U.S. at 657–58.

disproportionate Republican control of statehouses and governorships suggests that a deferential justiciability rule for partisan gerrymandering will provide a net benefit to Republicans and the white interests that they represent.

In addition, the Supreme Court often has the option of making a Democratic gerrymander become justiciable by characterizing it as racial rather than partisan in nature. In cases like *Shaw*, where white electoral strength is reduced through the creation of majority-minority voting districts, the Court intervenes to hold those districts unconstitutional, finding them to be justiciable because they are racial gerrymanders. True, the Court will uphold some racial gerrymanders that benefit minorities, and invalidate some that benefit whites. But on balance, whites will derive a net benefit from treating racial gerrymanders as justiciable. And by gerrymandering the line that separates justiciable from nonjusticiable claims, the Supreme Court will have succeeded in helping whites to preserve the political advantage that they have over racial minorities.

Part I of this Article describes the Supreme Court's current justiciability rules for gerrymandering claims. Section I.A explains how the Court finds partisan gerrymandering claims to be nonjusticiable political questions. Section I.B explains how the Court finds racial gerrymandering claims to be justiciable. Part II inverts the Court's justiciability rules, showing how they can be applied in a way that produces the opposite of the results that the Court found them to produce. Section II.A explains how partisan gerrymandering claims can be found justiciable. Section II.B explains how racial gerrymandering claims can be found nonjusticiable. Part III argues that the Court's gerrymandered justiciability decisions create a sphere of unconstrained judicial discretion that the Court will end up exercising in a way that protects white electoral advantage from the threat of equalization through either partisan or racial gerrymandering. Section III.A argues that the Court's decisions have the effect of diluting minority votes and reducing minority voting strength. Section III.B argues that such protection of white interests is consistent with the role that the Supreme Court has played throughout the history of race relations in the United States. The Article concludes that neither political nor judicial efforts are likely to secure electoral equality for either political or racial minorities, because the Supreme Court will not compel the mathematical proportionality that offers the only realistic hope of ever achieving the equality needed for genuine democratic self-governance.

I. GERRYMANDERING

The practice of drawing voting district lines for partisan political advantage predates the Declaration of Independence. Named "gerrymandering" in 1812, after its use by Massachusetts Governor Elbridge Gerry to favor Democratic-Republicans over Federalists in apportioning the state legislature, the practice is now a common technique for securing political power that exceeds one's numerical voting strength.[8] Two common forms of contemporary gerrymandering are:

8. *See Rucho*, 139 S. Ct. at 2494–95.

(1) partisan gerrymandering that seeks to secure electoral advantages for one's preferred political party, and (2) racial gerrymandering that seeks to secure electoral advantages for one's preferred race. Gerrymandering is controversial because the vote dilution that it produces puts a strain on the principle of democratic self-governance. The Supreme Court has now ruled on the justiciability of both types of gerrymanders.

A. PARTISAN POLITICAL QUESTIONS

The Supreme Court's long anticipated June 27, 2019 decision in *Rucho v. Common Cause* settled a nagging question in constitutional law.[9] It held that the constitutionality of partisan gerrymandering was a nonjusticiable political question over which the federal courts lacked jurisdiction under the case-or-controversy provision of Article III.[10] For a time, it looked as if earlier decisions, and the now-retired Justice Kennedy's concurring opinion in *Vieth v. Jubelirer*, might prompt the Roberts Court to find at least some partisan gerrymandering claims to be justiciable.[11] However, writing for a 5–4 majority in *Rucho*, Chief Justice Roberts rejected that possibility. He realized that "such gerrymandering is 'incompatible with democratic principles,'"[12] but he nevertheless found that exercising judicial review over partisan gerrymandering would destroy "the very foundation of democratic decisionmaking."[13]

The case involved two partisan gerrymanders. The 2016 North Carolina party-line Republican gerrymander of congressional voting districts produced a delegation of ten Republicans and three Democrats; notably, one of the Republican-districting committee chairs said "he did not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats."[14] In the prior 2014 election, Republican candidates had also won ten of thirteen House seats, despite having received only 55% of the total vote.[15] A three-judge federal district court held that the North Carolina partisan gerrymander violated the First Amendment, the Equal Protection Clause, and the Article I, Section 2 requirement that Representatives be chosen "by the People of the several States."[16] *Rucho*'s companion case, *Lamone v. Benisek*, involved a party-line, Democratic gerrymander in Maryland in 2011, which succeeded in achieving the Democratic Governor's

9. *See id.* at 2484.

10. *See id.* at 2506–07.

11. *See* Vieth v. Jubelirer, 541 U.S. 267, 306–17 (2004) (Kennedy, J., concurring); *cf.* Davis v. Bandemer, 478 U.S. 109, 125–27, 143 (1986) (finding a partisan gerrymandering claim justiciable under the Equal Protection Clause and rejecting the view that racial gerrymandering claims are distinguishable from partisan gerrymandering claims with respect to justiciability).

12. *Rucho*, 139 S. Ct. at 2506 (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015)).

13. *Id.* at 2500 (quoting *Vieth*, 541 U.S. at 291) (alteration in original) (internal quotation marks omitted).

14. *Id.* at 2510 (Kagan, J., dissenting) (internal quotation marks omitted).

15. *Id.*

16. U.S. CONST. art. I, § 2; *Rucho*, 139 S. Ct. at 2491–92 (majority opinion) (internal quotation marks omitted).

goal of using "the redistricting process to change the overall composition of Maryland's congressional delegation to 7 Democrats and 1 Republican by flipping one district."[17] In Maryland's congressional elections from 2012 to 2018, Democrats won seven of eight House seats, despite never having won more than 65% of the total vote.[18] A three-judge federal district court held that the Maryland gerrymander violated the First Amendment.[19]

In vacating the lower court decisions, Chief Justice Roberts stressed that "a jurisdiction *may* engage in constitutional political gerrymandering,"[20] and that "[t]o hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities."[21] The absence of "judicially discoverable and manageable standards" for determining when partisan gerrymandering had gone too far indicated that the permissibility of partisan gerrymandering was a nonjusticiable political question.[22] Accordingly, the Elections Clause of Article I, Section 4, Clause 1 gives state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress, and gives Congress itself the oversight power to "make or alter" any such regulations.[23]

Chief Justice Roberts rejected the suggestion that proportional representation could serve as a judicially manageable standard for adjudicating partisan gerrymandering claims. He quoted Court precedent: "Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be."[24] Roberts also rejected the suggestion that a judicially developed notion of "fairness" could serve as an operative standard, noting that imprecision and contending conceptions of fairness would fail to afford adequate constraint on the exercise of judicial discretion.[25]

Roberts also found that the "one-person, one-vote" standard that applies to "vote dilution" claims does not readily transfer to the partisan gerrymandering context because the standard protects individual rights and not group rights.[26] Similarly, Roberts rejected use of the "predominant intent" standard that applies to racial gerrymandering claims because racial discrimination in voting is unconstitutional unless it satisfies strict scrutiny.[27] Unlike racial gerrymandering,

17. *Rucho*, 139 S. Ct. at 2493 (internal quotation marks omitted).
18. *Id*. at 2511 (Kagan, J., dissenting).
19. *See id*. at 2493 (majority opinion).
20. *Id*. at 2497 (emphasis added) (quoting Hunt v. Cromartie, 526 U.S. 541, 551 (1999)).
21. *Id*.
22. *Id*. at 2494 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).
23. U.S. CONST. art. I, § 4, cl. 1; *Rucho*, 139 S. Ct. at 2495 (internal quotation marks omitted).
24. *Rucho*, 139 S. Ct. at 2499 (quoting Davis v. Bandemer, 478 U.S. 109, 130 (1986) (plurality opinion)).
25. *See id*. at 2499–2501.
26. *See id*. at 2501.
27. *See id*. at 2502–03.

partisan gerrymandering is constitutional in the voting context where it is unrealistic to ask for the elimination of political partisanship.[28] Roberts also rejected the suggestion that a "persistence" standard was judicially manageable, concluding that reviewing courts could easily make mistakes about how persistent the effects of a particular partisan gerrymander might turn out to be.[29]

For Roberts, the First Amendment rights to free speech and association could not serve as a basis for justiciability because there is no evidence that partisan gerrymandering interferes with those rights, and the First Amendment does not provide any basis for determining when partisanship has gone too far.[30] Using the degree of deviation from a state's own districting criteria as a standard would also fail to work because those criteria could not only vary from state to state and year to year, but a reviewing court would still not know how much partisan deviation from those criteria was permissible and how much was not.[31] In other cases where judicial determinations are made as matters of degree, courts have other common law or statutory standards that they rely on for guidance.[32] Roberts also found that the Article I, Section 2 and Section 4 provisions that describe the selection of members of the House of Representatives are not a source of justiciable standards.[33] Although excessive partisan gerrymandering can place a strain on democratic self-governance, Roberts insisted that remedies for that problem must be political, and must come from Congress rather than the federal courts.[34]

B. RACIAL LEGAL RIGHTS

Unlike partisan gerrymandering, racial gerrymandering *does* give rise to justiciable legal claims. In the 1993 case *Shaw v. Reno*, Justice O'Connor wrote an opinion for a 5–4 Court holding that racial gerrymandering could give adversely

28. *See id.* Interestingly, Chief Justice Roberts's rejection of inquiries into intent applies only where a partisan and not a racial gerrymander is at issue. But the problem is that one may not be able to make that determination without such an inquiry. That seems to pose a self-referential paradox, emanating from the *Easley v. Cromartie* recognition that partisan gerrymandering can be mistaken for racial gerrymandering. *See* 532 U.S. 234, 257–58 (2001). For justiciability purposes, the intent inquiries that a court would have to make in order to determine if a gerrymander was racial or partisan would seem to be the same as the inquiries that a court would have to make to determine whether a gerrymander was constitutional.

One could argue that Chief Justice Roberts did not intend wholly to preclude inquiries into the intent of legislatures that adopt partisan gerrymanders, but only to deem such inquiries irrelevant. He does say, "But determining that lines were drawn on the basis of partisanship does not indicate that the districting was improper. A permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent 'predominates.'" *Rucho*, 139 S. Ct. at 2502–03. However, this defense of Roberts's approach ignores the fact that he is not merely saying that partisan gerrymandering intent is constitutionally permissible on the merits. He takes the further step of holding that partisan gerrymandering claims are nonjusticiable. That means that federal courts lack the jurisdiction even to consider the merits of partisan gerrymandering intent.

29. *See Rucho*, 139 S. Ct. at 2503–04.

30. *See id.* at 2504–05.

31. *See id.* at 2505.

32. *See id.* at 2505–06.

33. *See id.* at 2506.

34. *See id.* at 2506–08.

affected voters a cause of action under the Equal Protection Clause.[35] In *Shaw*, the North Carolina legislature adopted a reapportionment plan that created two majority-minority voting districts—gerrymandered districts drawn so that a majority of the voters would be black.[36] The majority-minority districts were adopted in response to pressure by the United States Attorney General, who made those districts a condition of granting preclearance for the reapportionment plan under section 5 of the Voting Rights Act of 1965.[37] The Voting Rights Act sought to remedy the long history of voting discrimination in the United States, and the section 5 preclearance provision applied to North Carolina because of its history of racial discrimination in voting.[38] Five white North Carolina voters, with *amicus* support from the Republican National Committee, challenged the constitutionality of the majority-minority districts, arguing that they were the product of racial discrimination that violated the Fourteenth Amendment equal protection rights of the white plaintiffs.[39] A three-judge federal district court dismissed the challenge, finding no equal protection violation.[40] But the Supreme Court reversed and remanded.[41]

In recognizing a new equal protection cause of action for white voters who challenged the creation of majority-minority voting districts, Justice O'Connor did not detect any justiciability problem. Seven years earlier, in *Davis v. Bandemer*, the Supreme Court had observed: "Our past decisions also make clear that even where there is no population deviation among the districts, racial gerrymandering presents a justiciable equal protection claim."[42] Citing *Davis*, Justice O'Connor assumed that racial gerrymanders remained justiciable.[43] However, Justice O'Connor was quick to emphasize that not all racial gerrymanders would violate the Equal Protection Clause. She said:

> This Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances. What appellants object to is redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification.[44]

35. *See* 509 U.S. 630, 642–44, 649–50 (1993).
36. *See id*. at 633.
37. *See id*. at 634–35.
38. *See id*. at 656.
39. *Id*. at 635–36.
40. *Id*. at 637.
41. *See id*. at 658. Since *Shaw* was decided, the Roberts Court has effectively eliminated the section 5 preclearance provision of the Voting Rights Act by holding that the section 4(b) formula for determining which jurisdictions are subject to section 5 preclearance is based on unconstitutionally stale data. *See* Shelby County v. Holder, 570 U.S. 529, 550–57 (2013).
42. 478 U.S. 109, 119 (1986). Although *Davis* went on to hold that partisan gerrymandering claims were also justiciable, *see id*. at 143, the Supreme Court rejected that holding in *Rucho* for lack of a judicially manageable standard. *See Rucho*, 139 S. Ct. at 2501–02.
43. *See Shaw*, 509 U.S. at 650 (discussing *Davis*, 478 U.S. at 118–27).
44. *Id*. at 642.

Justice O'Connor also insisted that the claim she was recognizing in *Shaw* was analytically distinct from vote-dilution claims that had been rejected in prior cases. The *Shaw* claim was not about vote dilution, she explained, but rather was about segregating voters into particular voting districts on the basis of race.[45] As a result of *Shaw*, racial gerrymanders could be upheld under the Equal Protection Clause only if they could survive the strict scrutiny applied to other racial classifications—something that the three-judge district court was to determine on remand.[46]

Two years later, in *Miller v. Johnson*, the Court applied strict scrutiny to affirm a three-judge district court's invalidation of a Georgia reapportionment plan containing three majority-minority districts that had been created to secure Attorney General approval under section 5 of the Voting Rights Act.[47] Justice O'Connor's opinion in *Shaw* had emphasized that some consideration of race remained permissible in the districting process.[48] Writing for the same 5–4 majority as in *Shaw*, Justice Kennedy's majority opinion in *Miller* articulated the equal protection standard that was to be used in determining whether the consideration of race would be constitutionally permissible under the Equal Protection Clause. Participants in the districting process could be aware of racial demographics. However, the consideration of race was unconstitutional once it became the "predominant factor" motivating the districting decision.[49] The consideration of race could not subordinate "traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests."[50] Justice O'Connor's concurring opinion in *Miller* emphasized that the "predominant factor" test was a high standard that would be difficult to satisfy in most cases. Accordingly, the standard did not "throw into doubt the vast majority of the Nation's 435 congressional districts," even though race may have been a factor in their creation.[51]

Neither the *Shaw* nor *Miller* opinions viewed justiciability as posing a significant problem in the racial gerrymandering context. However, in *United States v. Hays*, decided the same year as *Miller*, the Court did hold that in order to have standing to assert a racial gerrymandering equal protection claim under *Shaw*, a plaintiff had to reside in the majority-minority voting district being challenged.[52] In her majority opinion for seven members of the Court, Justice O'Connor emphasized that "standing 'is perhaps the most important of [the jurisdictional] doctrines.'"[53] Accordingly, four white plaintiffs who lived in a district that was

45. *See id.* at 651–52.
46. *See id.* at 657–58.
47. *See* 515 U.S. 900, 920–28 (1995).
48. *See Shaw*, 509 U.S. at 642.
49. *Miller*, 515 U.S. at 916.
50. *Id.*
51. *Id.* at 928–29 (O'Connor, J., concurring).
52. *See* 515 U.S. 737, 739 (1995).
53. *Id.* at 742 (alteration in original) (quoting FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 230–31 (1990) (citations omitted)).

adjacent to a majority-minority district did not have standing to challenge the constitutionality of the majority-minority district. Because they did not live in the racially gerrymandered majority-minority district, they could not claim any "representational injury" from the fear that a minority legislator elected in that district would inadequately represent their interests. As a result, they did not demonstrate "the irreducible constitutional minimum" injury in fact that was necessary to establish standing.[54] Even though redistricting plans could have attenuated effects on all residents of a state, residents who did not live in the challenged district were asserting a mere generalized grievance that was not sufficient for standing.[55]

Rucho held that partisan gerrymandering is constitutionally nonjusticiable because the issues raised by such gerrymandering are political questions. They are not questions of legal right, which would be suitable for judicial enforcement under Article III, because they lack judicially discoverable and manageable standards to guide courts in their adjudications. *Shaw* and its progeny held that racial gerrymandering *is* justiciable because the issues raised by such gerrymandering *are* claims of legal right. Those rights are suitable for enforcement by federal courts because they *do* provide judicially discoverable and manageable standards to guide courts in their adjudications. But what if the Supreme Court has it exactly backwards?

II. INVERSION

It is relatively easy to formulate arguments that invert the Court's *Rucho* and *Shaw* analyses and demonstrate that, actually, partisan gerrymandering claims are justiciable, and racial gerrymandering claims are not. And those arguments are at least as plausible as the arguments the Supreme Court has offered for its own pairings of gerrymandering and justiciability. On a doctrinal level, the inversion can be accomplished simply by accepting the interpretations of ambiguous legal standards that the dissents, rather than the majorities, thought were appropriate. On a deeper, more meaningful level, the inversion can be accomplished by looking behind the doctrinal rules and focusing on factors that may better advance the instrumental goals that the concept of justiciability is intended to serve. This can have the effect of exposing the degree to which mere normative preferences of the Justices have been presented by the Court as if they were actual constitutional mandates.[56] And such exposure suggests that the Supreme Court possesses a degree of unconstrained judicial discretion in race-relations matters that ought to be viewed as troubling.

54. *Id*. at 742, 745.

55. *See id*. at 742–47. The Court applied a similar standing test to partisan gerrymandering claims in *Gill v. Whitford*, 138 S. Ct. 1916, 1930–31 (2018).

56. I discussed techniques for making normative preferences appear to be constitutional mandates in Girardeau A. Spann, *Constitutionalization*, 49 ST. LOUIS L.J. 709, 710–11, 721–47 (2005).

A. PARTISAN LEGAL RIGHTS

The opinion of Chief Justice Roberts in *Rucho* holds that partisan gerrymandering claims are nonjusticiable political questions because there are no judicially discoverable and manageable standards on which the Court can rely to determine the constitutionality of partisan gerrymandering.[57] However, on a doctrinal level, there are a number of legal standards that the Court could have used to determine the constitutionality of partisan gerrymandering. On a deeper, instrumental level, more elaborate arguments favoring justiciability can be rooted in the constraining function of judicially manageable standards, the goal of democratic self-governance, and the nature of an injury that is sufficient to confer standing.

1. Doctrinal Arguments

The doctrinal need for "judicially discoverable and manageable standards" is traceable to *Baker v. Carr*.[58] But *Baker* held that the failure to reapportion the Tennessee legislature for sixty years—and the vote dilution that the resulting legislative malapportionment entailed—*did* present a justiciable claim under the Equal Protection Clause of the Fourteenth Amendment.[59] Accordingly, the doctrinal requirement of judicially discoverable and manageable standards is quite ambiguous. It was satisfied by the equal protection vote-dilution claims asserted in *Baker*, but it was not satisfied by the equal protection vote-dilution claims asserted in *Rucho*. Therefore, one way to invert the nonjusticiability holding of *Rucho* is simply to conclude that the Equal Protection Clause does provide a

57. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2494, 2501, 2508 (2019). The majority opinion of Chief Justice Roberts could be read to accord dominant political parties a constitutional right to draw district lines in a way that gives them a partisan advantage. The opinion says, "[T]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." *Id.* at 2498 (internal quotation marks omitted) (quoting Davis v. Bandemer, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring)). The opinion goes on to say that the question before the Court is how to "provid[e] a standard for deciding how much partisan dominance is too much." *Id.* (internal quotation marks omitted) (quoting League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 420 (2006) (plurality opinion)). To the extent that this language can be viewed as "holding" that dominant political parties have a constitutional right to draw district lines that give them a partisan advantage, it is problematic. That is because the opinion also held that the issue before the Court was a nonjusticiable political question over which the Court lacks Article III jurisdiction to issue any holding. In that regard, any substantive *Rucho* holding would be reminiscent of the Court's dramatic dictum holdings in cases like *Marbury v. Madison* and *Dred Scott*. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) (holding Missouri Compromise Act of 1820 unconstitutional, and holding blacks could not be citizens, despite holding that Court lacked jurisdiction); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (resolving multiple issues, including power of judicial review, despite holding that Court lacked jurisdiction); *see also* Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 589–92, 609 (1983) (discussing lack of jurisdiction in *Marbury* and *Dred Scott*). A formalist way around this problem in *Rucho* might be to interpret that case as holding that the Court had jurisdiction to find the *existence* of a constitutional right to partisan advantage, but that the constitutionally permissible *degree* of that partisan advantage was a political question over which the Court lacked jurisdiction. *See Rucho*, 139 S. Ct. at 2498–99 (focusing on difficulty in determining how much partisan dominance is too much).

58. 369 U.S. 186, 217 (1962).

59. *See id.* at 192–95, 217, 228, 232, 238.

judicially discoverable and manageable standard, just as it had in *Baker*. And that is precisely what Justice Kagan did in her *Rucho* dissent.

Justice Kagan asserted in *Rucho* that the Equal Protection Clause provided a judicially discoverable and manageable standard, because it "'guarantees the opportunity for equal participation by all voters in the election' of legislators."[60] Justice Kagan also found a plethora of other standards on which the majority could have relied in adjudicating the partisan gerrymandering claims of the plaintiffs.[61] She identified the First Amendment, which protects voters from "disfavored treatment" in the form of counting their votes for less, because of "their voting history [and] their expression of political views."[62] She noted that, "[C]ourts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims."[63] These included both lower federal courts[64] and state courts.[65] She also suggested that close questions could be avoided by limiting the operative standard to "extreme outlier" gerrymanders.[66]

For Justice Kagan, judicial neutrality could be ensured by looking for deviations from a state's own political geography and districting criteria,[67] or it could focus on the "'predominant' purpose and 'substantial' effects" standard that had been utilized by the lower courts.[68] Justice Kagan emphasized that "predominant" purpose and "substantial" effects tests contained the types of legal standards that courts are accustomed to applying in a variety of contexts, where they seek to ascertain legislative intent for the purpose of constitutional analysis.[69] She stressed that the standards she had identified were similar to, and no less judicially manageable than, the one-person-one-vote standard that courts are required to apply when ruling on the constitutionality of legislative reapportionment plans under *Reynolds v. Sims*.[70]

Justice Kagan disclaimed any intent to use proportional representation as a standard for governing partisan gerrymandering.[71] But it is unclear why proportional representation would not be a perfectly appropriate standard. In fact, the Supreme Court itself has authorized state officials to pursue proportional representation between political parties when they wish to do so.[72] In a properly

60. *Rucho*, 139 S. Ct. at 2514 (Kagan, J., dissenting) (quoting Reynolds v. Sims, 377 U.S. 533, 566 (1964)).
61. *See id.* at 2509, 2514.
62. *Id.* at 2514 (internal quotation marks omitted) (quoting Vieth v. Jubelirer, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring)).
63. *Id.* at 2509.
64. *See id.* at 2516–17.
65. *See id.* at 2524.
66. *See id.* at 2517–19.
67. *See id.* at 2520–21.
68. *Id.* at 2522.
69. *See id.*
70. *See id.* at 2514.
71. *See id.* at 2515–16, 2520–21, 2523.
72. *See id.* at 2517 (citing Gaffney v. Cummings, 412 U.S. 735 (1973)).

functioning political process, where one person's vote was genuinely equal to the vote of another, we would expect the political makeup of the legislature to reflect the political makeup of the electorate. And unexplained deviations from the proportionality baseline would enable a court to determine when a partisan gerrymander had gone too far.

There are a variety of mathematical ways in which a court could decide how much deviation from an aspirational norm was too much. One of the most promising was relied on by a three-judge court in *Gill v. Whitford* when it invalidated a partisan Republican gerrymander in Wisconsin.[73] In *Gill*, the plaintiffs demonstrated that Republicans had secured excessive political representation in the state legislature by "cracking" Democratic voters into multiple voting districts where their numbers were too small to win, and by "packing" Democratic voters into other districts where their numbers were much higher than what was necessary to win, thereby removing those Democratic voters from other districts in which they might have been able to prevail.[74] The plaintiffs provided a mathematical formula for calculating an "efficiency gap" that compared the "wasted" votes of each party in a way that showed an unusually large efficiency gap favoring Republicans.[75] They also contrasted the Wisconsin Republican gerrymander with a "Demonstration Plan" that could have satisfied the legal criteria for apportionment, and was "almost perfectly balanced in its partisan consequences."[76]

The three-judge district court in *Gill* found the Republican partisan gerrymander to be unconstitutional, but the Supreme Court vacated and remanded.[77] However, the Court did not remand because of any defect in the "efficiency gap" concept of proportionality. Rather, the Court remanded because it doubted the standing of the plaintiffs to raise a statewide vote-dilution claim. The majority opinion of Chief Justice Roberts said:

> The plaintiffs and their *amici curiae* promise us that the efficiency gap and similar measures of partisan asymmetry will allow the federal courts—armed with just "a pencil and paper or a hand calculator"—to finally solve the problem of partisan gerrymandering that has confounded the Court for decades. We need not doubt the plaintiffs' math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else entirely: the effect that a gerrymander has on the fortunes of political parties.[78]

73. *See* 138 S. Ct. 1916, 1925 (2018).
74. *See id*. at 1920.
75. *See id*. at 1933.
76. *Id*. at 1924 (internal quotation marks omitted) (quoting Complaint ¶ 10, Whitford v. Gill, 218 F. Supp. 2d 837 (W.D. Wis. 2016)).
77. *See id*. at 1934.
78. *Id*. at 1933 (citations omitted).

As discussed below, there is a problem with the Court's standing analysis.[79] But not even the Supreme Court found any deficiency in the mathematical measure of proportionality offered by the plaintiffs in *Gill*.

Even if one were not willing to accept political proportionality as the proper standard, the Court could adopt a standard precluding partisan gerrymandering that was intended solely to secure a partisan advantage for one political party, if it lacked any other public purpose.[80] The intent inquiry would, once again, be similar to the sorts of intent inquires that courts are routinely required to make.[81] Doctrinally, therefore, it would be relatively easy to rule that partisan gerrymandering claims were justiciable if the Supreme Court were inclined to do so. Indeed, four Justices on the *Rucho* Court were so inclined. But five were not.

2. Instrumental Arguments

Formal doctrinal analysis is often unsatisfying because legal doctrines can fail to capture the issues that seem to matter the most. In *Rucho*, Chief Justice Roberts focused on the differences between partisan and racial gerrymandering because he thought those differences were doctrinally significant. But by emphasizing instead the instrumental concerns that actually seem to be at stake, one's views about the proper outcome can change.

As an instrumental matter, justiciability doctrines are designed to serve two basic functions. First, they help ensure that courts are presented with legal issues in a context that is suitable for judicial resolution under the traditional *Marbury* model of adjudication, where courts have the obligation to protect legal rights, even if doing so entails invalidating the acts of other branches of government.[82] Second, justiciability doctrines advance separation-of-powers concerns by helping to ensure that courts do not usurp the power to resolve issues for which other branches of government have greater relative institutional competence.[83] It turns out that those instrumental goals are advanced by deeming partisan gerrymanders to be justiciable at least as much as they are advanced by deeming racial gerrymanders to be justiciable.

If one focuses on the similarities rather than the differences that exist between partisan and racial gerrymandering, three factors argue in favor of judicial protection against the injuries that are inflicted by partisan gerrymandering. First, the governing legal standards are adequate to confine the reviewing court to its proper judicial role. Second, judicial protection facilitates the process of democratic self-governance in a way that cannot be ensured by relying on mere political protections. Third, the court is guarding against the type of legal injury that is

79. *See infra* Part II.A.2.c.

80. Such a standard is proposed in Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 352–59 (2017).

81. *See supra* notes 68–69 and accompanying text.

82. *See* Spann, *supra* note 57, at 588–92, 617–32 (discussing the traditional dispute-resolution model of judicial review traceable to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 166, 167, 170–71 (1803), and the influence of that model on justiciability doctrines).

83. *See id.*

customarily sufficient to confer standing. So viewed, the justiciability of the Court's obligation to protect partisan legal rights becomes controlling rather than inapposite.

a. Judicially Manageable Standards.

In *Easley v. Cromartie*, the Supreme Court held that what appears to be an unconstitutional racial gerrymander could actually be a constitutionally permissible partisan gerrymander.[84] That is because there is often a high correlation between race and political affiliation.[85] Because one could be used as a proxy for the other in a way that would be hard to detect from the outside, the degree of judicial scrutiny needed to uncover unconstitutional voter discrimination would be the same regardless of how the gerrymander was initially labeled. The two inquiries would be equally justiciable. So viewed, the judicial adjudication of a partisan gerrymandering claim—like the adjudication of a racial gerrymandering claim—looks like the adjudication of a legal right under the *Marbury* model rather than a nonjusticiable political question.

From this perspective, judicially discoverable and manageable standards begin to emerge that can facilitate the judicial, rather than mere political, protection of vote-dilution claims that the concept of justiciability allocates to courts. The "predominant factor" test that *Miller v. Johnson* uses to assess whether a majority-minority voting district is a racial classification now becomes directly applicable.[86] It is as judicially manageable in the partisan gerrymandering context as intent standards have been in other areas of the law, such as enforcement of the First Amendment's religion clauses.[87] In addition, the *Washington v. Davis* intentional-discrimination standard for identifying a racial classification is appropriate to determine whether the use of political affiliation is being invoked as a proxy for facially neutral discrimination that is actually based on race.[88] Such a surreptitious motive may well be operative in a districting context where voters do not wish to be placed in a voting district occupied primarily by members of another race. Regardless of how courts ultimately resolve such claims on the merits, courts will minimize justiciability concerns because they are merely doing what they do every day in adjudicating racial discrimination claims and in protecting legal rights.

The correlation between race and political affiliation is particularly strong in the electoral context, as evidenced by the Supreme Court's rejection of the

84. *See* 532 U.S. 234, 257–58 (2001). Justice Breyer's majority opinion rejected the claim made in Justice Thomas's dissent that the majority was allowing "districting decisions based on a 'stereotype' about African–American voting behavior." *Id.* at 257.

85. *See id.* at 257–58.

86. *See* 515 U.S. 900, 920–27 (1995).

87. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2522 (2019) (Kagan, J., dissenting) (citing the Free Exercise Clause case of *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993)).

88. *See* 426 U.S. 229, 238–48 (1976) (adopting an intentional-discrimination standard to define racial classifications under the Equal Protection Clause); *see also Rucho*, 139 S. Ct. at 2522 (Kagan, J., dissenting) (citing *Washington*, 426 U.S. at 239).

Trump Administration's desire to include a citizenship question on the 2020 census form in *Department of Commerce v. New York*.[89] There, the Court concluded that the government's offered justification for including the question was "contrived."[90] Press coverage indicated that, although the stated reason for adding the question was to facilitate enforcement of the Voting Rights Act, the real reason was to facilitate the drawing of election districts that would enhance the voting strength of white Republicans by reducing the voting strength of Latinx residents who were likely to support Democratic candidates.[91]

In his *Vieth v. Jubelirer* plurality opinion, Justice Scalia argued that a Pennsylvania partisan gerrymandering challenge was nonjusticiable.[92] In so doing, he asserted that segregating voters in districts by race was more unlawful, and less common, than segregating them by political affiliation.[93] However, once the correlation between race and political partisanship is understood, as it was in *Easley v. Cromartie*, Justice Scalia's assertions simply seem wrong. Justice Scalia claimed that racial discrimination is unlawful, but under *Shaw*, most racial discrimination in drawing district lines is, in fact, permissible—a point that Justice O'Connor hastened to stress in her *Miller v. Johnson* concurrence.[94] Moreover, discrimination based on political affiliation is itself often unconstitutional.[95] Accordingly, there is no inherent difference between racial discrimination and political-affiliation discrimination that would justify differential justiciability treatment of racial and partisan gerrymandering claims. And the suggestion that partisan gerrymandering occurs more frequently than racial discrimination is simply nonresponsive to the realization that one can often appear to be the other. In *Rucho*, Chief Justice Roberts assumes that there is a meaningful difference between legal rights that are protected by courts and political questions that are protected by the representative branches. But if that baseline assumption is wrong, then the conclusions that flow from it may also be wrong.

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89. *See* 139 S. Ct. 2551, 2575–76 (2019).

90. *Id.* at 2575.

91. *See* Tara Bahrampour, *GOP Strategist and Census Official Discussed Citizenship Question, New Documents Filed by Lawyers Suggest*, WASH. POST (June 16, 2019), https://www.washingtonpost.com/dc-md-va/2019/06/15/new-documents-suggest-direct-connection-between-republican-redistricting-strategist-census-bureau-official-over-citizenship-question/?utm_term=.fb19ad03c406.

92. *See* 541 U.S. 267, 305–06 (2004) (plurality opinion).

93. *See id.* at 285–86. This position ultimately was adopted by Chief Justice Roberts in *Rucho*. *See* 139 S. Ct. at 2497 ("[W]hile it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, 'a jurisdiction may engage in constitutional political gerrymandering.'" (quoting Hunt v. Cromartie, 526 U.S. 541, 551 (1999))).

94. *See* Miller v. Johnson, 515 U.S. 900, 928–29 (1995) (O'Connor, J., concurring).

95. *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 71–79 (1990) (holding that the First Amendment does not permit government employers to discriminate against non-policymaking employees on basis of political affiliation or belief); *cf.* Heffernan v. City of Paterson, 136 S. Ct. 1412, 1416 (2016) (holding that the First Amendment prohibits dismissal or demotion of a government employee even based on the mistaken belief that the employee was engaged in partisan political activity).

b. Representative Democracy.

Proper regulation of partisan gerrymandering should be viewed as justiciable because it is ultimately linked to the goal of promoting representative democracy. Citing Justice Stone's famous footnote four in *United States v. Carolene Products Co.*, Justice Kennedy's concurring opinion in *Vieth v. Jubelirer* emphasized that, "Allegations of unconstitutional bias in apportionment are most serious claims, for we have long believed that 'the right to vote' is one of 'those political processes ordinarily to be relied upon to protect minorities.'"[96] To the extent that partisan gerrymandering threatens to undermine the proper functioning of representative democracy, it becomes increasingly important for partisan gerrymandering claims to be treated as justiciable, rather than as nonjusticiable political questions. Even if the Court viewed a governing standard as less than completely precise, an imperfect standard would still provide more of an incentive for legislatures to avoid extreme partisan gerrymanders than the *Rucho* nonjusticiability ruling, which permits limitless partisan gerrymandering.

As a matter of relative institutional competence, it makes sense to have an interest protected by the branch of government that is best suited to provide protection. If it turns out that the interests jeopardized by partisan gerrymandering are better protected by courts than by redistricting legislatures, it is irrelevant that those interests seem more political than legal in nature. In the gerrymandering context, it is unlikely that politically dominant legislatures will wish to remedy the plight of voters whose electoral interests are harmed by their inclusion in partisan gerrymandered districts. The interest of legislatures in maintaining their political dominance will make them insensitive to the interests of voters who would like to remove them from office. As a matter of relative institutional competence, therefore, courts are much more likely than legislatures to provide effective protection for the interests of voters who are in the political minority. This is a point that Justice Kagan makes in her *Rucho* dissent.[97] It is also a point that undermines the baseline assumption that law and politics can be kept in the separate spheres to which Chief Justice Roberts would like to consign them.[98]

Treating the interests harmed by partisan gerrymandering as political rather than justiciable simply ignores Justice Kennedy's observation that such gerrymandering undermines the functioning of representative democracy.[99] If partisan

96. Vieth v. Jubelirer, 541 U.S. 267, 311–12 (2004) (Kennedy, J., concurring) (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)).

97. *See Rucho*, 139 S. Ct. at 2524 (Kagan, J., dissenting).

98. If maintaining those separate spheres were viable, the common 5–4, conservative–liberal splits of the Justices in politically controversial cases would make it unclear which sphere the Supreme Court itself was occupying. As if to illustrate the role of political expediency in Supreme Court adjudication, Chief Justice Roberts explicitly endorsed state districting commissions as a political solution to the partisan gerrymandering problem presented in *Rucho*. *See id.* at 2507–08 (majority opinion); *id.* at 2524 (Kagan, J., dissenting). He did so even though Roberts himself had previously voted that such commissions were unconstitutional. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2677–79 (2015) (Roberts, C.J., dissenting).

99. *See supra* note 96 and accompanying text.

gerrymandering produces discriminatory vote dilution, it both violates the individual rights of the voters who suffer the dilution, and threatens structural damage to our system of representative democracy. As partisan gerrymandering techniques become more sophisticated and effective, the risks to individual rights and to the electoral system itself become more severe.[100] One of the core responsibilities of the Supreme Court should be to safeguard the structural features of our representative democracy because so much is at stake. As a result, the structural threats to democratic self-governance posed by partisan gerrymandering would seem to have an even stronger claim to judicial redress than the racial rights to which Chief Justice Roberts wishes to confine his conception of justiciability.

Although none of the Justices in *Rucho* mention the case, *Bush v. Gore* appears relevant.[101] There, the Supreme Court ordered the halt of a Florida election recount ordered by the Florida Supreme Court in a case that ultimately facilitated the selection of George W. Bush over Al Gore as President of the United States in the 2000 election.[102] The United States Supreme Court's 5–4 decision held that the recount would violate the Equal Protection Clause because Florida's governing "intent of the voter" standard did not ensure uniform treatment in counting the notorious "hanging" and "dimpled" chads on some ballots that had been cast.[103]

The reason *Bush v. Gore* seems instructive is that the Court found a justiciable claim under the Equal Protection Clause even though no uniform rule could have provided equal treatment of the Florida ballots that were cast. And, as Justice Souter pointed out in his dissent, the Court did so even though a political solution to the recount issue seemed both possible and preferable.[104] The political alternative to Supreme Court intervention was also forcefully asserted in Justice Breyer's dissent.[105] It is difficult to think of something more directly tied to representative democracy than the election of the President of the United States. Accordingly, if the Supreme Court thought that the equal protection issue presented in *Bush v. Gore* was justiciable—despite its extremely political nature—then partisan gerrymandering claims seem to be at least as justiciable.

As Justice Stevens emphasized in his *Bush v. Gore* dissent, there were a variety of ways in which local election officials applied the "intent of the voter" standard, subject to a single impartial magistrate who oversaw all objections to the recount process.[106] But no rule interpreting the intent of the voter standard could have provided a uniform result. If all hanging or dimpled chads had been counted, that rule would have overcounted the votes of those who did not intend to cast a vote with their ambiguous ballots. If the hanging and dimpled chads had not been

100. *See Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting).
101. *See* 531 U.S. 98 (2000).
102. *See id.* at 111.
103. *See id.* at 105–11.
104. *See id.* at 129–30 (Souter, J., dissenting).
105. *See id.* at 152–58 (Breyer, J., dissenting) (arguing that legislative history shows that the Court should practice judicial restraint when faced with political disputes).
106. *See id.* at 125–29 (Stevens, J., dissenting).

counted, the rule would have undercounted the votes of those who did intend to cast a vote with their ambiguous ballots. Even more fundamentally, by stopping the Florida recount, the United States Supreme Court merely reinstated the initial vote count. And it did so despite the fact that the initial vote count had been tainted by the same lack of uniformity that tainted the recount that the Court enjoined.

The one thing we know about the Supreme Court's application of the Equal Protection Clause in *Bush v. Gore* is that it ensured unequal outcomes. But nevertheless, the Court found that standard to be judicially discoverable and manageable enough to permit the Court to influence the outcome of a presidential election. If the equal protection and intent standards can serve as adequate bases for adjudicating the "political question" of who should be elected President of the United States, surely they can serve as adequate bases for justiciability in ordinary partisan gerrymandering cases—especially where the proper functioning of democratic self-governance is at stake.

c. Standing.

Even if judicially manageable standards and democratic self-governance concerns indicated that partisan gerrymandering raised claims of legal right rather than political questions, there would still be a justiciability issue relating to standing. *United States v. Hays* held that only residents of a racially gerrymandered district had standing to challenge the constitutionality of that district.[107] Similarly, the Supreme Court held in *Gill v. Whitford* that only residents of a partisan gerrymandered district had standing to challenge the constitutionality of that district.[108]

The standing requirement was problematic in the racial gerrymandering context, but it is particularly troubling in the partisan gerrymandering context. The residency requirement might make a minimal amount of sense in the racial context as something that was relevant to the representational injury suffered by a *Shaw* plaintiff.[109] However, in a partisan gerrymandering case, the primary injury being inflicted is not representational in nature. Rather, the injury results from the vote dilution caused by malapportionment of the entire legislature. That malapportionment is the reason why the vote of someone in the minority party has less political influence than the vote of someone in the controlling party. Even if the two political parties have an equal number of voters, the partisan gerrymander allows the controlling party to elect more representatives than the minority party is able to elect. It is as if members of the controlling party are given two votes, whereas members of the minority party are given only one. [110]

107. *See* 515 U.S. 737, 744–45 (1995).

108. *See* 138 S. Ct. 1916, 1930–31 (2018).

109. *See supra* notes 52–55 and accompanying text.

110. Justice Kagan made both a vote-dilution and a First Amendment right-of-association version of this argument in her *Gill* concurrence, arguing that the statewide effects of partisan gerrymandering were properly cognizable. *See Gill*, 138 S. Ct. at 1934–40 (Kagan, J., concurring).

Nevertheless, the *Gill* Court's holding is unambiguous: standing law does not recognize loss of electoral power as a cognizable injury under Article III, because Article III recognizes only individual, and not statewide, injuries.[111] In *Gill*, Chief Justice Roberts said:

> To the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific.
>
> . . .
>
> The plaintiffs argue that their claim of statewide injury is analogous to the claims presented in *Baker* and *Reynolds*, which they assert were "statewide in nature" because they rested on allegations that "districts *throughout a state* [had] been malapportioned." But, as we have already noted, the holdings in *Baker* and *Reynolds* were expressly premised on the understanding that the injuries giving rise to those claims were "individual and personal in nature" . . . .[112]

Characterizing the vote-dilution injury suffered by the victims of partisan gerrymandering as personal rather than statewide simply ignores the true nature of the injury that has been inflicted. The partisan gerrymandering of one voting district, of course, affects the partisan makeup of other voting districts as well. Indeed, that is the whole point of partisan gerrymandering. By distributing opposition-party voters among particular districts, the controlling party can ensure that it will win races in a disproportionately larger number of election districts than its political support warrants. The harm inflicted is the transfer of political power from a party that can legitimately claim it to a party that cannot. Arguing that the loss of statewide political power must be disregarded is like arguing that the injury inflicted by school segregation could be solved simply by sending Linda Brown to a white school. Segregation inflicts a systemwide injury, and the remedy for that injury must be systemwide as well. The same is true of the systemwide injury inflicted by partisan gerrymandering. The vote-dilution injuries inflicted by partisan gerrymandering should be deemed justiciable because of the collective impact that they have on democratic majority rule.

Nevertheless, if forced to state the harm caused by partisan gerrymandering as an injury that is "individual and personal"[113] for purposes of the law of standing, the individual victim of a partisan gerrymander suffers a loss of political power that is commensurate with the political power to which that voter is entitled by virtue of having associated with other voters sharing the same political interests. The diluted vote is the vote that would have entitled the voter to additional political power. When the partisan gerrymander is sufficiently successful, that means that the injured voter will have lost the right to be in the political majority and will instead be consigned to the minority at the close of the election. Chief Justice

111. *See id*. at 1930–31 (majority opinion).
112. *Id*. at 1930 (citations omitted).
113. *Id*. at 1929 (quoting Reynolds v. Sims, 377 U.S. 533, 561 (1964)).

Roberts certainly understands the true nature of this injury. But he chooses simply to ignore it in order to make partisan gerrymandering appear nonjusticiable.

The presence of judicially manageable standards, the need to protect democratic self-governance, and the need to guard against the types of injuries that are inflicted by partisan gerrymandering all suggest that partisan gerrymandering claims should be viewed as justiciable. In discussing partisan gerrymandering in *Rucho*, Chief Justice Roberts admits, "Excessive partisanship in districting leads to results that reasonably seem unjust."[114] He also admits that "such gerrymandering is 'incompatible with democratic principles.'"[115] But by refusing to concede the justiciability of partisan gerrymandering, Roberts paradoxically concludes that the judicial intervention needed to restore "the very foundation of democratic decisionmaking" is prohibited, precisely because it would destroy that very foundation.[116] In a representative democracy, protecting democratic self-governance should be the highest calling for judicial review.[117] Justice Kagan captures the point rhetorically. After describing the extreme partisan gerrymandering presented to the Court in *Rucho*, she asks, "Is that how American democracy is supposed to work? I have yet to meet the person who thinks so."[118]

B. RACIAL POLITICAL QUESTIONS

The opinions of the Supreme Court in *Shaw v. Reno*[119] and *Miller v. Johnson*[120] hold that, unlike partisan gerrymandering, racial gerrymandering does raise justiciable issues. A voter subjected to a racial gerrymander suffers a legal injury that federal courts have jurisdiction to redress through enforcement of the Equal Protection Clause.[121] But the meaning of the equal protection standard in the context of redistricting is ambiguous, and the Justices in the majorities of *Shaw* and *Miller* proffered a different interpretation than the Justices in the dissents. Once again, there are doctrinal reasons to view racial gerrymandering as nonjusticiable. In addition, there are instrumental reasons for finding racial gerrymandering to be nonjusticiable that relate to the existence of judicially manageable standards, the elusive distinction between racial and political rights, and the relative institutional competence of courts as opposed to the political branches.

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114. Rucho v. Common Cause, 139 S. Ct. 2484, 2506 (2019).

115. *Id.* (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015)).

116. *Id.* at 2500 (quoting Vieth v. Jubelirer, 541 U.S. 267, 291 (2004)).

117. I realize that there is an irony in asking a countermajoritarian judiciary to override the policy preferences of the democratically accountable branches of government in the name of democratic self-governance. The countermajoritarian argument against judicial review is an argument with which I have some sympathy, especially in areas where imprecise doctrinal standards impose only loose constraints on the exercise of judicial discretion. However, for those who favor judicial review despite the countermajoritarian dangers that it creates, the judicial enforcement of structural safeguards that are designed to promote democratic self-governance would seem to have a relatively strong claim to judicial legitimacy.

118. *Rucho*, 139 S. Ct. at 2511 (Kagan, J., dissenting).

119. 509 U.S. 630 (1993).

120. 515 U.S. 900 (1995).

121. *See Miller*, 515 U.S. at 916–17, 920; *Shaw*, 509 U.S. at 642–44, 649–50.

1. Doctrinal Arguments

Justice O'Connor's majority opinion in *Shaw* viewed application of the equal protection standard as straightforward. Unless strict scrutiny could be satisfied, the Equal Protection Clause prohibited efforts to "'segregat[e] . . . voters' on the basis of race."[122] A voter assigned to a voting district on the basis of race was the victim of racial discrimination in the same way that a student assigned to a school on the basis of race was the victim of racial discrimination.[123] Such voter segregation bore "an uncomfortable resemblance to political apartheid" because "[i]t reinforce[d] the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls."[124]

Dissenting, Justice Souter had a different interpretation of the Equal Protection Clause. He said:

> The majority's use of "segregation" to describe the effect of districting here may suggest that it carries effects comparable to school segregation making it subject to like scrutiny. But a principal consequence of school segregation was inequality in educational opportunity provided, whereas use of race (or any other group characteristic) in districting does not, without more, deny equality of political participation.[125]

For a variety of reasons, the view of the dissenters—that the Equal Protection Clause does not create a new cause of action for disappointed white voters to challenge the constitutionality of majority-minority voting districts—supports the conclusion that racial gerrymandering claims should not be viewed as justiciable in the context of redistricting.

None of the opinions in *Shaw* mention justiciability or the political question doctrine. However, the Court's decision two years later in *Miller* made justiciability a central issue in redistricting cases. In *Miller*, the majority and dissenting Justices disagreed over the issue of standing—specifically, the constitutional component of standing requires a plaintiff to suffer an injury in fact that would be redressed by a favorable ruling on the merits of the plaintiff's legal claim.[126] Justice Kennedy's majority opinion in *Miller* assumed that five white voters aggrieved by being assigned to a majority-minority voting district suffered an injury sufficient for standing. Because they resided in the challenged district, as required for standing under *United States v. Hays*, they suffered the type of

122. *Shaw*, 509 U.S. at 647 (alteration in original) (quoting Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960)).

123. *See id.* at 641–49.

124. *Id.* at 647.

125. *Id.* at 682 n.4 (Souter, J., dissenting) (citing Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954)).

126. *See* Warth v. Seldin, 422 U.S. 490, 498–502 (1975).

representational harms recognized in *Shaw*.[127] Their injury, therefore, stemmed from the danger that a minority representative elected in their majority-minority district might not adequately represent their interests.[128]

Justice Stevens disagreed. In dissent, he argued that the white plaintiffs had not suffered any "legally cognizable injury" sufficient for standing.[129] In so doing, he also highlighted a fundamental incoherence in the new *Shaw* cause of action, which both condemned and reinforced racial stereotypes. He said:

> The *Shaw* Court explained the concept of "representational harms" as follows: "When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." Although the *Shaw* Court attributed representational harms solely to a message sent by the legislature's action, those harms can only come about if the message is received—that is, first, if all or most black voters support the same candidate, and, second, if the successful candidate ignores the interests of her white constituents. Appellees' standing, in other words, ultimately depends on the very premise the Court purports to abhor: that voters of a particular race "think alike, share the same political interests, and will prefer the same candidates at the polls." This generalization, as the Court recognizes, is "offensive and demeaning."[130]

Because, as Justice Stevens pointed out, the new *Shaw* cause of action ends up being self-consuming, the injury required for jurisdictional standing is nonexistent.[131] Accordingly, it makes sense to resist the *Shaw* and *Miller* holdings and conclude that *Shaw* claims asserted under the Equal Protection Clause are better viewed as nonjusticiable.

In her *Miller* dissent, Justice Ginsburg offers yet another reason for reaching this conclusion. Whatever may constitute legally cognizable racial discrimination in other contexts, no legally cognizable injury can exist in the redistricting context. Unlike school segregation, which can violate someone's right to be treated as an individual rather than as a mere member of a group, there is no comparable right to individualized treatment in the redistricting context. Ginsburg emphasizes:

> In adopting districting plans, however, States do not treat people as individuals. Apportionment schemes, by their very nature, assemble people in groups. States do not assign voters to districts based on merit or achievement, standards States might use in hiring employees or engaging contractors. Rather,

127. *See* Miller v. Johnson, 515 U.S. 900, 909 (1995) (citing United States v. Hays, 515 U.S. 737, 744–45 (1995)).

128. *See id*. Prior to *Rucho*, the Supreme Court adopted a similar standing requirement for partisan gerrymandering claims in *Gill v. Whitford*. *See supra* note 108 and accompanying text.

129. *Miller*, 515 U.S. at 929 (Stevens, J. dissenting).

130. *Id*. at 930 (citations omitted) (internal quotation marks omitted).

131. *Id*. at 930–31.

> legislators classify voters in groups—by economic, geographical, political, or social characteristics—and then "reconcile the competing claims of [these] groups."[132]

The victims of racial gerrymandering may be disappointed or even offended by their inclusion in a voting district populated primarily by voters of a different race. But they do not incur any injury that is independent from the racial stereotypes that the Court insists are impermissible. As a result, the victims of racial gerrymandering do not suffer the sorts of particularized injury to a legally protected interest that are typically required for standing. Doctrinally, therefore, racial gerrymandering claims should be treated as nonjusticiable.

2. Instrumental Arguments

In addition to the doctrinal rules relating to standing that point to rejecting the justiciability of *Shaw* redistricting challenges, there are, once again, deeper instrumental reasons for rejecting the Court's characterization of racial gerrymandering as justiciable. Racial gerrymanders seem to share the characteristics of nonjusticiable political questions for three reasons. First, they do not rest on any claim of a legal right that the Supreme Court has not already rejected. Second, in the redistricting context, racial gerrymandering claims lack any judicially discoverable and manageable standards. Third, proper resolution of racial gerrymandering claims is more likely when those claims are assigned to the political branches rather than to the courts. As a result, racial gerrymandering claims rest on questions that are ultimately political rather than judicial in nature.

a. No Legal Right.

Under the *Marbury* model of adjudication, the law of justiciability seeks to confine courts to the judicial function of adjudicating legal rights so that they will not intrude on the function of social policymaking that the Constitution allocates to the political branches. In its *Shaw* holding that racial gerrymandering claims are justiciable, the Supreme Court was guilty of such an intrusion because the new legal right that it claimed to be adjudicating did not actually exist. Rather, the Court was recasting a legal claim that it had already rejected in a way that made it appear to be a new legal right. Because the new right had no legitimate content, the Court's use of that supposed new right to circumvent its prior

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132. *Id.* at 947 (Ginsburg, J., dissenting) (quoting Davis v. Bandemer, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring)). It is interesting to note that Justices Ginsburg and O'Connor seem to have reversed the customary positions that liberals and conservatives take on the issue of group versus individual rights. Liberal Justice Ginsburg seems to reject the recognition of any white group rights that could be offended by the creation of majority-minority voting districts, even though she tends to favor recognition of minority group rights in the context of racial affirmative action. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 272–74 (1995) (Ginsburg, J., dissenting). Conservative Justice O'Connor seems to have accepted the legitimacy of treating voters as groups in the redistricting context, even though she typically rejects the legitimacy of group treatment in the racial affirmative action context. *See, e.g.*, *id.* at 224–25 (majority opinion). This shift in customary political positions illustrates the degree of doctrinal plasticity that exists in the governing legal doctrines.

rejection of the actual claim at issue enabled the Court to engage in nonjusticiable political policymaking rather than the justiciable protection of a genuine legal right.

The furtive nature of the racial gerrymandering claim that the Court recognized in *Shaw* is illustrated by the dispute among the Justices about whether *Shaw* was actually creating a new equal protection cause of action, or was instead seeking to camouflage a vote-dilution claim that the Court had already rejected. As has been noted, the *Shaw* majority claimed to be creating a new equal protection cause of action that was available to voters who were segregated in voting districts due to their race.[133] However, Justice White's dissent in *Shaw* argued that the only concrete harm that could result from assigning white voters to majority-minority districts was the harm that the political influence of white voters might be diluted.[134] And it turns out that the Court had already rejected that vote-dilution claim in a 1977 case called *United Jewish Organizations of Williamsburg, Inc. v. Carey* (*UJO*).[135] The *UJO* Court rejected the claim because "members of the white majority could not plausibly argue that their influence over the political process had been unfairly canceled," and ultimately the *Shaw* Court chose "not to overrule, but rather to sidestep, *UJO*."[136]

Although the *Shaw* majority argued that the mere race-based assignment of voters to voting districts constituted a legal injury distinct from any vote-dilution injury, the *Shaw* dissenters explained how the race-based assignment of voters to voting districts alone could not be viewed as a meaningful injury in the redistricting context. The mere race-based treatment of individuals might be viewed as a legal injury in other contexts, such as the context of school segregation.[137] That was because some benefits or harms were likely to result from the race-based assignment.[138] However, the collateral harms that existed in an educational context were simply not present in a redistricting context where all voters retained the same right to vote regardless of the voting districts to which they were assigned.[139] Where assignment to voting districts was involved, no injury existed independent of the potential vote-dilution injury that the *UJO* Court had found could not plausibly be said to have been inflicted on white voters in light of the majority voting power that they retained.

The argument of the *Shaw* dissenters seems persuasive. But whether the *Shaw* racial gerrymandering claim is ultimately deemed the same as, or different from, the *UJO* vote-dilution claim, it does seem to parallel the partisan gerrymandering claim that *Rucho* declared to be a political question. In both cases, the plaintiffs suffered the same vote-dilution harms. And if discriminatory assignment

133. *See supra* notes 122–24 and accompanying text.
134. *See* Shaw v. Reno, 509 U.S. 630, 658–59 (1993) (White, J., dissenting).
135. *See* 430 U.S. 144 (1977).
136. *Shaw*, 509 U.S. at 658–59 (White, J., dissenting); *id.* at 667–70.
137. *See supra* note 125 and accompanying text.
138. *See Shaw*, 509 U.S. at 681–82 (Souter, J. dissenting).
139. *See supra* notes 126–32 and accompanying text.

simpliciter is to be recognized as a legal injury, that injury is equally present in both cases. It was present as racial discrimination in *Shaw*, and as political discrimination in *Rucho*. If the Supreme Court thought that those injuries were insufficient to create a justiciable legal right in *Rucho*, those same injuries should also be insufficient to create a justiciable legal right in *Shaw*. If partisan gerrymandering was a nonjusticiable political question in *Rucho*, it was a nonjusticiable political question in *Shaw* as well. By purporting to adjudicate a legal claim that did not really exist in *Shaw*, the Supreme Court was violating separation-of-powers principles by substituting its policy preferences for the policy preferences of the political branches that sought to enhance electoral protections for minority voters.

b. Judicially Manageable Standards.

The standards that govern both the recognition and the adjudication of racial gerrymandering claims are too imprecise to be characterized as judicially manageable. Even if *Shaw* is viewed as implicating legal rights rather than political questions, the *Easley v. Cromartie* problem still exists. A court viewing the racial gerrymander as justiciable would still have to decide in a particular case whether it was looking at a racial gerrymander or an instance in which purported partisan politics was being used to camouflage the predominant use of race. Indeed, that very dispute occurred in the *Shaw* litigation itself. *Easley v. Cromartie* resolved the characterization problem by deeming the North Carolina voting district at issue to be a partisan gerrymander rather than a racial one. But in so doing, the Supreme Court had to declare the three-judge district court's contrary finding to be clearly erroneous.[140] Indeed, the characterization problem was so judicially unmanageable that *Easley* was the fourth time the North Carolina voting district at issue in the initial *Shaw* case had been before the Supreme Court.[141] And then, proper characterization of the same district after a subsequent redistricting plan appeared before the Court for yet a fifth time in *Cooper v. Harris* in 2017.[142]

The judicially unmanageable distinction between partisan and racial gerrymanders in our current racially polarized culture is so slippery that Joey Fishkin has referred to it as a "sinkhole."[143] He fears that the two concepts are so closely related that an effort to treat one in a particular manner may end up swallowing the other—the way a sinkhole indiscriminately swallows everything in its vicinity.[144] This, of course, creates opportunities for strategic behavior in the way that each concept can be classified.[145] The possibility of such strategic behavior—

140. *See* Easley v. Cromartie, 532 U.S. 234, 257–58 (2001).

141. *See id.* at 237.

142. *See* 137 S. Ct. 1455, 1472 (2017).

143. Joseph Fishkin, Rucho*: A Sinkhole Dangerously Close to the House*, BALKINIZATION (July 1, 2019, 11:22 AM), https://balkin.blogspot.com/2019/07/rucho-sinkhole-dangerously-close-to.html [https://perma.cc/L56A-8875].

144. *See id.*

145. *See id.*

especially if it is politically motivated, as seems likely to have been the case in *Rucho*—increases the danger that a court will violate the separation-of-powers underpinnings of the justiciability doctrines. If a court strays from the judicially legitimate goal of protecting legal rights and intrudes into the sphere of political policymaking, the court will be usurping a function that the Constitution assigns to the political branches of government.

Another thing that makes the *Shaw* racial gerrymander standard problematic is that it permits some, but not all, consideration of race in the districting process.[146] If racial gerrymanders are unconstitutional, why are they not always unconstitutional? And the *Miller* Court's effort to contain the problem by using a predominant-factor test simply highlights the imprecision inherent in that standard.[147] Once again, that was the elusive standard the Supreme Court was using in the *Easley* litigation as the case repeatedly reappeared before the Court.

Miller also holds that districting does not violate the Equal Protection Clause if the resulting districts group together voters who constitute "communities defined by actual shared interests."[148] But given the prevalence of racial bloc voting—the bloc voting that permits *Easley* to recharacterize race as political affiliation—it is not clear why race does not constitute a community of shared interests for districting purposes. This is a point that Justice Ginsburg makes forcefully in her *Miller* dissent. Ethnic groups that are "Chinese, Irish, Italian, Jewish, Polish, [and] Russian" count as communities of shared interests, but apparently racial minorities do not.[149] If the governing standard encompasses some communities defined by actual shared interests but not others, it is difficult to see how the standard can be judicially managed to generate consistent, coherent, and defensible results.

Justice Stevens, dissenting in *Shaw*, discusses another feature that makes the racial gerrymandering standards unmanageable. The *Shaw* cause of action permits white voters to invalidate majority-minority voting districts that are designed to benefit underrepresented minority groups. This allows a group with more political power to neutralize remedial districting efforts intended to equalize political power. Justice Stevens concludes that such a result "could only be described as perverse."[150] Nevertheless, Justice O'Connor rejected any special rule for the benign, remedial use of race.[151] A standard that can be applied in a way that both advances and negates the racial-equality objectives that the standard is intended to serve may be judicially manipulable, but it is not judicially manageable under any defensible definition of the term.

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146. *See* Shaw v. Reno, 509 U.S. 630, 642 (1993).

147. *See* Miller v. Johnson, 515 U.S. 900, 916–17 (1995) (adopting the "predominant factor" test). Indeed, in *Rucho*, the Court held that the predominant-factor test was too imprecise to constitute a judicially manageable standard in the context of partisan gerrymandering. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2502–03 (2019).

148. *Miller*, 515 U.S. at 916.

149. *Id*. at 944–45 (Ginsburg, J., dissenting).

150. *Shaw*, 509 U.S. at 677–79 (Stevens, J., dissenting).

151. *See id*. at 653–58 (majority opinion).

One additional feature makes the *Sh*aw racial gerrymandering standard seem unmanageable. Under the *Miller* predominant-factor test, it is permissible to engage in racial gerrymandering unless race becomes the predominant factor in drawing district lines. The meaning of the predominant-factor test is, of course, imprecise. But there is one thing that it could well mean. It could mean that consideration of race is permissible as long as the consideration of race is not outcome-determinative. Another way to phrase the test is that race can be considered in a districting context as long as the consideration of race does not matter. Once it does matter, however, the Court can simply say that the consideration of race has become predominant, and therefore, unconstitutional. Why would a court want to invoke such a standard as a basis for finding an issue to be justiciable unless it wanted to preserve for itself the discretion to pick and choose among the racial gerrymanders that it wished to invalidate or uphold? If the ability to constrain the exercise of judicial discretion is part of what makes a standard judicially manageable, the *Miller* predominant-factor standard does not survive that test.

c. Relative Institutional Competence.

On an even deeper instrumental level, it may make sense to view issues attendant to racial gerrymanders as nonjusticiable in a redistricting context because the Court lacks the relative institutional competence to resolve them. The representative branches may be institutionally able to do a better job. The problem of racial discrimination in voting has a history that is long enough, and severe enough, that Congress passed the Voting Rights Act of 1965 in order to address the problem.[152] And the statute appeared to be working. In fact, its provisions enabled the election of the first black representatives in some southern states since Reconstruction.[153] But then the Supreme Court created the *Shaw* cause of action, which had the effect of reversing the progress that had been made by invalidating the very types of majority-minority voting districts that had made electoral gains possible for racial minorities.

It is far from clear why we should think that such a Supreme Court could do a better job than the political branches in protecting minority voting rights. The United States Attorney General had adopted a policy of maximizing the number of majority-minority voting districts that a jurisdiction's political geography would permit before granting preclearance under section 5 of the Voting Rights Act. But the Supreme Court in *Miller* refused to consider that policy a compelling interest that could satisfy the strict scrutiny required by *Shaw* for the survival of majority-minority districts.[154]

152. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

153. *See Miller*, 515 U.S. at 938 (Ginsburg, J., dissenting) (Georgia); *Shaw*, 509 U.S. at 659 (White, J., dissenting) (North Carolina); *id*. at 676 (Blackmun, J., dissenting) (North Carolina).

154. *See Miller*, 515 U.S. at 909, 917–18, 921–26.

Section 5 of the Fourteenth Amendment gives Congress the power to remedy violations of the Equal Protection Clause.[155] In addition, Section 2 of the Fifteenth Amendment gives Congress the power to remedy racial discrimination in voting.[156] Congress authorized the Attorney General to enforce remedial anti-discrimination policies in the Voting Rights Act of 1965.[157] But the Supreme Court's *Shaw* cause of action has undermined the remedial efforts of the political actors who have tried to promote voting rights. The Supreme Court seems to proceed from an analytical baseline that assumes that the current allocation of political power among whites and racial minorities is a natural and neutral allocation that the Supreme Court is obliged to protect. Therefore, interpreting the laws of justiciability in a way that permits judicial intervention in the process of providing political protections for minority voting rights does not seem particularly prudent. Stated more succinctly, a *Shaw*-based claim of racial gerrymandering should be deemed nonjusticiable because the usurpation of political functions entailed in the judicial recognition of such a claim would violate separation-of-powers principles.

III. GERRYMANDERING JUSTICIABILITY

The Court chose to treat racial gerrymandering as justiciable in *Shaw* and partisan gerrymandering as nonjusticiable in *Rucho*. And I fear there was a reason for that choice. It allows the Court to exercise the considerable discretion it accords itself under its justiciability jurisprudence to advance what it apparently believes is one of its social functions. In a time of increasing cultural diversity in the United States—a time when whites will soon cease to constitute a numerical majority of the population—the Court appears to have gerrymandered the law of justiciability in a way that facilitates the efforts of whites to preserve the current advantage they have over racial minorities in the domain of electoral politics.[158] Moreover, that social function is consistent with the role that the Supreme Court has played in applying other doctrines throughout U.S. history in matters that affect the race relations of the country.

155. *See* U.S. CONST. amend. XIV, § 5.

156. *See id*. amend. XV, § 2.

157. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended in scattered sections of 52 U.S.C.).

158. *See* Sabrina Tavernise, *Why the Announcement of a Looming White Minority Makes Demographers Nervous*, N.Y. TIMES (Nov. 22, 2018), https://www.nytimes.com/2018/11/22/us/white-americans-minority-population.html (explaining that the announcement that whites will no longer be a majority of the population by 2044 has made whites racially apprehensive). Fears of white persons of losing their majority status have prompted President Donald Trump and other Republicans to adopt a strategy of overt appeals to the racist and xenophobic segments of their white working-class core political base. *See* Matt Viser, *Midterms Test Whether Republicans Not Named Trump Can Win by Stoking Racial Animosity*, WASH. POST (Nov. 4, 2018, 7:49 PM), https://www.washingtonpost.com/politics/midterms-test-whether-republicans-not-named-trump-can-win-by-stoking-racial-animosity/2018/11/04/bb5f00ac-e059-11e8-ab2c-b31dcd53ca6b_story.html?utm_term=.3a3dc348dfa9.

A. DILUTING MINORITY VOTES

As the 5–4 decisions in *Rucho*,[159] *Shaw*,[160] and *Miller*[161] indicate, the Supreme Court's justiciability jurisprudence gives the Court a considerable amount of discretion to decide how it wants to rule in gerrymandering cases. The outcome in each of those cases was determined by the views of a single swing-vote Justice. Doctrinally and conceptually, the Supreme Court could easily have ruled either way on the justiciability of partisan and racial gerrymandering. It could have upheld the justiciability of both, rejected the justiciability of both, or upheld the justiciability of one while rejecting the justiciability of the other. If the Court wishes to uphold a gerrymander, it can characterize the gerrymander as partisan, treat it as nonjusticiable under *Rucho*, and simply defer to the political process that adopted it. If the Court wishes to invalidate a gerrymander, it can characterize the gerrymander as racial, intervene to resolve a dispute that is justiciable under *Shaw*, and invalidate the gerrymander by finding race to be the "predominant factor" under *Miller*. The breadth of the Court's discretion in choosing how to characterize the gerrymander is further increased by the Court's ability under *Easley v. Cromartie* to treat race as partisanship when doing so will advance the Court's objective. The Court has lots of discretion, and the absence of meaningful constraint allows the Court to exercise that discretion in ways that are likely to reflect the political and ideological leanings of the Court's conservative and liberal voting blocs. It also allows that discretion to be exercised in ways that reflect the political and ideological leanings of the Court on the issue of race.[162] In fact, the substantial overlap that exists between partisan and racial gerrymandering has already prompted some legislators to repackage their suspect, racially motivated gerrymanders as permissible partisan gerrymanders.[163]

The role of race is apparent on the surface of racial gerrymanders. But race can also play a significant role behind the scenes in partisan gerrymanders that occur in jurisdictions with high levels of racial bloc voting. Indeed, the high correlation that often exists between race and political affiliation prompted the Supreme Court to rule the way it did in *Easley*. There, the Court upheld a partisan gerrymander, but in so doing, it may actually have allowed race to function as a surreptitious predominant factor.[164] In addition, the Voting Rights Act itself requires

159. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2490 (2019).

160. *See* Shaw v. Reno, 509 U.S. 630, 632 (1993).

161. *See* Miller v. Johnson, 515 U.S. 900, 902 (1995).

162. I have previously discussed the Supreme Court's similar conservative and liberal voting blocs on the issue of affirmative action in GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES 159–63 (2000).

163. *See* Amy Gardner et al., *Redistricting Activists Brace for Wall of Inaction as Battle Moves to States*, WASH. POST (Nov. 13, 2019), https://www.washingtonpost.com/politics/2019/11/12/redistricting-activists-brace-wall-inaction-battle-moves-states/?arc404=true (describing North Carolina's efforts to repackage racial gerrymanders as partisan gerrymanders).

164. *See* Easley v. Cromartie, 532 U.S. 234, 257–58 (2001). It is true that *Easley* upheld, as a partisan gerrymander, the creation of majority-minority districts that advanced the interests of Democrats and racial minorities. *See id.* However, because Republicans control a disproportionately high number of statehouses and governorships, the net effect of partisan gerrymandering is likely to benefit Republicans

that race be taken into account in order to prevent unlawful vote dilution in jurisdictions where racial bloc voting takes place.[165] And racial bloc voting had been found pervasive in the North Carolina voting districts at issue in *Shaw*.[166]

Racial bloc voting has become common in the current political environment of the United States. For example, Democratic President Barack Obama received 93% of the black vote in 2012 and Republican President Donald Trump received 8% of the black vote in 2016.[167] Trump did, however, win 58% of the white vote in 2016.[168] Donald Trump has also adopted a reelection strategy for his 2020 presidential campaign that makes overt appeals to white identity politics in the hope that the racial biases of his core political base will help him secure reelection.[169] The intimate connection between racial and partisan gerrymandering is further illustrated by the Trump Administration's hidden efforts to enhance white Republican voting strength by reducing Latinx and Democratic voting through the addition of a citizenship question on the 2020 Census forms.[170] The relationship between race and political affiliation is also strong enough that both partisan and racial gerrymandering challenges are sometimes asserted against the same voting districts.[171] Racial gerrymanders are overtly racial, but partisan gerrymanders can also be racial gerrymanders in disguise. Accordingly, it is not clear whether the Supreme Court's finding of nonjusticiability in *Rucho* was intended to help Republicans or was intended to help *white* Republicans.

Rule-of-law rhetoric notwithstanding, it is not surprising that a Supreme Court with a five-Justice conservative majority tends to rule in ways that advance conservative political interests over liberal interests. And because race and political affiliation tend to be highly correlated, it is not surprising that a conservative Court will also tend to rule in ways that favor the interests of whites over the

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and whites more than it benefits Democrats and racial minorities. *See infra* notes 177–80 and accompanying text.

165. *See Shaw*, 509 U.S. at 680 (Souter, J., dissenting).

166. *See id*. at 656 (majority opinion).

167. Alison Durkee, *Here's a Breakdown of How African-Americans Voted in the 2016 Election*, MIC (Nov. 14, 2016), https://www.mic.com/articles/159402/here-s-a-break-down-of-how-african-americans-voted-in-the-2016-election [https://perma.cc/7CAN-UT48].

168. *Id*.

169. *See* Michael Scherer, *White Identity Politics Drives Trump, and the Republican Party Under Him*, WASH. POST (July 16, 2019, 6:00 AM), https://www.washingtonpost.com/politics/white-identity-politics-drives-trump-and-the-republican-party-under-him/2019/07/16/a5ff5710-a733-11e9-a3a6-ab670962db05_story.html?utm_term=.b8405f57a42c.

170. *See supra* note 91 and accompanying text.

171. *See, e.g*., League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 409–10, 413–14, 427, 442, 443 (2006) (asserting both partisan and racial gerrymandering claims with respect to black and Latinx voters in Texas). *Compare* Abbott v. Perez, 138 S. Ct. 2305, 2313–15 (2018) (adjudicating Texas racial gerrymandering claim), *with id*. at 2354–55 (Sotomayor, J., dissenting) (noting district court found race was used for partisan purposes); *compare* Cooper v. Harris, 137 S. Ct. 1455, 1465–66 (2017) (adjudicating racial gerrymandering claim for North Carolina Districts 1 and 12), *with* Rucho v. Common Cause, 139 S. Ct. 2484, 2491 (2019) (adjudicating North Carolina partisan gerrymandering claim for statewide districting map). *See also* Michael Li et al., *The State of Redistricting Litigation (January 17, 2020)*, BRENNAN CTR. FOR JUST. (Aug. 2, 2019) (describing pending partisan and racial redistricting cases), https://perma.cc/8B8A-XGU6.

interests of racial minorities. That appears to be what is happening with the Supreme Court's current justiciability jurisprudence in the context of gerrymandering. The Court defers on nonjusticiability grounds when white interests are being advanced, and it intervenes in what it finds to be a justiciable case or controversy to invalidate a gerrymander when racial-minority interests are advanced.

In cases like *Rucho*, where the constitutionality of partisan gerrymandering is at issue, the Court now finds the constitutional challenges to be nonjusticiable. Partisan gerrymandering is typically used by a dominant political party to maintain or increase its control over a legislature or legislative delegation. The party that is out of power has little ability to force a gerrymander that is favorable to itself, or to prevent the dominant party from perpetuating its political dominance over the gerrymandering process. Under the facts of *Rucho*, the dominant Republican Party in North Carolina used extreme partisan gerrymandering to secure a highly disproportionate advantage in the state's congressional delegation to the U.S. House of Representatives. After noting the unfairness of the gerrymander, and the strain that it placed on the principle of democratic self-governance, the conservative voting bloc on the Supreme Court nevertheless refused to intervene. It found that constitutional challenges to the gerrymander raised nonjusticiable political questions.[172] That allowed the North Carolina Republican Party to succeed in its efforts to secure ten of the state's thirteen seats in the House, despite having won only 55% of the popular vote.[173] And because racial bloc voting is so high in North Carolina, the partisan gerrymander the Supreme Court allowed—giving Republicans a dramatic advantage over Democrats—also gave whites a dramatic political advantage over racial minorities in selecting North Carolina delegates to the House.[174]

Not all partisan gerrymanders will favor Republicans (and therefore whites) even where racial bloc voting is prevalent. Partisan gerrymandering will favor Republicans in states under Republican political control, and will favor Democrats in states that are under Democratic political control. In *Lamone v. Benisek*, the Maryland companion case to *Rucho*, extreme partisan gerrymandering gave a dramatic advantage to Democrats over Republicans in the state's U.S. House of Representatives congressional delegation.[175] Democrats secured seven of eight House seats despite never winning more than 65% of the popular vote.[176] Because of racial bloc voting, the vote also had the effect of preventing whites from increasing their political advantage over racial minorities in selecting Maryland delegates to the House.

172. *See Rucho*, 139 S. Ct. at 2506–07.

173. *See id.* at 2491; *id.* at 2510 (Kagan, J., dissenting).

174. Racial bloc voting was so high in North Carolina that the courts considering the constitutionality of the districts involved in *Easley v. Cromartie* had difficulty determining whether the gerrymanders at issue were racial or partisan. *See* 532 U.S. 234, 257–58 (2001).

175. *Rucho*, 139 S. Ct. at 2493.

176. *See id.*; *id.* at 2511 (Kagan, J., dissenting).

In theory, there is no reason why treating partisan gerrymandering as a nonjusticiable political question should favor Republicans and whites over Democrats and racial minorities. But in practice, most state legislatures and governorships in the United States are currently controlled by Republicans rather than Democrats.[177] That means that the Supreme Court's current rule treating partisan gerrymanders as nonjusticiable political questions will benefit Republicans and whites more than it benefits Democrats and racial minorities. In the event that the Republican advantage changes over time, the Supreme Court conservative voting bloc can change the justiciability rule governing partisan gerrymanders if it so desires. After all, the current nonjusticiability rule is of relatively recent vintage. Under the 1986 Supreme Court decision in *Davis v. Bandemer*, partisan gerrymandering claims were deemed to be justiciable.[178] The Court seriously questioned the continued vitality of that rule in 2004 with its plurality vote in *Vieth v. Jubelirer*.[179] And then Chief Justice Roberts substituted the new nonjusticiability rule in *Rucho*.[180] Perhaps the justiciability rule for partisan gerrymanders will continue to evolve over time in ways that remain politically correlated.

The Court's nonjusticiability deference to partisan gerrymandering can help white Republicans maintain their electoral advantage over racial-minority Democrats. On the surface, this would seem to have racial overtones only in geographic electoral areas that have significant minority populations whose interests can be subordinated to the interests of whites. In racially homogenous areas, where voter populations are essentially all white, partisan gerrymanders should be wholly political in nature. Racial motivations should be absent because there will be no significant racial minorities whose interest need to be suppressed. That may be true in a superficial sense, but subterranean racial concerns may still be present.

The high correlation that exists between race and political affiliation means that political parties tend to acquire racial valances. After the Civil War and emancipation, the Republican Party became the party of Lincoln, and Southern Democrats became the party of slavery and Jim Crow racial segregation. Now, Democrats have come to be associated with diversity and the protection of racial-minority interests, while Republicans have come to be associated with racial homogeneity and opposition to civil rights. This can be starkly illustrated by comparing the racially divisive 2020 presidential campaign of Donald Trump to the

177. *See Partisan Composition of State Legislatures*, BALLOTPEDIA, https://perma.cc/WN3K-6TXJ (last updated Feb. 3, 2020); *Governor (State Executive Office)*, BALLOTPEDIA, https://ballotpedia.org/Governor_(state_executive_office)#Partisan_breakdown [https://perma.cc/XFK3-WLSM] (last visited Feb. 6, 2020).

178. *See* 478 U.S. 109, 125–27 (1986) (finding that a partisan gerrymandering claim did not raise nonjusticiable political question but rather was justiciable under the Equal Protection Clause, and rejecting view that racial gerrymandering claims are distinguishable from partisan gerrymandering claims with respect to justiciability).

179. *See* 541 U.S. 267, 305–06 (2004) (plurality opinion); *cf. id.* at 306–17 (Kennedy, J., concurring) (suggesting that some partisan gerrymandering claims might be justiciable).

180. *See Rucho*, 139 S. Ct. at 2506–07.

racially inclusive campaigns of virtually all of Trump's Democratic challengers.[181] It seems likely that white Republican states will have predictable views on political issues such as D.C. statehood, affirmative action, and immigration, even if their minority populations are small.

As a result of these racial valances, even in electoral areas where whites constitute a large segment of the population, Supreme Court deference to partisan gerrymandering is likely to have the net effect of advancing Republican racial policies over Democratic racial policies. That means that, even in white electoral areas, when the Supreme Court defers to Republican political policies by deeming partisan gerrymanders to be nonjusticiable, it is also deferring to the Republican racial policies that those partisan gerrymanders encompass.

The Supreme Court's *Shaw* and *Miller* rule treating racial gerrymandering claims as justiciable also has a disproportionately adverse effect on racial minorities. The *Shaw* cause of action permits voters living in racially gerrymandered voting districts to challenge the constitutionality of those districts as products of racial discrimination violating the Equal Protection Clause.[182] Again, in theory there is no reason to think that the *Shaw* cause of action should have a disproportionately adverse effect on racial minorities, or on the Democratic candidates whom racial minorities tend to support. Voters can complain that their voting districts have been racially engineered to their disadvantage regardless of their race. But once again, as a practical matter, most traditional *Shaw* challenges are asserted by white voters who object to being assigned to majority-minority districts.[183] Even more recent "packing" and "cracking" claims filed by racial-minority voters tend to argue that racial-minority votes have been diluted by excessive concentration in a small number of districts, or by excessive dispersion over too many districts, either of which can reduce the ability of minority voters to elect the representatives of their choice.[184]

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181. *See, e.g.*, Julia Cherner, *2020 Democrats Attack Trump's Response to El Paso and Dayton Shootings*, CBS NEWS (Aug 5, 2019, 8:53 PM), https://www.cbsnews.com/news/2020-democrats-attack-trumps-response-to-el-paso-dayton-shootings/ [https://perma.cc/VT45-TSYT]; Astead W. Herndon & Jennifer Medina, *Trump Sets the Terms on Racial Division. Do Democrats Know What to Do?*, N.Y. TIMES (July 21, 2019), https://www.nytimes.com/2019/07/21/us/politics/trump-race-democrats.html; Toluse Olorunnipa & Ashley Parker, *'Everything that We Hold Dear': From Race to Plastic Straws, Trump Dials Up Culture Wars in Divisive Play for 2020 Votes*, WASH. POST (Aug. 12, 2019, 6:05 PM), https://www.washingtonpost.com/politics/trump-dials-up-culture-wars-in-divisive-play-for-2020-votes/2019/08/12/8c5c2a96-b556-11e9-8f6c-7828e68cb15f_story.html.

182. *See* Shaw v. Reno, 509 U.S. 630, 642–44, 649 (1993).

183. In the wake of *Shaw*, most of the Supreme Court's racial gerrymandering cases were decided in ways that favored white interests and disfavored the electoral interests of racial minorities. *See* SPANN, *supra* note 162, at 155; *see generally id.* at 107–55 (discussing several relevant voting rights cases). Most Supreme Court cases during this period also rejected statutory claims of minority vote dilution asserted under the Voting Rights Act of 1965. *See id.* at 85–107; *id.* at 162–63 (presenting a voting chart showing racially correlated case outcomes).

184. *See, e.g.*, Cooper v. Harris, 137 S. Ct. 1455, 1465–66, 1472, 1476, 1478, 1481–82 (2017) (holding that packing superfluous black voters into district constituted unconstitutional racial gerrymander that diluted black voting strength); *see also* THEODORE M. SHAW, THE SUPREME COURT'S ELECTION AND REDISTRICTING LAW RECONSIDERED 4–15 (n.d.), https://www.law.nyu.edu/sites/default/files/upload_documents/The-Supreme-Court-Election-Law-and-Redistricting.pdf [https://perma.cc/ZHM2-

As a result, the Supreme Court's treatment of racial gerrymandering claims as justiciable in the redistricting context tends to harm the interests of racial-minority voters and advance the interests of white voters. *Shaw* and *Miller* illustrate this tendency. In both cases, the Court entertained challenges by white plaintiffs who sought to nullify electoral benefits that the Voting Rights Act gave racial minorities to compensate for past voter discrimination.[185] Because racial gerrymandering claims are justiciable, the Supreme Court can uphold or reject *Shaw* challenges on the merits. Once again, the Court is likely to do so in accordance with the political and ideological views of the Justices who comprise the Court's dominant voting bloc. Accordingly, it is not at all surprising that cases like *Shaw* and *Miller* end up being 5–4, politically correlated decisions.

The political question doctrine is not the only justiciability doctrine the Supreme Court has applied in a way that benefits whites at the expense of racial minorities. I have previously argued that the Supreme Court's notoriously problematic doctrine of standing is so racially correlated that it seems to be "color coded."[186] When racial minorities "file programmatic challenges to widespread patterns of racial discrimination, the Court typically denies standing" on one or more of a variety of technical grounds relating to particularized injury, causation, or redressability.[187] But when whites "file similar programmatic challenges to affirmative action programs, the Court typically grants standing" by applying the technical requirements with relaxed stringency.[188] In this regard, it is worth noting that the Supreme Court found standing in *Shaw* for white plaintiffs who wished to challenge majority-minority voting districts, even though it was difficult to identify any injury suffered by those plaintiffs that did not rest on and reinforce the very same racial stereotypes that the *Shaw* majority said it created the *Shaw* cause of action to prevent.[189]

When the Supreme Court has discretion in matters affecting race relations, it tends to exercise that discretion in ways that favor the interests of whites over the interests of racial minorities. That is not an appropriate role for the Court to play in a representative democracy. The Court should instead enforce the concept of racial equality as one of the structural mechanisms that promote democratic self-governance. Nevertheless, the Court does often seem to favor the interests of

FPC6] (discussing recent Supreme Court cases that have ruled on efforts to pack minority voters in ways that would reduce minority voting strength, often invalidating such efforts); Michael S. Kang, *The End of Challenges to Partisan Gerrymandering*, REG. REV. (July 17, 2018), https://www.theregreview.org/2018/07/17/kang-end-challenges-partisan-gerrymandering/ [https://perma.cc/UF6W-YMGS] (describing the difference between "packing" and "cracking"); Kim Soffen, *How Racial Gerrymandering Deprives Black People of Political Power*, WASH. POST (June 9, 2016, 12:01 PM), https://www.washingtonpost.com/news/wonk/wp/2016/06/09/how-a-widespread-practice-to-politically-empower-african-americans-might-actually-harm-them/?utm_term=.07899963cf0e (describing how Republicans use packing, rather than more conventional cracking, to dilute the black vote).

185. *See Shaw*, 509 U.S. at 633–39; Miller v. Johnson, 515 U.S. 900, 921–27 (1995).

186. *See generally* Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422 (1995).

187. *Id*. at 1424.

188. *See id*. at 1422–25.

189. *See supra* note 130 and accompanying text.

whites over the interests of racial minorities. Indeed, it is hard to imagine why the Supreme Court would have invented the *Shaw* cause of action to begin with, other than to disadvantage minorities in the electoral process. That is particularly true because *UJO* had already rejected white vote-dilution claims as not plausibly depriving whites of equal access to the electoral process.[190] But the Supreme Court has a long history of sacrificing racial-minority interests to benefit the white majority.

B. HISTORICAL ROLE OF THE COURT

In holding that partisan gerrymanders were nonjusticiable, the *Rucho* Court rejected its earlier precedent in *Davis v. Bandemer*, which had held that partisan gerrymanders *were* justiciable.[191] The Supreme Court initially intervened to override the gerrymandering policy adopted by the political branches, but then it changed course and subsequently deferred to the political branches. Throughout its history, the Court has vacillated in and out of politics. It has sometimes deferred to politics, and other times intervened to override actions of the political branches. But it does seem to have been largely consistent along another dimension: the Supreme Court tends to rule against racial minorities. The Court appears to believe that one of its social functions is to protect the interests of whites against the competing interests of racial minorities. And if history is any indication, the Court has become disturbingly good at performing that function.[192]

In the beginning, the United States was unambiguously committed to the sacrifice of minority interests for the benefit of whites. A rationalizing belief in the racial inferiority of blacks was central to maintaining the brutal regime of chattel slavery in the American South.[193] A racial caste system helped prevent oppressed black and white laborers from forming alliances that would threaten the economic interests of slaveowners.[194] A sense of white supremacy was also central to the genocide and forced relocation of indigenous Indians, and to the passage of laws that discriminated against Chinese, Mexican, and Irish workers.[195]

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190. *See supra* note 136 and accompanying text.

191. *See* 478 U.S. 109, 118–27 (1986).

192. I have long believed that a tacit social function of the Supreme Court has been to facilitate the protection of white interests at racial-minority expense. *See, e.g.*, GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 4–5, 94–99, 104–18 (1993) [hereinafter SPANN, RACE AGAINST THE COURT]; Spann, *supra* note 186, at 1422–25; Girardeau A. Spann, *Race Ipsa Loquitur*, 2018 MICH. ST. L. REV. 1025, 1028–29.

193. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 89 (2d ed. 1985) (discussing treatment of free blacks in the eighteenth century); SCOTT L. MALCOMSON, ONE DROP OF BLOOD: THE AMERICAN MISADVENTURE OF RACE 191 (2000) (discussing the development of racial attitudes in the United States); ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 94–97 (1982) (describing how the degradation and brutal treatment of slaves provided psychological benefits to slaveowners).

194. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 22–26 (2010).

195. *See* FRIEDMAN, *supra* note 193, at 508–10; RONALD TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA 146, 171–72, 200–01, 233 (1993).

The Supreme Court turned out to be complicit in legitimizing these early forms of racial oppression, with some of its decisions becoming infamous. In *Prigg v. Pennsylvania*, the Court deferred to the federal political process and protected slaveowner rights under fugitive slave provisions of the Constitution and a federal statute.[196] *Prigg* invalidated a Pennsylvania law that required the use of the judicial process, rather than the violent removal from the state by force, to determine the status of someone alleged to be an escaped slave.[197] The Supreme Court's invalidation of the Pennsylvania statute permitted the continued kidnapping of free blacks who were falsely alleged to be slaves, as was depicted in the autobiographical book and Academy Award winning film *12 Years a Slave*.[198]

In *Dred Scot v. Sandford*, the Supreme Court overrode the federal political process and invalidated on constitutional grounds the Missouri Compromise Act of 1820, which was an attempted political solution to the nation's vexing problem of slavery.[199] In the process of invalidating the federal statute, the Court announced that black people could not be citizens of the United States or of the states within which they resided.[200] *Dred Scott* is often said to have inflamed racial and regional tensions that ultimately culminated in the Civil War.[201] The case was politically overruled by the Fourteenth Amendment grant of citizenship to "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof."[202]

After the Civil War, Congress passed three Reconstruction constitutional amendments and a series of Reconstruction statutes that were designed to abolish slavery and provide a measure of equal rights for racial minorities. However, the Supreme Court narrowly construed some of those amendments, and invalidated some of those statutes in ways that preserved the privileged status that whites possessed over racial minorities. The Court even permitted the South to impose on blacks a functional substitute for slavery through systems of peonage and convict labor.[203] One of the Court's most far-reaching decisions was the *Civil Rights Cases*, in which it invalidated the public accommodations provisions of the Civil Rights Act of 1875 under a new "state action" requirement, thereby prohibiting Congress from providing a remedy for private acts of discrimination that were ubiquitous in the southern states.[204]

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196. 41 U.S. (16 Pet.) 539 (1842).

197. *See id*. at 608, 611, 613, 625–26 (1842).

198. *See* SOLOMON NORTHUP, TWELVE YEARS A SLAVE (David Wilson ed., 2014); 12 YEARS A SLAVE (Regency Enterprises et al., 2013).

199. *See* 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. AMEND. XIV.

200. *See id*. at 404–05, 407.

201. *See* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 191–93 (1992).

202. U.S. CONST. amend. XIV, § 1.

203. *See* ALEXANDER, *supra* note 194, at 30–40, 197, 205; DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II 36, 39, 53–54, 56, 58, 274, 359 (2008); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 61–97 (2004).

204. *See* 109 U.S. 3, 8–19 (1883).

As a result of the Court's invalidation of federal Reconstruction efforts, the South was able to impose on blacks a Jim Crow regime of brutal segregation. The Supreme Court, once again, then changed track and deferred to politics and upheld the so-called separate-but-equal regime of racial segregation in *Plessy v. Ferguson*.[205] The Supreme Court nominally brought an end to separate-but-equal segregation by overruling *Plessy* in its 1954 *Brown v. Board of Education* decision.[206] But *Brown* has been at least as problematic as it was helpful. *Brown* was supposed to desegregate the public schools and end the government's use of racial classifications, but thanks to subsequent Supreme Court decisions, *Brown* has done neither. Schools remain badly segregated, and racial profiling remains a common practice by police and airport security personnel.[207]

One of the reasons that *Brown* has had such limited success in promoting racial equality is that that Court has given itself a broad range of discretion in determining what constitutes school "desegregation." In *Brown II*, decided the year after the original 1954 *Brown* decision, the Court rejected a requirement of immediate desegregation and instead required desegregation "with all deliberate speed."[208] *Brown II* ushered in a ten-year period of massive resistance to desegregation in the South, which delayed any meaningful southern school desegregation until the Department of Health and Human Services threatened the withholding of federal education funds under the Civil Rights Act of 1964 for southern schools that resisted.[209]

When the school desegregation effort began to move north and west, the Supreme Court exercised its "desegregation" discretion in a way that would allow the public schools to remain de facto segregated. The Court's 1973 decision in *Keyes v. School District No. 1* prohibited the use of race-conscious remedies to eliminate the de facto segregation that was produced by private (rather than state) action.[210] De facto segregation was the most common form of school segregation that existed outside the South.[211] In the 1974 case of *Milliken v. Bradley*, the Court largely prohibited interdistrict remedies for school segregation.[212] Because school segregation in the North and West was caused primarily by residential-housing segregation that was reflected in school district zones, most minority students attended inner-city schools and most white students attended suburban

205. *See* 163 U.S. 537, 544–52 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

206. *See* 347 U.S. at 494–95.

207. *See* SPANN, RACE AGAINST THE COURT, *supra* note 192, at 104–10.

208. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955).

209. *See* SPANN, RACE AGAINST THE COURT, *supra* note 192, at 98.

210. *See* 413 U.S. 189, 208–09 (1973).

211. *See id.* at 218–19, 222–23 (Powell, J., concurring in part and dissenting in part); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 501–03 (8th ed. 2018); Judith Rosenbaum, *De Facto Segregation in the North: Introductory Essay*, JEWISH WOMEN'S ARCHIVE, https://jwa.org/teach/livingthelegacy/de-facto-segregation-in-north-introductory-essay [https://perma.cc/HWH3-KRFQ] (last visited Feb. 8, 2010).

212. *See* 418 U.S. 717, 752–53 (1974); *id.* at 789–90 (Marshall, J., dissenting).

schools.[213] As a practical matter, that meant that no actual school integration was possible under *Milliken*.

The Court's decisions in *Pasadena City Board of Education v. Spangler* and *Freeman v. Pitts* held that any schools that had been desegregated under *Brown* and then resegregated as a result of shifts in residential housing patterns, did not have to be desegregated again.[214] And in *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court went so far as to hold that public schools could not even voluntarily use race-conscious methods to remedy de facto resegregation.[215] In his plurality opinion, Chief Justice Roberts perversely cited *Brown* for the proposition that the resegregated schools had to remain resegregated.[216]

The Supreme Court has also used its loosely constrained discretion to advance the interests of whites over the interests of racial minorities in areas outside of the school-desegregation context. The Court has sometimes shown sympathy for racial affirmative action that was designed to remedy past discrimination or to promote prospective diversity in an educational context. For example, in *Grutter v. Bollinger*, the Court upheld an affirmative action plan designed to increase student diversity at the University of Michigan Law School.[217] However, on the same day, the Court held unconstitutional in *Gratz v. Bollinger* an affirmative action plan that was used to increase student diversity at the University of Michigan undergraduate college.[218] Although the two plans were strikingly similar, the Court found that the undergraduate plan was not narrowly tailored enough to survive equal protection scrutiny.[219] The juxtaposition of those two decisions, which reach different outcomes under strikingly similar sets of facts, illustrates how much unconstrained discretion the Supreme Court has in ruling on the constitutionality of affirmative action.[220]

The Supreme Court issued a particularly troubling affirmative action decision in *Schuette v. Coalition to Defend Affirmative Action*.[221] In *Schuette*, the Court upheld a Michigan ballot initiative that amended the state constitution to ban affirmative action.[222] Using language reminiscent of the language the Court uses

213. *See, e.g.*, *id.* at 725–27 (majority opinion).

214. Freeman v. Pitts, 503 U.S. 467, 495 (1992); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 425 (1976).

215. 551 U.S. 701, 709–11 (plurality opinion).

216. *See id.* at 709–11, 720–25, 733–35, 743 (2007) (plurality opinion); *cf. id.* at 861–63 (Breyer, J., dissenting) (arguing that race-conscious remedies invalidated by the Court may be necessary to prevent resegregation).

217. 539 U.S. 306, 327–30, 334 (2003).

218. 539 U.S. 244, 255–57, 275–76 (2003).

219. *Id.* at 275–76.

220. On a superficial level, *Grutter* and *Gratz* could be characterized as distinguishable because *Grutter* entailed the holistic consideration of race, and *Gratz* entailed a mechanical consideration of race. As I have argued elsewhere, however, that suggested distinction does not withstand more careful scrutiny. *See* Girardeau A. Spann, *The Dark Side of* Grutter, 21 CONST. COMMENT. 221, 242–49 (2004); Girardeau A. Spann, *Neutralizing* Grutter, 7 U. PA. J. CONST. L. 633, 652–56 (2005).

221. 572 U.S. 291 (2014) (plurality opinion).

222. *Id.* at 314–15.

when invoking the political question doctrine, Justice Kennedy's plurality opinion found a need to defer to the preferences of Michigan voters with respect to the desirability of affirmative action.[223] That was because the U.S. Constitution allocated such racial policy determinations to the democratic process.[224] Justice Scalia's concurring opinion viewed the issue in terms that were even starker. He said:

> It has come to this. Called upon to explore the jurisprudential twilight zone between two errant lines of precedent, we confront a frighteningly bizarre question: Does the Equal Protection Clause of the Fourteenth Amendment *forbid* what its text plainly *requires*? Needless to say (except that this case obliges us to say it), the question answers itself.[225]

Not only did the political-policy nature of the issue require deference to Michigan voters, but the Michigan voters themselves simply insisted on the prospective race neutrality that was already required by the Constitution.

However, the Michigan ballot initiative was far from neutral. The Supreme Court had already held in cases like *Adarand Constructors, Inc. v. Pena* and *Grutter* that racial affirmative action plans could satisfy constitutional strict scrutiny only if they were narrowly tailored to serve a compelling governmental interest.[226] That means that the Michigan anti-affirmative action initiative only applied to affirmative action plans that, by hypothesis, were necessary to advance a compelling governmental interest by compensating for past discrimination or providing prospective diversity. Affirmative action plans that did not satisfy that standard would already be unconstitutional. So, the policy that the Michigan voters were adopting was a policy that precluded remedial efforts to restore some semblance of racial equality to racial minorities.

Another way to state this is that the Michigan voters had adopted a ballot initiative that was designed to make sure that whites retained their existing advantage over racial minorities with respect to the distribution of resources that fell within the scope of whatever affirmative action plan was at issue. By upholding the ballot initiative, therefore, the Supreme Court ruled that the desire of Michigan voters to retain the advantage that whites possessed over racial minorities was constitutionally protected. The Supreme Court was accepting the current maldistribution of resources as part of the baseline from which equal protection determinations would be made. Equality, therefore, encompassed white advantage over racial minorities.

The Court has also been quite clear about two other features that it will not tolerate in affirmative action plans. First, in applying strict scrutiny to an affirmative

223. *See id.* at 310–12.
224. *See id.* at 309–15.
225. *See id.* at 316 (Scalia, J., concurring).
226. *See* Grutter v. Bollinger, 539 U.S. 306, 308 (2003); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995).

action plan set aside for minority construction contractors, the Court in *Adarand* refused to distinguish between benign and invidious racial classifications, applying strict scrutiny to both.[227] In his dissent, Justice Stevens characterized Justice O'Connor's majority opinion as being unable to distinguish a "No Trespassing sign" from "a welcome mat."[228] Second, in *Grutter*, the Court emphatically insisted that affirmative action plans could not utilize quotas, because "[t]hat would amount to outright racial balancing, which is patently unconstitutional."[229] The prohibition is difficult to understand because in a race-neutral, nondiscriminatory, colorblind society, we would expect resources to be distributed in a racially balanced way. It is difficult to see what is wrong with directly pursuing an important goal that we all claim to share. The suggestion that only race-neutral measures can be used to remedy injuries that have been inflicted through race-conscious discrimination reveals a disturbing imbalance that itself constitutes a form of discrimination favoring whites over racial minorities.

Voter fraud has been a controversial issue about which both Republicans and Democrats have complained in recent years. Republicans claim that blacks, indigenous Indians, and Latinx immigrants are casting illegal votes that help Democratic candidates. As a result, Republicans wish to engage in vigorous anti-fraud activities such as adopting voter ID laws, relocating polling places, and limiting voting hours.[230] Democrats view those efforts as blatant attempts to

227. *See* 515 U.S. at 223–27.

228. *See id.* at 245 (Stevens, J., dissenting).

229. *Grutter*, 539 U.S. at 329–30.

230. Racially motivated voter-fraud initiatives, and other minority-voter suppression measures, have been heavily funded and coordinated by conservative billionaires such as the Koch brothers, as have efforts to engage in partisan gerrymandering that reduces diversity and segregates voters in voting districts, thereby giving Republicans a significantly disproportionate share of electoral power. *See* JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT 328–32, 333–53 (2016). For example, in an October 29, 2018 *New Yorker* comment, Jelani Cobb put Georgia gubernatorial candidate Brian Kemp's voter-suppression efforts during the 2018 election in the context of Kemp's previous voter-suppression efforts as Georgia Secretary of State. *See* Jelani Cobb, *Voter Suppression Tactics in the Age of Trump*, NEW YORKER (Oct. 29, 2018), https://www.newyorker.com/magazine/2018/10/29/voter-suppression-tactics-in-the-age-of-trump. Cobb also put those efforts in the context of the more general voter-suppression efforts that have been practiced by the Republican Party in the wake of the Supreme Court's 2013 decision in *Shelby County v. Holder*. *Id. Shelby County* freed states with a history of voter discrimination from the obligation to get changes to their voting procedures approved by the Justice Department or a federal court. Cobb stressed that the 2018 midterm elections were not only a referendum on the Trump Presidency, but also on the effectiveness of voter-suppression electoral restrictions. *See id.* As if to illustrate Cobb's point, in the final days before the 2018 midterm elections, President Trump, Attorney General Jeff Sessions, Brian Kemp, and other Republican candidates continued to raise fears of voter fraud. *See, e.g.*, Richard Fausset & Alan Blinder, *Brian Kemp's Office, Without Citing Evidence, Investigates Georgia Democrats over Alleged 'Hack,'* N.Y. TIMES (Nov. 4, 2018), https://www.nytimes.com/2018/11/04/us/politics/georgia-elections-kemp-voters-hack.html. The absence of any genuine voter-fraud danger caused the Republican focus on voter fraud to be interpreted by many as an effort to intimidate legitimate minority and immigrant voters with a fear of arrest and prosecution. *See* Amy Gardner, *Without Evidence, Trump and Sessions Warn of Voter Fraud in Tuesday's Elections*, WASH. POST (Nov. 5, 2018, 8:08 PM), https://www.washingtonpost.com/politics/without-evidence-trump-and-sessions-warn-of-voter-fraud-in-tuesdays-elections/2018/11/05/e9564788-e115-11e8-8f5f-a55347f48762_story.html?utm_term=.a2a5bcfe9a59&wpisrc=nl_most&wpmm=1.

intimidate and disenfranchise legitimate minority voters.[231] The Supreme Court has yet to rule on most of the competing voter-fraud and voter-suppression claims. But the Court has issued one decision. In *Crawford v. Marion County Election Board*, the Supreme Court ruled in a way that benefitted white Republicans by upholding an Indiana voter-ID law.[232]

In the political context surrounding the *Crawford* litigation, many people viewed the Indiana voter-ID law as an effort to suppress minority voting. But in his plurality opinion, Justice Stevens said that the record did not support that conclusion.[233] He did, however, end his opinion by suggesting that additional evidence of racial or partisan voter suppression might produce a different outcome.[234] A subsequent interview with Justice Stevens revealed that his knowledge of facts surrounding the Indiana voter-ID law that were not in the record gave him concerns about the law's constitutionality, but he did not feel as if he could consider evidence that was outside the record.[235]

One of the Supreme Court decisions that most explicitly provides an advantage to white voters is *Shelby County v. Holder*, which effectively invalidated the section 5 preclearance provision of the Voting Rights Act of 1965.[236] Congress enacted the Voting Rights Act to help remedy a long history of voting discrimination against blacks and other racial minorities.[237] Its section 5 preclearance provision required prior federal approval before a jurisdiction with a history of voting discrimination could make any changes to its voting procedures.[238] Section 4 of the Act prescribed a formula for determining whether a jurisdiction was covered by the section 5 preclearance requirement.[239] The Act had strong bipartisan

231. *See* Amy Gardner, *GOP Claims of Voter Fraud Threat Fuel Worries About Ballot Access in November*, WASH. POST (Oct. 13, 2018, 3:52 PM), https://www.washingtonpost.com/politics/crackdowns-on-potential-voter-fraud-fuel-worries-about-ballot-access-in-november/2018/10/13/764db388-c0cd-11e8-be77-516336a26305_story.html?utm_term=.bffd396e1a12&wpisrc=nl_most&wpmm=1 (explaining that GOP officials try to suppress minority vote in name of preventing supposed voter fraud); William Wan, *North Carolina's Battle over Voting Rights Intensifies*, WASH. POST (May 29, 2019), https://www.washingtonpost.com/national/north-carolinas-battle-over-voting-rights-intensifies/2017/05/29/7c9fa05e-4214-11e7-8c25-44d09ff5a4a8_story.html?utm_term=.f26aa7f42b9b (noting that Democrats and voting-rights activists have resisted Republican efforts to suppress minority voting in the name of curtailing alleged voter fraud); Editorial Board, *Voter Suppression Is the Civil Rights Issue of This Era*, WASH. POST (Aug. 19, 2017), https://www.washingtonpost.com/opinions/voter-suppression-is-the-civil-rights-issue-of-this-era/2017/08/19/926c8b58-81f3-11e7-902a-2a9f2d808496_story.html?utm_term=.32c205e05bc4 (arguing that there is a need to stop Republican efforts to roll back minority voting rights).

232. *See* 553 U.S. 181, 200–04 (2008) (plurality opinion).

233. *See id.* at 202.

234. *See id.* at 203–04.

235. *See* Robert Barnes, *Stevens Says Supreme Court Decision on Voter ID Was Correct, but Maybe Not Right*, WASH. POST (May 15, 2016), https://www.washingtonpost.com/politics/courts_law/stevens-says-supreme-court-decision-on-voter-id-was-correct-but-maybe-not-right/2016/05/15/9683c51c-193f-11e6-9e16-2e5a123aac62_story.html?utm_term=.e16f5165eebc.

236. *See* 570 U.S. 529, 557 (2013).

237. *Id.* at 529.

238. *See id.* at 534–35.

239. *Id.* at 529.

support, and it had been repeatedly renewed by Congress, most recently in 2006, for another twenty-five years.[240] However, because the same section 4 formula had been in effect since the Act was first adopted in 1965, Chief Justice Roberts, writing for a 5–4 majority, held that section 4 was unconstitutionally stale in light of population and voting statistics changes that had occurred since the Act's initial adoption.[241] Without a functioning section 4 formula to determine which jurisdictions were covered, the section 5 preclearance requirement could not be applied.

The *Shelby County* decision was disheartening. As Justice Ginsburg documented in her dissent, section 5 preclearance was working remarkably well to help reverse the long history of racial discrimination in voting.[242] The Court's invalidation of section 4 put a stop to this. Since the Supreme Court's decision in *Shelby County*, legislatures in Republican states have adopted a flood of voter-ID laws and other measures that suppress minority voting.[243] In a real sense, the Supreme Court in *Crawford* and *Shelby County* became an active participant in the suppression of racial-minority voting.

This is just a sampling of the many cases in which past and present Supreme Courts have exercised their discretion in ways that advance the interests of whites at the expense of racial minorities. There is a reason why the Court would be inclined to favor white interests over racial-minority interests. Most Supreme Court justices are white. Most share the prevailing values of the society in which they have been acculturated. Throughout its history, the prevailing value that U.S. culture has embraced is the value that white interests matter more than

240. *See id*. at 536, 538–39.

241. *See id*. at 551, 553, 557.

242. *See id*. at 573–76 (Ginsburg, J., dissenting).

243. *See, e.g*., JONATHAN BRATER ET AL., BRENNAN CTR. FOR JUST., PURGES: A GROWING THREAT TO THE RIGHT TO VOTE (2018), https://t.e2ma.net/click/zmf14/z2fk8r/7chmlp [https://perma.cc/LC2U-MESF]; Tiffany D. Cross, *Purging Voters of Color Is on the Rise*, BEAT DC (July 25, 2018), https://www.thebeatdc.com/blog/2018/7/25/purging-voters-of-color-is-on-the-rise [https://perma.cc/WV36-PN5T] (noting that the July 2018 Brennan Center report showed states with history of discrimination have purged black and Latinx voters from polls, despite lack of in-person voter fraud); Sari Horwitz, *North Carolina Voter-ID Case Could Have Ramifications Across U.S*., WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/world/national-security/north-carolina-voter-id-case-could-have-ramifications-across-us/2016/01/25/0a70c888-c384-11e5-a4aa-f25866ba0dc6_story.html (noting that many Republican states passed voter-ID laws that disproportionately reduce minority voting after *Shelby County v. Holder* effectively invalidated the section 5 preclearance provision of the Voting Rights Act of 1965); Kira Lerner, *Native Americans' Right to Vote Is Under Attack*, THINKPROGRESS (June 20, 2018, 8:00 AM), https://thinkprogress.org/for-native-americans-the-right-to-vote-is-under-attack-f667a402d63c/ [https://perma.cc/3KTY-NFEG] (explaining that voter-ID and other laws have disproportionately suppressed voting by indigenous Indians); Vann R. Newkirk II, *How Voter ID Laws Discriminate*, ATLANTIC (Feb. 18, 2017), https://www.theatlantic.com/politics/archive/2017/02/how-voter-id-laws-discriminate-study/517218/ (explaining that voter-ID laws passed by Republican legislatures double the turnout gap between white and Latinx voters in general elections, and almost double the turnout gap between whites and blacks in primary elections); Bryan Pietsch, *Tribal Leaders Tell Senate Voting Barriers Are Persistent, Systemic*, AZ DAILY SUN (July 19, 2018), https://azdailysun.com/news/local/tribal-leaders-tell-senate-voting-barriers-are-persistent-systemic/article_d2e10421-49e4-53a0-b3a6-31eaf52dd794.html (same).

racial-minority interests. That, of course, is not a *stated* value in U.S. culture. But the advantage that whites incessantly have over racial minorities in the distribution of societal resources proclaims that it is a *tacit* value of U.S. culture. If Supreme Court Justices share the values of the culture that has placed them on that Court, they are likely to respond to those values, either consciously or unconsciously, when they adjudicate cases that come before them. Knowing this, we insist that adherence to the rule of law will insulate Supreme Court decisions from the cultural biases and predispositions that the Justices have necessarily internalized over the course of their lives. But if, as in the case of justiciability and gerrymandering, the doctrine is too imprecise to impose any meaningful constraint on the exercise of judicial discretion, the doctrinal safeguard will not work. And the Supreme Court will serve the social function of advancing the interests of whites at the expense of racial minorities.[244]

CONCLUSION

The Supreme Court has gerrymandered the law of justiciability in a way that continues a long Supreme Court tradition of sacrificing the interests of racial minorities in order to advance the interests of whites. By treating partisan gerrymandering as nonjusticiable in *Rucho v. Common Cause*, and treating racial gerrymandering as justiciable in *Shaw v. Reno*, the Court has acted as if the two types of gerrymanders are different. But as the Court recognized in *Easley v. Cromartie*, one can often appear to be the other. Moreover, the Court's doctrinal pairings can easily be inverted to support the conclusion that partisan gerrymandering is justiciable and racial gerrymandering is not. This gives the Supreme Court a vast amount of unconstrained discretion in ruling on the constitutionality of gerrymandering. That poses a problem.

When the Supreme Court possesses unconstrained judicial discretion, history shows that the Court is likely to exercise that discretion in ways that favor the interests of whites over the interests of racial minorities. Because most Supreme Court Justices have internalized the unstated cultural values that favor whites over racial minorities in the United States, protean legal doctrines cannot be relied on to insulate the Justices from the influence of those values when they formulate constitutional policy. Indeed, one of the consequences of the *Rucho* decision is that it now leaves the white Republicans who control most statehouses and governorships in the United States free to engage in unbridled partisan gerrymandering that seems certain to help whites and harm racial minorities. That not only deprives minorities of their individual rights, but it also creates a structural defect in the electoral process that undermines the operation of democratic self-governance. On paper, at least, that is not how things are supposed to work.

There are steps that a genuinely neutral Supreme Court could take to address the problem of minority underrepresentation in the political process. In an effort

244. My book-length articulation of this thesis is contained in SPANN, RACE AGAINST THE COURT, *supra* note 192.

to achieve some semblance of meaningful constraint on the scope of the Court's discretion, it could focus on effects rather than imprecise doctrinal standards in enforcing the equality provisions of the Constitution. By requiring racial proportionality in the political process, the Court could insist on equality by the numbers rather than a mere rhetorical equality that masked underlying inequities. But the Supreme Court is unlikely to do that. As the Court stressed in *Grutter*, it believes that the pursuit of racial balance would be "patently unconstitutional."[245] In the final analysis, it may be that the rule-of-law safeguards that are supposed to protect racial minorities from the discriminatory inclinations of the culture in which they live were never intended to provide anything but false hope.

245. Grutter v. Bollinger, 539 U.S. 306, 330 (2003).