

# RACIAL GERRYMANDERING'S QUESTIONABLE REVIVAL

*Richard L. Hasen\**

## INTRODUCTION

Like history, the racial gerrymandering cause of action has repeated itself, the first time as tragedy, the second time as farce.<sup>1</sup>

In the 1990s, conservative members of the Supreme Court recognized a new cause of action, grounded in the Fourteenth Amendment's Equal Protection Clause, of an "unconstitutional racial gerrymander."<sup>2</sup> The claim was not one, long recognized, for the intentional dilution of black votes through the manipulative drawing of district lines. Instead, it was a shaky, ephemeral claim based solely on appearances. Racial gerrymandering is an "expressive harm," aimed at preventing jurisdictions from sending an impermissible "message" by separating voters during redistricting on the basis of race without adequate justification. As it has become understood in its current incarnation, when race becomes the "predominant factor" in redistricting, it is presumptively unconstitutional. In practice, the cause of action helped limit attempts by the U.S. Department of Justice in the 1990s to force jurisdictions then covered by section 5 of the Voting Rights Act to create more majority-minority voting districts, which tended to vote Democratic. Sometimes creating these districts helped Democrats; at other times the concentration of reliable Democratic voters helped Republicans by allowing the creation of more Republican districts elsewhere in a jurisdiction. Within a decade, however, racial gerrymandering claims seemed to wither away, as the Court used other methods to stop the Department of Justice from reading the Act too broadly.

In 2015, the Supreme Court revived racial gerrymandering claims.<sup>3</sup> In *Alabama Legislative Black Caucus v. Alabama*, the four liberals on the Court and Justice Kennedy agreed with Democrats and minority voters that

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\* Chancellor's Professor of Law and Political Science, UC Irvine School of Law. Thanks to Morgan Kousser, Nate Persily, and Nick Stephanopoulos for useful comments and suggestions.

1. Cf. KARL MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* 13 (C.P. Dutt ed., N.Y. Int'l Publishers 1935) (1852) ("Hegel remarks somewhere that all great, world-historical facts and personages occur, as it were, twice. He has forgotten to add: the first time as tragedy, the second as farce.").

2. See *infra* Part I.

3. See *infra* Part II.

the state of Alabama engaged in an unconstitutional racial gerrymander when it passed a legislative districting plan that over-concentrated black voters in majority-minority districts in ostensible compliance with the Voting Rights Act.<sup>4</sup> There was great irony in the use of the racial gerrymandering cause of action by minority voters who had rejected it in the 1990s, in its acceptance by liberal justices, and in the defense of race-based redistricting by Alabama Republicans and some conservative Supreme Court justices.<sup>5</sup> While racial gerrymandering has for now become a useful tool for Democrats and minority plaintiffs to fight certain Republican gerrymanders, it is no more coherent or justified now than it was the first time the Court recognized it in the 1990s.

This Essay proceeds in three parts. Part I briefly describes the emergence of the racial gerrymandering cause of action in the 1990s and the critiques made of it. Part II briefly describes the circumstances leading up to the 2015 *Alabama* case and the Court's questionable revival of the racial gerrymandering claim. Part III argues that the racial gerrymandering claim is no more defensible when used by Democrats or minority voters than by conservatives or Republicans. No doubt the Alabama legislature used compliance with the Voting Rights Act as a pretext to pack more reliable Democratic voters into a smaller number of districts to help Republicans in the state overall. But that behavior should be policed as either a form of impermissible racial vote dilution or as inappropriate partisan behavior. In the end, the Supreme Court has relied upon the incoherent racial gerrymandering claim because the Court lacks the right tools to police certain political conduct that might be impermissibly racist, partisan, or both. Liberal and conservative scholars have long recognized that the Voting Rights Act's enforcement and interpretation can have partisan implications and motivations. The same is now true for racial gerrymandering claims, especially given the great overlap of race and party categories in the South.

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4. 135 S. Ct. 1257, 1265–69 (2015).

5. On earlier ironies, see J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 667 (2008).

I. RACIAL GERRYMANDERING IN THE 1990s<sup>6</sup>

Legislators often draw lines for congressional, state, and local legislative districts for self-interested reasons, but they face a number of judicially imposed constraints.<sup>7</sup>

To begin with, since the Supreme Court's one-person, one-vote cases in the 1960s, legislative districts cannot have great disparities in the number of people in them because disparities give voters in smaller populated districts greater voting power in violation of the Fourteenth Amendment's Equal Protection Clause.<sup>8</sup> This rule has required states to redistrict after each census to equalize the district populations that shift over each decade. In contrast to congressional redistricting, in which there may be little or no deviation from strict population equality, the Court has allowed state and local redistricting to deviate somewhat from strict equality for legitimate reasons, such as preserving city or county boundaries.<sup>9</sup> For a long time, the Court seemed to allow up to a ten-percent population deviation.<sup>10</sup> However, the Supreme Court's summary affirmance in the 2004 *Larios v. Cox*<sup>11</sup> case has been understood to prevent deviations from strict population equality done for bad reasons, such as to help one's political party.<sup>12</sup>

States cannot intentionally dilute the votes of some voters on the basis of race under the Fourteenth and Fifteenth Amendments.<sup>13</sup> The Court has not yet developed a test to determine when it is impermissible to dilute the votes of some voters on the basis of party; thus, while partisan gerrymandering claims may still be brought to court, they inevitably fail.<sup>14</sup> Further, under section 2 of the Voting Rights Act, states must create districts in which racial minorities have the ability to elect candidates of

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6. This section draws from Richard Hasen, *Argument Preview: Racial Gerrymandering, Partisan Politics, and the Future of the Voting Rights Act*, SCOTUSBLOG (Oct. 30, 2014, 3:02 PM), <http://www.scotusblog.com/2014/10/argument-preview-racial-gerrymandering-partisan-politics-and-the-future-of-the-voting-rights-act/>, and RICHARD L. HASEN, LEGISLATION, STATUTORY INTERPRETATION, AND ELECTION LAW: EXAMPLES AND EXPLANATIONS § 11.4 (2014).

7. State law also may impose constraints, such as mandating that redistricting authorities respect municipal boundaries or meet a certain compactness standard.

8. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964).

9. *Brown v. Thomson*, 462 U.S. 835, 843–45 (1983). On the Court's perhaps newfound flexibility on strict equality in congressional districting, see *Tennant v. Jefferson Cty.*, 133 S. Ct. 3 (2012).

10. See DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN & DANIEL P. TOKAJI, *ELECTION LAW: CASES AND MATERIALS* 74 (5th ed. 2012).

11. 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947, 947 (2004).

12. LOWENSTEIN, HASEN & TOKAJI, *supra* note 10, at 74.

13. *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 65, 67 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 3, § 2, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301 (2012)).

14. See *Vieth v. Jubelirer*, 541 U.S. 267, 305–06 (2004).

their choice (majority-minority districts)<sup>15</sup> under certain conditions (the *Gingles* factors), beginning with proof that the minority group is sufficiently large and geographically compact for it to be possible to draw a majority-minority district and that there is “racially polarized voting,” meaning that whites and minority voters tend to vote for different candidates.<sup>16</sup>

Until 2013, jurisdictions with a history of racial discrimination were subject to federal oversight of their voting laws. Under section 5 of the Voting Rights Act, these covered jurisdictions could not make a change in their redistricting maps (or other voting rules) without convincing either the Department of Justice or a three-judge federal court in Washington, D.C., that its changes would not have the effect of making minority voters worse off (the non-retrogression principle) or have an unconstitutional or retrogressive purpose.<sup>17</sup> In the context of redistricting, non-retrogression had generally been understood as a requirement for covered jurisdictions not to decrease the number of majority-minority voting districts, although this standard was sometimes debated.<sup>18</sup> In 2013, the Supreme Court in *Shelby County, Alabama v. Holder* rejected the formula under which Alabama was subject to preclearance as constitutionally outdated.<sup>19</sup>

In addition to all of these rules, the Court in the 1990s first recognized the racial gerrymandering cause of action as a constraint on redistricting. This cause of action is the key concern of this Essay.

By the 1990s, the United States Department of Justice had become aggressive in enforcing section 5 of the Voting Rights Act in the redistricting context. Through broad readings of the scope of the Act, the DOJ required covered jurisdictions to create as many majority-minority districts as plausibly could be drawn given the size of a minority population.<sup>20</sup>

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15. It is probably more correct to refer to these districts these days as “ability-to-elect” districts, since they need not be literally made up of a majority of minority voters to meet Voting Rights Act requirements. However, the majority-minority language has been used for a long time to refer to these districts, and I will continue to do so here.

16. *Thornburg v. Gingles*, 478 U.S. 30, 50–51, 56 (1986). For a general overview of the *Gingles* factors and section 2 redistricting claims generally, see HASEN, *supra* note 6, at 280–88.

17. On the history and workings of section 5, see HASEN, *supra* note 6, at 265–73.

18. The issue became complicated by the Supreme Court’s decision in *Georgia v. Ashcroft*, 539 U.S. 461, 479–81 (2003), when the Supreme Court offered a more nuanced test for judging retrogression—a test that Congress may have partially reversed in the 2006 Amendments to the Voting Rights Act. See Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 *YALE L.J.* 174, 190 (2007). The issue was never fully tested because the Supreme Court made section 5 at least temporarily unenforceable in the *Shelby County* case, discussed below.

19. 133 S. Ct. 2612, 2631 (2013).

20. For a critical examination, see ABIGAIL THERNSTROM, *VOTING RIGHTS—AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS* ch. 5 (2009).

In the 1990s round of state legislative redistricting in North Carolina, self-interested Democrats reacted to the DOJ's demands to create an additional majority-minority legislative district by passing a plan that simultaneously created the required number of such districts, protected Democratic incumbents, and maximized the number of Democratic seats. To accomplish these goals, the mapmakers drew some very oddly shaped majority-minority districts, including one that tied together disparate populations of African-American voters along the I-85 freeway corridor.<sup>21</sup>

Republicans initially challenged the legislative districting plan as a partisan gerrymander. The claim failed, following the fate of other partisan gerrymandering claims.<sup>22</sup> Opponents of the redistricting plan then filed a new claim, arguing that the redistricting was an unconstitutional racial gerrymander.<sup>23</sup> Importantly, the claim was *not* that the plan diluted the white vote or anyone else's vote.<sup>24</sup> The plaintiffs were pushing a view of a colorblind Constitution and election process,<sup>25</sup> arguing that the plan separated voters on the basis of race in violation of the Equal Protection Clause.<sup>26</sup>

In *Shaw v. Reno*, the Supreme Court accepted the argument, creating a cause of action for an unconstitutional racial gerrymander.<sup>27</sup> Justice O'Connor's decision for the Court stressed the odd shape of the district and said that the odd shape showed voters being separated on the basis of race, in violation of the Constitution:

Put differently, we believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc

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21. See LOWENSTEIN, HASEN & TOKAJI, *supra* note 10, at 236–37.

22. See *Pope v. Blue*, 809 F. Supp. 392, 399 (W.D.N.C.), *aff'd*, 506 U.S. 801 (1992).

23. See *Shaw v. Reno*, 509 U.S. 630, 636 (1993).

24. *Id.* at 641.

25. *Id.* at 641–42.

26. See *id.* at 642.

27. See *id.* at 657–58.

voting that majority-minority districting is sometimes said to counteract.

The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.<sup>28</sup>

The Court held such separation could not be sustained unless it satisfied strict scrutiny and remanded the case for further consideration of justification.<sup>29</sup>

*Shaw* was harshly criticized by some liberals and others.<sup>30</sup> Why should there be a cause of action for race-conscious districting without evidence of vote dilution? Why should the shape of the district matter? Where was the evidence that the shape of the district affected representation in the way suggested by the majority? In any case, the districts at issue in *Shaw* had many white and African-American voters in them—they were not “apartheid” districts containing only African-Americans.<sup>31</sup>

Subsequent cases in the 1990s fleshed out the theory and workings of the new racial gerrymandering claim.<sup>32</sup> Justice O’Connor explained in a later case that the interest she was protecting was against an “expressive harm.”<sup>33</sup> As Professors Richard Pildes and Richard Niemi explain:

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28. *Id.* at 647–48 (citations omitted).

29. *See id.* at 657–58.

30. *See, e.g.*, A. Leon Higginbotham, Jr., Gregory A. Clarick & Marcella David, *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 *FORDHAM L. REV.* 1593, 1620 (1994); Pamela S. Karlan, *All Over the Map: The Supreme Court’s Voting Rights Trilogy*, 1993 *SUP. CT. REV.* 245, 286–87; Daniel Hays Lowenstein, *You Don’t Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 *STAN. L. REV.* 779, 795–98 (1998).

31. Karlan, *supra* note 30, at 282.

However race-conscious the General Assembly had been, and it concededly had drawn the plan with the intent to create two majority-black districts, it had not in fact segregated the races into separate districts. Consider the racial composition of the two districts in which the *Shaw* plaintiffs lived. House District 2’s population was 76.23 percent white and 21.94 percent black; House District 12’s population was 41.80 percent white and 56.63 percent black. To say that either district even remotely resembles “political apartheid”—especially given that House District 2, where a majority of the *Shaw* plaintiffs lived, was a nearly perfect mirror of the state’s overall racial makeup—would be risible if it were not so pernicious.

*Id.* (footnotes omitted).

32. *See Miller v. Johnson*, 515 U.S. 900, 913–14 (1995).

33. *See Bush v. Vera*, 517 U.S. 952, 984 (1996) (“We are aware of the difficulties faced by the States, and by the district courts, in confronting new constitutional precedents, and we also know that the nature of the expressive harms with which we are dealing, and the complexity of the districting process, are such that bright-line rules are not available.”).

One can only understand *Shaw*, we believe, in terms of a view that what we call *expressive* harms are constitutionally cognizable. An expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about. On this view, the *meaning* of a governmental action is just as important as what that action *does*. Public policies can violate the Constitution not only because they bring about concrete costs, but because the very meaning they convey demonstrates inappropriate respect for relevant public values. On this unusual conception of constitutional harm, when a governmental action expresses disrespect for such values, it can violate the Constitution.<sup>34</sup>

Although Justice O'Connor continued to focus on the shape of the district, other Court conservatives shifted the focus to motive. In *Miller v. Johnson*, the Court held that race could not be the "predominant factor" in redistricting without compelling justification.<sup>35</sup> The *Miller* Court concluded that the Georgia legislature had such an impermissible predominant motive and remanded under the strict scrutiny standard to determine whether the state's apparent decision to make race predominate the redistricting process was justified by a compelling state interest.<sup>36</sup> The harm in *Miller* appeared to be the same as in *Shaw*, but the proof moved from district shape to legislative motive.

To talk of the state's "predominant" motive in redistricting was odd, however, because the state of Georgia, subject to preclearance, was simply drawing the number of majority-minority districts required by the DOJ. If anything, its predominant motive was to obtain preclearance of its plan by proposing the number of majority-minority districts the DOJ demanded. The placement of the districts appeared motivated not by race but by party and incumbency considerations. Nonetheless, the Court found race to be the predominant factor.<sup>37</sup>

The new test led lower courts to search for an impermissible legislative motive: a difficult, if not impossible, task when examining the votes of a multimember body.<sup>38</sup> In 2001, the Court decided *Easley v. Cromartie*,<sup>39</sup> the

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34. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506–07 (1993).

35. See 515 U.S. at 916.

36. See *id.* at 923–27.

37. For a thorough analysis, see Lowenstein, *supra* note 30, at 798–801.

38. Further, jurisdictions defended their districts from racial gerrymandering claims by arguing that they were created to avoid section 5 or section 2 Voting Rights Act liability. This argument led to some question as to whether the Supreme Court's conservatives would hold section 2 unconstitutional if indeed it required the creation of these districts and the making of race a predominant factor in

fourth time a North Carolina racial gerrymandering case reached the Supreme Court within a decade. In *Easley*, Justice O'Connor and the four more liberal members of the Court in an opinion by Justice Breyer rejected a challenge to North Carolina's latest redistricting plan after concluding that *party* dominance, not race, was the predominant factor in drawing the challenged district lines.<sup>40</sup>

After *Easley*, racial gerrymandering cases became far less frequent. One reason may be that redistricters got smart and started drawing more compact majority-minority districts (and hiding any evidence in emails or other discoverable correspondence of a predominant motive in using race in redistricting). Another key factor is likely the changed role of the DOJ. Because of a number of cases reining in the DOJ's powers to require the creation of additional majority-minority districts, the DOJ was no longer pushing jurisdictions to create more of them. Without such pressure, jurisdictions could avoid both DOJ liability and potential problems in the courts through the creation of too many of these districts.<sup>41</sup> Further, the DOJ under President George W. Bush may have had less appetite to pursue these claims.

The politics of the claims were strange as well. Although the original *Shaw* claim helped Republicans defeat a partisan gerrymander, the creation of safe majority-minority districts challenged in *Shaw* litigation often helped Republicans, especially in the South, create more and stronger Republican districts. Redistricting sometimes depended upon an "unholy" alliance between minority officeholders and Republicans, which sometimes led to the creation of districts that were challenged by other conservatives as racial gerrymanders.<sup>42</sup>

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redistricting. Eventually, Justice O'Connor in a separate concurring opinion in *Bush v. Vera* agreed that compliance with section 2 could be a compelling interest to justify an otherwise unconstitutional gerrymander. But she never found that any plan she considered a racial gerrymander was compelled by section 2. To reach this result, Justice O'Connor tweaked the holding of *Thornburg v. Gingles*. In *Gingles*, the first prong of the threshold test was that the minority group bringing a claim is large and compact enough to be a majority in a single-member district. Although the compactness requirement did not have much bite before the racial gerrymandering cases, Justice O'Connor read *Gingles* to require the creation of a *reasonably compact* majority-minority district. In other words, in a racial gerrymandering case, it would be hard for a state to show it was compelled to draw a majority-minority district in an odd shape to comply with section 2 if section 2 itself requires the creation of such districts only when the minority population is reasonably compact. See LOWENSTEIN, HASEN & TOKAJI, *supra* note 10, at 253–54.

39. 532 U.S. 234 (2001).

40. See *id.* at 243–44, 258.

41. Persily, *supra* note 18, at 200 n.105.

42. Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1558 (2002) (“[T]he Republican Party has come to recognize that the ‘safe districting’ approach of the 1990s favors its partisan interests, while the Democratic Party has recognized the opposite. Concentrating black voters into safe majorities tends to hurt the Democratic Party across a state as a whole because too many of the party’s most loyal voters have been safely confined to one district.”); Ari Berman, *How the GOP Is Resegregating the South*,

The most recent Supreme Court case touching on racial gerrymandering claims until the *Alabama* case is *League of United Latin American Citizens v. Perry*.<sup>43</sup> This case concerned a Texas congressional redistricting plan in the mid-2000s. Challengers raised both racial gerrymandering and section 2 claims against parts of the plan.<sup>44</sup> In a portion of the majority opinion written by Justice Kennedy and joined by the four liberal Justices, Justice Kennedy found that one of the districts, District 23, violated section 2 of the VRA because it drew together Latinos from different parts of the state that had little culturally or socio-economically in common.<sup>45</sup> The analysis appeared to merge aspects of racial gerrymandering claims into the section 2 analysis by requiring district residents to have more in common than simply race to avoid liability.

## II. RACIAL GERRYMANDERING'S 2015 REVIVAL IN ALABAMA<sup>46</sup>

In the 1990s, the Alabama legislature and Governor could not agree on a redistricting plan for carving up state legislative districts, and therefore a court drew a legislative redistricting plan. The plan contained twenty-seven house districts that were majority-minority African-American districts and eight senate districts that were majority-minority African-American districts.<sup>47</sup>

In the 2000s, the Alabama legislature, controlled by Democrats, drew a state redistricting plan that contained the same number of majority-minority house and senate districts as the 1990s plan and preserved the percentage of African-American voters in each of these districts.<sup>48</sup> The districts were allowed to deviate in population by up to ten percent.<sup>49</sup>

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THE NATION (Jan. 31, 2012), <http://www.thenation.com/article/how-gop-resegregating-south/> (“Southern Republicans formed an ‘unholy alliance’ with black Southern Democrats when it came to redistricting. In the 1980s and ’90s, when white Democrats ruled the Statehouses, Republicans supported new majority-minority districts for black Democrats in select urban and rural areas in exchange for an increased GOP presence elsewhere, especially in fast-growing metropolitan suburbs. With Democrats grouped in fewer areas, Republicans found it easier to target white Democrats for extinction.”).

43. 548 U.S. 399 (2006).

44. The Court also rejected a partisan gerrymandering claim. *See id.* at 417.

45. *See id.* at 400–03.

46. This section draws from Hasen, *supra* note 6, and Richard Hasen, *Opinion Analysis: A Small Victory for Minority Voters, or a Case with “Profound” Constitutional Implications?*, SCOTUSBLOG (Mar. 25, 2015, 12:33 PM), <http://www.scotusblog.com/2015/03/opinion-analysis-a-small-victory-for-minority-voters-or-a-case-with-profound-constitutional-implications/>.

47. Ala. Legislative Black Caucus v. Alabama, 989 F. Supp. 2d 1227, 1235–36 (M.D. Ala. 2013) (three-judge court), *vacated*, 135 S. Ct. 1257 (2015).

48. *Id.*

49. *Id.* at 1245.

After the 2010 census, the Alabama legislature, now controlled by Republicans, drew a redistricting plan that contained the same number of majority-minority senate districts and one additional majority-minority house district. Because of population shifts and declines, as well as the composition of the original 2001 districts, the African-American districts were the most underpopulated of all the districts, meaning that many voters had to be shifted into these districts to comply with one-person, one-vote requirements.<sup>50</sup>

The state legislative leaders in charge of redistricting set as a goal a deviation in population of no more than two percent across districts. Further, the leaders instructed the consultant charged with redistricting to maintain not only the same number of majority-minority districts in the two state houses but also the same percentage of African-Americans *within* each district, a decision which turns out to have been a key issue in the case before the Supreme Court. The leaders and consultant indicated that they kept the same percentage of African-American voters in each majority-minority district in order to comply with section 5 of the Voting Rights Act's non-retrogression principle.<sup>51</sup>

The result of these two commands to the redistricting consultant—a population deviation of no more than two percent across districts and preserving not just the number of majority-minority districts but also the percentage of minority members in each jurisdiction—led to the shifting of many more African-Americans into these majority-minority districts. The upshot of these changes in the context of Alabama was to pack more of the state's African-Americans, the state's most reliable Democratic voters, into fewer districts, thereby strengthening Republican voting power in districts throughout the rest of the state.

Black and Democratic legislators, voters, and groups brought a number of challenges to the state redistricting plan, including a vote-dilution challenge under section 2 of the Voting Rights Act and racial and partisan gerrymandering claims. A three-judge federal court divided two to one on the racial gerrymandering claim.<sup>52</sup> The two judges in the majority (both Republican appointees) sided with Alabama, stating that the Republican post-2010 census plan was just partisan politics, no different than what the Democrats did in the 2000 round of redistricting:

This record offers no reason to conclude that the rules for redistricting were turned upside down when Republicans gained control of the Alabama Legislature. The parties have switched

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50. *Id.* at 1294; *see also id.* at 1244–48 (tracing the history of the post-2010 redistricting process).

51. *Id.* at 1247; *see also id.* at 1323–24 (Thompson, J., dissenting).

52. *See Ala. Legislative Black Caucus*, 989 F. Supp. 2d 1227.

sides, but the law that governs their disputes remains the same. We refuse to read the Voting Rights Act and the Fourteenth and Fifteenth Amendments as mandating some kind of “Democratic candidate protection program.”<sup>53</sup>

The dissenting judge (a Democratic appointee and the only African-American judge on the panel) rejected this argument, seeing a “cruel irony”:

Even as it was asking the Supreme Court [in the *Shelby County* case] to strike down the requirement of preclearance for failure to speak to current conditions, the State of Alabama was relying on racial quotas with absolutely no evidence that they had anything to do with current conditions, and seeking to justify those quotas with the very provision it was helping to render inert.<sup>54</sup>

On the specific question whether the Alabama redistricting plan was an unconstitutional racial gerrymander, the lower court majority held it was not; the state’s predominant motive in redistricting was complying with the two-percent population deviation maximum as part of the one-person, one-vote principle, not dividing voters on the basis of race.<sup>55</sup> Further, the court held that any division of voters on the basis of race was justified by the state’s requirement to comply with the non-retrogression principle of section 5 of the Voting Rights Act.<sup>56</sup> The dissent disagreed, concluding that race was the predominant factor in redistricting and that section 5 did not require maintenance of the same percentage of minority voters in each majority-minority district.<sup>57</sup> Further, since *Shelby County* eliminated the preclearance requirement for Alabama, compliance with section 5 could no longer be a compelling interest to justify a racial gerrymander.<sup>58</sup>

The Supreme Court considered the two appeals in the case and agreed to hear only the racial gerrymandering challenges;<sup>59</sup> thus, the Court did not decide whether the packing of African-American voters into these districts constituted vote dilution in violation of section 2 of the Voting Rights Act or any other claims heard in the lower court.

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53. *Id.* at 1303.

54. *Id.* at 1347–48 (Thompson, J., dissenting).

55. *Id.* at 1294 (majority opinion).

56. *See id.* at 1295–97.

57. *See id.* at 1347 (Thompson, J., dissenting).

58. *Id.* at 1345.

59. *See* Ala. Democratic Conference v. Alabama, 134 S. Ct. 2697, 2698 (2014) (noting probable jurisdiction and limiting questions considered by the Court); Ala. Legislative Black Caucus v. Alabama, 134 S. Ct. 2695 (2014) (same).

In the Supreme Court, Justice Anthony Kennedy sided with the four more liberal Justices, over the objections of the four more conservative Justices, to rule against Alabama and send the case back for reconsideration.<sup>60</sup> The majority, in an opinion written by Justice Breyer, held that the lower court erred in considering whether Alabama's legislative redistricting plan was an unconstitutional racial gerrymander *as a whole*.<sup>61</sup> The majority sent the case back to a lower court to consider the issue on a *district-by-district* basis. It said that the lower court could consider new evidence as well as other claims that the Supreme Court did not reach, such as the "one-person, one-vote" challenge.<sup>62</sup>

But the Supreme Court majority did more than simply send the case back for a new hearing. It very strongly suggested that at least some of the districts were unconstitutional gerrymanders. It began by taking away two of the state's strongest arguments.

First, the Court held Alabama was wrong to the extent it believed that section 5 of the Voting Rights Act required Alabama to pack more African-American voters into districts in order to keep the same percentage of African-Americans in each majority-minority district.<sup>63</sup> This was a misreading of what section 5 required, and such a reading could actually hurt minority voters under some circumstances.<sup>64</sup>

Second, the Court held that Alabama could not point to its desire to have more equally populated districts as its predominant factor in redistricting.<sup>65</sup> In other words, the majority rejected the argument that the state could not engage in racial gerrymandering if its first order of the day was to maintain equally populated districts. The majority took compliance with "one-person, one-vote" out of the equation, saying this was something

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60. Much of the dispute between the majority and the dissent concerned issues likely to be unimportant in other voting cases: whether one of the sets of plaintiffs had standing and whether a key argument of the parties was properly preserved for Supreme Court appeal. Justice Breyer's majority opinion even included an appendix to show where arguments were raised in the court below. *See Ala. Leg. Black Caucus v. Alabama*, 135 S. Ct. 1257 app. A (2015).

61. *See id.* at 1265–68 (majority opinion).

62. *See id.* at 1264–65, 1274. At the end of the case, the Court remanded for consideration of these other issues in addition to the racial gerrymandering claim. *See id.* at 1274. ("We note that appellants have also raised additional questions in their jurisdictional statements, relating to their one-person, one-vote claims (Caucus) and vote dilution claims (Conference), which were also rejected by the District Court. We do not pass upon these claims. The District Court remains free to reconsider the claims should it find reconsideration appropriate. And the parties are free to raise them, including as modified by the District Court, on any further appeal.")

The rejection of the plan-as-a-whole standard seemed odd. If a state could have an unconstitutional predominant motive as to particular districts, why could it not similarly have an unconstitutional predominant motive as to an entire plan?

63. *See id.* at 1272.

64. *Id.* at 1272–74. Further, the Court's reading of the "ability-to-elect" standard could improve minority plaintiffs' chances to succeed in their claims under section 2 of the Act.

65. *See id.* at 1270–71.

that was a “background” rule to be considered *before* determining whether race is a predominant factor.<sup>66</sup>

In the end, the majority all but instructed the lower court to find that at least some of the districts were unconstitutional racial gerrymanders:

For example, once the legislature’s “equal population” objectives are put to the side—*i.e.*, seen as a background principle—then there is strong, perhaps overwhelming, evidence that race did predominate as a factor when the legislature drew the boundaries of Senate District 26, the one district that the parties have discussed here in depth.<sup>67</sup>

The Court then left open the question whether compliance with section 5 could be a compelling interest to justify what would be an otherwise unconstitutional racial gerrymander and, no doubt at the urging of Justice Kennedy, added this sentence:

Finally, we note that our discussion in this section is limited to correcting the District Court’s misapplication of the “predominance” test for strict scrutiny discussed in *Miller*. It does not express a view on the question of whether the intentional use of race in redistricting, even in the absence of proof that traditional districting principles were subordinated to race, triggers strict scrutiny.”<sup>68</sup>

With section 5 now (at least temporarily) halted by the Supreme Court’s *Shelby County* decision, courts will not soon test another case in which a state justifies its use of race as a predominant factor in redistricting by pointing to compliance with section 5.

Justice Scalia, who wrote the principal dissent, argued mostly on the question of standing and on whether the district-by-district issue was preserved on appeal.<sup>69</sup> He believed that the case was not properly litigated and the issues were not properly preserved.<sup>70</sup> On the merits, Justice Scalia said little. He began with a hyperbolic statement about the effects of the Court’s ruling, calling it a “sweeping holding that will have profound

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66. *See id.* at 1270–73.

67. *Id.* at 1271.

68. *Id.* at 1272 (citations omitted).

69. *See id.* at 1274–81 (Scalia, J., dissenting).

70. He wrote:

This disposition is based, it seems, on the implicit premise that plaintiffs only plead legally correct theories. That is a silly premise. We should not reward the practice of litigation by obfuscation, especially when we are dealing with a well-established legal claim that numerous plaintiffs have successfully brought in the past.

*Id.* at 1280.

implications for the constitutional ideal of one person, one vote, for the future of the Voting Rights Act of 1965, and for the primacy of the State in managing its own elections.”<sup>71</sup> But he offered no follow-up to explain why he believed the majority opinion would have such dire consequences, and it was not evident from the majority opinion precisely what his concerns were. It was an odd dissent, suggesting there could have been more on substance in an earlier draft that got left out of the final version. Justice Thomas, while joining (along with the Chief Justice and Justice Alito) in Justice Scalia’s dissent, dissented separately as well, to express his disagreement more broadly with Voting Rights Act jurisprudence and the permissible consideration of race in redistricting.<sup>72</sup>

It seems likely on remand that at least some of Alabama’s districts will be found to be racial gerrymanders. This means that some of these districts will have to be redrawn to “unpack” some minority voters from these districts. But Alabama could preempt the lawsuit by drawing new districts that are less racially conscious but still constitute a partisan gerrymander helping Republicans maintain great power over Alabama legislative districts. The question of how far they could go may be limited by other constraints, such as Alabama’s own substantive standards for legislative redistricting—for instance, complying with the “whole county” provision to keep counties together.

### III. RACE, PARTY, AND JURISPRUDENTIAL INCOHERENCE

During oral argument in *Alabama*, Justice Scalia commented to noted election law professor Pildes, arguing for one set of the plaintiffs: “You realize, I assume, that you’re . . . making the argument that the opponents of black plaintiffs used to make here.”<sup>73</sup> Justice Breyer too noted the “obverse and odd situation”<sup>74</sup> of African-American plaintiffs advancing racial gerrymandering arguments that used to be raised against the districting plans they supported. Indeed, speaking at the *Alabama* argument, Justice Sotomayor sounded the traditional liberal argument against racial gerrymandering claims, questioning if they are based upon an “ephemeral injury.”<sup>75</sup> Where’s the harm?

But those concerns disappeared by the time of the *Alabama* opinion; neither Justice Sotomayor nor any other liberal justice said a peep against the use of the racial gerrymandering cause of action to reject Alabama’s

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71. *Id.* at 1274.

72. *See id.* at 1281–88 (Thomas, J., dissenting).

73. Transcript of Oral Argument at 8, *Ala. Legislative Black Caucus*, 135 S. Ct. 1257 (No. 13-895).

74. *Id.* at 54.

75. *Id.* at 22.

redistricting plan. The former dissenters in the earlier racial gerrymandering cases and new liberal Justices just accepted the racial gerrymandering claim as is. It was not the first time liberals who dissented or objected to the whole *Shaw* line of cases wanted to borrow it for other purposes; *Shaw* dissenter Justice Stevens, for example, long argued that partisan gerrymandering should be judged under the same “predominant factor” standard as used in the racial gerrymandering cases, despite dissenting in those cases.<sup>76</sup> In *Easley*, Justice Breyer too accepted the *Shaw* framework, but found no violation under the facts of the case.

But it is not just Democrats and those on the left who can be accused of hypocrisy when it comes to race and voting-rights claims. Indeed, Democrats’ use of the racial gerrymandering claim is perfectly understandable in the context of the Republican gerrymanders in the 2010s. The Alabama legislature was one of many Republican legislatures packing African-Americans in districts out of ostensible compliance with the Voting Rights Act. As Justin Levitt points out, the reason Democrats and minority voters have been raising racial gerrymandering claims following the latest round of redistricting is that Republican legislatures around the country have mangled their readings of the Voting Rights Act as an excuse to pack minority voters into fewer districts.<sup>77</sup> For example, Alabama’s claim that section 5 required it to maintain the *same percentage* of minority voters within majority-minority jurisdictions was not only unsupported by earlier interpretations of the Act; it had the perverse effect of hurting minority voters. It is hard to imagine that any Alabama legislators or staffers who understood the issue actually believed the packing was required by section 5.

One can therefore see in the new racial gerrymandering cases both text and subtext. The text is Republicans’ feigned adherence to the Voting Rights Act to pass redistricting plans packing minority voters and the Democrats’ and civil rights lawyers’ feigned acceptance of the racial gerrymandering cause of action absent proof of vote dilution as a legitimate response to these plans. The text is a farce.

The subtext is one of racial and party competition, in which these feigned positions mask the real power struggle. In that struggle, Republicans seek to maximize their political power in state legislatures and Congress through aggressive redistricting plans that minimize the voting strength of Democratic, especially minority, voters. Democratic and

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76. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 339 (2004) (Stevens, J., dissenting) (“In sum, in evaluating a challenge to a specific district, I would apply the standard set forth in the *Shaw* cases and ask whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles.”); see also JOHN PAUL STEVENS, *SIX AMENDMENTS* ch. II (2014).

77. Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U. L. REV. (forthcoming 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2487426](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487426).

minority leaders, who have a hard time making out vote-dilution and partisan gerrymandering claims against the plans, recast their complaints as racial gerrymandering claims so that they have a chance to succeed in court.

The gap between text and subtext is an artifact of the Supreme Court's jurisprudence, which accepts certain race-based complaints and rejects most political ones. And the problem is complicated because of the overlap between race and party, especially in the South, where most African-American voters vote for Democrats and many white voters vote for Republicans.<sup>78</sup> The overlap makes analyzing both Voting Rights Act and racial gerrymandering claims and separating racial from partisan intent and effect quite difficult. Is the primary purpose and effect of redistricting in cases like *Alabama* a racial one or a partisan one?

On the Alabama legislature's motive, optimists will be tempted to assume that legislators have moved on from racism, and to see the issue as primarily partisan, with the Republican party doing the packing of African-American voters to hurt *Democrats*. Pessimists, however, have advanced a more nefarious theory of the Alabama legislature's aim for packing African-Americans, in which the Republican legislature plays on private white racism.<sup>79</sup> By making all Democratic districts in the state majority-minority districts and leading most probably to the election of African-American Democratic legislators, elections would send the signal that the Democratic Party in Alabama is the "black party." White racists then will be drawn even more to vote only for Republicans. The harm is not symbolic or expressive; it is an attempt to piggyback on private racial motivations to minimize the power of the Democratic party and the African-American voters who support it.

Plaintiffs advanced the "black party" in the *Alabama* case, but the district court majority rejected it.<sup>80</sup> The dissenter did not see the need to address the "deep dispute" over the legislators' motivations, but wrote that "no black legislator" supported the redistricting plans because of their belief that the legislative majority was trying to create a "black party."<sup>81</sup>

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78. See Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58 (2013).

79. See Mark Andrew, *Supreme Court Colludes with Alabama Racists*, STARTRIBUNE (Nov. 16, 2014, 12:33 PM), <http://www.startribune.com/supreme-court-colludes-with-alabama-racists/282864461/>; Jason Zengerle, *The New Racism*, NEW REPUBLIC (Aug. 10, 2014), <http://www.newrepublic.com/article/119019/civil-rights-movement-going-reverse-alabama>.

80. See *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1290 ("The Black Caucus plaintiffs and the Democratic Conference plaintiffs also argued that the Acts were the product of a grand Republican strategy to make the Democratic Party the 'black party' and the Republican Party the 'white party,' but the record does not support that theory.").

81. *Id.* at 1347 (Thompson, J., dissenting).

In this case, there is a deep dispute regarding the legislative purpose behind these plans. According to the drafters, they sought nothing more than to comply with their legal duties

We do not know whether to believe the optimists or pessimists (and note that the optimistic story is still pretty cynical about the nature of legislative self-interest). The intersection of race and party makes the search for a predominant motive impossible.

More fundamentally, the whole exercise from *Shaw* to *Miller* to *Easley* to *Alabama* is a nonsensical one. As Dan Lowenstein ably showed in the 1990s, the Supreme Court's search for predominant motivations in redistricting without proof of vote dilution is quixotic.<sup>82</sup> Legislators engaged in redistricting face constraints, such as the Voting Rights Act and one-person, one-vote requirements, and they then design plans conforming to these constraints to reach their political goals. Naked self-interest may fairly be said to predominate in most legislative redistricting exercises, subject to legal and political constraints.<sup>83</sup>

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and honor their colleagues' wishes as far as that was possible. According to the plaintiffs, these redistricting plans are part of a scheme to eliminate all white Democrats in the State and thereby establish the Republican Party as the natural home for all white Alabamians, leaving the Democratic Party comprised of only black voters and legislators. In furtherance of that scheme, the plaintiffs claim, the drafters packed as many black people as possible into the majority-black districts, thereby eliminating their influence anywhere else. All this, the plaintiffs claim, was done under the pretext of seeking to comply with § 5, while in reality the drafters were motivated by invidious racial discrimination. Apparently for this reason, no black legislator voted in favor of these plans.

In my view, we need not resolve the question of the drafters' ultimate purpose, nor need we reach the plaintiffs' other claims.

*Id.*

82. See Lowenstein, *supra* note 30.

83. See *id.* at 806–07.

To ask whether one factor “predominates” over others is to imply that the districting process consists of a weighing or balancing of factors. But that is not what occurs with race in redistricting. Under the VRA, race is not a “factor” at all, but a prior requirement in a lexical ordering. In John Rawls' definition of a lexical (or serial) ordering:

This is an order which requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we consider the third, and so on. A principle does not come into play until those previous to it are either fully met or do not apply. A serial ordering avoids, then, having to balance principles at all; those earlier in the ordering have an absolute weight, so to speak, with respect to later ones, and hold without exception.

A consideration that is lexically prior is a *privileged* consideration. It is a necessary precondition of what comes afterward, and aside from that, there is little that can be said about how it is “weighted” against the rest.

...

Because the racial quotas imposed under the VRA were *privileged* considerations, debate over their “predominance” is inevitably uncertain and arbitrary. Although the majority and the dissenters in the racial gerrymandering cases debated numerous aspects of the complex factual records, there was no serious disagreement between them over what actually happened. In each case, the state was forced to create a minimum number of [majority-minority districts]. Subject to that constraint, the state produced its districting plan by a normal political process of competition and negotiation. The majority on the Court and the dissenters debated the artificial question of whether to characterize the privileged consideration as predominant, when they all knew that the privileged consideration was never balanced against other considerations at all.

The Court in *Alabama* tried to avoid this fundamental problem with identifying “the” predominant factor in racial gerrymandering cases when it relegated Alabama’s compliance with the one-person, one-vote standard as a “background” rule with which the state was obligated to comply. Thus, compliance with the standard was taken out of factors for redistricting which could be considered “predominant.”

But this analysis is problematic. If we eliminate all of the rules with which a state is legally required to comply as potential predominant factors, then what factors are left as potential predominant factors in redistricting? There are only three: political considerations (including promoting one’s party and protecting incumbents); racial motivations; and discretionary, potentially desirable redistricting principles (such as creating compact or competitive districts). Having a court choose one of the three as predominant in a racial gerrymandering claim relies upon the wrong conception of how redistricting occurs.

Consider, for example, Alabama’s decision to reduce population disparities in districts from ten percent to two percent. This was a discretionary choice. Alabama legislators were very unlikely to have a strong feeling that it was wrong to have larger deviations from perfect equality across districts. Rather, Alabama’s decision to move from up to ten percent deviations in legislative districts to deviations up to two percent was about how to achieve political goals (of minimizing Democratic or African-American influence in the state so as to benefit Republicans) within the one-person, one-vote constraint.

Even if it would be possible to correctly identify a legislature’s predominant motive in redistricting, it is not worth the effort because the cause of action for racial gerrymandering protects against no real harm. Despite Justice O’Connor’s partially formed theory in *Shaw*, which was bulked up into the expressive harm theory by Professors Pildes and Niemi, there is no good evidence that racially conscious districts, including majority-minority districts, actually send messages to voters about the separation of voters by race.<sup>84</sup> The harm of such racial gerrymandering is less than “ephemeral”; it is non-existent. Harm arises only when racial motivations are accompanied by actual dilutive effects on minority voters.<sup>85</sup>

This is not to say that African-American and Democratic voters in Alabama were unharmed by the packing of minority voters into fewer

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*Id.* (footnote omitted).

84. See DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION (1999); Stephen Ansolabehere & Nathaniel Persily, *Testing Shaw v. Reno: Do Majority-Minority Districts Cause Expressive Harms?*, N.Y.U. L. REV. (forthcoming 2015) (“To put the matter succinctly, the only way a *Shaw* district can communicate its message of racial stereotyping is if someone is paying attention—if a district is drawn in the forest and no one is there to experience it, there can be no expressive harm.”).

85. See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

districts, even if the packing did not have a large enough vote-dilutive effect to constitute a violation of section 2 of the Act.<sup>86</sup> It is to say that the harm they suffered was not an expressive one.

If in fact the Alabama legislature's motivation for packing African-American voters into fewer districts was to make the Alabama Democratic Party the "black party," then Alabama had a racially discriminatory purpose in redistricting with a potential racially discriminatory effect, making its plan both unconstitutional under the Fourteenth Amendment as well as a violation of the provisions of the Voting Rights Act aimed against stopping intentional racial discrimination. The harm of a "black party" plan is not the expressive one of Alabama sending a message about race; it is the real one of the legislature intending to marginalize the power of African-American state residents and the party they support.

But proof of intent to pursue a "black party" plan would still be difficult (and proved difficult in the district court) for the same reason it would be hard to prove a racial gerrymander. One way to try to deal with proof is to borrow a tool from *Easley*; we could ask plaintiffs to show through the presentation of alternative redistricting plans that the state could have achieved its political or good-government goals without the packing of African-Americans in fewer districts.

Another way a court could deal with minority packing when done through manipulation of one-person, one-vote variances, as presented in *Alabama*, is through extension of the *Larios* theory of liability for one-person, one-vote deviations: when a state manipulates its deviations in the one-person, one-vote rule for partisan or other illegitimate reasons, courts should not allow it, whether the state does it to increase *or decrease* prior deviations from perfect population equality. This alone would be a reason to rule in favor of the plaintiffs in the *Alabama* suit and send the districting plan back to the legislature for a new drawing of lines.

Finally, courts could invigorate the moribund partisan gerrymandering claim in the context of cases like *Alabama* presenting the intermingling of race and party issues. I have been skeptical overall of having courts police partisan gerrymandering because of the difficulty of drawing a line

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86. As the district court majority concluded:

Both the Black Caucus plaintiffs and the Democratic Conference plaintiffs also contend that Acts 602 and 603 dilute the strength of black voters by "packing" them into majority-black districts, that is, by "concentrat[ing] . . . blacks into districts where they constitute an excessive majority," but the record establishes otherwise. As the previous sections explain, neither set of plaintiffs offered any evidence that the Legislature could have drawn another majority-black district for either the House or the Senate as part of a statewide plan with an overall deviation in population of 2 percent.

*Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1284 (alteration in original) (citation omitted).

between permissible and impermissible use of parties in redistricting.<sup>87</sup> However, race and party issues are so intractable in parts of the country, and the sense of injury in a case like *Alabama* is so real, that perhaps the Court should experiment with new potential measures of partisan gerrymandering in these cases.<sup>88</sup>

To sum it up, racial gerrymandering is an unsupportable jurisprudential theory, whether offered by Republicans to stop potential excesses of the Department of Justice in reading the Voting Rights Act or when offered by Democrats to stop fake reliance by Republicans on the Voting Rights Act in packing minority voters or otherwise manipulating district lines. When there is a real injury affecting the actual allocation of political power, and not an ephemeral or expressive one, the Court should work creatively to police bad political behavior.

#### IV. CONCLUSION

Noting the intersection of racial and party claims in the context of the Voting Rights Act is not new. From Morgan Kousser<sup>89</sup> on the left to Abigail Thernstrom<sup>90</sup> on the right, scholars have seen how political parties can manipulate voting rules aimed at protecting minorities for partisan purposes. *Alabama* demonstrates that the same has become true of racial gerrymandering claims.

*Alabama* thus gives Democratic and minority challengers a new tool, or more accurately an old tool reworked for new purposes, making it harder for states to use compliance with the Voting Rights Act as a pretext to secure partisan advantage. All in all, this may help stop some egregious gerrymanders, but there will still be plenty of ways for states to draw district lines for partisan advantage without running afoul of the rules barring racial gerrymanders.

Some on the left saw the *Alabama* decision as a rare victory for minority plaintiffs and those who support them.<sup>91</sup> It could even help

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87. See Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims after Vieth*, 3 ELECTION L.J. 626 (2004). Professor Pildes advanced an early argument to rein in both racial and partisan gerrymandering under objective standards. See Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505 (1997).

88. For a potentially promising measure of partisan gerrymandering, see Nicholas O. Stephanopoulos & Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015).

89. See J. MORGAN KOUSSER, *COLORBLIND INJUSTICE* (1999).

90. See THERNSTROM, *supra* note 20.

91. See Rick Hasen, *Nick Stephanopoulos on the Alabama Redistricting Case*, ELECTION LAW BLOG (Mar. 31, 2015, 7:15 PM), <http://electionlawblog.org/?p=71412> (comments of Stephanopoulos); Janai Nelson, *Guest Blog: Janai Nelson, Preserving the Nuance of a Suspended Section 5*, HAMILTON & GRIFFIN ON RTS. (Apr. 6, 2015), <http://hamilton-griffin.com/guest-blog-janai-nelson-preserving-the-nuance-of-a-suspended-section-5/>. Both Stephanopoulos and Nelson note that the Supreme Court's

strengthen the scope of section 2 by expanding the meaning of “ability to elect” districts.<sup>92</sup> The victory, however, is relatively small. More importantly, racial gerrymandering claims in the hands of minority plaintiffs is a tool not matched to the actual harm. Courts should abandon the pretense that this is all about appearances and focus on what really matters: the allocation of political power by self-interested actors in a situation in which race and party are inextricably intertwined. If courts do so, the nonsensical racial gerrymandering cause of action untethered to proof of actual vote dilution might not have a third act.

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understanding of the scope and operation of section 5 would inure to minority plaintiffs' benefit if Congress ever passed a new coverage formula and the Supreme Court had to once again consider legal issues under section 5.

92. *See* *Bartlett v. Strickland*, 556 U.S. 1, 14–16 (2009) (requiring proof for a section 2 violation that a reasonably compact minority group would have the “ability to elect” a candidate of its choice in a properly drawn legislative district).