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## Taking the States' Congressional Delegations Seriously: A Twelfth Amendment and First Amendment Approach to Identifying the Worst Gerrymanders

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TAKING THE STATES' CONGRESSIONAL DELEGATIONS  
SERIOUSLY: A TWELFTH AMENDMENT AND FIRST  
AMENDMENT APPROACH TO IDENTIFYING THE WORST  
GERRYMANDERS

JAMIN B. RASKIN\*

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*“We shall not cease from exploration, and the end of all our  
exploring will be to arrive where we started and know the place  
for the first time.”*

—T.S. Eliot<sup>1</sup>

### I. GERRYMANDERING AND THE SINGLE-MEMBER DISTRICT: THE COMPLEXITY OF THE PROBLEM

Charming and irresistible as it is, the nineteenth-century slang term “gerrymander”<sup>2</sup> cannot generate an equal protection standard to transform congressional and state legislative redistricting in the twenty-first century. The problem is that the word, which first appeared in the *Boston Gazette* on March 26, 1812, referred to the expansive artistic liberties taken by Governor Elbridge Gerry in redrawing a Massachusetts State Senate district for a partisan ally.<sup>3</sup> A cartoon lampooning the serpentine shape of the district quickly cemented in public consciousness the definition of a “gerrymander” as a district outlandishly drawn by politicians to serve partisan purposes.<sup>4</sup> Ever since, the critics of “partisan gerrymandering” (something of a redundancy) have treated the bizarre shape of districts not only as the hallmark of manipulative districting, but also as the essential injury inflicted by politicians on the people in reconstituting the mechanics of representation.<sup>5</sup>

But the pervasive critique of byzantine cartography is strikingly superficial as both political and constitutional analysis. While strange-looking districts may be one of the signs of partisan

1. T.S. ELIOT, *Little Gidding*, in *FOUR QUARTETS* 49, 59 (1971) (1942).

2. Emily Barasch, *The Twisted History of Gerrymandering in American Politics*, ATLANTIC (Sept. 19, 2012), <http://www.theatlantic.com/politics/archive/2012/09/the-twisted-history-of-gerrymandering-in-american-politics/262369/#slide2> [<https://perma.cc/D2VV-7XXN>]; Kristi Keck, *History Has Drawn Skewed Image of the Father of ‘Gerrymandering,’* CNN (Feb. 26, 2010, 9:24 PM), <http://www.cnn.com/2010/POLITICS/02/26/profile.gerrymandering/> [<https://perma.cc/UAZ4-D74M>].

3. See Barasch, *supra* note 2; Keck, *supra* note 2.

4. See Barasch, *supra* note 2; Keck, *supra* note 2.

5. See, e.g., Christopher Ingraham, *America’s Most Gerrymandered Congressional Districts*, WASH. POST. (May 15, 2014), [https://www.washingtonpost.com/news/wonk/wp/2014/05/15/americas-most-gerrymandered-congressional-districts/?utm\\_term=.be71375b516d](https://www.washingtonpost.com/news/wonk/wp/2014/05/15/americas-most-gerrymandered-congressional-districts/?utm_term=.be71375b516d) [<https://perma.cc/6LYQ-Y46T>] (“The compactness of a district—a measure of how irregular its shape is, as determined by the ratio of the area of the district to the area of a circle with the same perimeter—can serve as a useful proxy for how gerrymandered the district is.”).

manipulation of political consent, they do not themselves constitute an intrinsic or essential injury against democratic rights. Aesthetically appealing and graciously drawn legislative districts are not only rare in the United States, but they are also unlikely to be of any superior quality in terms of enhancing the values that really matter in democratic politics.<sup>6</sup> To focus exclusively on district line aesthetics is to miss the real story.

What matters from a democratic standpoint in congressional (and state and local legislative) electoral systems is not better-looking cartography or drawing districts into geometric shapes that children can recognize, but (1) the ultimate *representativeness* of the body of legislators elected to represent all the people of the state in Congress (or their other legislative assemblies); and (2) the *competitiveness* of the elections by which candidates reach office. Of these two intertwined but often conflicting goals, *representativeness* is the more fundamental and important because the whole purpose of elections is to promote effective representative democracy. Competitiveness is a subsidiary value because it is useful primarily in promoting the election of representatives who are motivated to faithfully serve and respond to the people. Thus, the more an electoral design engenders comprehensive and effective *representative politics* for all citizens, the more democratic it is.

Seen through this lens, single-member districting constitutes a serious democratic disappointment even under the most attractive circumstances—that is, even when the district perimeters are gracefully and compactly drawn by independent commissioners who have not a partisan bone in their bodies. Single-member districts register poorly on the representativeness scale because huge numbers of people supporting the political minority party in a single-member district routinely end up with no member of Congress that they voted for or feel any political affinity toward. In a time of intense polarization like today, a single-member district guarantees

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6. See Dustin G. Mixon, *Stop Criticizing Bizarrely Shaped Voting Districts. They Might Not Be Gerrymandered After All*, CONVERSATION (Nov. 30, 2017, 7:41 PM), <http://theconversation.com/stop-criticizing-bizarrely-shaped-voting-districts-they-might-not-be-gerrymandered-after-all-86510> [<https://perma.cc/WM4V-AE8R>] (arguing that mathematical models show that badly misshapen districts can produce *less* gerrymandered results under the right circumstances).

massive frustration and disaffection among constituents belonging to the losing party.

Imagine a state with nine congressional districts and a 55% Republican majority evenly spread across the state. Republicans will be able to win against all Democratic opponents in every single district. That means that 45% of the people across the state will end up with 0% of the seats, while the party of 55% of the people will capture 100% of them.

This scenario illustrates the central flaw of winner-take-all single-member districts. These districts are great at facilitating representation of partisans who have been drawn—whether purposefully or not—into the majority position, but they are terrible at incorporating and representing the voice of partisans who have been drawn into the minority position. Moreover, the lack of representativeness in the resulting congressional delegation will be accompanied by a lack of competitiveness in each district: the 55% versus 45% margin creates a ten-point advantage that is virtually impossible for the minority party to overcome (situations like this exist in many states).

Furthermore, engineering more competitive congressional districts (which is tough to do given the politically cohesive nature of most American communities) does not make them more representative. Indeed, as districts become more competitive, they become less representative in general. For example, if the statewide partisan breakdown in the hypothetical state above were a 52 to 48% split instead of a 55 to 45% split, each district would become more competitive: there would be a more exciting campaign and a smaller ultimate margin of victory for candidates in the general election. But in terms of representativeness, this closer partisan balance means that 3% *more* of the people will be left without a representative that they actually supported. The most competitive congressional district in the country, one where an election is decided by a single person's vote, effectively leaves half the population without a representative of choice. Although society acts as if ending partisan gerrymandering would promote representativeness and competitiveness at the same time, under the system of single-member districting, these goals are actually in significant conflict.<sup>7</sup>

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7. Indeed, designing the hypothetical district with something like seven 65 to 35%

The creation of extraordinarily precise redistricting software over the last three decades has dramatically improved the scientific exactitude of gerrymandering.<sup>8</sup> But the software has not changed the essential art of the practice, which is simple and second-nature to effective party leaders operating in winner-take-all single-member district regimes: packing, cracking, and stacking.<sup>9</sup> Pack as many of the opponent party's voters as you can into as few districts as possible while creating reliably safe (but not wastefully lopsided) majorities for the ruling party's candidates in all of the other districts; stack narrow but invulnerable majorities on top of large minorities; and, crack any natural majority districts for the opposition into splintered pieces.<sup>10</sup>

This familiar decennial state-based practice of the party in power—maximizing at all costs its share of U.S. House seats in the state's congressional delegation—is the name of the game in most of America. The large swing state of Ohio provides a striking example of how a party in power can gerrymander its way to a lopsided advantage over its competitors. Although President Barack Obama carried Ohio in both 2008 and 2012, Republican leaders in Akron drew themselves a startling twelve-to-four seat advantage in the state's sixteen congressional districts, stuffing huge Democratic majorities into a handful of districts while handing Republicans a decisive edge in all the rest.<sup>11</sup>

Republican leaders in North Carolina, enjoying their historic takeover of the legislature in 2010, have used the same formula to

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Republican districts and two 80% Democratic districts would reverse the priority of the goals in this hypothesis (that is, prioritizing competitiveness). These districts would be far more representative now because more of the voters (including a lot more Democrats) would be able to cast a vote for a winner, but the districts would become completely noncompetitive. The more representative they become, the less competitive they become.

8. See *Bush v. Vera*, 517 U.S. 952, 961, 963 (1996) (plurality opinion); see also Sam Wang, *The Great Gerrymander of 2012*, N.Y. TIMES (Feb. 2, 2013), [http://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html?pagewanted=all&_r=0) [https://perma.cc/YL55-EGJF].

9. See, e.g., KENNY J. WHITBY, *THE COLOR OF REPRESENTATION: CONGRESSIONAL BEHAVIOR AND BLACK INTERESTS* 114-15 (1997) (describing use of the methods of packing, cracking, and stacking in racial gerrymandering)

10. See, e.g., *id.*

11. See Sabrina Eaton, *In Evenly Split Ohio, Redistricting Gives GOP 12-4 Edge in Congressional Seats*, CLEVELAND.COM (Nov. 11, 2012, 9:00 PM), [http://www.cleveland.com/open/index.ssf/2012/11/in\\_evenly\\_split\\_ohio\\_redistrict.html](http://www.cleveland.com/open/index.ssf/2012/11/in_evenly_split_ohio_redistrict.html) [https://perma.cc/XG63-APGP].

demolish their opponents' position. In a state carried by Obama in the 2008 presidential election, the Republicans expertly drew themselves a "super-majority partisanship advantage in 10 of 13 House districts," a brazen plan in which "10 districts have a Republican partisanship of between 57% and 64%, while 3 districts have a packed partisanship of 69% to 77% Democratic."<sup>12</sup> In 2012, 50.6% of North Carolina voters voted for a Democrat for Congress, and yet Democrats captured less than one-third of the state's U.S. House seats.<sup>13</sup>

In Virginia, a state that has in recent elections sent two Democrats to the United States Senate and Democrats to the governorship and to every other statewide constitutional office, and a state that President Obama carried in both 2008 and 2012, Republican leaders in Richmond have drawn seven safe U.S. House seats out of eleven, creating a lopsided seven-to-four majority for the minority party in the state's U.S. House delegation.<sup>14</sup> Across the Potomac River, the same kind of dynamic is at work in Maryland (a state with a Republican governor), where Democrats now enjoy, after the 2012 redistricting, a seven-to-one advantage in the state's House delegation, a ratio far beyond the actual partisan proportions of the state's voters.<sup>15</sup> In Virginia, a Republican minority has gerrymandered the Democratic majority into near oblivion; in Maryland, a Democratic majority has gerrymandered the Republican minority into near oblivion.

One might defend the regime of single-member districting on the theory that it at least advances majority rule, but this is significantly and demonstrably false. Because the districts are so manipulable,

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12. FAIR VOTE, 2014 ELECTIONS IN NORTH CAROLINA 1 (July 2014), <https://visionpdf.com/2014-elections-in-north-carolina.html> [<https://perma.cc/LV5J-CMCZ>].

13. See Wang, *supra* note 8.

14. Aaron Blake, *Could GOP Grab Control of Redistricting in Virginia?*, WASH. POST (Jan. 31, 2011, 12:05 PM), <http://voices.washingtonpost.com/thefix/mapping-the-future/could-gop-grab-control-of-redi.html> [<https://perma.cc/A8XD-LYNY>]; Tarini Parti, *Fighting Red Maps in Purple States*, POLITICO (Jan. 4, 2015, 8:54 AM), <https://www.politico.com/story/2015/01/fighting-red-maps-in-purple-states-113932> [<https://perma.cc/QQ6J-3S82>].

15. David Hill, *Maryland: A Lonely State for Republicans*, WASH. TIMES (Nov. 8, 2012), <http://www.washingtontimes.com/news/2012/nov/8/maryland-a-lonely-state-for-republicans/> [<https://perma.cc/BEQ3-BUS5>]; Brian Witte & Meredith Somers, *Maryland Governor to Push for Redistricting Reform*, WASH. TIMES (Feb. 4, 2015), <http://www.washingtontimes.com/news/2015/feb/4/maryland-governor-to-push-for-redistricting-reform/> [<https://perma.cc/CE9U-LJEW>].

they can easily be drawn to convert a statewide popular-vote minority into a congressional delegation majority that produces serious distortions at the national level,<sup>16</sup> an effect seen in Virginia or Pennsylvania.<sup>17</sup> Across America in 2012, Republican state leaders redrawing congressional districts acted so effectively with new gerrymander software that Republicans captured a thirty-three vote majority (234-201) in the U.S. House of Representatives despite the fact that 1.36 million more Americans voted for Democratic candidates in congressional elections that year.<sup>18</sup> Amazingly, the combination of the structural flaws of single-member districts with the extremist vices of strategic partisan gerrymandering has thwarted majority rule in some states, fair minority representation in most states, and national majority rule in Congress.

## II. JUDICIAL PARALYSIS: WHY THE SUPREME COURT HAS NOT BEEN ABLE TO SOLVE THE PROBLEM OF GERRYMANDERING

Unless the Supreme Court embraces a standard of proportional representation, the problem of the partisan gerrymander is ultimately intractable and unsolvable. There may be a way to solve the most extreme cases (demonstrated in the next Section), but most partisan gerrymanders will remain untouched until the Supreme Court defines a proportional representation standard as a constitutional requirement.

The mathematical logic for proportional representation (60% of the voters in a state should end up with 60% of the seats in their congressional delegation and 40% of the voters should end up with 40% of the seats) is compelling indeed, and it flows right out of the one-person, one-vote principle.

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16. See *supra* note 5 and accompanying text.

17. See *Analysis Indicates Partisan Gerrymandering Has Benefited GOP*, ASSOCIATED PRESS (June 25, 2017, 4:07 PM), <https://wtop.com/author/the-associated-press/> [<https://perma.cc/WC34-CBZA>].

18. See David Daley, *How the GOP Made Your Vote Useless*, DAILY BEAST (Oct. 7, 2017, 12:01 AM), <https://www.thedailybeast.com/how-gop-gerrymandering-made-your-democratic-vote-useless> [<https://perma.cc/R7CX-DNUJ>].

*Baker v. Carr*<sup>19</sup> and *Wesberry v. Sanders*<sup>20</sup> established the central precept that there have to be equal numbers of voters in a state's congressional districts so that each citizen's vote counts the same as all the others. This "radical equation" is rooted in the fertile Enlightenment soil of political equality and the "consent of the governed," as Jefferson put it in the Declaration of Independence.<sup>21</sup> Rousseau famously argued that each person in a democracy has  $1/N$  of the political sovereignty, where  $N$  is the population.<sup>22</sup> It follows that groups of elected officials, who legislate on behalf of voters, must wield a proportion of legislative power roughly equal to the proportion of voters who support them. Any failure to translate a party's share of the vote into the party's share of the seats breaks the circuit of democratic equality, agency, and representation.

The idea that citizens should have a right to see that the political party whose candidates they vote for actually collects a proportionate share of congressional and legislative seats in the state has a brilliant provenance in democratic political theory. John Stuart Mill argued:

In a really equal democracy, every or any section would be represented, not disproportionately, but proportionately .... Unless they are, there is not equal government, but a government of inequality and privilege: one part of the people rule over the rest: there is a part whose fair and equal share of influence in the representation is withheld from them, contrary to all just government, but, above all, contrary to the principle of democracy, which professes equality as its very root and foundation.<sup>23</sup>

Proportional representation regimes advance both representativeness and competitiveness at the same time. Every vote, whether for the majority party candidate or minority party candidate, counts toward enlarging the chosen party's representative share.

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19. 369 U.S. 186, 187-95 (1962) (holding claim that vote dilution violates the Equal Protection Clause of the Fourteenth Amendment is justiciable).

20. 376 U.S. 1, 7-8 (1964) (striking down a Georgia statute diluting votes of citizens in a single district because the "Constitution intends that when qualified voters elect members of Congress each vote [should] be given as much weight as any other vote").

21. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

22. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 14-19 (Jonathan Bennett ed., 2017).

23. JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT ch. VII (Project Gutenberg ed. 2013) (1861).

This means that there are, theoretically at least, no wasted votes (or many fewer), and it means that every party will have an incentive to fight for every vote, and every citizen will have an incentive to turn out to vote.

To be sure, proportional representation is not perfect and there are abundant and complex practical questions as to how and when to translate John Stuart Mill's proportionality principle into the cycles and mechanics of American congressional politics. But these logistical problems need not detain this principle because no Justice has ever endorsed a proportional representation standard under equal protection principles. Rather, quite the opposite has occurred, as the Court explicitly and decisively rejected this proposition in *City of Mobile v. Bolden*,<sup>24</sup> *Davis v. Bandemer*,<sup>25</sup> and *Vieth v. Jubelirer*.<sup>26</sup>

Thus, nearly three decades after the Supreme Court called partisan gerrymandering unconstitutional in *Bandemer*, still no one can define it, agree on how to distinguish illegitimate partisan gerrymandering from legitimate partisan redistricting, or specify what objective standards should be imposed on legislators charged with placing voters into districts. In 2004, the *Vieth* plurality simply gave up the ghost. Writing for the *Vieth* plurality, Justice Antonin Scalia lamented “[e]ighteen years of judicial effort with virtually nothing to show for it”<sup>27</sup> and rejected Justice Byron White’s *Bandemer* framework—that partisan gerrymanders can be dismantled by the courts when plaintiffs show “both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group”<sup>28</sup>—as hopelessly ambiguous, totally unmanageable in practice, and essentially incoherent.

Justice Scalia thus declared partisan gerrymander claims to be a nonjusticiable political question<sup>29</sup> within the meaning of the canonical *Baker v. Carr* criteria, holding that no judicially “discernable” and “manageable” standards had emerged to manage such claims under the Equal Protection Clause or Article I (Sections 2 or 4) of

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24. 446 U.S. 55, 75-76 (1980) (plurality opinion).

25. 478 U.S. 109, 118-27 (1986).

26. 541 U.S. 267, 288 (2004) (plurality opinion).

27. *Id.* at 281.

28. *Id.* (quoting *Bandemer*, 478 U.S. at 127).

29. *Id.* at 277-81.

the Constitution.<sup>30</sup> He proceeded to eviscerate with logical rigor and his characteristic lacerating sarcasm all the different puffy standards for adjudicating partisan gerrymanders: those advanced in *Bandemer* by Justices Byron White<sup>31</sup> and Lewis Powell;<sup>32</sup> those advanced in *Vieth* by dissenting Justices John Paul Stevens,<sup>33</sup> David Souter,<sup>34</sup> and Stephen Breyer,<sup>35</sup> who threw desperate hail-Mary passes to rescue the whole effort; and by Justice Anthony Kennedy, who held out in his *Vieth* concurrence the possibility that one day an answer might magically appear.<sup>36</sup>

Justice Scalia and his side have definitely gotten the better of the Justices who have tried to supply the missing standards for defining and overthrowing invidious partisan gerrymanders. The basic problem is that, in the real world of American politics defined by winner-take-all single-member districts, all legislative redistricting has vivid and well-understood partisan consequences and all political redistricting is, in essence, partisan gerrymandering. The Court has long recognized and allowed redistricting's fundamentally partisan character. As Justice White stated in his *Bandemer* concurrence, "As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended."<sup>37</sup>

Given this fundamental political reality, the doctrinal challenge since *Bandemer* has been to figure out when partisanship in the

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30. *Baker* set out a six-part test to define when a case seeks to answer a "political question." 369 U.S. 186, 217 (1962). A case involves a political question when there is a question that is: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) impossible for courts to decide without making "an initial policy determination of a kind clearly for non-judicial discretion"; (4) impossible for courts to independently resolve "without expressing lack of respect due [to] coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; or (6) if answered, potentially embarrassing due to "multifarious pronouncements" on the one question by various departments. *Id.* It is the second criterion that has bedeviled the partisan gerrymander discussion because no one can divine "discoverable and manageable standards" for defining and correcting the partisan gerrymander. *See id.*

31. *See Vieth*, 541 U.S. at 281-84 (plurality opinion).

32. *See id.* at 290-91.

33. *See id.* at 292-95.

34. *See id.* at 295-98.

35. *See id.* at 299-301.

36. *See id.* at 301-05.

37. *Bandemer*, 478 U.S. at 129 (plurality opinion).

process goes *too far*, or when a partisan redistricting map is *too* strange-looking, or when the resulting makeup of a legislative body (as in the Indiana House of Representatives in *Bandemer*<sup>38</sup>) is *too* unfair and disproportionate. This is an overwhelmingly difficult and seemingly arbitrary task. With his razor-like instinct for puncturing loose subjective standards like these (that is, when he is not endorsing them himself, as he did in the analogous *racial* gerrymandering cases<sup>39</sup>), Justice Scalia pounces whenever the Justices on the other side rely on vague language to this effect, as they all necessarily do. Although we do not need to revisit his painful takedown of each Justice's pet theory, Scalia's failsafe rhetorical strategy informs this cogent and typical critique of one part of Justice Souter's five-part standard for divining an illicit partisan gerrymander:

Like us, Justice Souter acknowledges and accepts that “some intent to gain political advantage is inescapable whenever political bodies devise a district plan, and some effect results from the intent.” Thus, again like us, he recognizes that “the issue is one of how much is too much.” And once those premises are conceded, the only line that can be drawn must be based, as Justice Souter again candidly admits, upon a substantive “notio[n] of fairness.” This is the same flabby goal that deprived Justice Powell's test of all determinacy. To be sure, Justice Souter frames it somewhat differently: Courts must intervene, he says, when “partisan competition has reached an *extremity* of unfairness.” We do not think the problem is solved by adding the modifier.<sup>40</sup>

If we accept the fact that partisanship saturates the redistricting process, informs the design of single-member district maps, and affects the ultimate composition of our legislative bodies, as all of the Justices clearly do, then there can be no principled or coherent way to say when the process has gone *too far* for the requirements of the Equal Protection Clause or Article I. To say that things have gone too far would imply that there is a normative equal protection

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38. See *id.* at 113 (majority opinion).

39. See generally Jamin B. Raskin, *The Supreme Court's Racial Double Standard in Redistricting: Unequal Protection in Politics and the Scholarship That Defends It*, 14 J.L. & POL. 591 (1998).

40. *Vieth*, 541 U.S. at 298 (plurality opinion) (alteration in original) (citations omitted).

standard for defining what a fair constitutional redistricting plan is, but that is assuredly not the case. As Justice Scalia taunts Justice Souter, “Justice Souter’s proposal is doomed to failure for a more basic reason: No test—yea, not even a five-part test—can possibly be successful unless one knows what he is testing *for*.”<sup>41</sup>

Justice Scalia is right about this. If the Court were to dive back into Justice Frankfurter’s “political thicket”<sup>42</sup> now to slay the monster of partisan gerrymandering, it would be without a compass, without a map, and without a weapon. All fancy multipart tests to the side, the Justices would have to fall back on a seductive but theoretically empty *aesthetic-appearances* analysis that dwells on the beguiling spectacle of “bizarre” district lines and contorted district shapes. But the obsessive focus on district aesthetics, as we have seen, is a massive distraction from the important substantive issues of representativeness and competitiveness.<sup>43</sup> Moreover, even if the Court successfully defined ugliness, and struck down ugly districts produced by partisan gerrymandering, they would only be replaced by pretty districts produced by partisan gerrymandering. There is a glimmer of hope coming from the Court in the Justices’ decision to uphold independent redistricting commissions in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,<sup>44</sup> yet this should not be deemed a panacea given the inherent unfairness that single-member districting creates on the whole. If the constitutional test of unfairness of the redistricting thicket is going to turn on some notion of extremism in gerrymandering, what will extreme gerrymandering mean and how will we recognize it?

### III. A DEFINITION OF TWO TYPES OF EXTREME GERRYMANDERING: MINORITY USURPATION AND FENCING OUT

What legislatures need is a definition of extreme partisan gerrymandering that is based on neither a comprehensive proportional representation standard (which no Justice is prepared to accept as a constitutional requirement today), nor a subjective aesthetic-

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41. *Id.* at 297.

42. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

43. *See supra* note 6 and accompanying text.

44. 135 S. Ct. 2652, 2659 (2015).

appearances “you know it when you see it” standard, which is hopelessly vague and unworkable.

The key to managing a conceptual breakthrough is to take the states’ *U.S. House delegations* seriously as component parts of functional American political and constitutional democracy. These delegations are woven both textually and subtextually into the federal constitutional regime, and they have played significant formal and informal institutional roles in American politics, both on Capitol Hill and in their home states.<sup>45</sup>

When thinking about the states’ congressional delegations meeting in Washington, as they represent the people of their states and legislate, two extreme problems come into focus that will define the worst partisan gerrymanders. The first problem—“usurping the majority”—occurs when state legislative leaders are able to flip a *minority* of popular votes for Congress in statewide elections into a *majority* of seats in the state’s congressional delegation through expert gerrymandering, including through the familiar stand-by practices of packing, stacking, cracking, and shacking.<sup>46</sup> The second problem—“fencing out”—occurs when majority party leaders in the legislature not only gerrymander to deprive the minority party of a number of seats in the state’s U.S. House delegation proportional to their statewide vote, but also go so far as to deny them even a single seat in the delegation (a seat to which they would be entitled by virtue of having enough support to reach at least the so-called “threshold of exclusion,” that is, they have drawn at least one-third of the votes in a state with four seats).<sup>47</sup>

Viewing the redistricting process through this prism, this Article will define extreme partisan gerrymandering as: (1) *usurping the majority*, when party leaders use their control over the redistricting process to convert a partisan minority in the statewide popular vote for Congress into a U.S. House delegation majority; and (2) *fencing out*, when party leaders run the table and completely freeze out the opposition party which should be entitled, proportionally speaking, to at least one seat, if not more, in the state’s U.S. House delegation.

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45. See U.S. CONST., art. I, § 2, cl. 3.

46. Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 551-52, 551 n.45 (2004).

47. See *infra* note 73.

To address these two problems, this Article proposes two clear and workable constitutional solutions that venture beyond the Equal Protection Clause by deploying a Twelfth Amendment analysis, in the case of the minority usurping the majority, and a First Amendment analysis, in the case of fencing out. These mostly unmined and unexamined doctrinal fields are fertile for identifying new approaches to attacking insider manipulation of the democratic political will.<sup>48</sup>

### A. *Minority Usurpation Gerrymanders*

Should the partisan majority of voters for Congress be able to obtain a majority, or at least half, of the seats in a state's U.S. House delegation? Does this idea follow from the one-person, one-vote principle or any other constitutional provision?

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48. *Benisek v. Lamone*, which is presently pending before the U.S. Supreme Court, is the first case to reach the Court based on allegations that partisan gerrymandering violates the First Amendment. 266 F. Supp. 3d 799, 818-19 (D. Md. 2017) (three-judge court), *argued*, No. 17-333 (U.S. Mar. 28, 2018). In the underlying case, *Shapiro v. McManus*, the U.S. District Court for the District of Maryland held that a First Amendment claim challenging redistricting was justiciable and actionable should the plaintiff adequately allege and prove that (1) those responsible for the map redrew the lines of [the] district with the *specific intent* to impose a burden on [the voter] and similarly situated citizens because of how they voted[; (2) to establish the injury [of vote dilution], the plaintiff must show that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect[; and (3) the plaintiff must allege *causation*—that, absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred.

203 F. Supp. 3d 579, 596-97 (D. Md. 2016) (three-judge court). However, the court noted that “the State can still avoid liability by showing that its redistricting legislation was narrowly tailored to achieve a compelling government interest.” *Id.* at 597. Additionally, the dissent disagreed that the First Amendment claim was workable because the Supreme Court's prior tolerance for partisanship in districting creates intractable line-drawing problems, and courts are poorly equipped to determine unusual circumstances in which “redistricting inflicts an actual, measurable burden on voters' representational rights.” *Id.* at 601 (Bredar, J., dissenting).

Furthermore, on January 9, 2018, a three-judge panel in the U.S. District Court for the District of North Carolina struck down a North Carolina congressional redistricting plan on First Amendment, Equal Protection Clause, and Article I grounds, and ordered that the districts be redrawn in advance of the 2018 midterm elections. *Common Cause v. Rucho*, No. 1:16-CV-1026, 2018 U.S. Dist. LEXIS 5191, at \*248 (M.D.N.C. Jan. 9, 2018) (three-judge court). On January 18, 2018, the Supreme Court issued a stay on the order. *Order in Pending Case, Rucho v. Common Cause*, 138 S. Ct. 923 (2018) (No. 17A745).

To begin with, it should be obvious that frustrated partisan voters who assert a right to have the majority in their state's U.S. House delegation cannot win this claim on the mere basis of favorable statewide party registration figures. After all, registered Democrats can (and do) vote for Republican candidates in the general election and vice versa, and Independent and minor-party voters also have a right to participate and potentially swing the general election. Thus, party registration figures should be irrelevant because party registration cannot be confused with the actual exercise of deliberate political will.

However, if a majority of voters in a state actually cast their ballots for U.S. House candidates from the Democratic Party, but in the same election, gerrymandering produces a House delegation majority for the Republicans, then the cause of action becomes compelling and viable indeed. This result is not because of a generalized proportional representation requirement, which few scholars, much less jurists, are prepared to read into equal protection at this point, but rather because of the specific details and operation of a part of the Constitution that has not yet been brought to bear on the gerrymander controversy: the Twelfth Amendment.

Under the Twelfth Amendment, a state's congressional delegation has an important constitutional function and status.<sup>49</sup> The Amendment, which spells out procedures for electing the President of the United States, calls upon each state's U.S. House delegation to act as a single voting unit if no majority forms in the electoral college.<sup>50</sup> Then, the President must be chosen by the participants in a so-called "contingent election" in the U.S. House of Representatives.<sup>51</sup> The Twelfth Amendment is explicit about this procedure. Before the entire Congress, the President of the Senate must count the electoral votes cast for presidential candidates and then

if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. *But in choosing the*

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49. See U.S. CONST. amend. XII.

50. See *id.*

51. Michael J. McGee, *Avoiding a Corrupt Bargain: Ensuring Congress Is Kept Out of a Contingent Presidential Election*, 52 U. LOUISVILLE L. REV. 345, 353-54 (2014).

*President, the votes shall be taken by states, the representation from each state having one vote.*<sup>52</sup>

This unit voting procedure for the states in a contingent presidential election in Congress has urgent but as-yet unexamined constitutional significance in designing redistricting rules for the composition of a state's U.S. House delegation. If a state's electoral procedures allow 47% of the people of a state to control 60% of the state's congressional delegation while 53% of the voters end up with only 40% of the U.S. House seats, it means that the congressional representatives of the popular minority will control the state's presidential vote in a contingent election, and the state's popular majority will be effectively shut out of having a say in who the next president will be. If leaders of the minority party succeed in usurping the majority, they will have effectively thwarted majority rule under the Twelfth Amendment, which requires the state's congressional delegation, speaking as one, to represent the will of the people of the state in weighing in on who will become President of the United States.

When the Twelfth Amendment was passed, the Founders had an idealistic view of the House of Representatives as the people's house.<sup>53</sup> John Adams had recently described the goal of the House as being "in miniature, an exact portrait of the people at large."<sup>54</sup> Elbridge Gerry would not sign the redistricting bill that gave rise to the term "gerrymander" for another thirty-six years.<sup>55</sup> In the meantime, before the Founders passed the Twelfth Amendment, in all but six states electors were appointed by the state legislature rather than through the popular vote.<sup>56</sup> By locating prospective contingent elections in the House of Representatives, this provision of the new Twelfth Amendment represented an attempt to improve a failed process arising from an undemocratic, elitist, and manipulative

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52. U.S. CONST. amend. XII (emphasis added).

53. See generally THE FEDERALIST NOS. 52-57 (Alexander Hamilton or James Madison), NO. 58 (James Madison) (discussing the people's interest in the House of Representatives and its functioning).

54. JOHN ADAMS, *Thoughts on Government*, reprinted in 4 PAPERS OF JOHN ADAMS 86, 87 (Robert J. Taylor et al. eds., 1979).

55. See Barasch, *supra* note 2.

56. CONGRESSIONAL QUARTERLY, INC., CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS 254 (John L. Moore ed., 2d ed. 1985).

method of choosing the executive. The idea was to bring presidential elections much closer to the actual will of the people. It would be a fitting and triumphant vindication of the Twelfth Amendment if it were to help this deadlocked nation dislodge the tyranny of the entrenched partisan gerrymander in congressional elections.

What is important to see about the possibility of lawsuits by voters challenging minority usurpation of their states' congressional delegations is that they will be rare. Consider the following example. In 2014, there was only one state where state legislative leaders had effectively flipped the script and engineered minority party usurpation, and that was Michigan.<sup>57</sup> In that year, some 50.9% of Michiganders cast their ballots for Democrats for the State House and 48.9% voted for Republicans.<sup>58</sup> But, through the miracle of gerrymandering in the computer age, Republicans captured an astounding nine of the state's fourteen U.S. House seats, leaving the densely-packed Democrats the remaining five.<sup>59</sup> This means that a majority of voters in Michigan voted for Democratic candidates for Congress, but Republicans won two-thirds of the House seats.<sup>60</sup>

Thus, it would be fairly straightforward for Michigan's Democratic voters and candidates to bring a lawsuit alleging and proving minority usurpation of the state's congressional delegation (and presidential contingent election voting) by an extreme partisan gerrymander. Indeed, Democrats in Michigan recently did so in *League of Women Voters of Michigan v. Johnson*, although the plaintiffs based the challenge in First Amendment and Equal Protection Clause violations.<sup>61</sup> Regardless, if the courts agreed that this map was intended to create, and resulted in, an unconstitutional gerrymander of the majority into a minority, they could order the

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57. See Complaint for Declaratory and Injunctive Relief at 3, *League of Women Voters of Mich. v. Johnson*, No. 2:17-cv-14148-DPH-SDD, 2017 WL 6610622 (E.D. Mich. Dec. 12, 2017) [hereinafter Complaint].

58. See *id.* at 18.

59. See *id.* In the 2016 election, Republicans in Michigan garnered 50.5% of the votes cast for the House of Representatives, but did not increase the number of seats they held, maintaining nine of the state's fourteen seats. See *id.* at 17. More to the point, in two districts packed with Democratic voters, the Democratic candidates received in excess of 75% of the votes tallied. See *2016 Michigan House Election Results*, POLITICO (Dec. 13, 2016, 1:57 PM), <https://www.politico.com/2016-election/results/map/house/michigan/> [https://perma.cc/V6Z3-ZW8R].

60. See Complaint, *supra* note 57, at 18.

61. See *id.* at 30, 32.

Michigan legislature to devise a revised plan before the 2018 mid-term election that would assure that Democrats would have a fair opportunity to capture at least half of the state's fourteen House seats. This could be accomplished through the old-fashioned and excruciating method of conducting prolonged hearings and negotiations over single-member district lines, or it could be accomplished relatively easily and efficiently through the adoption of a proportional representation mechanism, such as cumulative voting or ranked choice voting.<sup>62</sup> Either way, under the Twelfth Amendment and the complementary one-person, one-vote principle, the congressional delegation must be left in the hands of representatives selected by a majority of voters.

However, the Michigan example should not leave the impression that minority usurpation is completely aberrational. If this cause of action had been in place in 2012, voters in five states could have brought lawsuits attacking statewide gerrymanders that reversed the public will and thwarted the popular vote. In Arizona, Republicans had 52.9% of the votes for Congress but won only four seats, while Democrats had just 42.7% but picked up five seats.<sup>63</sup> In Michigan, Republicans again won nine seats with only 45.65% of the vote, while Democrats won five with nearly 51% of the vote.<sup>64</sup> In North Carolina, Republicans captured a remarkable nine seats with 48.5% of the vote, while Democrats ended up with four seats despite having collected 50.6% of the vote.<sup>65</sup> In Pennsylvania, which may be

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62. See *Fair Representation*, FAIRVOTE, [http://www.fairvote.org/fair\\_representation#what\\_is\\_fair\\_voting](http://www.fairvote.org/fair_representation#what_is_fair_voting) [<https://perma.cc/B788-4GNQ>] (displaying FairVote's descriptions of the different voting systems).

63. Data on file with author. See *Election 2012—Arizona*, N.Y. TIMES (Nov. 2012), <https://www.nytimes.com/elections/2012/results/states/arizona.html> [<https://perma.cc/5Z4G-C784>] As noted before, Arizona Republicans challenged the constitutionality of the Arizona Independent Redistricting Commission, which the U.S. Supreme Court upheld. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015). Republicans presently hold four out of nine congressional delegation seats in Arizona; Democrats hold five; and one remains vacant after Republican Trent Franks resigned in 2017. See *Directory of Representatives*, U.S. HOUSE REPRESENTATIVES, <https://www.house.gov/representatives#state-alabama> [<https://perma.cc/JB6M-YGFW>].

64. See Complaint, *supra* note 57, at 17-18.

65. Data on file with author. See *Election 2012—North Carolina*, N.Y. TIMES (Nov. 2012), <https://www.nytimes.com/elections/2012/results/states/north-carolina.html> [<https://perma.cc/W4V7-D2Z8>]. North Carolina Democrats initiated a lawsuit, the outcome of which (at the time of this writing) has required that new maps be drawn in advance of the 2018 midterm elections. See *Common Cause v. Rucho*, No. 1:16-CV-1026, 2018 U.S. Dist. LEXIS 5191, at \*250-

the most striking case in the country, Republicans took thirteen seats with only 48.77% of the vote while, Democrats were left with five seats after collecting 50.28% of the popular vote.<sup>66</sup> Finally, in Wisconsin, Republicans claimed five seats with 48.92% of the vote, while Democrats ended up with only three based on 50.42% of the vote.<sup>67</sup>

In all of these cases, the courts should have been able to order a statewide redistricting or voting system remedy that would reverse the naked political usurpation that had taken place and likely restore the majority of voters to their rightful place within their state's U.S. House delegation. Indeed, the gerrymanders in Wisconsin<sup>68</sup> and North Carolina<sup>69</sup> have already been deemed unconstitutional by the lower courts, and the Wisconsin case, *Gill v. Whitford*, is currently pending before the Supreme Court.<sup>70</sup> The key point is that a state's congressional delegation cannot be gerrymandered and flipped by a usurping minority in advance of a presidential election. The Twelfth Amendment analysis makes clear that gerrymandering of a popular majority into a legislative minority is not merely a representational harm on the legislative side, but a direct

51 (M.D.N.C. Jan. 9, 2018) (three-judge court).

66. Data on file with author. See *Election 2012—Pennsylvania*, N.Y. TIMES (Nov. 2012), <https://www.nytimes.com/elections/2012/results/states/pennsylvania.html> [https://perma.cc/RV2V-QN3P]. In December 2017, a Pennsylvania state court issued a Recommended Findings of Fact and Conclusions of Law, holding that although it has been shown that partisan gerrymandering has resulted in a significant imbalance of party representation in the state congressional delegation (Republicans have held thirteen of the eighteen seats since the 2011 redistricting plan was implemented), the petitioners “failed to meet their burden of proving that the 2011 [redistricting] plan ... clearly, plainly, and palpably violate[d] the Pennsylvania Constitution.” Recommended Findings of Fact and Conclusions of Law at 46, 48, 49-50, 126-27, *League of Women Voters of Pa. v. Commonwealth*, No. 261 M.D. 2017 (Pa. Commw. Ct. Dec. 29, 2017) [hereinafter Recommended Findings of Fact]. In January 2018, the Pennsylvania Supreme Court ruled the 2011 plan unconstitutional after finding that the partisan gerrymandering that occurred in 2011 and resulted in a significant imbalance of party representation in the state congressional delegation “clearly, plainly and palpably violate[d] the Constitution of the Commonwealth of Pennsylvania.” See *League of Women Voters of Pa. v. Commonwealth*, 175 A.3d 282 (Pa. 2018) (per curiam). In February 2018, the court issued an opinion further delineating the reasons for its January order. See *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

67. See *Election 2012—Wisconsin*, N.Y. TIMES (Nov. 2012), <https://www.nytimes.com/elections/2012/results/states/wisconsin.html> [https://perma.cc/5VXH-U6T2].

68. See *Whitford v. Gill*, 218 F. Supp. 3d 837, 843 (W.D. Wis. 2016) (three-judge court), argued, No. 16-1161 (U.S. Oct. 3, 2017).

69. See *Common Cause*, 2018 U.S. Dist. LEXIS 5191, at \*248.

70. See *Gill v. Whitford*, 137 S. Ct. 2268 (2017) (mem.).

threat to popular control of a state's participation in a contingent presidential election as well.

*B. Fencing Out the Minority Party in the Congressional Delegation*

An even more egregious gerrymandering violation takes place when a majority party in a state legislature “runs the table” and effectively “fences out” *any* representation of the minority party in the state's U.S. House delegation when the numbers justify its receiving at least one seat.<sup>71</sup> The constitutional sin here relates not to participating in presidential elections under the Twelfth Amendment, but rather to the delegation's expressive political functions as the representative body of the people of the state. Completely fencing out a major partisan current of opinion creates a dramatic and compelling case of political viewpoint discrimination under First Amendment doctrine.

Completely excluding the minority party from representation in a state's congressional delegation is a surprisingly common feature of American congressional politics today. To begin with, we must recognize—but then dismiss—seven small states which send only a single member to the U.S. House of Representatives.<sup>72</sup> This political shut-out is a melancholy fact of life for Republicans in Vermont and Democrats in Wyoming, but it is based purely on population and the reapportionment process, not partisan discrimination. Thus, these states are irrelevant to the fencing out analysis, although they do help to clarify what is so wrong with shut-out arrangements in the larger states.

Of primary interest are the ten states where one party has completely fenced the other one out from the congressional delegation despite the fact that the minority party's vote total in House elections surpasses the so-called “threshold of exclusion” and, thus, is deserving of at least one House seat.<sup>73</sup> In several cases, the

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71. The phrase “runs the table” comes from pool when a player sinks all of the balls on the first turn before the other player even gets a chance to shoot. The evocative and apposite phrase “fencing out” comes from the Supreme Court's decision in *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (holding that Texas could not fence out military personnel from registering to vote and participating in state politics based on political predictions of how they might vote).

72. Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming only have one Representative. See U.S. HOUSE REPRESENTATIVES, *supra* note 63.

73. Edward Still & Pamela Karlan, *Cumulative Voting and the Voting Rights Act*,

zeroed-out minority party would be due more than one seat under basic principles of fairness and proportionality.<sup>74</sup>

There are six Republican states—Arkansas, Idaho, Kansas, Oklahoma, Utah, and West Virginia—where legislative leaders have run the table and fenced out Democrats from Congress; there are four Democratic states—Connecticut, Hawaii, Massachusetts, and Rhode Island—where party leaders have entirely fenced out Republicans.<sup>75</sup> In all of these cases, the excluded party surmounted the “threshold of exclusion,” meaning that it garnered enough popular votes to justify receiving at least one seat (and perhaps more) in the state’s congressional delegation.<sup>76</sup> The largest minority vote showing in 2014 from a vanquished party was by Republicans in Connecticut, who drew 41.5% of the vote and ended up with zero out of five seats.<sup>77</sup> On a proportional theory, they should have been entitled to two seats, but were instead shut out completely.

The most dramatic wipeout took place in Massachusetts where Democrats in 2014 captured all nine U.S. House seats in a state that simultaneously elected a Republican Governor, Charlie Baker.<sup>78</sup> In fact, six of Massachusetts’s congressional districts in 2014 had no Republican in the race at all,<sup>79</sup> driving down the number of voters who voted for Republicans by taking away their ability to do so. This steady downward and corrosive pressure on minority parties reinforces and entrenches majority party control. Democrats now have a lock on every seat in Massachusetts, while more than half a million Massachusetts voters who prefer Republicans have no representation reflecting their votes anywhere in the state’s congressional delegation.

The following tables list all the states where the majority party has run the table and fenced out the political opposition from the

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FAIRVOTE, <http://archive.fairvote.org/?page=418> [<https://perma.cc/4FHC-RFFK>] (discussing the “threshold of exclusion” in electoral systems).

74. *See id.*

75. *See* U.S. HOUSE REPRESENTATIVES, *supra* note 63.

76. *See infra* Tables 1-3.

77. *See infra* Tables 1-3.

78. *See Election 2014—Massachusetts Election Results*, N.Y. TIMES (Dec. 17, 2014, 12:28 PM), <https://www.nytimes.com/elections/2014/massachusetts-elections> [<https://perma.cc/R2JQ-G397>].

79. *See id.*

state's congressional delegation, leaving voters of the minority party effectively voiceless in Congress:

Table 1. 2012 Fence-Out States<sup>80</sup>

State	R Votes	D Votes	Elected
AR*	61.5%	29.5%	4R
CT	34.1%	64.9%	5D
ID	64.0%	32.8%	2R
KS*±	62.7%	23%	4R
ME	38.4%	61.6%	2D
MA*	33.5%	62.1%	9D
NE	64.7%	35.3%	3R
NH	45.5%	49.9%	2D
OK	64.6%	30.9%	5R
RI	39.3%	55.7%	2D

Note: The states marked with an (\*) included one or more uncontested House races, meaning that *even more voters* would have voted for the minority party statewide had they even had the opportunity to do so. The states marked with a (±) reflects a total percentage of the vote at less than 95% of total votes in the state based on votes cast for independent/non-major-party candidates.

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80. Data on file with author.

Table 2. 2014 Fence-Out States<sup>81</sup>

State	R Votes	D Votes	Elected
AR*	56.3%	34.9%	4R
CT	39.2%	59.8%	5D
ID	63.2%	36.8%	2R
KS	62.7%	36.2%	4R
MA*	39.8%	57.8%	9D
OK*	70.2%	26.7%	5R
RI	38.9%	610.1%	2D
UT	62.3%	33.5%	4R
WV	55.3%	41.5%	3R

Note: The states marked with an (\*) included one or more uncontested House races, meaning that *even more voters* would have voted for the minority party statewide had they even had the opportunity to do so. The states marked with a (±) reflects a total percentage of the vote at less than 95% of total votes in the state based on votes cast for independent/non-major-party candidates.

Table 3. 2016 Fence-Out States<sup>82</sup>

State	R Votes	D Votes	Elected
AR*±	71.2%	10.4%	4R
CT±	36.2%	63.1%	5D
ID	65.7%	30.7%	2R
KS*±	59.6%	33.1%	4R
MA*±	20.8%	72.6%	9D
NE	58.9%	39.4%	3R
NH±	44.9%	47.7%	2D
OK*	68.9%	26.9%	5R
RI	33.6%	62.6%	2D
UT	64.1%	32.1%	4R
WV	64.9%	32.7%	3D

Note: The states marked with an (\*) included one or more uncontested House races, meaning that *even more voters* would have voted for the minority party statewide had they even had the opportunity to do so. The states marked with a (±) reflects

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81. Data on file with author.

82. Data on file with author.

a total percentage of the vote at less than 95% of total votes in the state based on votes cast for independent/non-major-party candidates.

Based on this data, in 2014 alone, there were *over three million voters* nationally whose views should have been reflected and represented somewhere in their state's delegation but were nowhere to be heard or found.<sup>83</sup> Those are citizens who have the right to influence public policy through their votes but who, as a practical matter, cannot have any say at all even if indirectly through a member of Congress elected from a different district in their state. Their effective exclusion from representation is a consequence of the invisible but systematic nullification of district lines that leaders of the other party have deliberately drawn around them.

#### IV. PARTISAN VIEWPOINT DISCRIMINATION IN THE STATE'S STRUCTURING OF ITS CONGRESSIONAL DELEGATION

The fencing-out process is seriously problematic under the First Amendment when we recognize that congressional delegations sent to Washington are an essential forum for core political expression, debate, and representation.

Our constitutional system forbids the viewpoint-based suppression of political speech in any public speech forum, especially when the viewpoint suppression completely cancels out an entire school of thought. It is "axiomatic that the government may not regulate speech based on its substantive content or the message it conveys,"<sup>84</sup> and targeting specific political viewpoints for exclusion from a public forum is a type of speech censorship "all the more blatant" and the most "egregious form of content discrimination."<sup>85</sup> Political viewpoint discrimination is the cardinal official sin in government-structured speech forums.

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83. *See supra* Tables 1-3. When the vote tallies noted above are aggregated, more than three million people voted in the fence-out states and their votes did not result in congressional representation.

84. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (holding that the University of Virginia could not have a policy of reimbursing the costs of all student publications except those with a religious perspective or point of view).

85. *Id.* at 829.

It goes without saying that discriminating against people because of their political party affiliation is the bull's-eye center of viewpoint-based speech discrimination. The Supreme Court established this principle in cases striking down the time-honored but invidious governmental practice of firing and hiring employees on a partisan basis (in non-policymaking jobs).<sup>86</sup>

The hard question is whether a state's congressional delegation actually constitutes a public speech forum of any of the three recognized types (traditional, designated, and nonpublic)<sup>87</sup> such that it should be impermissible for state actors—that is, state legislators engaged in the act of redistricting—to deliberately drive out any representative from the other party who seeks to participate and speak in it. In both traditional and designated public fora, the government may not make any content-based or viewpoint-based exclusions without showing that they are narrowly drawn to advance a compelling state interest; in nonpublic fora, which are the most easily controlled by official state managers, government can make reasonable content-based exclusions and selections, but such discrimination may never be based on political viewpoint.<sup>88</sup>

A state's congressional delegation obviously does not qualify as a “traditional public forum,” an effectively closed category which includes streets, sidewalks, and parks.<sup>89</sup> These are the places where the modern free speech struggle of labor unionists first took place in the 1930s<sup>90</sup> and which have been treated, at least by an act of judicial imagination, as sites of wide-open expression traditionally

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86. See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 65 (1990) (holding that government employers may not base hiring and promotion decisions on party affiliation); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) (striking down the firing of Republican employees of the sheriff's office by the new Democratic sheriff and holding that public employment outside of high-ranking policymaking positions may not be conditioned on party membership or political belief). Justice Stevens noted that point in his dissenting opinion in *Vieth v. Jubelirer*. See 541 U.S. 267, 324 (2004) (Stevens, J., dissenting) (“[U]nless party affiliation is an appropriate requirement for the position in question, government officials may not base a decision to hire, promote, transfer, recall, discharge, or retaliate against an employee, or to terminate a contract, on the individual's partisan affiliation or speech.”).

87. See, e.g., *Rosenberger*, 515 U.S. at 829-30; *Int'l Soc'y for Krishna Consciousness, Inc. (ISKCON) v. Lee*, 505 U.S. 672, 678-79 (1992).

88. See, e.g., *Rosenberger*, 515 U.S. at 829-30; *ISKCON.*, 505 U.S. at 678-79.

89. See, e.g., *Perry Educ. Ass'n v. Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

90. See generally *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 518-32 (1939) (Stone, J., concurring) (discussing impermissible government interference with labor unions' peaceful assembly and distribution of literature).

“devoted to assembly and debate.”<sup>91</sup> Nor is a state’s congressional delegation a “designated public forum,” which is to say public property, like meeting rooms in a state university<sup>92</sup> that the state has deliberately “opened for expressive activity by part or all of the public.”<sup>93</sup> A congressional delegation does not qualify as a designated forum because the state has not desired it to be “generally open” to speakers coming from the public.<sup>94</sup> Only the tiniest sliver of the American people gets to participate as members in a state’s congressional delegation—far less than .001%.<sup>95</sup>

Therefore, if a congressional delegation is to be any kind of speech forum, it must be a “nonpublic forum,” the kind of government-created speech arena in which the state exercises considerable control and grants only selective access to a certain handful of individual speakers and positions rather than general access to all.<sup>96</sup> In nonpublic fora, the state can restrict the number of speakers and the number and type of subjects to be discussed, but *it may never discriminate based on speakers’ political viewpoint*.<sup>97</sup>

The state’s congressional delegation, which is the essential mechanism for the people of a state to express themselves on federal

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91. *Perry Educ. Ass’n*, 460 U.S. at 45; see also *Schneider v. Irvington*, 308 U.S. 147, 160 (1939). These seminal cases destroyed the concept that Justice White advanced in *Davis v. Massachusetts* that government officials could exclude the public from speaking on Boston Common and other publically owned properties because a private owner could exclude the public from comparable properties that were privately owned. 167 U.S. 43, 46-47 (1897). Instead, the Court held that the title to public places like streets and parks had “immemorially” been held in trust by government for speech communication by citizens. *Hague*, 307 U.S. at 515-16.

92. In *Widmar v. Vincent*, the Court recognized that a state university had created a designated public forum for student groups by effectuating a policy opening its meeting facilities up to the student body. 454 U.S. 263, 267-68, 267 n.5 (1981).

93. *ISKCON*, 505 U.S. at 678.

94. *Id.* at 267-68.

95. See, e.g., *Shapiro v. McManus*, 203 F. Supp. 3d 579, 586-87 (D. Md. 2016) (three-judge court) (explaining that the state legislature approved a congressional district plan created by only five individuals for the eight representatives of Maryland, each which represents over 721,000 citizens). Additionally, dividing the total number of members of Congress by the total U.S. population equals a percentage of 0.00016. See *QuickFacts—United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045217#viewtop> [<https://perma.cc/N88Y-QFYU>] (estimating the U.S. population at 325,719,178 as of July 1, 2017); *Members of Congress*, GOVTRACK, <https://www.govtrack.us/congress/members> [<https://perma.cc/9AME-JUPY>] (noting there are currently 100 senators and 435 representatives in Congress).

96. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 805-06 (1985).

97. *Id.* at 806.

policy questions, should definitely be classified as a nonpublic forum in which a state-imposed political viewpoint censorship screen is impermissible. A state's congressional delegation has all of the necessary features of a "nonpublic forum." A congressional delegation is a select and rarified body, which is what makes it "nonpublic," but the delegation is also a critical "forum," perhaps *the* critical forum, for political expression and discussion. As a body operating in Washington, the delegation speaks for the people of its state in the U.S. House of Representatives in multiple contexts relating to budget and taxes, criminal justice policy, environmental protection, international trade and business regulation, election law, war and peace, and so on.<sup>98</sup> Conversely, when at home in the state, the congressional delegation speaks for the U.S. House of Representatives to the people, with its members explaining to the public the processes of the House and reporting on its deliberations and decisions.<sup>99</sup>

Moreover, a state's congressional delegation is itself the site of intense discussion and debate as members continually caucus about the state's legislative priorities, spending requests, funding formulas, logrolling ventures, and institutional House strategy. The congressional delegation must also act as a cohesive unit in Twelfth Amendment contingent presidential elections,<sup>100</sup> and its members play a critical role in decennial redistricting by communicating the delegation's views to state legislative leaders to influence the fate of their districts and political careers.

The Court has recognized nonpublic fora in everything from the Combined Federal Campaign charity drive<sup>101</sup> to the publication of public high school newspapers,<sup>102</sup> a public school's internal mailbox system,<sup>103</sup> and government-sponsored and televised congressional

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98. See U.S. CONST. art. I, § 8.

99. See, e.g., Eli Watkins, *How to Find Town Hall Meetings*, CNN (Feb. 10, 2017, 5:34 PM), <https://www.cnn.com/2017/02/10/politics-town-hall-location-congress/index.html> [<https://perma.cc/97UU-AMM8>] (demonstrating a method through which federal legislators interact with constituents).

100. See *supra* notes 49-52 and accompanying text.

101. *Cornelius*, 473 U.S. at 802-06.

102. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262, 267-70 (1988) (holding evidence failed to demonstrate school officials intended to make the student newspaper a public forum).

103. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 39, 45-49 (1983).

candidate debates.<sup>104</sup> Indeed, it is the Supreme Court's decision in *Arkansas Educational Television Commission v. Forbes*, the case about the exclusion of congressional candidates from political debates organized by a state-run cable network,<sup>105</sup> which clearly indicates that a nonpublic forum analysis is an illuminating way to think about the structuring of a state's congressional delegation. The Court's discussion of political viewpoint discrimination establishes the specific grounds for finding that a state's deliberate use of the redistricting process to completely suppress the political voice of the opposition imposes an impermissible viewpoint-based discrimination in a nonpublic forum.<sup>106</sup>

In *Forbes*, a state-owned public television broadcaster staged a congressional candidate debate but excluded from it "an independent candidate with little popular support."<sup>107</sup> Justice Anthony Kennedy found that public broadcasting ordinarily "does not lend itself to scrutiny under the forum doctrine" but that a state government's officially-organized "candidate debates present the narrow exception to the rule."<sup>108</sup> A debate such as this one—although not itself a fixed place like a park, a sidewalk, or a school—is treated as a public forum for two significant reasons. First, "the debate was by design a forum for political speech by the candidates."<sup>109</sup> Second, the Court found that "in [its] tradition, candidate debates are of exceptional significance in the electoral process."<sup>110</sup>

These characteristics of a First Amendment nonpublic forum are present in the creation, structure, and function of a state's congressional delegation. Each state's congressional delegation, formed through the electoral process and itself crucial to the governmental process, is by design a forum for political speech, and it is the kind of political speech that goes right to the heart of government policy-making. Further, a congressional delegation is also of continuing and "exceptional significance" to politics<sup>111</sup>—not only for the electoral process involving Congress, but also for the electoral process

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104. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 669 (1998).

105. *Id.* at 669-71.

106. *Id.* 673-74.

107. *Id.* at 678, 669, 682.

108. *Id.* at 675.

109. *Id.*

110. *Id.*

111. *See id.*

involving the President, and for government policy formulation itself.

Although the *Forbes* Court found that the occasion of a state-sponsored congressional candidate debate is definitely a nonpublic forum, it also held that the maverick and perennial Independent candidate Ralph Forbes was not unlawfully excluded from it.<sup>112</sup> The test is whether “the exclusion of a speaker from a nonpublic forum” is “based on the speaker’s viewpoint” or is otherwise not “reasonable.”<sup>113</sup> The majority found that Forbes was *not* excluded because of “objections or opposition to his views,” but rather because “he had generated no appreciable public interest.”<sup>114</sup> Specifically, voters and news media “did not consider him a serious candidate,” he had “little, if any, financial support,” his headquarters was his house, and he described his own campaign organization as “bedlam” and his public visibility through the media as “zilch.”<sup>115</sup> Significantly, Justice Kennedy explained that the State did not “exclude Forbes in an attempted manipulation of the political process.”<sup>116</sup> He also cited the fact that Forbes’s exclusion was “not the result of political pressure.”<sup>117</sup>

This analysis is clarifying and helpful for the analysis of partisan gerrymandering as a means to exclude Republicans or Democrats from a state’s congressional delegation. When majority party leaders in a state, like Democrats in Massachusetts<sup>118</sup> or Republicans in Arkansas,<sup>119</sup> set about to squelch the voices and presence of congressional candidates from the opposition party in the state’s congressional delegation, it is obviously “based on the speaker[s]’ viewpoint”<sup>120</sup> and because of “objections or opposition”<sup>121</sup> to their partisan views and position. In the vast majority of cases of expert gerrymandering, major-party candidates who, unlike Forbes, have indeed generated

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112. *Id.* at 669, 683.

113. *Id.* at 682.

114. *Id.*

115. *Id.*

116. *Id.* at 683.

117. *Id.* (internal quotation marks omitted).

118. *See supra* notes 78-79 and accompanying text.

119. *See supra* note 75 and accompanying text.

120. *Ark. Educ. Television Comm’n*, 523 U.S. at 682.

121. *Id.*

“appreciable public interest”<sup>122</sup> are the players involved. And, unlike the refusal to include the presumably hopeless candidacy of the gadfly Mr. Forbes, the exclusion of Republicans from the Massachusetts congressional delegation or Democrats from the Arkansas congressional delegation is a form of discrimination that targets serious and substantial political forces representing millions of people. Whatever the merits of the *Forbes* decision with respect to the exclusion of a fringe candidate from a two-party debate sponsored by the government, fencing out the other party in a redistricting is *all about* “manipulation of the political process”, and it is indisputably the direct “result of political pressure.”<sup>123</sup>

In sum, when a state legislature deliberately redistricts in such a way as to completely nullify the voice of the major opposition party in the state’s congressional delegation, it constitutes an impermissible viewpoint-based discrimination and exclusion from an essential nonpublic forum. This forum is surely more important than a poorly watched congressional candidate debate on cable television or a low-visibility charitable fundraising drive.

The natural remedy follows from the nature of the violation: the courts must send the faulty redistricting back with orders to pursue either a redrawn map or new voting systems that will permit the minority party to climb the fence and win at least one seat. As long as the fenced-out party can demonstrate from the most recent vote totals that it proportionately could have and should have won at least one seat, then judicial relief should compel the state to develop new district lines or adopt a new voting system that will facilitate the election of at least one congressman or woman from the minority party. The courts clearly have the power to break up this falsely engineered regime of political silence and conformity by integrating the congressional delegation across party lines.

#### V. BACK TO THE THICKET? THE SUPREME COURT, REDISTRICTING, AND DEMOCRATIC PROGRESS

The Supreme Court has undertaken two major constitutional forays into the storied “political thicket” of reapportionment and

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122. *Id.*

123. *Id.* at 683 (internal quotation marks omitted).

redistricting. Both journeys related to America's original sin: racism and white supremacy. The first was an historic triumph that sets the standard for any judicial effort to resolve the partisan gerrymander conundrum. The second was a doctrinal disaster and political failure of the first order. What we learn from both lines of authority is that the Court acts best when it has clear and workable rules, rooted in constitutionally anchored democratic principles, that directly advance the political rights of citizens.

The Court's masterpiece intervention to correct a systemic democratic failure of the political branches came in the 1960s when it struck down malapportioned congressional and state legislative districts. The Court declared the imperative of a one-person, one-vote redistricting standard in the landmark cases of *Baker v. Carr*,<sup>124</sup> *Wesberry v. Sanders*,<sup>125</sup> and *Reynolds v. Sims*.<sup>126</sup> In these magnificent decisions, the Court found justiciable the pervasive problem of malapportioned legislative districts and struck down absurdly lopsided ratios in the internal populations of congressional, state legislative, county, and city council districts in the states.<sup>127</sup> In *Reynolds*, decided in 1964, the Court replaced Alabama's state legislative district imbalances of up to 41:1 with a bright-line requirement of equally populated 1:1 districts.<sup>128</sup> Chief Justice Warren declared that "[l]egislators represent people, not trees or acres," and "[l]egislators are elected by voters, not farms or cities or economic interests."<sup>129</sup> Population must be the "controlling consideration" in redistricting, and districts must be "as nearly as practicable, districts of equal population."<sup>130</sup> This bright-line formula transformed the landscape of American representative democracy with a simple formula: one person, one vote, so all votes equal.

This was a stunningly controversial move that must be understood in the context of the nation's civil rights awakening at the time. One person, one vote did not exist judicially prior to *Reynolds v. Sims*, and the dissenters in that decision attacked the allegedly

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124. 369 U.S. 186, 207-08 (1962).

125. 376 U.S. 1, 17-18 (1964).

126. 377 U.S. 533, 565-66, 568-69 (1964).

127. *See id.*; 369 U.S. at 207-08.

128. 377 U.S. at 545, 565-66.

129. *Id.* at 562.

130. *Id.* at 534, 581.

aggressive judicial activism of the Court's majority.<sup>131</sup> When the Court adopted it, the one-person, one-vote standard was unthinkable radical and it undoubtedly capsized American politics by uplifting masses of marginalized and disenfranchised people over the Jim Crow political masters of the redistricting process. It was the irreducible clarity of one person, one vote that made this sweeping judicial intervention into American politics not only a readily workable proposition in federal district courts across the land, but also a dramatic and well-internalized success at every level of government.

The development of the one-person, one-vote idea drew heavily on the political struggle of the civil rights movement and the experience of African Americans. Chief Justice Warren described *Reynolds v. Sims* as one of his finest decisions, bitterly controversial though it was both on and off the Court. As a practical matter, it ended the artificially inflated hegemony of conservative rural interests in many states, destroying the malapportioned “rotten boroughs” of American politics. As a matter of American constitutional philosophy, the Court's new formula rested on a self-evident political and moral truth that mathematician and Student Nonviolent Coordinating Committee (SNCC) master organizer Bob Moses would come to call a “radical equation.”<sup>132</sup> As they went from door to door on the sweltering country roads of Mississippi registering African Americans to vote in the early 1960s, Moses and other SNCC organizers coined the “one-person, one-vote” phrase to counter the idea they encountered at the doors that voting was “white man's business.”<sup>133</sup> This powerful organizing axiom distilled the existential commitment in the civil rights movement that each and every person in a state must have an equal vote and an equal voice if democracy is to be a living reality rather than a cynical alibi for white supremacy. Through acts of nearly incomprehensible physical and moral courage in the most dangerous hamlets of police violence and KKK terror, Moses and SNCC—along with assassinated colleagues like Mickey Schwerner, James Chaney, and Andrew Goodman—tore down the literacy test, the white primary, and the polling-place

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131. *Id.* at 589 (Harlan, J., dissenting).

132. See ROBERT P. MOSES & CHARLES E. COBB, JR., *RADICAL EQUATIONS: CIVIL RIGHTS FROM MISSISSIPPI TO THE ALGEBRA PROJECT* 68-70 (2001).

133. See *id.*

constitutional exam,<sup>134</sup> making way for the Voting Rights Act of 1965.<sup>135</sup> These civil rights heroes made the radical equation of democracy—one person, one vote—come alive in the Supreme Court and throughout American politics.

But the Warren Court's dramatic success in the one-person, one-vote era contrasts with the Rehnquist Court's trek through the political thicket to slash away at the phantom called "racial gerrymandering." Nothing better proves the dangers of adopting a pervasively subjective and essentially aesthetic method of determining the constitutionality of legislative districts than the *Shaw v. Reno* (*Shaw I*)<sup>136</sup> line of decisions. The Court, on a 5-4 basis, repeatedly struck down majority-minority districts (and, of course, no majority-white districts) for being "bizarrely shaped" or having a "predominant racial purpose," whatever these mysterious and conclusory labels might mean to the Justices.

In these cases, the conservatives drew on their psychic powers—like Justice Potter Stewart channeling obscene art and literature—and essentially said they knew the obscenity of racial gerrymandering when they saw it on a redistricting map.<sup>137</sup> In *Shaw*, the 5-4 majority upheld the justiciability of claims by Duke University professor Robinson Everett and other white voters that their Equal Protection rights were violated when North Carolina, after the 1990 reapportionment and for the first time since Reconstruction, drew two new majority-African American districts (out of twelve), finding their perimeter lines "uncouth" and "bizarre."<sup>138</sup> Justice O'Connor respectfully recapitulated the whites' nonsensical racial complaint: "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."<sup>139</sup> Thus, the Court's conservative majority, already in full backlash mode over affirmative action and other race-conscious remedies, embraced

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134. *See id.*

135. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301-10702 (Supp. III 2016))

136. 509 U.S. 630 (1993).

137. *See id.* 509 U.S. at 646-47.

138. *Id.* at 677.

139. *Id.* at 642.

and deployed a totally intuitive subjective standard, rooted in its own haughty aesthetic reactions, to declare that certain majority-African American and Hispanic districts presumptively violate the Equal Protection Clause.<sup>140</sup>

This astounding decision marked a radical break from logic and precedent and transplanted a racial double standard into the very heart of Equal Protection Clause jurisprudence. The Court had never before imposed on majority-*white* districts aesthetic constitutional standards or any equal protection expectations for district shape, compactness, or the gracefulness of district lines. Indeed, there were majority-white districts in the 1990 North Carolina plan that looked even more bizarre and convoluted than the majority-non-white districts that were targeted for destruction. Moreover, Justice O'Connor's repeated invocation of "segregat[ion]"<sup>141</sup> and even "political apartheid"<sup>142</sup> to describe these new districts gave the game away because, however "uncouth" they seemed, they were the most closely *integrated* districts in North Carolina history. Both the First District and the Twelfth District had "voting-age populations that are approximately 53 percent black [and] 45 percent white."<sup>143</sup> Before redistricting, out of the twelve members of North Carolina's U.S. House delegation, there were no African Americans and, indeed, there had been none since 1899.<sup>144</sup> But in 1992, after the redistricting, Eva Clayton won in the First District,<sup>145</sup> becoming the first African American woman ever to reach Congress from the state. Additionally, Mel Watt prevailed in the Twelfth District, becoming not only one of the first two African Americans to serve in Congress from North Carolina in a century,<sup>146</sup> but a passionate voice for North Carolina's long-suppressed progressive voters.

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140. *Id.* at 658.

141. *Id.* at 642, 651-52.

142. *Id.* at 647.

143. Brief for the Congressional Black Caucus as Amicus Curiae Supporting Appellees at 23, *Shaw v. Hunt* (Shaw II), 509 U.S. 630 (1995) (Nos. 94-923, 94-924), 1995 WL 702802.

144. See *Black-American Representatives and Senators by State and Territory, 1870-Present*, U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES, <http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Black-American-Representatives-and-Senators-by-State-and-Territory/> [<https://perma.cc/83HX-NCSV>].

145. See *Clayton, Eva M.*, U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES, <http://history.house.gov/People/Detail/11065> [<https://perma.cc/XJ2M-JTP9>].

146. See *Watt, Melvin L.*, U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES, <http://history.house.gov/People/Detail/23463> [<https://perma.cc/WG3W-U92A>].

Mesmerized by appearances and constitutionally forgetful (at best), the majority in *Shaw v. Reno* never asked whether the *purpose* behind the design of majority-African American districts was to discriminate against white voters. This stiff “purpose requirement” has been a fast-acting guillotine used to decapitate Equal Protection Clause lawsuits by minority plaintiffs challenging facially neutral laws. Thus, the Court rejected challenges brought by African Americans to: a personnel exam which Black applicants disproportionately failed;<sup>147</sup> the use of at-large winner-take-all elections that consistently thwarted Black political aspirations;<sup>148</sup> and state death penalty regimes in which the murderers of white victims are more than four times more likely to be executed than the murderers of African Americans or Hispanics.<sup>149</sup> In all these cases of patently lopsided racial disadvantage and inequality, the minority plaintiffs lost because, as the Court put it in *Mobile v. Bolden*, “only if there is purposeful discrimination can there be a violation of the Equal Protection Clause.”<sup>150</sup>

Not only did the *Shaw* Court fail to ask whether the purpose of creating a majority-African American district was to discriminate against white voters, it did not even require the white litigants to show that the *effect* was discriminatory, a showing they plainly could *not* have made. In the First and Twelfth House Districts of North Carolina, white voters enjoyed every right Black voters had: the right to vote, to run for office, to give and spend money, to petition their legislators, and so on. Of course, white voters had no right to see that their preferred candidate win an election; but, this is a right that no Black voter has ever dreamed of asserting, and it is certainly not a right that is possible or even coherent within single-member district, winner-take-all competitive elections in American democracy.<sup>151</sup>

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147. *Washington v. Davis*, 426 U.S. 229, 252 (1976).

148. *City of Mobile v. Bolden*, 446 U.S. 55, 59-60, 71, 73 (1980) (plurality opinion).

149. *McCleskey v. Kemp*, 481 U.S. 279, 320 (1987) (Brennan, J., dissenting).

150. *City of Mobile*, 446 U.S. at 66-67.

151. Furthermore, the Court in the *Shaw* cases completely suspended its general insistence that Equal Protection Clause litigants demonstrate that they have constitutional “standing” to bring their claims, which means making a showing that they have been concretely injured in a way that is traceable to the government and redressable by judicial action. *See generally Shaw I*, 509 U.S. 630 (1993). The *Shaw* plaintiffs could simply show no “concrete, particularized” injury because they lost no political right unless it was the right, cherished but

But the conservative Court and lower federal courts have struck down numerous majority-minority districts under the *Shaw/Miller* line of cases, almost always leaning heavily on impressionistic judgments about contorted line-drawing. These cases have been an intellectual embarrassment at every level, imposing a naked racial double standard in the name of equal protection and causing political and administrative nightmares in the states. *Shaw* cases are only slowly subsiding now as the conservatives who originally brought them have decided to exchange their ideological fervor for denouncing quota districts<sup>152</sup> and political Bantustans<sup>153</sup> for the strategic partisan advantages of packing as many African American voters as possible into as few districts as possible. In other words, “political apartheid” has gone from being a rhetorical constitutional bludgeon that conservatives use in court against redistricting plans favorable to Black political empowerment, to being a conscious strategy that conservatives employ in state legislatures for packing a handful of districts with maximum numbers of African American voters to “bleach” all the others and racialize the two parties. Today, in the states of the former Confederacy,<sup>154</sup> the Republican Party is effectively the white party and the Democratic Party is effectively the African American party.<sup>155</sup> There are four southern white Democrats in the U.S. Senate<sup>156</sup> and only one of these is from what colloquially known as the “Deep South.”<sup>157</sup> Moreover, there are only

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carefully unspoken, for white voters to be guaranteed a white representative. *See id.* This apparently deeply-felt right reflects nostalgia for white supremacy but is perfectly incoherent in a multiracial political democracy where all citizens will presumably be represented at some level—from the White House to the local school board—by someone who does not share our “race.” *Cf. id.* at 641-42.

152. *See Holder v. Hall*, 512 U.S. 874, 905-06 (1994) (Thomas, J., concurring) (describing district lines as drawn to ensure the existence of the appropriate number of minority seats).

153. *See id.*

154. The Confederacy included Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. *See Confederate States of America*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Confederate-States-of-America> [<https://perma.cc/K4NK-MMGC>].

155. *See, e.g., Party Affiliation Among Adults in Virginia by Race/Ethnicity*, PEW RES. CTR. (2014), <http://www.pewforum.org/religious-landscape-study/compare/party-affiliation/by/> [<https://perma.cc/JW8W-5AR6>]; *see also infra* note 161 and accompanying text.

156. *See Our Caucus*, U.S. SENATE DEMOCRATIC CAUCUS, <https://www.democrats.senate.gov/about-senate-dems/our-caucus> [<https://perma.cc/76K8-SFNE>] (Doug Jones (Ala.); Bill Nelson (Fla.); Tim Kaine, Mark Warner (Va.)).

157. The election of Democrat Doug Jones to the U.S. Senate from Alabama by a robust

thirteen southern white Democrats left in U.S. House seats, with five of these coming from southern Florida.<sup>158</sup> Every Deep South legislature has a white Republican majority<sup>159</sup> while African Americans are overwhelmingly supportive of the Democratic Party<sup>160</sup> and have been reduced to a permanent political minority in Dixie. There is not a single African American chair of a legislative committee in all the states of the former Confederacy today.

There are not many people motivated to bring *Shaw* claims anymore, except African Americans themselves: the plaintiffs in *Alabama Legislative Black Caucus v. Alabama* understood that their votes are being traduced and diluted through the cynical “packing” process underway in redistricting throughout the South.<sup>161</sup> Although the Voting Rights Act of 1965 has been dismembered by the Supreme Court, the Court still has this incoherent “racial gerrymandering” cause of action lying about, and the plaintiffs shrewdly seized upon it to see whether they could move the Court to act. How the Roberts Court ultimately responds in the Alabama case is anyone’s guess, but the Rehnquist Court’s disgraceful 5-4 performance in *Bush v. Gore* in 2000 suggests that strategic partisan considerations are likely to trump professed conservative ideology (federalism, respect for the political branches, and judicial

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interracial political coalition in a special election is a promising but singular event: he was opposing Judge Roy Moore, a religious and ideological extremist who had been credibly accused of sexual predation toward teenaged girls. See Alexander Burns & Jonathan Martin, *Once a Long Shot, Democrat Doug Jones Wins Alabama Senate Race*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/2017/12/12/us/politics/alabama-senate-race-winner.html> [<https://perma.cc/4574-HU8N>].

158. See *Our Members*, U.S. HOUSE DEMOCRATS, <http://www.dems.gov/members/> [<https://perma.cc/4DYG-6ZBV>] (Kathy Castor, Charlie Crist, Ted Deutch, Lois Frankel, Debbie Wasserman (Fla.); David E. Price (N.C.); Steve Cohen, Jim Cooper (Tenn.); Lloyd Doggett, Gene Green, Beto O'Rourke (Tex.); Don Beyer, Gerry Connolly (Va.)).

159. See *Legislator Demographics*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/about-state-legislatures/who-we-elect-an-interactive-graphic.aspx#> [<https://perma.cc/3LTS-E456>] (follow “PDF: Download Table for Race/Ethnicity” hyperlink under “Additional Resources”) (Alabama—75%; Arkansas—88%; Florida—70%; Georgia—72%; Louisiana—76%; Mississippi—71%; North Carolina—79%; South Carolina—76%; Tennessee—85%; Texas—65%; Virginia—83%).

160. See *Exit Polls*, CNN (2016), <https://www.cnn.com/election/2016/results/exit-polls> [<https://perma.cc/2NSE-GK2Y>]; *How Groups Voted in 2012*, ROPER CTR., <https://ropercenter.cornell.edu/polls/us-elections/how-groups-voted/how-groups-voted-2012/> [<https://perma.cc/8BUM-YJSQ>]; *How Groups Voted in 2004*, ROPER CTR., <https://ropercenter.cornell.edu/polls/us-elections/how-groups-voted/how-groups-voted-2004/> [<https://perma.cc/F2EQ-MR7F>].

161. See 988 F. Supp. 2d 1285, 1291 (M.D. Ala. 2013).

restraint).<sup>162</sup> Because the Justices know unlawful racial gerrymandering only when they see it, and given that it is no longer in the majority's interests to find it, it is unlikely they are going to "see" it for much longer anywhere. The Roberts Court may be concluding that it is time to slowly retire the flabby subjective standard, as its political utility may be exhausted.

But the doctrine itself, arbitrary and incoherent to the core, ideologically charged and tinged with the history of political white supremacy, demonstrates the complete malleability and plasticity of aesthetic approaches to dissecting the awesome exercise of political power embodied in legislative redistricting. Citizens need stronger rules and more precise standards.

#### CONCLUSION

There is no political movement in the country today challenging gerrymandering the way the civil rights movement challenged Jim Crow and racial disenfranchisement, but there is a widely felt disenchantment with the dynamics of the redistricting process and growing efforts in various states to move to something less manipulative and autocratic. At the same time, conservatives on the Supreme Court may undercut these political efforts as they seek to dismantle independent redistricting commissions, which are the institutional actors that have opened up some political space to imagine alternatives to the gerrymandering regime.

This possibility makes it all the more important to refocus the Court and the country on a real constitutional pathway through the gerrymander system. In order to spell out discernable and workable judicial standards for invalidating partisan gerrymanders, these standards must be clear, precise, and workable. Otherwise, the standards can simply become another magnet for political and racialized tactics, and then serve as the pretext for the kind of slanted, partisan, and ideological actions undertaken by the Court in the *Shaw* line of cases.

But the crisis of political democracy that partisan gerrymandering has caused is deepening. The advent of finely tuned computer redistricting software enables state legislative majorities to

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162. See generally 531 U.S. 98 (2000) (per curiam).

maximize their legislative seats by packing voters of the other party into a few extremely safe districts, thereby “wasting” as many of their votes as possible in lopsided districts and leaving them a hopeless minority in all the others. In the masterpiece congressional gerrymanders, the ruling party actually draws the lines and stacks the deck in such a way as to run the table and fence out the other party completely, leaving their voters with no U.S. House seats at all (as Democrats have done to Republicans in Massachusetts<sup>163</sup> and Republicans to Democrats in Oklahoma).<sup>164</sup> This practice constitutes a form of egregious political viewpoint discrimination found right at the heart of the electoral process and in the structuring of a governmental nonpublic forum: the state’s congressional delegation.

Similarly, the advanced technology of redistricting sometimes empowers the party in control in the state capital to engineer a majority in the state’s congressional delegation, even if its opponents won a majority of votes for Congress in the last election. This role reversal upsets the proper alignment of forces under the Twelfth Amendment, which makes the state’s congressional delegation a formal and significant constitutional actor that must speak for the state in contingent presidential elections. The political majority must have a delegation majority, or at least a tie, if the Twelfth Amendment and Equal Protection Clause are to be respected.

The Court has been unable to tease out of Equal Protection Clause doctrine alone any discernable, workable, or manageable standards for addressing even the most severe and egregious partisan gerrymanders. Thus, it is time to consider the Twelfth Amendment and First Amendment forum doctrine in order to introduce two compelling and workable definitions for the most extreme kinds of partisan gerrymanders, and to establish bright-line standards for how to replace them.

If the Court were to strike down some of these blatant cases of minority usurpation or fencing out, it would force the states to change the way they do business. It would also open up impressive space for political movements and citizens to call for the kinds of proportional remedies and systems that Justice Thomas discussed

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163. *See supra* notes 78-79 and accompanying text.

164. *See supra* note 75 and accompanying text.

in his concurring opinion in *Holder v. Hall*.<sup>165</sup> Democracy is stagnating under the weight of partisan gerrymandering. U.S. politics needs new voices and new choices and to dramatically enhance the representativeness and competitiveness of elections. The Court can begin by striking down the most egregious partisan gerrymanders in the country, those in which a popular minority abuses the redistricting process to lock down a majority in the House delegation, and those in which the dominant party completely excludes and effaces the voice of its partisan opposition.

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165. See *Holder v. Hall*, 512 U.S. 874, 909-11 (1994) (Thomas, J., concurring) (“As some Members of the Court have already recognized, geographic districting is not a requirement inherent in our political system.”); see also *Davis v. Bandemer*, 478 U.S. 109, 159 (1986) (O’Connor, J., concurring) (“Districting itself represents a middle ground between winner-take-all statewide elections and proportional representation for political parties.”).