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THE COURT’S GERRYMANDERING CONUNDRUM: HOW HYPER-PARTISANSHIP IN POLITICS ALTERS THE *RUCHO* DECISION

Vince Mancini*

Abstract

The Supreme Court’s recent decision in Rucho v. Common Cause was the latest in a line of opinions regarding reviewability of gerrymandering claims related to the constitutionally required decennial state redistricting process. In Rucho, the Court altered the course of future electoral processes and held that partisan gerrymandering claims were nonjusticiable. In doing so, the Court failed to consider obvious pitfalls in limiting the type of review available for these gerrymandering claims. In particular, the Court failed to understand the gravity of the impact such a decision would have on minority voting power and discarded one of the few structural safeguards our democratic process has in place to ensure fair elections. Chained to the idea that review of the redistricting cycle should remain with the state, the Court overestimated the power of state courts and the democratic process to mitigate partisan bias in the redistricting process. If left unchecked, these state legislatures, fueled by the hyper-partisan politics of our day, could erode all faith in the electoral process and dilute votes to the point of giving them little value to the electoral process, depending on the party of the candidate.

I. INTRODUCTION

In 1812, then-Governor of Massachusetts, Elbridge Gerry, signed a redistricting proposal that would allow his party, the Democratic-Republicans, to retain control of the state senate with little competition from the opposing Federalist Party.¹ The local news outlets mocked the partisan apportionment plan and took particular offense to the affected district in Gerry’s home county of Essex, whose contorted boundaries resembled the shape of a salamander.² The journalists, needing a name to describe what they found to be a blatantly undemocratic process, combined the name of “Gerry” with the animal shape similar to that of his home district, and in turn, the term “gerrymander” was born.³

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¹ See Anna Khomina, *Elbridge Gerry and the Original Gerrymander*, GILDER LEHRMAN INST. OF AM. HIST. (Oct. 2, 2017), <https://www.gilderlehrman.org/news/elbridge-gerry-and-original-gerrymander> [<https://perma.cc/FNC3-FYF9>].

² *Id.*

³ *Id.*

Since then, gerrymandering has been a consistent practice in state districting apportionment plans.⁴ The rise of hyper-partisan politics, however, presents uncharted territory for the U.S. Supreme Court (“Court”) in its decisions on whether to interfere in this process. In recent years, the Court, while acknowledging the justiciability⁵ of *racial* gerrymandering, has refused to acknowledge the justiciability of *partisan* gerrymandering.

This Note gives an overview of the state redistricting process as well as a history of how redistricting cases have historically been decided by the Court. Part II discusses the process of redistricting generally and outlines the different principles states are supposed to use to draw their district lines. Part III reviews the history of the Court’s decisions regarding racial and partisan gerrymandering claims up until the most recent *Rucho v. Common Cause* decision. Part IV first argues that the hyper-partisan nature of today’s political climate requires the Court to reconsider its justiciability stance as it relates to partisan gerrymandering, and second, argues that federal courts, not state courts, are the body best suited to make the determination of whether an improper gerrymander occurred during the redistricting process. Finally, Part V recommends a test the Court can apply to future partisan gerrymandering judicial determinations should the Court reverse its decision on the justiciability of partisan gerrymandering claims.

II. STATE CONSIDERATIONS IN THE REDISTRICTING PROCESS

Redistricting gets its authority from the U.S. Constitution, Article I, section 2, clause 3, which requires that every ten years representatives be apportioned by their representative states.⁶ The Court generally affords states discretion to draw their districts but has stated some traditional “principles” on which states should rely for a showing of an unbiased map-drawing process; these include “compactness, contiguity, and respect for political subdivisions.”⁷ While a minor digression from these principles does not wholly indicate an unconstitutional gerrymander, a drastic deviation can support a showing that a state sought to reapportion districts in a particular way so as to suppress the vote of a particular representative group in the

⁴ See ERIK J. ENGSTROM, *PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY* 1–18 (2013).

⁵ In this Note, “justiciability” refers to the authorization from Article III, section 2 of the Constitution for federal courts to hear several types of “cases” and “controversies.” See U.S. CONST. art. III, § 2, cl. 1. The Court has interpreted these words as giving rise to a series of limits on judicial power and determined that federal courts can only hear cases that fall under the scope of a valid case or controversy. See *Flast v. Cohen*, 392 U.S. 83, 95 (1968). For the purpose of this Note, “nonjusticiability” refers to the inappropriateness of a particular subject for judicial consideration. See *Baker v. Carr*, 369 U.S. 186, 198 (1962).

⁶ See U.S. CONST. art. I, § 2, cl. 3 (“Representatives . . . shall be apportioned among the several States which may be included within this Union,” and “[t]he actual Enumeration shall be made . . . within every subsequent Term of ten Years . . .”).

⁷ *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

state.⁸ This Part examines the primary traditional principles—(A) population, (B) contiguity, (C) compactness, (D) traditional boundaries, and (E) communities of interest—courts look towards to determine whether there was bias in the redistricting process.

A. Population Deviation

One principle for an unbiased approach to redistricting is to minimize population deviation between districts.⁹ The basis of this minimal variance standard comes from the Equal Protection Clause of the Fourteenth Amendment, which declares that states shall not “deny to any person within its jurisdiction the equal protection of the laws.”¹⁰ The Court has consistently held, starting with *Baker v. Carr*, that the Equal Protection Clause prevents states from creating districts with disproportionate populations.¹¹

In *Baker*, the Court gave its first instruction to its population variance standard and took its first significant stance on gerrymandered districts.¹² The issue considered in the case was whether Tennessee’s redistricting plan, which had not realigned the state’s districts in over 60 years and had heavily skewed population proportions from district to district, ran afoul of the Equal Protection Clause.¹³ Further, the Court had to determine whether this issue, which is based on a political right, was a nonjusticiable political question. Under the political question doctrine, courts should not decide overtly political cases out of respect for separation of powers between the three branches of government.¹⁴ In *Carr*, the Court established two main criteria for determining whether an issue violates the political question doctrine: “[1] the appropriateness under our system of government of attributing finality to the action of the political departments and . . . [2] the lack of satisfactory criteria for a judicial determination.”¹⁵ Ultimately, the Court found there was federal jurisdiction and no conflict with the political question doctrine¹⁶ for the Court to

⁸ See, e.g., *Karcher v. Daggett*, 462 U.S. 725, 755 (1983) (noting that “dramatically irregular shapes may have sufficient probative force to call for an explanation.”).

⁹ See *Baker*, 369 U.S. at 191 (noting that polarized population deviation could signal an unconstitutional redistricting process).

¹⁰ U.S. CONST. amend. XIV, § 1.

¹¹ See *Baker*, 369 U.S. at 197–98.

¹² See *id.* at 208–09.

¹³ See *id.* at 188–89.

¹⁴ See *id.* at 210.

¹⁵ See *id.* (quoting *Coleman v. Miller*, 307 U.S. 433, 454–55 (1939)); see also *id.* at 217 (laying out six independent tests for the existence of a political question).

¹⁶ See *id.* at 209 (“Of course the mere fact that the suit seeks protection of a political right does not mean it presents a political question.”).

consider constitutional challenges to state legislative redistricting plans when brought under the Equal Protection Clause.¹⁷

Two years later, in *Reynolds v. Sims*, the Court expounded on *Baker* and held that the Equal Protection Clause, as it relates to gerrymandering, requires that the vote of any citizen be “approximately equal in weight to that of any other citizen of the state.”¹⁸

While this “one-person, one-vote” rule still holds, the Court has consistently rejected any exact quantifiable standard for permissible variance in a redistricting population deviation.¹⁹ For example, in 2012, the Court found that a legislative redistricting reapportionment plan, which had a variance of 0.79 percent, did not run afoul of the “one-person, one-vote” rule.²⁰ Therefore, as it stands today, for a state to survive review on the population deviation redistricting principle, it must make a good-faith effort to make population variance as minimal as is reasonable, but *some* variance will be allowed.²¹

B. Contiguity

A second “traditional” principle that states should rely on for redistricting is the relatively straightforward concept that districts must be contiguous.²² The contiguous district standard requires that “all parts of the district must be connected in some way with the rest of the district.”²³ For example, a state cannot create a district that consists of a county in the northwest part of the state and an unconnected county in the southeast part of the state.²⁴ Because of its simplicity, courts have not interpreted the cohesiveness of a redistricted district’s contiguity other than to refer to it as a traditional redistricting principle.²⁵

¹⁷ *See id.* at 237 (“[T]he complaint’s allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment.”).

¹⁸ *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

¹⁹ *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 725–26 (1983) (“There are no de minimis population variations, which could practicably be avoided, that may be considered as meeting the standard of Art. I, § 2, without justification.”).

²⁰ *Tennant v. Jefferson County*, 567 U.S. 758, 764 (2012).

²¹ *See id.*

²² *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

²³ *Redistricting Criteria*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/redistricting/redistricting-criteria.aspx> [https://perma.cc/6XWH-X54B] (last visited June 12, 2022).

²⁴ *Id.*

²⁵ *See, e.g., Shaw*, 509 U.S. at 647.

C. Compactness

A third principle that states should apply to their redistricting criteria is that the districts must be “compact.”²⁶ In general, compactness refers “to both how close a legislative district’s boundaries are to its geographic center and how ‘regular’ in shape a district appears to be.”²⁷ The concept of compactness may be a traditional principle, but there is little consensus as to what standard is used to determine whether an apportioned district is sufficiently “compact.”²⁸ The Court has not been helpful in establishing a uniform standard of qualitative analysis; however, it has recognized that “dramatically irregular shapes may have sufficient probative force to call for an explanation.”²⁹ While the Court may not find a redistricting apportionment plan to be unconstitutional based on compactness alone, it may use a finding of irregular compactness among a particular district as a sign that the redistricting process was gerrymandered by the state.³⁰ Because a lack of compactness can lead to increased scrutiny by the court, 37 states have compactness requirements for the drawing of their state legislative districts, and 18 states have compactness requirements for the drawing of their congressional districts.³¹

D. Maintaining Traditional Boundaries

Further, states should follow traditional boundaries when considering new districts. In *Bush v. Vera*, the Court held that a district that takes “into account traditional districting principles such as maintaining traditional boundaries” may survive a claim alleging an unlawful gerrymander.³² In this sense, maintaining traditional boundaries “refers to not crossing county, city, or town boundaries when drawing districts.”³³ This criteria “provides an important reference point for courts undertaking the predominance analysis,”³⁴ which is an analysis used by courts in

²⁶ *Id.* at 647.

²⁷ Aaron R. Kaufman, Gary King & Mayya Komisarchik, *How to Measure Legislative District Compactness If You Only Know It When You See It*, 65 AM. J. POL. SCI. 533, 533 (2021), <https://gking.harvard.edu/files/gking/files/ajps.12603.pdf> [<https://perma.cc/R5E9-YVRH>].

²⁸ *See id.* at 534 (“Although many state constitutions explicitly require compactness, the vast majority provide no definition or measure for how to detect violations of the standard.”).

²⁹ *Karcher v. Daggett*, 462 U.S. 725, 755 (1983) (Stevens, J., dissenting).

³⁰ *See id.* (“One need not use Justice Stewart’s classic definition of obscenity—‘I know it when I see it’—as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation.”).

³¹ *Compactness*, BALLOTPEDIA, <https://ballotpedia.org/Compactness> [<https://perma.cc/Y36K-F6C6>] (last visited June 12, 2022).

³² *Bush v. Vera*, 517 U.S. 952, 977 (1996).

³³ *Redistricting Criteria*, *supra* note 23.

³⁴ *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 538 (E.D. Va. 2015).

racial gerrymandering cases and will be discussed further below.³⁵ The difficulty with this principle is that some states have many districts, and it is impossible for them to comply with the population deviation requirement without dividing certain towns, cities, or counties.³⁶

E. Maintaining Communities of Interest

Finally, states should maintain communities of interest while redrawing districts. Maintaining communities of interest is a similar requirement to maintaining traditional boundaries. Instead of preserving town, city, or county lines, however, this principle maintains areas where “the residents have common political interests”³⁷ and prevents the legislature from diluting this political power. This principle is perhaps the vaguest of all the traditional principles in that defining common political interests is an extremely difficult standard for courts to scrutinize uniformly. Adherence to this principle rests on the same rationale as that of maintaining traditional boundaries. Specifically, the Court may infer a gerrymander if a state legislature targeted a particular community of interest—for example, a community that contains a predominant ethnic majority—and split that majority into separate districts for the purpose of diluting their voting power.³⁸

These traditional principles serve as a basis for many state redistricting considerations. If states fail to follow these principles, they may face judicial review of their redistricting process. Part III discusses how the Court conducts this review.

III. THE HISTORY OF THE COURT’S GERRYMANDERING ANALYSIS

Part II laid out traditional redistricting principles that courts refer to in their gerrymandering analysis. Save for the population deviation *requirement*, however, these principles serve more as guideposts that can help states create a non-biased redistricting apportionment.³⁹ Article I, section 2, clause 3 of the Constitution gives states the authority to adopt these practices, but they are under no constitutional

³⁵ See *supra* Part III.A.

³⁶ For example, California, the state with the most congressional districts, has 53 congressional districts which must comply with the population deviation requirement. See *Directory of Representatives*, U.S. HOUSE OF REPRESENTATIVES, https://www.house.gov/representatives#state_ca [<https://perma.cc/YGG9-KEFN>] (last visited June 12, 2022).

³⁷ *Redistricting Criteria*, *supra* note 23.

³⁸ See, e.g., *Shaw v. Hunt*, 517 U.S. 899, 937–38 (1996) (Stevens, J., dissenting) (“If race rather than incumbency protection had been the dominant consideration, it seems highly unlikely that the Democrats would have drawn this bizarre district rather than accepting more compact options that were clearly available Instead, as the detailed findings of the District Court demonstrate, the legislature deliberately crafted a districting plan that would accommodate the needs of Democratic incumbents.”).

³⁹ See *supra* Part II.

requirement to do so.⁴⁰ While there is no constitutional requirement, a state that substantially deviates from these principles can signal to courts it conducted a gerrymander. Depending on the severity of the gerrymander, courts may find the redistricting unconstitutional.⁴¹ When evaluating the constitutionality of a gerrymander, the Court views racial and partisan gerrymandering differently. This Part explores the Court's distinction between racial and partisan gerrymandering and will explain why this distinction is determinative of whether the Court will find the gerrymander to be federally justiciable.⁴²

A. Racial Gerrymandering

Subsection 2(a) of the Voting Rights Act ("VRA") of 1965 prohibits all states from imposing *any* voting qualifications or prerequisites to voting standards, practices, or procedures "in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."⁴³ Subsection 2(a), along with the Equal Protection Clause, creates a cause of action for cases in which racial gerrymandering is alleged.

1. Judicial Standard for Racial Gerrymandering Claims

Beginning in 1986, with its opinion in *Thornburg v. Gingles*,⁴⁴ the Court established a test for an unlawful racial gerrymander under subsection 2(a) of the VRA.⁴⁵ In *Thornburg*, the Court held that, as a precondition to any finding of a violation under subsection 2(a), a discriminated party must first show that a majority-minority district is viable and likely to occur through a redistricting reapportionment.⁴⁶ While the Court did not define a majority-minority district, it can best be described as one in which a "racial minority equals 50 percent or more of the citizen voting-age population."⁴⁷

⁴⁰ See U.S. CONST. art. I, § 2, cl. 3 ("Representatives . . . shall be apportioned among the several States which may be included within this Union," and "[t]he actual Enumeration shall be made . . . within every subsequent Term of ten Years . . .").

⁴¹ See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 141 (1986) ("[E]vidence of exclusive legislative process and deliberate drawing of district lines in accordance with accepted gerrymandering principles would be relevant to intent . . .").

⁴² *Baker v. Carr*, 369 U.S. 186, 198 (1962) (defining justiciability as "the inappropriateness of the subject matter for judicial consideration").

⁴³ Voting Rights Act of 1965, Pub. L. No. 117-130, 42 U.S.C. § 1973(a) (codified as amended at 52 U.S.C. § 10301(a)).

⁴⁴ *Thornburg v. Gingles*, 478 U.S. 30 (1986).

⁴⁵ See *id.*

⁴⁶ *Id.* at 50.

⁴⁷ *Majority-Minority District*, REDISTRICTING: KEY TERMS, <https://redistricting.lls.edu/wp-content/uploads/Basics-English10.pdf> [<https://perma.cc/2ATL-G7K6>] (last visited June 12, 2022).

In *Thornburg*, the appellees, Black citizens in North Carolina who were registered to vote, argued that the apportionment scheme of the state legislature targeted and separated majority-Black communities and therefore impaired the Black citizens' ability to vote for a representative of their choosing.⁴⁸ In deciding whether the prerequisite majority-minority district was apparent, the *Thornburg* Court created a three-factor test, which requires the minority group to demonstrate: "[1] that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single-member district[;] . . . [2] that [the minority group] is politically cohesive[;] . . . [and] [3] that the . . . majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate."⁴⁹ Ultimately, the Court found that a majority-minority block could be found in this case, as the appellants met all three requirements of the test.⁵⁰ Because the *Thornburg* Court found a VRA violation in the redistricting process, it did not wade into the territory of determining how the Court should scrutinize an Equal Protection racial gerrymandering claim.

Through a series of cases, beginning with *Shaw v. Reno*,⁵¹ the Court has established that the same Equal Protection analysis applies to cases involving a racial gerrymander as cases involving government discrimination on the basis of race generally. *Reno* was another case featuring redistricting in North Carolina; this time following the 1990 redistricting cycle when North Carolina was awarded an additional (twelfth) Congressional district.⁵² At the time, 20 percent of the eligible voters in the state were Black while 78 percent were white, and in the redistricting reapportionment, the state created a majority Black district.⁵³ The appellants, the North Carolina Republican Party and individual white voters, brought suit, claiming the majority-Black district was a racial gerrymander in violation of the Fourteenth Amendment.⁵⁴ In deciding the Equal Protection claim, the Court held that "the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest."⁵⁵ In other words, in cases where race serves as a key factor, a strict-scrutiny analysis applies.⁵⁶ Further, the Court held that strict scrutiny also applies to statutes that "although race neutral, are, on their face 'unexplainable on grounds other than race.'"⁵⁷

⁴⁸ *Thornburg*, 478 U.S. at 35.

⁴⁹ *Id.* at 50–51.

⁵⁰ *Id.* at 80.

⁵¹ 509 U.S. 630 (1993).

⁵² *Id.* at 632.

⁵³ *Id.* at 634.

⁵⁴ *Id.* at 637.

⁵⁵ *Id.* at 643 (citing *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 277–78 (1986) (plurality opinion)).

⁵⁶ See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

⁵⁷ *Reno*, 509 U.S. at 643 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)).

The *Reno* opinion opened the door to the future questions of when courts will consider race as a key factor in redistricting reapportionment decisions. The Court, in *Miller v. Johnson*,⁵⁸ gave guidance on this distinction; it concluded that a court may find an unconstitutional racial gerrymander if race was the “predominant” factor in the drawing of its lines.⁵⁹ The Court noted that this “predominance” line of reasoning can be further applied to racial gerrymandering cases in which the legislative redistricting process appears facially neutral, so long as such cases show a “discriminatory purpose” to the apportionment plan.⁶⁰ In order to find this discriminatory purpose, the Court pointed to *Personnel Administrator of Massachusetts v. Feeney*, which held that “[d]iscriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects.”⁶¹ Such a test established a high threshold for a finding of an unconstitutional racial gerrymander and helped set the foundation for the Court to distinguish racial gerrymandering claims from claims that were purely partisan in nature.

This foundation was solidified by *Cooper v. Harris*,⁶² which is the Court’s most recent opinion⁶³ on racial gerrymandering claims. In *Cooper*, the Court concluded that partisanship cannot be used to justify a racial gerrymandering claim.⁶⁴ The Court’s holding in *Cooper* made clear that a racial discrimination claim cannot be found if a gerrymander unfairly hinders a certain political party, even though empirical evidence shows that members of a particular race vote heavily in favor of that party.⁶⁵ Specifically, the Court will only find racial gerrymandering claims if race was the predominant factor in line drawing and that the legislature distinguished between races for the purpose of diluting one group’s voting power.⁶⁶ As discussed in the following Section, this separation of racial gerrymandering from partisan

⁵⁸ 515 U.S. 900 (1995).

⁵⁹ *See id.* at 916 (“The plaintiff’s burden is to show, either through circumstantial evidence of a district’s shape and demographics or more direct evidence going to legislative purpose, that race was the *predominant factor* motivating the legislature’s decision to place a significant number of voters within or without a particular district.” (emphasis added)).

⁶⁰ *Id.* at 924–25.

⁶¹ *Id.* at 916 (footnotes omitted) (citation omitted) (quoting *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

⁶² *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

⁶³ In a recent shadow docket decision, the Court granted injunctive relief to the state of Alabama after citizens claimed an unlawful racial gerrymander. *See Merrill v. Milligan*, 142 S.Ct. 879 (2022). The oral argument for the case is set for Fall 2022.

⁶⁴ *Id.* at 1488 (Alito, J., dissenting) (“[W]hile some might find it distasteful, ‘[o]ur prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact.’” (emphasis omitted) (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551(1991))).

⁶⁵ *See id.*

⁶⁶ *Id.* 1463–64.

gerrymandering has severe consequences with regard to the Court's willingness to consider gerrymandering claims.

B. Partisan Gerrymandering

As noted above, partisan gerrymandering has been around since the founding of the country.⁶⁷ The Court stood silent on these claims until the early 1970s but since then has made four landmark decisions regarding the justiciability of partisan gerrymandering claims. The final decision, made in *Rucho v. Common Cause*, found partisan gerrymandering nonjusticiable and barred federal courts from protecting voters from plainly partisan gerrymanders.⁶⁸

I. Pre-Rucho Partisan Gerrymandering Review

The first landmark decision regarding partisan gerrymandering came in 1973 in *Gaffney v. Cummings*.⁶⁹ In *Gaffney*, the state of Connecticut incorporated political data for assistance in drawing its maps with the intent to create districts under a policy of political "fairness," "which aimed at a rough scheme of proportional representation of the two major political parties."⁷⁰ The purpose of the political data usage was to create districts that reflected the statewide plurality of votes among party lines and awarded a "proportionate number of Republican and Democratic legislative seats" based on those lines.⁷¹ Additionally, the redistricting proposal included a maximum deviation of population in house districts totaling 7.83 percent and a maximum deviation of population in senate districts totaling 1.81 percent.⁷² Under this pretense, the Court found that while the population deviations could be large enough to justify additional scrutiny, the fact that the state drew districts using political data did not lead to an immediate conclusion that they were not "justifiable and legally sustainable" under the Equal Protection Clause.⁷³ Ultimately, the Court concluded that "politics and political considerations are inseparable from districting and apportionment," and the fact that a state's reapportionment plan attempted to reflect the strength of major political parties in locating and defining election districts did not violate the Equal Protection Clause.⁷⁴

The second landmark case, *Davis v. Bandemer*,⁷⁵ attempted to clarify the *Gaffney* holding and left open the door for federal court intervention in partisan gerrymandering claims. In this case, Indiana Democratic candidates for the State House of Representatives in the 1982 election cycle received 51.9 percent of the

⁶⁷ See *supra* Part I (describing the origin of the phrase in 1812).

⁶⁸ See *infra* Part III.B.2.

⁶⁹ *Gaffney v. Cummings*, 412 U.S. 735 (1973).

⁷⁰ *Id.* at 738.

⁷¹ *Id.*

⁷² *Id.* at 750.

⁷³ *Id.* at 745.

⁷⁴ *Id.* at 753.

⁷⁵ *Davis v. Bandemer*, 478 U.S. 109 (1986).

vote statewide, while the Republican candidates received 48.1 percent of the vote.⁷⁶ Of the 100 seats to be filled, however, Republican candidates won 57 seats, and Democratic candidates won only 43.⁷⁷ The opinion had two key parts, which are important for the partisan gerrymandering analysis.

The first part, a 6-3 opinion written by Justice White, held that political gerrymandering “is properly justiciable under the Equal Protection Clause.”⁷⁸ Using the rationale of *Reynolds v. Sims*,⁷⁹ the Court felt it could reasonably adjudicate gerrymandering cases where the issue of fair representation arises—and a case with such blatant partisan gerrymandering is an issue of fair representation.⁸⁰

In the second part, a plurality opinion, Justice White attempted to create an Equal Protection test courts could apply to evaluate partisan gerrymandering claims.⁸¹ This test required a showing of both discriminatory intent and discriminatory purpose.⁸² For the discriminatory intent portion, Justice White felt that such a showing was relatively easy to prove, reasoning that if the state conducted the redistricting through a legislative process, then it is apparent “that the likely political consequences of the reapportionment were intended.”⁸³ As for whether there is a discriminatory effect to such intent, Justice White reasoned that purpose can be supported through “evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.”⁸⁴ Under this reasoning, evidence that a party lacks proportional representation as it relates to a past election is not enough. Further, there must be clear proof that the partisan vote dilution is of such an extreme nature that the discriminated party lacks any fair chance to elect a candidate of its choosing.⁸⁵

While *Davis* held that partisan gerrymandering claims were justiciable, the Court still lacked a clear, decisive test for determining Equal Protection cases under this gerrymandering under a partisan standard. In the twenty years following the opinion, no lower court successfully created a manageable legal standard under

⁷⁶ *Id.* at 115.

⁷⁷ *Id.*

⁷⁸ *Id.* at 143.

⁷⁹ *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁸⁰ *See id.* at 118–20 (finding that “the constitutional deficiencies of plans that dilute the vote of political groups, at the least supports an inference that these cases are justiciable” under the Equal Protection Clause).

⁸¹ *See id.* at 129.

⁸² *See id.*

⁸³ *Id.*

⁸⁴ *Id.* at 132.

⁸⁵ *See id.* (“[A] group’s electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause”).

which they could scrutinize partisan gerrymandering, thus paving the way for the Court's plurality opinion in *Vieth v. Jubelirer*.⁸⁶

In *Vieth*, a plurality of Justices disagreed with the precedential effect of *Davis*. The plurality held that partisan gerrymandering claims were nonjusticiable because it was a political issue under which no manageable Equal Protection standards had emerged, and thus, the political question doctrine, under the test set forth in *Baker v. Carr*,⁸⁷ was implicated.⁸⁸ But because *Vieth* was a plurality opinion, the holding from *Davis*, that partisan gerrymandering claims were justiciable, remained good law. In *Vieth*, Justice Kennedy, while concurring with the opinion's ultimate judgment, allowed for potential future claims to be brought under the First Amendment rather than the Equal Protection Clause.⁸⁹ Justice Kennedy opined that the First Amendment and its protection of ideologies, beliefs, and political associations could bring forth a valid unconstitutional partisan gerrymandering claim in future cases.⁹⁰

Interestingly, the *Vieth* dissent, written by Justice Souter, acknowledged that the standards established in *Davis* were of such a high burden and contained significant vagueness that no court would be able to succeed in establishing a practical test.⁹¹ The dissent felt, however, that a lack of a test did not suggest that the unconstitutionality of an apportionment plan could not be found; it simply meant that the Court should establish an adequate test by which all courts can judge the partisan gerrymandering issue.⁹² As a solution, the dissent proposed a new five-part test in which the plaintiff alleging a partisan gerrymander under the Equal Protection Clause would need to: (1) "identify a cohesive political group to which [s]he belonged";⁹³ (2) show that the district of the plaintiff's residence disregarded "traditional districting principles" (e.g., "contiguity, compactness, respect for political subdivisions, and conformity with geographic features . . .");⁹⁴ (3) "establish specific correlations between the district's deviations from traditional

⁸⁶ *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

⁸⁷ *Baker v. Carr*, 369 U.S. 186, 217 (1962) (noting the six independent tests for the existence of a political question, one of which is "a lack of judicially discoverable and manageable standards for resolving [the issue]").

⁸⁸ See *Vieth*, 541 U.S. at 267–69.

⁸⁹ *Id.* at 311 (Kennedy, J., concurring) ("That no such standard has emerged in this case should not be taken to prove that none will emerge in the future.").

⁹⁰ *Id.* at 314 ("[T]hese allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.").

⁹¹ *Id.* at 345 (Souter, J., dissenting) ("This standard, which it is difficult to imagine a major party meeting, combined a very demanding burden with significant vagueness; and if appellants have not been able to propose a practical test for a *Davis* violation, the fault belongs less to them than to our predecessors.").

⁹² *Id.* at 343–47.

⁹³ *Id.* at 347.

⁹⁴ *Id.* at 347–48.

districting principles and the distribution of the population of his group”;⁹⁵ (4) “present to the court a hypothetical district including her residence, one in which the proportion of the plaintiff’s group was lower (in a packing claim) or higher (in a cracking one) and which at the same time deviated less from traditional districting principles than the actual district”;⁹⁶ and (5) “show that the defendants acted intentionally to manipulate the shape of the district in order to pack or crack his group.”⁹⁷

Following *Vieth*, the uncertainty surrounding partisan gerrymandering was high. With no clear guidance pointing towards an agreed-upon test and disagreement amongst the Justices of whether partisan gerrymandering claims were justiciable, the doctrine was on life support. The Court’s opinion in *Rucho v. Common Cause* effectively pulled the plug.

2. *Rucho v. Common Cause*

In *Rucho*, the Court considered both a partisan gerrymander by Republicans in North Carolina and a partisan gerrymander by Democrats in Maryland.⁹⁸ In Maryland, the Democrats never received more than 65 percent of the statewide congressional vote; yet, from the 2012 elections through the 2018 elections, Democrats won seven of the eight potential House seats, including one seat that was previously a reliably Republican district before the 2010 census.⁹⁹ In North Carolina, Republican candidates won 10 out of the state’s 13 total congressional seats in 2016, even though they only won 53 percent of the statewide vote.¹⁰⁰ Further, in the 2018 election, the Republicans won nine out of a total of 12 seats even though statewide they only won 50 percent of the total vote.¹⁰¹ Ultimately, the majority held partisan gerrymandering claims were nonjusticiable and thus could not be heard by the Court,¹⁰² while the dissent argued the claims were justiciable because there were manageable standards to decide partisan gerrymandering claims.¹⁰³

⁹⁵ *Id.* at 349.

⁹⁶ *Id.* at 349–50. The practice of “packing” occurs when a large number of minority voters are placed in a small number of districts, while the practice of “cracking” occurs when minority voters are spread thin over districts so they cannot form a majority to vote for a preferred candidate. See Louis Michael Seidman, *Rucho Is Right—But for the Wrong Reasons*, 23 U. PA. J. CONST. L. 865, 866 (2021).

⁹⁷ *Id.* at 350.

⁹⁸ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019) (5-4 decision).

⁹⁹ See *id.* at 2511 (Kagan, J., dissenting).

¹⁰⁰ See *id.* at 2510.

¹⁰¹ See *id.*

¹⁰² See *id.* at 2507 (majority opinion).

¹⁰³ See *id.* at 2509 (Kagan, J., dissenting).

(a) *Majority Opinion*

The *Rucho* Court, in a 5–4 opinion written by Chief Justice Roberts and decided along ideological lines,¹⁰⁴ held that gerrymandering claims that are partisan in nature present political questions and are, therefore, nonjusticiable under the political question doctrine and beyond the reach of the Court.¹⁰⁵ As a basis for its holding, the Court cited precedent that an issue runs afoul of the political question doctrine when it gives the Court no judicially manageable standard to decide the case.¹⁰⁶ The North Carolina district court had concluded that “the Elections Clause did not empower State legislatures to disfavor the interests of supporters of a particular candidate or party in drawing congressional districts.”¹⁰⁷ However, the Court disagreed with this analysis and found that the lower court’s argument was based not on the Elections Clause but rather on the Guaranty Clause of Article IV, section 4, which gives the “guarantee to every State in [our] Union a Republican Form of Government.”¹⁰⁸ While acknowledging that the analysis rested in the Guaranty Clause, the Court gave this argument little weight and cited precedent that has repeatedly held that “the Guarant[y] Clause does not provide the basis for a justiciable claim.”¹⁰⁹ The Court, however, qualified this opinion by noting that state courts can decide these claims so long as the respective state constitution provides a method of review.¹¹⁰

Additionally, the Court dismissed the viability of a First Amendment claim, as noted by Justice Kennedy’s concurrence in *Vieth*, concluding that the available First

¹⁰⁴ Chief Justice Roberts was joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh—each of whom was nominated by a Republican president; Justice Kagan dissented, and was joined by Justices Ginsburg, Breyer, and Sotomayor—each of whom was nominated by a Democratic president. *See id.* at 2486; *About the Court: Current Members*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/8FN7-5HLG>] (last visited June 14, 2022); *About the Court: Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [<https://perma.cc/MND5-S552>] (last visited June 14, 2022).

¹⁰⁵ *Rucho*, 139 S. Ct. at 2508 (majority opinion) (“‘It is emphatically the province and duty of the judicial department to say what the law is.’ In this rare circumstance, that means our duty is to say ‘this is not law.’” (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803))); *see also* U.S. CONST. art. III § 2, cl. 1 (restricting federal courts to deciding “Cases” and “Controversies,” meaning that federal courts can address only questions historically viewed as capable of resolution through the judicial process).

¹⁰⁶ *Id.* at 2487 (“Among the political question cases [the] Court has identified are those that lack ‘judicially discoverable and manageable standards for resolving [them].’” (alteration in original) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962))).

¹⁰⁷ *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 937 (M.D.N.C. 2018).

¹⁰⁸ *Rucho*, 139 S. Ct. at 2506 (quoting U.S. CONST. art. IV § 2, cl. 1).

¹⁰⁹ *Id.* (citing *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912) as an example of a past Supreme Court decision which disallowed a justiciable claim through the Guaranty Clause).

¹¹⁰ *See id.* at 2507 (“Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.”).

Amendment tests offer “no ‘clear’ and ‘manageable’ way of distinguishing permissible from impermissible partisan motivation.”¹¹¹ As a result, the Court held that partisan gerrymandering claims were nonjusticiable under the Guaranty Clause, the Equal Protection Clause, and the First Amendment. Consequently, the Court left no avenue for a party to bring a claim for an unconstitutional partisan gerrymander.

(b) *Dissent*

In her dissent, Justice Kagan¹¹² expressed her fear that the majority’s opinion, if left unchecked, threatened to harm the democratic system upon which our country relies.¹¹³ The dissent argued that manageable standards were available to the Court to decide partisan gerrymandering cases only in the worst-of-the-worst case scenarios and that the Maryland and North Carolina gerrymanders clearly fell under that “worst-of-the-worst” category.¹¹⁴ Such an egregious gerrymander, the dissent said, in effect, amounts to the rigging of an election, and only judicial intervention can cure such a corrupt process.¹¹⁵ Justice Kagan conceded that the Court should not strike down a map when it shows just a “smidgen of politics.”¹¹⁶ She warned, however, that today’s gerrymandering, with increased block-level data specificity, is different than partisan gerrymanders of the past, which has the ability to “make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides.”¹¹⁷

In contrast to the majority, Justice Kagan argued that an egregious partisan gerrymandering claim is justiciable through the Equal Protection Clause.¹¹⁸ The dissent found that the district court’s *Rucho* opinion adequately laid out a sustainable test to determine an Equal Protection gerrymandering claim, which proves: “(1) intent; (2) effects; and (3) causation.”¹¹⁹ Under this test, a party challenging a districting plan must first prove that “state officials’ ‘predominant purpose’ in drawing a district’s lines was to ‘entrench [their party] in power’ by

¹¹¹ *Id.* at 2505.

¹¹² Also joining the opinion were Justices Bader Ginsburg, Sotomayor, and Breyer. *See id.* at 2509 (Kagan, J., dissenting).

¹¹³ *See id.* (“If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.”).

¹¹⁴ *See id.*

¹¹⁵ *See id.* at 2512 (“By drawing districts to maximize the power of some voters and minimize the power of others, a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer.”).

¹¹⁶ *See id.* at 2515–16.

¹¹⁷ *Id.* at 2513; *see also id.* at 2512 (arguing that the “crude linedrawing [used by the Framers] of the past” cannot be compared to the advanced techniques used today).

¹¹⁸ *See id.* at 2514 (“The Fourteenth Amendment, we long ago recognized, ‘guarantees the opportunity for equal participation by all voters in the election’ of legislators.” (quoting *Reynolds v. Sims*, 377 U.S. 533, 506, 566 (1964))).

¹¹⁹ *Id.* at 2516.

diluting the votes of citizens favoring its rival.”¹²⁰ Second, the party “must establish that the lines drawn in fact have the intended effect by ‘substantially’ diluting their votes.”¹²¹ Finally, if the party is able to make the first two showings of the test, then “the State must come up with a legitimate, non-partisan justification to save its map.”¹²²

Ultimately, the dissent sympathized with the majority opinion’s concern for maintaining political neutrality and understood there was the potential for a slippery slope, with the Court stepping into the role of the state legislature and becoming too involved in the redistricting process.¹²³ Justice Kagan, however, contested this concern and felt the dissent’s test, with its “predominant purpose” and “substantial dilution” requirements, ensures a high discretionary threshold, where courts will only be able to intervene in the most egregious partisan gerrymanders.¹²⁴ Further, the dissent took issue with the majority’s apparent conclusion that state courts could “develop and apply neutral and manageable standards to identify unconstitutional gerrymanders” but did not have the same confidence that federal courts would be able to apply similar standards.¹²⁵ In the dissent’s opinion, if state courts could apply these standards, then the Court was more than capable of creating and applying standards of their own.¹²⁶ The dissent ended with a strong statement in which it found that these partisan gerrymandering practices threatened the notion of our democratic system of governing and that it was the job of the courts, in response to such threats, to defend the foundations of this democracy and intervene when needed.¹²⁷

Part III laid out the current federal jurisprudence surrounding gerrymandering, culminating with the *Rucho* decision. Part IV will discuss the factors the Court failed to consider in *Rucho*, and will argue that these factors necessitate a reconsideration of *Rucho*’s holding.

IV. HYPER-PARTISANSHIP AND THE NECESSITY OF A RECONSIDERATION OF THE *RUCHO* COURT’S NONJUSTICIABILITY CONCLUSION

The Court, through its opinion in *Rucho*, made it clear that partisan gerrymandering claims will be considered nonjusticiable in federal courts; however, there are certain trends the Court failed to give proper weight, which warrant a

¹²⁰ *Id.* (alteration in original) (quoting *Rucho*, 318 F. Supp. 3d at 864).

¹²¹ *Id.* (quoting *Benisek v. Lamone*, 348 F. Supp. 3d 493, 498 (2018)).

¹²² *Id.*

¹²³ *Id.* at 2525.

¹²⁴ *Id.* at 2522 (“[T]he combined inquiry used in these cases set the bar high, so that courts could intervene in the worst partisan gerrymanders, but no others”).

¹²⁵ *Id.* at 2524 (“If [state courts] can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn’t we?”).

¹²⁶ *Id.*

¹²⁷ *Id.* at 2525 (“Of all times to abandon the Court’s duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court’s role in that system is to defend its foundations. None is more important than free and fair elections.”).

reconsideration of the case. Given the strong correlation of race and party affiliation, the concerning pattern of political parties targeting racial groups, and the hyper-partisan nature of today's political climate, the Court should reconsider its nonjusticiability precedent and intervene in partisan gerrymandering cases in order to preserve our democracy. This Part examines: (A) the propensity of racial groups to consistently vote for a particular party; (B) the rise of the "Great Replacement" theory and its implications for gerrymandering; and (C) hyper-partisanship.

A. Changing Demographics and the Propensity for Racial Classes to Vote with a Particular Party

Following the 2020 election, 34 percent of voters identified as Independent, 33 percent identified as Democrats, and 29 percent identified as Republicans.¹²⁸ When taking partisan leanings into account, 49 percent of all registered voters either explicitly affiliate with the Democratic Party or lean towards the party, and 44 percent either explicitly affiliate with the Republican Party or lean towards the GOP.¹²⁹ In this context, it should be noted that "leaning" does not necessarily mean that a registered voter will certainly vote for their identified or preferred political party. For instance, in the 2016 presidential election, 5 percent of Republican-leaning voters voted for the Democratic candidate, while 4 percent of Democratic-leaning voters voted for the Republican candidate.¹³⁰ Thus, this data shows that the switch of party-leaning voters tends to be relatively equal between parties, and the deviation of voters who vote against their partisan leaning comes out as a relative wash.¹³¹

When it comes to how racial categories vote, there are clear lines of party favoritism amongst racial groups: 51 percent of registered white voters are more likely to lean towards or affiliate with the Republican Party, compared with 43 percent of registered white voters who are more likely to lean towards or affiliate with the Democratic Party.¹³² Additionally, 63 percent of Hispanic voters identify or lean toward the Democratic Party, while 28 percent of Hispanic voters identify or

¹²⁸ John Gramlich, *What the 2020 Electorate Looks Like, by Party, Race and Ethnicity, Age, Education and Religion*, PEW RSCH. CTR. (Oct. 26, 2020), <https://www.pewresearch.org/fact-tank/2020/10/26/what-the-2020-electorate-looks-like-by-party-race-and-ethnicity-age-education-and-religion/> [<https://perma.cc/K4W2-53HQ>] (citing a research survey and analysis conducted on more than 12,000 voters in 2018 and 2019).

¹²⁹ *Id.*

¹³⁰ PEW RSCH. CTR., AN EXAMINATION OF THE 2016 ELECTORATE, BASED ON VALIDATED VOTERS (2018), <https://www.pewresearch.org/politics/2018/08/09/an-examination-of-the-2016-electorate-based-on-validated-voters/> [<https://perma.cc/M6HF-9F4D>].

¹³¹ *See id.*

¹³² *See* PEW RSCH. CTR., 1. TRENDS IN PARTY AFFILIATION AMONG DEMOGRAPHIC GROUPS (2018), <https://www.pewresearch.org/politics/2018/03/20/1-trends-in-party-affiliation-among-demographic-groups/> [<https://perma.cc/89M7-RLVH>].

lean toward the Republican Party.¹³³ The partisan disparity of Black voters is the most drastic of all the racial classes: 84 percent of registered Black voters identify or lean towards the Democratic party, while only 8 percent of Black voters identify or lean towards the Republican party.¹³⁴ To add further context to this data, 85 percent of all Republican voters in the 2020 presidential election were white, while 15 percent were voters of color (defined in the poll as Black, Latinx, or other non-white races).¹³⁵ In contrast, roughly 60 percent of all Democratic voters in the 2020 election were white, while 40 percent were voters of color.¹³⁶

These correlations in party affiliations between racial classes are important when considering the changing demographics of the country. Currently, non-Hispanic white voters make up 69 percent of the registered voting base, Black and Hispanic voters make up 11 percent each, and Asian American voters make up 5 percent of total voters.¹³⁷ These numbers are likely to see significant changes, considering that the overall share of white Americans has consistently dropped as the overall population becomes more diverse.¹³⁸ Further, the population of people of color—those who identify as “Latin[x] or Hispanic, Asian American, Black, Native American, or two or more races (including whites)” —is consistently on the rise, with children of color now comprising “more than half (53 percent) of the nation’s total youth population, as well as in 21 states.”¹³⁹

These statistics strongly suggest that, at the very least, there is some correlation between race and political association which could blur the lines between partisan and racial gerrymanders. The ever-growing diversity in the country should be a positive sign for those who pride themselves on our country being a “melting pot” of cultures and ethnicities. Nationalistic and xenophobic sentiments, however, bring forth a troubling trend among certain political circles perpetuating a “Great Replacement” rhetoric. The following Section discusses how this rhetoric has further blurred the line between racial and partisan distinctions.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Yair Ghitza & Jonathan Robinson, *What Happened in 2020*, CATALIST, <https://catalist.us/wh-national/> [<https://perma.cc/C8VZ-CXG2>] (last visited June 12, 2022).

¹³⁶ *See id.*

¹³⁷ *See* Gramlich, *supra* note 128 (describing the voting share of white, Black, and Hispanic voters); *see also* Abby Budiman, *Asian Americans Are the Fastest Growing Racial or Ethnic Group in the U.S. Electorate*, PEW RSCH. CTR. (May 7, 2020), <https://www.pewresearch.org/fact-tank/2020/05/07/asian-americans-are-the-fastest-growing-racial-or-ethnic-group-in-the-u-s-electorate/> [<https://perma.cc/DW32-3LU4>].

¹³⁸ *See, e.g.,* Mike Schneider, *Census Shows US Is Diversifying, White Population Shrinking*, AP NEWS (Aug. 12, 2021), <https://apnews.com/article/census-2020-house-elections-4ee80e72846c151aa41a808b06d975ea> [<https://perma.cc/GH3A-MZGG>] (describing how recent Census data shows the overall population share of white Americans “fell from 63.7 percent in 2010 to 57.8 percent in 2020”).

¹³⁹ William H. Frey, *America’s Shrinking White Population Needs to Value Youthful Diversity*, BROOKINGS (Sept. 9, 2021), <https://www.brookings.edu/blog/the-avenue/2021/09/09/americas-shrinking-white-population-needs-to-value-youthful-diversity/> [<https://perma.cc/6AM6-K7R>].

B. The Rise of the 'Great Replacement' Theory

The “Great Replacement” theory—a concept “popular in white supremacist circles that immigrants are being brought in to replace native-born (read: White) Americans”—has been a consistent talking point circling around extremist white nationalist communities.¹⁴⁰ Recently, however, this language has made its way into national politics, including in the redistricting processes. In particular, Republican figureheads have embraced the replacement theory belief that the growing number of voters of color in this country is part of a greater Democratic ploy to add new voters to their ranks.¹⁴¹ Such statements explicitly denote the thinking of some members of the Republican party—increased voter turnout from communities of color directly correlates to increased votes for the Democratic Party.

An example of this line of thinking can be found in the recent comments of Texas Lieutenant Governor Dan Patrick. As part of his duties, Patrick is one of five members on the Legislative Redistricting Board of Texas, which draws the district lines of the state should its legislature fail to do so.¹⁴² Patrick, in an interview with Fox News anchor Laura Ingraham stated that Democratic policy invites millions of Latinx immigrants into the country, and “every one of them has two or three children Who do you think they’re going to vote for?”¹⁴³ Patrick’s rhetorical question implies that he, a member of Texas’ Redistricting Board, directly correlates the rise of Latinx immigrants with a rise in Democratic vote.

It is worth noting that the “Great Replacement”¹⁴⁴ theory concept also permeates into Democratic Party rhetoric, and party leaders are not insulated from its line of reasoning. In an interview discussing Black voters during the lead-up to the 2020 election, then-Democratic candidate Joe Biden stated, “[i]f you have a

¹⁴⁰ Aaron Blake, *How Republicans Learned to Stop Worrying and Embrace 'Replacement Theory' — by Name*, WASH. POST (Sept. 27, 2021, 4:54 PM), <https://www.washingtonpost.com/politics/2021/09/27/how-republicans-learned-stop-worrying-embrace-replacement-theory-by-name/> [<https://perma.cc/WTG6-5MUJ>].

¹⁴¹ See, e.g., @EliseStefanik, TWITTER (May 16, 2022, 5:55 AM), <https://twitter.com/EliseStefanik/status/1526169590841106432> [<https://perma.cc/28AP-K9FY>] (“Democrats desperately want wide open borders and mass amnesty for illegals allowing them to vote.”). Elise Stefanik is the Chair of the House Republican Conference. See *About Congresswoman Stefanik*, ELISE STAFANIK, <https://stefanik.house.gov/about-congresswoman-stefanik> [<https://perma.cc/LMH6-JM76>] (last visited June 22, 2022).

¹⁴² See TEX. CONST. art. 3, § 28.

¹⁴³ James Barragán, *Dan Patrick Warns Democrats Are Allowing in Immigrants for 'Silent Revolution,' Mirroring Language of Far-Right Extremists*, TEX. TRIB. (Sept. 17, 2021, 10:00 AM), <https://www.texastribune.org/2021/09/17/texas-dan-patrick-immigrants-democrats-haitians/> [<https://perma.cc/Z9DF-3HRB>].

¹⁴⁴ See generally Laurretta Charlton, *What Is the Great Replacement* (Aug. 6, 2019), N.Y. TIMES, <https://www.nytimes.com/2019/08/06/us/politics/grand-replacement-explainer.html> [<https://perma.cc/DK8T-M78Z>].

problem figuring out whether you're for me or Trump, then you ain't Black."¹⁴⁵ Biden later apologized for the insensitive comment, but in the apology, he acknowledged that he needed the Black vote in order to win the presidency.¹⁴⁶

When both parties explicitly acknowledge the advantage or disadvantage they receive in elections due to changes or propensities in certain demographics, it is fair to question why the Court has failed to consider similar lines of reasoning and has separated partisan from racial gerrymanders. Further, as changing demographics persist, it is fair to assume that such rhetoric will not only continue but will also strengthen. As discussed in the next Section, this strengthening has led to a consequence of increased political divisiveness and, should the Court continue to separate race from politics, such divisiveness can become a severe detriment to the democratic electoral process.

C. A New Era of Hyper-partisanship

At the time *Rucho* was decided, the Court may have felt the political climate fit into the general ebb and flow of hyper-partisanship seen throughout this country's history.¹⁴⁷ The Court itself seemed to predicate its opinion on the idea that voters shift their allegiance throughout their lifetime, and there are independent voters upon which no party can rely:

Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes.¹⁴⁸

This sentiment, however, failed to consider the current gravity of today's political climate, in which the ideological overlap in political party affiliations is low, and more Americans are voting on strict party lines. Republicans today vote

¹⁴⁵ Breakfast Club Power 105.1 FM, *Joe Biden on Woman Running Mate, Democrats Taking Black Voters for Granted + Wiping Weed Crime*, YOUTUBE, 17:21–17:27 (May 22, 2020), https://www.youtube.com/watch?v=KOIFs_SryHI [<https://perma.cc/C8CN-WK9A>].

¹⁴⁶ Quint Forgey & Myah Ward, *Biden Apologizes for Controversial 'You Ain't Black' Comment*, POLITICO (May 22, 2020, 6:54 PM), <https://www.politico.com/news/2020/05/22/joe-biden-breakfast-club-interview-274490> [<https://perma.cc/T934-5N8J>].

¹⁴⁷ See Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1380–87 (2020) (noting that much of the law of redistricting has “grown up during an era of unusual bipartisanship” while the “skepticism about the political science reached its obvious apex in *Rucho v. Common Cause*”).

¹⁴⁸ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2503 (2019).

consistently for Republicans, and Democrats vote consistently for Democrats.¹⁴⁹ Additionally, in our current state, following the 2020 election and the campaigns of misinformation that culminated with the January 6 insurrection,¹⁵⁰ heightened partisanship serves as a direct and poignant threat to the safety of our democracy.¹⁵¹

Evidence of such hyper-partisanship can be found in the statements of current legislators and party officials that perpetuate the “Stop the Steal” movement and threaten future violence as an eventual consequence of alleged election fraud.¹⁵² Additionally, following the 2020 election, an election which has been validated as legitimate,¹⁵³ only 26 percent of Republicans felt Donald Trump’s loss to President Biden was “legitimate and accurate,” while 68 percent of Republicans felt the

¹⁴⁹ See Kang, *supra* note 147, at 1418–19 (showing that the disparity in split-ticket voting versus straight ticket voting in the past century has widened significantly since the 1990s).

¹⁵⁰ See Craig Silverman, Craig Timberg, Jeff Kao & Jeremy Merrill, *Facebook Hosted Surge of Misinformation and Insurrection Threats in Months Leading Up to Jan. Attack, Records Show*, PROPUBLICA (Jan. 4, 2022, 8:00 AM), <https://www.propublica.org/article/facebook-hosted-surge-of-misinformation-and-insurrection-threats-in-months-leading-up-to-jan-6-attack-records-show> [<https://perma.cc/HFC5-LQE>] (describing how false news stories ran rampant in the days leading up to the January 6 protest, which culminated in Trump-supporting protestors storming the Capitol and demanding that Senators not count electoral votes).

¹⁵¹ See Zogby, *The Zogby Poll: Will the US Have Another Civil War?*, ZOGBY ANALYTICS (Feb. 4, 2021), <https://zogbyanalytics.com/news/997-the-zogby-poll-will-the-us-have-another-civil-> [<https://perma.cc/QK3N-WEEL>] (illustrating that a plurality—46 percent—of Americans believed after the 2020 election that a future civil war amongst parties was likely).

¹⁵² See @polialertcom, TWITTER (Aug. 30, 2021 5:03 PM), <https://twitter.com/polialertcom/status/1432478998282518538> [<https://perma.cc/52QM-6MBD>] (including a video of U.S. Representative Madison Cawthorn saying, “[i]f our election systems continue to be rigged, continue to be stolen, then it’s going to lead to one place and that’s bloodshed”); Ramona Giwargis, *‘The War has Begun’: Silicon Valley Official Called to Resign over Facebook Posts, San Jose Spotlight* (Jan. 9, 2021), <https://sanjosespotlight.com/the-war-has-begun-silicon-valley-official-called-to-resign-over-facebook-posts/> Phil Reynolds [<https://perma.cc/Q9JF-43KS>] (noting a since-deleted tweet by Phil Reynolds, an elected member of Santa Clara’s County Republican Party’s Central Committee, saying, “The war has begun! Citizens take arms! FREEDOM SHALL PREVAIL!!! WE MUST DEFEND OUR CONSTITUTION TO THE DEATH!”); Daniel Bice, *St Croix County Republican Party Tells Members to ‘Prepare for War’ and to Remove ‘Leftist Tyrants’ from Local Office*, MILWAUKEE J. SENTINEL (Jan. 11, 2021, 4:38 PM), <https://www.jsonline.com/story/news/investigations/daniel-bice/2021/01/11/st-croix-republican-party-urges-members-prepare-war/6622950002/> [<https://perma.cc/KNU8-J5AJ>] (showing a screenshot of the St. Croix Republican Party’s website which containing the statement “If you want peace, prepare for war” as its header).

¹⁵³ See *It’s Official: The Election Was Secure*, BRENNAN CTR. FOR JUST. (Dec. 11, 2020), <https://www.brennancenter.org/our-work/research-reports/its-official-election-was-secure> [<https://perma.cc/WW7A-GZTZ>].

election was “rigged.”¹⁵⁴ Further, over one-third of all Americans feel that the 2020 election was stolen away from Donald Trump.¹⁵⁵

The *Rucho* majority felt confident that state courts were an adequate, objective solution to resolve partisan gerrymandering disputes.¹⁵⁶ State legislatures, however, are now looking to take away any state supreme court judicial review when it comes to redistricting. In the Court’s upcoming case, *Moore v. Harper*,¹⁵⁷ the state of North Carolina is looking to use a brand new “independent state legislature” theory to petition the Court to deny a state supreme court reversal on a Republican Party gerrymander.¹⁵⁸ This theory promotes the idea that a state legislature has nearly unbridled authority to set procedures in federal elections, and state courts cannot supplant nor review this authority.¹⁵⁹ Such an action serves as an example of how hyper-politically charged legislatures are already looking to supplant what they view as a weak authority to review their redistricting responsibility.

Further, the current makeup of state courts suggests that leaving these decisions out of the reach of federal review only adds to partisan divide and creates more distrust in the democratic process as it currently stands. Currently, eight states (representing over one-fourth of the nation’s total population) have partisan elections to nominate state supreme court justices.¹⁶⁰ The partisan election process in determining state judges has historically been criticized.¹⁶¹ Due to their political affiliations, these judges’ decisions may skew in favor of the policy goals of their

¹⁵⁴ Chris Khan, *Half of Republicans Say Biden Won Because of a ‘Rigged’ Election: Reuters/Ipsos Poll*, REUTERS (Nov. 28, 2020, 4:05 AM), <https://www.reuters.com/article/us-usa-election-poll/half-of-republicans-say-biden-won-because-of-a-rigged-election-reuters-ipsos-poll-idUSKBN27Y1AJ> [<https://perma.cc/JQ6B-9CXA>].

¹⁵⁵ *See id.*

¹⁵⁶ *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019); *supra* note 104 and accompanying text.

¹⁵⁷ *Moore v. Harper*, 2022 WL 2347621 (2022).

¹⁵⁸ *See* Zach Montellaro & Josh Gerstein, *Supreme Court to Hear Case on GOP ‘Independent Legislature’ Theory that Could Radically Reshape Elections*, POLITICO (JUNE 30, 2022, 11:55 AM), <https://www.politico.com/news/2022/06/30/supreme-court-gop-independent-legislature-theory-reshape-elections-00043471> [<https://perma.cc/3B4A-C4MH>].

¹⁵⁹ *See id.*

¹⁶⁰ *Judicial Selection in the States*, *Ballotpedia*, https://ballotpedia.org/Judicial_selection_in_the_states [<https://perma.cc/V2ET-DD6L>] (last visited June 12, 2022); *see also* Adam Liptak, *Judges Who Are Elected Like Politicians Tend to Act Like Them*, N.Y. TIMES (Oct. 3, 2016), <https://www.nytimes.com/2016/10/04/us/politics/judges-election-john-roberts.html> [<https://perma.cc/7FGH-DJ2G>] (noting that judges in 39 states face some type of election process).

¹⁶¹ *See, e.g.,* *Republican Party of Minn. v. White*, 536 U.S. 765, 792 (2002) (O’Connor, J., concurring) (“If the State has a problem with judicial impartiality, it is largely one that the State brought upon itself by continuing the practice of popularly electing judges.”).

preferred party.¹⁶² Thus, elected judges reviewing a state's redistricting map can have an underlying incentive to decide a case that favors their affiliated political party. Additionally, voters may associate a court's decision about electoral maps with their perception of those judges' political affiliations, thus further fueling the public's view that the election process is rigged. This type of review has obvious political consequences and makes some state courts—counter to the *Rucho* majority's opinion—perhaps the worst suited to deal with this type of review.

The federal courts have the standards and distanced objectivity to better handle these types of partisan gerrymander reviews. The Court, however, has ignored this practicality of federal review, and instead suggested that the process should come from Congressional or state legislative action.¹⁶³ Such a decision is effectively asking voters whose political power has been sapped by partisan gerrymandering to then use their now-limited political power to put a stop to partisan gerrymandering.¹⁶⁴ The reasoning is circular and does not consider the harm caused when an individual is not equally represented in the democratic process. Further, the hyper-partisan nature of politics the Court failed to consider in *Rucho* heavily suggests that these redistricting decisions should have some federal review. The Court must step-in when blatantly political practices dilute the voice of a political party, no matter which political party may benefit from such gerrymandering.

Of course, as this Note has described above, the Court can still decide cases on ideological lines and is not completely without bias in this regard. But of the three branches that could decide this issue, the federal judiciary has the standards and distanced objectivity to better handle these types of partisan gerrymander reviews. As Justice Kagan noted in her *Rucho* dissent, “[i]f [state courts] can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why [can't] we?”¹⁶⁵

Part V will discuss a viable standard that the Court could apply to fill this judicial gap.

¹⁶² See, e.g., Kate Berry, *How Judicial Elections Impact Criminal Cases*, BRENNAN CTR. FOR JUST. (Dec. 2, 2015), <https://www.brennancenter.org/our-work/research-reports/how-judicial-elections-impact-criminal-cases> [<https://perma.cc/MA5T-ETFB>] (“[P]roximity to re-election makes judges more punitive—more likely to impose longer sentences, affirm death sentences and even override life sentences to impose death.”); Billy Corriher, *Partisan Judicial Elections and the Distorting Influence of Campaign Cash*, CTR. FOR AM. PROGRESS (Oct. 25, 2012), <https://www.americanprogress.org/article/partisan-judicial-elections-and-the-distorting-influence-of-campaign-cash/> [<https://perma.cc/KJ7T-NKZJ>] (arguing that partisan judicial elections lead to increased partisanship among judges).

¹⁶³ See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019) (noting several proposed or enacted actions by states or Congress that seek to limit gerrymandering).

¹⁶⁴ Cf. David A. Graham, *John Roberts Says Partisan Gerrymandering Is Not His Problem*, ATLANTIC (June 27, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/partisan-gerrymandering-supreme-court-north-carolina/592741/> [<https://perma.cc/3RXX-BA2T>] (arguing that the Supreme Court's decision in *Rucho* leaves voters with nowhere to turn).

¹⁶⁵ *Rucho*, 139 S. Ct. at 2524.

V. A NEW TEST FOR PARTISAN GERRYMANDERING CLAIMS

For the Court to adequately reconsider the justiciability of partisan gerrymandering claims, it is paramount that the Court adopt a standard for which it can scrutinize such claims.¹⁶⁶ In adopting a standard, the Court should use as its benchmark the dissent's proposal in *Rucho*.¹⁶⁷

Under this test, a party would only be able to prevail on an Equal Protection partisan gerrymandering claim if they can prove a redistricting reapportionment had (1) the intent; (2) the effect; and (3) the causation to effectively target a certain political party and dilute their voting power by way of drawing district lines in a particular manner.¹⁶⁸ I further suggest, however, that the Court incorporate computer models focused on the traditional redistricting principles into the test to lessen human bias and create a more objective analysis.

The Court should use statistical analysis to determine the test's first two parts—intent and effect. Professor Samuel Wang recently offered three modeling tests that should be adopted.¹⁶⁹ The first two tests use statistical models to indicate whether there was intent to gerrymander and favor a particular party.¹⁷⁰ The third test uses rapid computer simulation models to analyze whether the intent actually affected gerrymandering.¹⁷¹

The first test, which is used to determine intent, is the “lopsided outcomes” test.¹⁷² This test compares “the difference between the share of Democratic votes in the districts that Democrats win and the share of Republican votes in the districts that Republicans win.”¹⁷³ Under this test, a gerrymander is considered well-executed if it “has a maximum number of districts that each contain just enough governing-party supporters to let the party's candidates win and hold the seat safely . . . [a]nd it packs the opposition's support into a minimum number of districts that the opposition will win overwhelmingly.”¹⁷⁴ Intent is shown through this test through electoral partisan outcomes which skew so heavily in favor of one political party, that such a result could not have realistically arisen by chance, and thus heavily implies deliberate actions by those who drew the lines.¹⁷⁵

¹⁶⁶ Presently, there is no such standard or test. *See* Part III.B.

¹⁶⁷ *See supra* Part III.B.2.b.

¹⁶⁸ *Id.*

¹⁶⁹ Samuel S.-H. Wang, *Three Practical Tests for Gerrymandering: Application to Maryland and Wisconsin*, 15 ELECTION L.J. 367 (2016).

¹⁷⁰ *See id.* at 377.

¹⁷¹ *See id.* at 377–78.

¹⁷² *Id.* at 376.

¹⁷³ *Id.*

¹⁷⁴ Michael Wines, *What Is Gerrymandering? And How Does It Work?* N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/us/what-is-gerrymandering.html> [<https://perma.cc/R4NG-K2TN>].

¹⁷⁵ *See* Wang, *supra* note 169, at 368.

The second test, also used to determine intent, is referred to as the “reliable wins” test.¹⁷⁶ There are two different versions of this test which are dependent on whether a state’s political representation is closely divided or whether it is a state where the redistricting party is dominant.¹⁷⁷ Under the closely divided intent application, the test measures the difference between the mean and median vote shares of a party.¹⁷⁸ Under the dominant party application, the test compares the standard deviations of the dominant party’s vote share in the district it wins statewide with the vote share of the districts won nationwide.¹⁷⁹

Once intent has been confirmed through the first two steps, the third and final test, referred to as the “excess seats” test,¹⁸⁰ is used to indicate whether there was a discriminatory effect in a partisan gerrymandering process. The excess means test uses rapid computer simulations to gauge “whether the outcome of an election after redistricting was dysproportional relative to a simulated seats/votes curve and whether that outcome favors the redistricting party.”¹⁸¹

Once discriminatory intent and effect have been found using Wang’s three tests, the Court can go to the third step of this proposed standard and determine whether the reapportionment caused a partisan gerrymander. This test will be a traditional scrutiny analysis in which “the State must come up with a legitimate, non-partisan justification to save its map.”¹⁸²

This standard, a mixture of historical Court jurisprudence with precise statistical analysis, would work to mitigate the harm caused by the largest deficiency in the gerrymandering process—human discretion. At a time when distrust in the democratic process is at a historic high, a non-biased judicial approach to gerrymandering questions may just be the solution to restoring faith in our democracy.

VI. CONCLUSION

The Court has found itself at a distinct time in history, where Americans are skeptical about the integrity of our democratic structure, and distrust for its safeguards are at an all-time high. With its decision in *Rucho* to deny federal judicial review to even the most egregious of partisan gerrymanders, the Court failed to calm this sentiment, and instead added fuel to the hyper-partisan fire. But with a reconsideration of this decision and implementation of the objective test suggested in this Note, the Court would have the opportunity to become a countering force to

¹⁷⁶ *Id.* at 376.

¹⁷⁷ *Id.* at 376–77.

¹⁷⁸ *See id.* at 376.

¹⁷⁹ *Id.* at 377.

¹⁸⁰ *Id.*

¹⁸¹ *See id.*

¹⁸² *Rucho v. Common Cause*, 139 S. Ct. 2484, 2516 (2019) (5-4 decision) (Kagan, J., dissenting).

this distrust and bring some credibility back to the electoral process. The Court has the choice to accept its responsibility to safeguard Americans from partisan corruption of the electoral process, or it can continue its current course and watch from the sidelines as the legitimacy of our democratic processes erodes.