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The 2020 Redistricting Process: Will the Courts Take It Over?

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KEY TAKEAWAYS

State courts should respect the separation of powers and prerogatives of the redistricting drafters unless they violate clearly established federal or state law.

Coalition districts, composed of more than one minority group to add up to a majority in a single-member district, should not be created by judicial fiat.

A state court considering a claim that a redistricting plan is unconstitutionally gerrymandered should not apply any test the Supreme Court has declined to adopt.

With or without COVID-19, the U.S. Census will be taken in 2020. The results of that Census will drive a round of reapportionment and redistricting for congressional seats and many state and local governing bodies in 2021. Even if the distribution of those results is delayed, as may happen, new plans must be in place before the 2022 election cycle; otherwise, the districts will be too malapportioned to be used again. In that case, the courts would step in. Historically, that has, for the most part,[1] been the job of the federal courts, but it is hard to tell about the 2020 redistricting cycle.

The federal courts have not just stepped in when a state or locality has not been able to come up with reapportionment plans. When that happens, federal courts have drawn *interim* plans that remain in place until the legislature or other political body tasked with drawing plans does so. The federal courts have

also been called upon to consider whether redistricting plans are unconstitutionally racially gerrymandered and, until recently, were also asked to decide political gerrymandering claims. In 2019, though, the U.S Supreme Court declared in *Rucho v. Common Cause* that, unlike racial gerrymandering claims, political gerrymandering claims present a non-justiciable political question and do not belong in federal court.[2]

When it comes to redistricting, losers in the political battle now frequently resort to litigation to try to achieve their desired ends. The Supreme Court has urged caution, warning lower courts and would-be litigants that the intervention of federal courts in the redistricting process intrudes on state prerogatives. Sometimes that warning has been in the nature of throat-clearing.[3] But the general consideration is clear: The Court does not want to "embroil the judiciary in second-guessing what has been consistently referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls."[4]

The same considerations should guide the actions of the state courts that have been increasingly called upon to resolve highly politicized redistricting and electoral disputes.

In the upcoming cycle, two developments promise to add litigation uncertainty where none previously existed. The first is the Supreme Court's decision in *Rucho*, which bars federal courts from considering political gerrymandering claims, effectively sending those claims (and, perhaps, others) to state court, where challengers will likely assert that such practices violate state constitutions. The second is the push to create districts by combining racial or ethnic groups, so-called coalition districts. Such claims are likely to be filed in state courts that have little experience dealing with them in all their docket-clogging, lawyer- and expert-driven glory, making it difficult to predict the outcome.

Reapportionment

The reapportionment and redistricting process starts when the Census Bureau delivers the Census results to the states in the first quarter of the year following the taking of the Census. The states' first task is to load the new Census data into the existing congressional, legislative, and other representative maps. The loading of that data shows how the distribution of the state's population has changed in the past decade; some areas and districts may have grown faster than others, and other areas and districts may have grown less rapidly or declined in population.

When loading population data into new districts, the initial constitutionally required goal is to achieve substantially equal population in each district. Congressional districts must be drawn with populations as close to equal as possible.[5] In contrast, states and localities have greater latitude to deviate from perfect equality when drawing the boundaries of state legislative and local districts "to accommodate traditional districting objectives, among them preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographical compactness."[6] States and localities can draw plans containing "minor" population deviations, which has meant, "as a general matter, that an apportionment plan with a maximum population deviation under ten percent falls within this category of minor deviations."[7]

In the 2010 cycle, several states tightened the population deviation. Alabama, for example, drew and considered only legislative plans with an overall deviation of 2 percent or less. Litigants challenged these plans in federal court, claiming that tightening the overall deviation resulted in the violation of the whole-county provision of the Alabama Constitution.[8] The court, limited as it was to enforcing federal law, stated that the claim was "odd" and correctly concluded that the plans "easily establishe[d] a presumption that the new districts satisfy the guarantee of one-person, one-vote."[9]

The question of allowable population deviation hides a more fundamental question: Who counts for the purpose of reapportionment? A count using total population generates one result, while looking at voting-age population or citizen voting-age population produces very different results. That is because the total population includes people who are ineligible to vote, such as noncitizens, disenfranchised felons, and minors. In *Evenwel v. Abbott*, the U.S. Supreme Court rejected the contention that the use of total population to draw the Texas Senate map unlawfully diluted the votes of eligible citizens in violation of the "one-person, one-vote" principle of the Equal Protection Clause.[10]

The gravamen of the claim in *Evenwel* was that, by including residents ineligible to vote, illegal immigrants in particular, in the total population count used to draw the district lines, the districts were malapportioned.[11] As the Court observed, while the overall population deviation between districts using total population was 8.04 percent, when voter-eligible population data were used, the deviation was greater than *40 percent* in some districts.[12] Nonetheless, the Court relied on its reading of constitutional history, precedent, and settled practice to conclude that there was nothing unconstitutional about using total population to draw district lines. Although not required under the Constitution, the Court declined to consider whether "States may draw districts to equalize voter-eligible population rather than total population."[13]

Even so, the Court seemed to endorse using total population. In her majority opinion, Justice Ruth Bader Ginsburg wrote, "Nonvoters have an important role in many policy debates—children, their parents, even their grandparents, for example, have a stake in a strong public education system—and in receiving constituent services, such as help navigating public-benefits bureaucracies. By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation."[14] That formulation contains embedded assumptions about the nature of representation and government that are questionable.[15]

More to the point, the underlying issue in the dispute over whom to count for districting purposes is political power. At the state level, the effect of counting residents who are ineligible to vote and often live in urban areas, accelerates the migration of districts in state legislatures toward urban areas and away from rural interests.

For congressional apportionment purposes, counting total population, as opposed to eligible voters, favors states in which such ineligible voters have congregated. For the expected results of the 2020 Census, if the country used total citizen population instead of total population as the basis for apportionment, states with large populations of illegal aliens would lose seats. It has been estimated that California would lose four seats in the U.S. House of Representatives, Florida, New York, and Texas would each lose one, and that Colorado, Louisiana, Michigan, Minnesota, Missouri, Montana, and Pennsylvania would likely each gain one seat if noncitizens were cut from state population totals and total citizen population were the basis for the apportionment.[16]

On July 21, 2020, President Trump issued an Executive Order directing that aliens present in the United States who are not in a lawful immigration status be excluded from the apportionment base.[17] The President characterized the exclusion of illegal aliens from the apportionment base "to the maximum extent feasible and consistent with the discretion delegated to the executive branch" as "more consonant with the principles of representative democracy underpinning our system of Government."[18]

The *Evenwel* Court's focus on total population elides a constitutional irony. The Constitution originally called for the apportionment of representatives among the states "according to their respective Number, which shall be determined by adding the whole Number of Free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three[-]fifths of all other Persons."[19] That provision limited the political power of the slave-holding states, which did not allow their slaves to vote;

without that limitation, the population of the slave-holding states, and the basis for their representation in Congress, would have been even greater, without any improvement in the lot of the slaves.

Nonetheless, the slaveholding states got the benefit, in terms of increased congressional representation, of more than half of their nonvoting slaves in the apportionment, even though the slaves, like illegal immigrants today, could not vote. Even if that compromise provision may have had some effect on the outcome of the presidential elections of 1800 and 1824,[20] it demonstrates a recognition that there is something unfair about counting people who cannot vote for representation purposes.

Evenwel blithely slides by this issue. It was obvious that including nonvoters in the count resulted in vote dilution disfavoring districts with a larger percentage of citizen voters. The nonvoters who were and are counted in full serve as filler, and the political effect of their inclusion is clear. Some states and many urban areas benefit from the presence of people not eligible to vote and, in fact, not even eligible to be in the country. It should not be beyond the power of the states to rebalance the locus of political power.

Given that the Supreme Court specifically refused to decide this issue, state legislatures should seriously consider using *only* citizen population or voter-eligible population when redrawing the lines for their legislative districts as a matter of fundamental fairness—and to avoid diluting the votes of citizens. Alternatively, if the state or locality uses total population to draw its districts, it should then review the population in the new districts using citizen or voting-eligible populations and make adjustments where the difference between the two measures exceeds 10 percent, the customary "minor deviation" allowed for states and localities. In so doing, the state or locality can minimize the dilutive effect of including a significant number of non-voters in a district.

After the U.S. Supreme Court rejected the Trump Administration's attempt to reinstate a question on the Census asking respondents about their citizenship status,[21] the President issued an Executive Order directing "all executive departments and agencies" to assist the Commerce Department "in determining the number of citizens and non-citizens in the country."[22] The same day the Executive Order was released, the Census Bureau released an announcement stating that, as a test, some 480,000 households would receive a questionnaire, half of which would contain a citizenship question and half would not.[23] That test would address the "operational effects of including a citizenship question on the 2020 Census."[24] Through the information received from other government agencies, the Census Bureau should be releasing citizenship data that states will be

able to use in redistricting. Under the terms of President Trump's July 21, 2020, Executive Order, that data will not include aliens not lawfully present in the United States as part of the apportionment base.[25]

Racial Gerrymandering

The States have substantial experience defending racial gerrymandering claims, but the Supreme Court's decisions fail to provide much practical guidance. Rather, those decisions tell particular states what they cannot do in specific cases, even as the Court's Voting Rights Act (VRA) jurisprudence and the VRA tell them to be conscious of, and to accommodate, race. More to the point, a decision invalidating a Georgia plan does not tell legislators in Mississippi much other than do not do what Georgia did; the facts on the ground in Mississippi may differ greatly from those in Georgia.

It was worse when Section 5 of the VRA gave the Justice Department's Civil Rights Division the power to review and reject redistricting plans submitted by a certain number of specifically covered jurisdictions, even though the Supreme Court was often not receptive to the Department's interpretation of the law.[26] Redistricting plans are no longer subject to a preclearance requirement by the Justice Department because the Court concluded in 2013 that the formula used to identify covered jurisdictions was no longer valid.[27] Nonetheless, we can expect to see racial gerrymandering claims being filed under Section 2 of the VRA after redistricting plans incorporating the results of the 2020 Census have been adopted.[28]

In 1986, in *Thornburg v. Gingles*, the Supreme Court established the legal framework for assessing claims of vote dilution of minority votes under Section 2, and when it is permissible, if not mandatory, for a legislature to create a district in which a racial or ethnic minority may be in the majority.[29] Section 2 requires plan drafters and legislatures to be aware of and take race into account. As the Court has observed, "the legislature always is aware of race when it draws district lines, just as it is aware of age, economic factors, religious and political persuasion, and a variety of other demographic factors."[30] Indeed, "[s]ince the Equal Protection Clause restricts consideration and the [VRA] demands consideration of race, a legislature attempting to produce a lawful redistricting plan is vulnerable to 'competing hazards of liability.'"[31]

Thornburgh v. Gingles effectively mandates the creation of minority–majority districts, that is, a district in which a racial or ethnic minority statewide is, nonetheless, in the majority in that district. The Court identified three criteria that must be met before a minority-majority district should be created:

1. a minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district";

2. that minority group "must be able to show that it is politically cohesive"; and

3. that minority group "must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it...usually to defeat the minority's preferred candidate."[32]

If these criteria are met, and the totality of the circumstances align, a minority–majority district must be created.

In the intervening years, plan drafters have gotten used to creating minority–majority districts and have already created those that were capable of being created based on the geographical dispersion of minority voters in those states. In addition, those districts have usually remained in the same general location.

In *Bartlett v. Strickland*, a plurality of the Court said that a majority means precisely that, a minority population that is greater than 50 percent in a particular district.[33] *Gingles* first requires a compact and contiguous group of minority citizens that is sufficiently large to constitute a "majority" in a single-member district. In *Bartlett*, North Carolina claimed that the VRA required it to create a district in which only 39 percent of the voting-age population was black in order to comply with a state constitutional bar against splitting counties, while at the same time creating a district in which it was feasible for a racial minority group to align with crossover voters to elect the minority's candidate choice.

A plurality of the Court disagreed, noting, "Nothing in § 2 protects a minority group's right to form political coalitions," which 39 percent of any group would have to do to create a majority.[34] The plurality also pointed out that, if the minority could elect its preferred candidate with majority support, its crossover-dependent success would "create serious tension with the third *Gingles* requirement that the majority votes as a bloc to defeat minority-preferred candidates."[35]

Finally, the plurality pointed to the benefit of a bright-line rule: "We find support for the minority-majority requirement in the need for workable standards and sound judicial and legislative administration. The rule draws clear lines for courts and legislatures alike. The same cannot be said of a less exacting standard that would mandate crossover districts under § 2."[36]

While the VRA, as construed in *Thornburg v. Gingles*, requires the creation of minority–majority districts when the specified conditions are met, states and localities can still act unconstitutionally in drawing their districts. In *Shaw v. Reno*, the Court held that a state's residents had standing to assert a claim that a black-majority congressional district with a "dramatically irregular shape" constituted unconstitutional racial gerrymandering.[37] Subsequently, in *Miller v. Johnson*, the Court held that a showing that a district had a bizarre shape was not a necessary element of a racial gerrymandering claim.[38] It stated, "parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness."[39]

The basis for a racial gerrymandering claim is that "the State has used race as a basis for separating voters into districts."[40] A plaintiff must show that "race was the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without a particular district."[41] That can be done by setting a target for the minority population in a district, as was done in Virginia in its 2010 State House plan, or as Alabama did by using the minority population in the old districts as its goal for the recreated black-majority districts in its 2010 legislative plans.[42]

North Carolina's Congressional District 12 has been problematic in at least two redistricting cycles; in the 1990 round, it was "approximately 160 miles long and, for much of its length, no wider than the I-85 corridor" and "w[ound] in snake-like fashion through tobacco country, financial centers, and manufacturing areas until it gobble[d] in enough minority enclaves."[43] In the 2010 cycle, the plan drafters "narrow[ed] its already snakelike body while adding areas at either end," and ran afoul of the racial gerrymandering bar by increasing the black voting-age population (BVAP) from 43.7 percent to 50.7 percent.[44] In both cases, North Carolina's District 12 was found to be unconstitutionally racially gerrymandered.

At the end of the day, there is a BVAP Goldilocks point. If the plan drafters do not consider race at all, they will be found to have violated the VRA by not taking the interests of minority voters into account. But, if they give too much consideration to race, they may be found to have engaged in an unconstitutional racial gerrymander, as outlined in *Shaw v. Reno* and its progeny. The plan drafters will not know where the acceptable line between these parameters is until a reviewing court tells them whether or not they met it. As a result, we will again see racial gerrymandering claims in the 2020 cycle, and, as I shall now explain, they may come with a new twist.

Coalition Districts

For much of its history, the VRA was about vindicating the rights of African Americans. Occasionally, though, other minorities formed a majority in a proposed district, as with Hispanics in a Hispanic-majority district.

A "coalition district" is different. It represents an attempt to cobble a majority together from more than one minority group. In 2018 litigation involving Gwinnett County, Georgia, for example, the plaintiffs argued that the court should require the creation of coalition districts composed of African Americans, Hispanics, and Asians. The district court agreed with the plaintiffs, but the case was rendered moot after the candidates preferred by the coalition plaintiffs won the elections in the districts they challenged.[45]

We will likely see more attempts to force the creation of coalition districts in the upcoming round of redistricting litigation. For the reasons stated below, the courts should reject any attempt to interpret the VRA as requiring the creation of such districts.

Judicial recognition of coalition districts would dramatically change the nature of redistricting. In 1988, dissenting from the Fifth Circuit's refusal to rehear a panel decision *en banc*, Judge Patrick Higginbotham, joined by five other judges, characterized the panel's endorsement of a coalition district theory as "a disturbing reading of a uniquely important statute, and one with the potential to affect the very structure of every school district, county, and city government in most states of this nation."[46] The panel had stated, "There is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics."[47] As Judge Higginbotham explained, the panel got the question wrong: It was not whether Congress intended to bar coalition districts, it is whether Congress "intended to protect those coalitions."[48]

Put simply, the notion that coalition districts are mandated by the VRA lacks textual support. It is also a transparently improper use of the VRA for political purposes and an end-run around *Bartlett v. Strickland*. In addition, it is not clear that a coalition district that joins several different minority groups together such as blacks, Asians, and Hispanics, will perform in a way that provides equal opportunity to each of the included minorities since the different groups have differing rates of citizenship, and, therefore, eligibility to vote. Finally, if all that is needed for different minority groups to vote together is for them to be jammed into a district, nothing is going on but "benign" political gerrymandering. In pertinent part, Section 2 of the VRA prohibits the "denial or abridgement of the right to vote of any citizen of the United States on account of race or color" or their membership in

certain specified language groups.[49] To show a violation, the plaintiff must demonstrate that "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a *class* of citizens protected [by the VRA] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[50]

Sitting *en banc*, the Sixth Circuit noted, "Even the most cursory examination reveals that § 2 of the Voting Rights Act does not mention minority coalitions, either expressly or conceptually."[51] Rather, the VRA "consistently" speaks of a "class," not "classes."[52] Further, to the extent that the VRA provides protection to language minorities, it identifies them specifically, "indicat[ing] that Congress considered the members of each group and the group itself to possess homogeneous characteristics."[53]

The creation of coalition districts by judicial edict would turn the VRA on its head because the law is about race, not politics. When he called on Congress to enforce the guarantees of the Fifteenth Amendment in March 1965, President Lyndon Johnson focused on ending practical barriers to minority voting, which he identified and divided into three categories:

1. Technical barriers such as poll taxes,

2. Noncooperation, and

3. Subjective barriers such as literacy tests.[54]

When he spoke to a special joint session of Congress, Johnson observed, "we are met here tonight as Americans—not as *Democrats or Republicans*—we are met here as Americans to solve th[e] problem" of assuring equal rights for African Americans.[55] Using § 2 to require the creation of coalition districts twists the VRA into an unambiguously political tool—distorting its purpose. Indeed, it is a form of political gerrymandering, putting voters into a district because of their imputed political beliefs.

The required creation of coalition districts also runs roughshod over *Bartlett v. Strickland*. There, a plurality of the Court said that the VRA does not require the creation of a district in which the minority population is less than 50 percent.[56] Plaintiffs seek the creation of a coalition district when none of the racially or ethnically separate minority groups to be combined constitutes a majority standing alone. That is why one must be cobbled together. But that political necessity does not override the law.[57]

The second *Gingles* criterion for a successful Section 2 vote dilution claim requires that the minority vote be politically cohesive. For African Americans, that criterion is often conceded because the first criterion, a group of minority citizens large enough to constitute a geographic majority, is harder to meet because nearly all of the black-majority districts that can be constitutionally created already have been. The plan drafters will typically preserve the core of pre-existing black-majority districts, so long as the African American population remains large enough to be a majority, and a new black-majority district will be created only where the unallocated African American population will support it.

But if the cohesion of minority voting were questioned, the plaintiff would have to produce proof of voting behavior. That is ordinarily accomplished by analyzing precinct-level results for precincts in which the minority is in the majority, not by anecdotal testimony alone. Where more than one minority is cobbled together into a coalition, that precinct-level data is needed for each minority. If Hispanics or Asians are to be included in the politically cohesive coalition, they must be in the majority in enough precincts to be able to show how they vote. In the Gwinnett County case, it was questionable whether Hispanics and Asians each had a sufficiently concentrated population in the county's precincts to support the necessary statistical analysis.

The likely performance of a coalition district is also problematic. A district that includes Hispanics, even a plurality of them, is also likely full of aliens who cannot vote. That is because the Hispanic community has a much lower citizenship rate than the African American community. The effect of the differing rates of citizenship is to increase the relative voting power of the African American bloc within the district. Moreover, in litigation in Texas, the court struggled with cohesion between African Americans and Hispanics, before rejecting the contention that they were cohesive.[58] The evidence showed that, while African Americans and Hispanics participated in the Democratic primary and voted for Democrats in the general election, they were not cohesive in the primaries where African American voters were unlikely to support Latino candidates.[59]

In the Gwinnett County litigation, the plaintiffs insisted that only political cohesion, that is, only a showing that each minority votes in the same way (Democrat in the general election), is required. It did not matter, the plaintiffs claimed, that African Americans may not have any civic, social, religious, or cultural interaction with the Hispanics or Asians with whom they were to share a district, or vice versa. Put differently, the plaintiffs disclaimed any

need to show that the three minorities were socially cohesive, asserting that they need to do nothing more than vote the same way. The insistence that only political affiliation is required further demonstrates the unmistakably political motivation for coalition district claims under the VRA.

For all of these reasons, coalition districts should not be created by judicial fiat.

Political Gerrymandering

Political gerrymandering claims percolated in the federal courts from 1973 until 2019.[60] After concluding that a claim of political gerrymandering could be considered by a federal court, without agreement on how to identify unconstitutional conduct, the Supreme Court rejected political gerrymandering claims in 1983, 2004, and 2018.[61] Finally, in 2019, the Court concluded that political gerrymandering claims do not belong in federal court, effectively diverting them to state court.[62]

In *Rucho v. Common Cause*, the Court held that political gerrymandering claims are nonjusticiable. It reasoned that "partisan gerrymandering claims present political questions beyond the reach of federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to direct their decisions."[63] Accordingly, in the absence of a workable, neutral standard, the Court declined to expand "judicial authority...not just into any area of controversy, but into one of the most intensely partisan aspects of American political life."[64]

The fundamental difficulty with political gerrymandering claims stems from the inherently political nature of the redistricting enterprise. As with race, it is inevitable that those doing the work of reapportionment and redistricting will be conscious of the political nature of their work. When the task is performed by a legislature, the plans must be supported by a majority of the members in each house to pass, and, to gain that support, the members of the majority must be happy with the way they have been treated. So, the task for any test for political gerrymandering has been to identify when the political considerations inherent in the exercise have gone too far.[65]

Some plaintiffs asserting partisan gerrymandering claims have proposed tests that draw on the Supreme Court's test for racial gerrymandering, but those tests fail for several reasons. Most compellingly, there is a fundamental difference between a voter's race and that voter's political affiliation. As Justice Antonin Scalia explained in his *Vieth* plurality opinion, "a person's politics is rarely as readily discernible—and *never* as permanently

discernible—as a person's race. Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line."[66] Justice Scalia was right.

Experience strongly suggests that political gerrymandering is sticky, but not intractable. When *Vieth* was pending in the Supreme Court, Alabama Democrats filed a friend-of-the-court brief urging the Court not to get involved because a rule prohibiting partisan gerrymandering would threaten their own partisan gerrymander, which they saw as benign.[67] They explained that Democratic representatives of both races "form[ed] coalitions that sought both to protect reliable Democratic seats with majority-black constituencies and to reduce the size of those black majorities in order to increase the number of reliable Democratic voters in several seats closely contested between Democrats and Republicans."[68] Their handiwork, stretching just over 50 percent of the statewide votes for Democratic candidates into larger majorities in each house, lasted until 2010, when Alabama Republicans, aided by a few party changers, took a super-majority in both houses.

The same result occurred in both Indiana, the site for *Davis v. Bandemer*, and in Pennsylvania, the site of *Vieth v. Jubelirer*. In Indiana, the Republicans went from state House control in 1981, to a 50-50 House split in 1988, to a Democrat House majority in 1990.[69] In Pennsylvania, the Democrats went from a 12–7 minority to an 11–8 majority in 2006 in the state's congressional delegation.[70] As the Court in *Rucho* explained, "In our two leading partisan gerrymandering cases themselves, the predictions of durability proved to be dramatically wrong."[71]

Going forward, we should be aware that none of the theoretical tests that plaintiffs proposed for determining when political gerrymandering has gone too far garnered the support of a majority of the Supreme Court. Put differently, none of those tests was "grounded in a 'limited and precise rationale'" and operated in a way that was "clear, manageable, and politically neutral."[72] In particular, the following have been established by the Court or by a plurality of the Justices:

1. A political gerrymandering claim cannot be proved by the results of a single election. As the *Bandemer* plurality explained, "relying on a single election to prove unconstitutional discrimination is unsatisfactory."[73]

2. A political gerrymandering claim cannot seek a proportionate result in a system dominated by single-member districts. Neither the Constitution nor the VRA provides for proportional results.[74]

3. The *Bandemer* plurality standard, which required a showing of discriminatory intent and a discriminatory effect that produces an electoral system that "is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole,"[75] produced only "a long record of puzzlement and consternation" in the lower courts.[76] "Because this standard was misguided when proposed, has not been improved in subsequent application, and is not even defended before us today by [the *Vieth*] Appellants," it should not be the constitutional standard.[77]

4. The *Vieth* Appellants' tweaking of the *Bandemer* plurality test does no better. They proposed a test that would require a showing that:

   - The mapmakers' predominant intent was to achieve a partisan political advantage with respect to the statewide map; and

   - The districts "systematically" misallocate a party's supporters, such that a court, looking at the totality of the circumstances, can "confirm[] that the map can thwart the plaintiffs' ability to translate a majority of votes into a majority of seats."[78]

   As the *Vieth* plurality noted, "Vague as the 'predominant intent' test might be when used to evaluate single-member districts, it all but evaporates when applied statewide."[79] More generally, attempting to adapt the Court's racial gerrymandering tests to the political gerrymandering arena does not work because of the different context: "while it is illegal for a jurisdiction...to engage in racial discrimination in districting, 'a jurisdiction may engage in constitutional political gerrymandering.'"[80] Political gerrymandering is said to be unlawful only when it goes too far.

5. The notion that "majority status in statewide races establishes majority status for district contests" is flawed both conceptually and legally.[81] It suggests that only political affiliation affects and drives voter behavior, but that suggestion is "assuredly not true."[82] State legislative elections are district-based, and the political parties "do not compete for the highest statewide totals or the highest district mean vote percentages. They compete for specific seats."[83] And, they hope to gain a majority of the seats in each house, by whatever margin they can, large or small. When large margins result in particular district-based

elections, it is likely attributable to the effect of incumbency or candidate quality; for statewide races, "political groups that tend to cluster (as is the case with Democratic voters in cities) would be systematically affected by what might be called a 'natural' packing effect."[84]

Finally, the suggestion that there is a quasi-mathematical relationship between the vote totals in statewide elections and the results in legislative district-based elections, or vice versa, sounds like a plea for proportionality in representation, something the VRA does not allow (and the Constitution does not guarantee). Section 2(b) concludes with the proviso that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."[85]

6. The "partisan symmetry" standard proposed by the challengers in *Gill v. Whitford* fails to establish the standing of individual plaintiffs.[86] In *Gill*, the plaintiffs proposed an "efficiency gap" calculation that entailed "subtracting the statewide sum of one party's wasted votes from the statewide sum of the other party's wasted votes and dividing the result by the statewide sum of all votes cast, where 'wasted votes' are defined as all votes cast for a losing candidate and all votes cast for a winning candidate beyond the 50 [percent] plus one that ensures victory."[87] They "promise[d]" that the resulting calculation would be easy and "allow the federal courts—armed with just 'a pencil and paper or a hand calculator'—to finally solve the problem of partisan gerrymandering that has confounded the courts for decades."[88] But, the Court pointed out that metric tells us about "the effect that a gerrymander has on the fortunes of political parties," not about the impact on individual voters living in different parts of the state, which turns on which district they are in.[89]

   The *Gill* Court reversed the lower court's decision and remanded the case for further consideration of the standing of the plaintiffs. As the Court noted, standing "vindicate[s] the individual rights of the people appearing before" a court, not "generalized partisan preferences."[90]

7. The First Amendment does not provide a basis for relief. A politically gerrymandered plan does not limit a voter's ability to speak or associate;[91] it just may make it less likely to be persuasive. The First Amendment carries no guarantee of success, just the opportunity

to speak and associate.[92] Moreover, if construed to reach viewpoint discrimination based on political affiliation, "any level of partisanship in districting would constitute an infringement of...First Amendment rights."[93] That, plainly, sweeps too far.

Neither those tests—nor any of the other tests proposed over the course of more than 35 years of trying to get the Supreme Court to endorse a test to identify when political gerrymandering goes "too far"—would work either. The state courts that will now likely be the forum for political gerrymandering claims based on alleged violations of state constitutions should hesitate before embracing *any* of those understandably confusing, overbroad, and inadequate rejected tests, even though some may be tempted to do so.

The 2020 Litigation Cycle

The diversion of political gerrymandering claims to the state courts has important consequences. It means that state courts will be confronted with important questions of state constitutional law for the first time: Does political gerrymandering violate the provisions of the state constitution? How do state constitutional provisions that limit or prohibit the splitting of counties interact with one-person, one-vote rules and federal racial gerrymandering standards?

State courts may also have to adjudicate claims in complaints that combine federal claims, like racial gerrymandering, with state claims of political gerrymandering. If the state courts keep the entire case, they are obligated to apply federal law correctly. One way or another, much of the redistricting litigation in the 2020 round is likely to take place in the state courts.

The actions of the state courts to date give little reason for confidence. In January 2018, the Pennsylvania Supreme Court found the state's 2011 congressional plan to be unconstitutionally politically gerrymandered even though no such claim had ever previously been recognized in the entire history of the Commonwealth.

When the court released its written opinion a month later, it said the remedial plan had to "consist of congressional districts composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population."[94] The court held that the plan violated the Free and Equal Elections Clause of the Pennsylvania Constitution, reasoning that partisan gerrymandering diluted the votes of some voters.[95]

Significantly, the Pennsylvania Supreme Court previously found an absence of any "analogous, direct textual references to such neutral apportionment criteria" in the congressional redistricting context in 2002.[96] Nonetheless, the court applied the standards expressly applicable to legislative redistricting in the Pennsylvania Constitution to congressional redistricting.

In North Carolina, a three-judge state court panel also found that North Carolina's state legislative plan was an unconstitutional partisan gerrymander in violation of the North Carolina constitution despite the fact that no such claim had ever been recognized by a North Carolina court as violating any portion of that state's constitution.[97]

In the end, each state court will be responsible for its own work. It can choose to follow the law, it can breach separation-of-powers principles to act as a super-legislature by creatively rewriting its state's constitution, or it can engage in the same kind of second-guessing of state legislatures that the federal courts have done for years. Federal and state courts should not act outside their judicial roles and should respect the work of the plan drafters, refraining from making redistricting work harder than it already is.

Conclusion

Redistricting litigation is here to stay in all of its partisan, expert-driven, docket-clogging glory. The losers in the legislative redistricting process cannot do any worse in litigation, so they have nothing to lose by going to court. That said, such litigation constitutes an invitation to the courts to intrude into a political subject that is reserved to the legislature, which they should generally decline. Such an intrusion should be avoided whenever possible and must be undertaken only with great care. It must also be consistent with the law, not the policy or partisan preferences of the judges.

The state courts that will be handling these cases should decline to recognize coalition districts and reject any attempt to drag them into an intensely partisan, political subject area through claims of political gerrymandering.

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Endnotes

1. In 1993, Alabama Democrats filed an action in state court after the legislature deadlocked. The Senate reapportionment plan never made it through the House, and the House plan never made it through the Senate. Eventually, the Democrats and the state, through then-Attorney General Jimmy Evans (D), settled the case, and the House-drawn Democrat plan for both House and Senate was imposed by judicial decree. A subsequent racial gerrymandering challenge to that plan was dismissed because the challengers lacked standing. *See* Kelley v. Bennett, 96 F. Supp. 2d 1310 (M.D. Ala.) (three-judge court), *reversed sub. nom.* Sinkfield v. Kelley, 531 U.S. 28 (2000).
2. Rucho v. Common Cause, 139 S. Ct. 2494 (2019).
3. *See*, *e.g.*, Miller v. Johnson, 515 U.S. 900, 915 (1995) ("Federal court review of districting legislation represents a serious intrusion on the most vital of local functions."); *id.* ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests."). In *Miller*, the Court found the Georgia congressional plan to be unconstitutionally racially gerrymandered.

   More generally, in his opinion for the plurality in Vieth v. Jubelirer, Justice Scalia pointed to the considerations that should guide the courts in addressing political gerrymandering claims. The test employed should "enable the state legislatures to discern the limits of their districting discretion… meaningfully constrain the discretion of the courts, and…win public acceptance of the courts' intrusion into a process that is the very foundation of democratic decisionmaking." Vieth v. Jubelirer, 541 U.S. 267, 291 (2004). Those same considerations should guide the courts in their disposition of all redistricting cases.
4. Davis v. Bandemer, 478 U.S. 109, 133 (1986) (plurality op.).
5. Kirkpatrick v. Preisler, 394 U.S. 526, 530–31 (1969).
6. Evenwel v. Abbott, 136 S. Ct. 1120, 1124 (2016).
7. Brown v. Thomson, 462 U.S. 835, 842 (1983) (citations omitted).
8. Article IX, § 200 of Alabama's 1901 Constitution provides that, with respect to the Alabama Senate, the districts "shall be as nearly equal to each other in the number of inhabitants as may be," and states, "No county shall be divided between two districts." No such prohibition on the splitting of counties applies to the drawing of districts for the Alabama House of Representatives. See Ala. Const. (1901), Art. IX, § 198.
9. Alabama Legislative Black Caucus v. Alabama, Case Nos. 2:12–CV–691, *et al*. (M.D. Ala. Dec. 26, 2012) (three-judge court), Memorandum and Order, at 6–7.
10. Evenwel, *supra* n. 6.
11. *See also* Chen v. City of Houston, 206 F.3d 502, 522 (5th Cir. 2000) ("The heart of this one-person, one-vote claim is that the City, despite being aware that it contained pockets with extremely high ratios of noncitizens, improperly crafted its districts to equalize total population rather than citizen voting age population.").
12. Evenwel, *supra* n. 6, 136 S. Ct. at 1125.
13. *Id.* at 1133.
14. *Id*. at 1132; *but cf. id*. at 1133 (Thomas, J., concurring in the judgment) ("The Constitution does not prescribe any one basis for apportionment within States. It instead leaves States significant leeway in apportioning their own districts to equalize total population, to equalize eligible voters, or to promote any other principle consistent with a republican form of government. The majority should recognize the futility of choosing only one of these options. The Constitution leaves the choice to the people alone—not to this Court.").
15. *See id*. at 1143 (Alito, J., concurring in the judgment) (The argument that total population must be used "implicates very difficult theoretical and empirical questions about the nature of representation.").
16. *See* Evie Fordham, California Would Lose Four Electoral Votes If Only Citizens Are Counted In The Census, The Daily Caller, (Aug. 1, 2018), available at https://dailycaller.com/2018/08/01/citizenship-census-california/?utm_medium=Social&utm_source=Twitter&utm_campaign=atdailycaller (last accessed July 27, 2020).
17. Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census (July 21, 2020), https://whitehouse.gov/presidentail-actions/memorandum-excluding-illegal-aliens-apportionment-base-following-2020-census (last accessed July 22, 2020).
18. *Id.*
19. U.S. Const. Art. I § 2, cl. 3. The Fourteenth Amendment, which was ratified in 1868, declares, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV § 1. In § 2 of the Fourteenth Amendment, the three-fifths clause was deleted, providing for the apportionment of the House of Representatives "by counting the whole number of persons in each State, excluding Indians not taxed." U.S. Const. amend. XIV § 2. Subsequently, in the Fifteenth Amendment, ratified in 1870, the right to vote was granted to former slaves: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV § 1.
20. See, e.g., Michael L. Rosin, The Three-Fifths Rule and the Presidential Elections of 1800 and 1824, 15 U. St. Thomas L. J. 159 (2018).

21. *See* Department of Commerce v. New York, 139 S. Ct. 2551 (2019).
22. *See* Executive Order on Collecting Information about Citizenship Status in Connection with the Decennial Census (July 11, 2019), *available at* https://www.whitehouse.gov/presidential-actions/executive-order-collecting-information-citizenship-status-connection-decennial-census/ (last accessed July 21, 2020).
23. *See* Census Bureau Announces 2019 Census Test to Begin (July 11, 2019), *available at* https://www. https://www.census.gov/newsroom/press-releases/2019/2019-test-begins.html (last accessed July 21, 2020).
24. *Id*.
25. Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census (July 21, 2020).
26. *See*, *e.g.*, Miller v. Johnson, *supra* n. 3 at 905–909 (1995) (detailing how the Justice Department twice denied preclearance of Georgia's 1990 congressional plan, leading to the creation of an unconstitutionally racially gerrymandered third black-majority district); Shaw v. Reno, 509 U.S. 630 (1993) (After the Justice Department objected to North Carolina's congressional redistricting plan, North Carolina redrew it to create a second black-majority district, which was unconstitutionally racially gerrymandered.).
27. Shelby County v. Holder, 570 U.S. 529 (2013).
28. Section 2 prohibits any action by a state or locality that "results in a denial or abridgment of the right of any citizen…to vote on account of race or color or in contravention" of the provisions regarding specified language minorities. 52 U.S.C. § 10301 (a). A vote dilution claim is established if, "based on the totality of the circumstances, minority voters have less opportunity than other voters to elect representatives of their choice." 52 U.S.C. § 10301(b). Section 2 applies nationwide. The Supreme Court "consistently understood these sections [*i.e.*, Sections 2 and 5 of the VRA] to combat different evils and, accordingly, to impose very different duties upon the States." Reno v. Bossier Parish, 520 U.S. 471, 477 (1997). Section 5 formerly applied to certain jurisdictions and required that changes in voting practices, including redistricting plans, be precleared before they could become effective. The purpose of Section 5 was "to insure [sic] that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, 425 U.S. 130, 141 (1976).
29. 467 U.S. 30 (1986).
30. Shaw v. Reno, *supra* n. 25 at 646.
31. Abbott v. Perez, 138 S. Ct. 2305, 2315 (2018) (quoting Bush v. Vera, 517 U.S. 952, 977 (1996) (plurality opinion)).
32. Thornburg, *supra* n. 28, 478 U.S. at 50–51 (1986); *cf*. Overton v. City of Overton, 871 F. 2d 529, 542 (5th Cir. 1989) (The first prong of *Gingles*, which requires a sufficiently large and geographically compact group of minority voters to be a majority, "refers to a *majority voting age population* in a single-member district.") (Jones, J., concurring) (collecting cases) (emphasis added).
33. 556 U.S. 1, 129 S. Ct. 1231 (2009). Justice Thomas, joined by Justice Scalia, concurred in the judgment, reasoning that "the text of § 2 of the Voting Rights Act of 1965 does not authorize any vote dilution claim, regardless of the size of the minority population in a given district." *Id*., 129 S. Ct. at 1250 (Thomas, J., concurring in the judgment). In terms of taxonomy, the district with a 39 percent minority population North Carolina said it had to create is known as a "crossover district." In such a district, "the minority population, at least potentially, is large enough to elect the candidate of its choice with help from members of the majority and who cross over to support the minority's preferred candidate." Bartlett, 556 U.S. at 1242 (plurality opinion). An "influence district" is one in which the minority "can influence the outcome of the election even if its preferred candidate cannot be elected." *Id*. As Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, has noted, "That African-Americans have influence in the district… does not suffice to state a § 2 claim in these cases. The opportunity 'to elect representatives of their choice'…requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice." *See* League of Latin American Citizens v. Perry, 548 U.S 399, 445 (2006) (Opinion of Kennedy, J.).
34. Bartlett, *supra* n. 32, 129 S. Ct. at 1243 (plurality opinion).
35. *Id*., 129 S. Ct. at 1244 (plurality opinion).
36. *Id*.
37. Shaw v. Reno, *supra* n. 25, 509 U.S. at 633–34.
38. Miller v. Johnson, *supra* n. 3.
39. *Id*., 515 U.S. at 915.
40. *Id*. at 911.
41. *Id*. at 916 (emphasis added).
42. *See* Bethune-Hill v. Virginia State Board of Elections, 137 S. Ct. 788 (2017); Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015), respectively. In Bethune-Hill, the plan drafters used a black voting-age population (BVAP) of 55 percent as its target for the House districts. In Alabama Legislative Black Caucus, the plan drafters focused on the need to get preclearance for the plans and used the BVAP in the old districts as its goal for the new districts. In essence, both cases involve the Court's "faulting [the State] for choosing the wrong percentage of blacks in the State's black-majority districts or at least for arriving at that percentage using the wrong reasoning." Alabama Legislative Black Caucus, 135 S. Ct. at 1282 (Thomas, J., dissenting).

43. Shaw v. Reno, *supra* n. 25, 509 U.S at 635–36.
44. Cooper v. Harris, 137 S. Ct. 1455, 1466 (2017).
45. *See* Tyler Estep, "Lawsuit Over Minority Voting Rights in Gwinnett Dismissed," Atl. Journal-Constitution (Jan. 25, 2019), available at https://www.ajc.com/news/local-govt--politics/lawsuit-over-minority-voting-rights-gwinnett-dismissed/ZYS2Jzkt801Kts6JIXVbcN/ (last accessed July 21, 2020).
46. Campos v. City of Baytown, 849 F. 2d 943, 944 (5th Cir. 1988) (Higginbotham, J., dissenting from denial of rehearing *en banc*).
47. Campos v. City of Baytown, 840 F.2d 1240, 1244 (5th Cir. 1988).
48. Campos, *supra* n. 45, 849 F. 3d at 945 (Higginbotham, J., dissenting from denial of rehearing *en banc*). As Judge Edith Jones observed elsewhere, while the Act does not expressly prohibit coalition claims, the "Act does not prohibit claims by minorities from the Indian subcontinent either." League of United Latin American Citizens v. Clements, 999 F.2d 831, 895 (5th Cir. 1993) (*en banc*) (Jones, J., concurring in majority opinion).
49. 52 U.S.C. § 10301(a).
50. 52 U.S.C.§ 10301(b) (emphasis added).
51. Nixon v. Kent County, 76 F. 3d 1381, 1386 (6th Cir. 1996) (*en banc*).
52. *Id*.
53. League of United Latin American Citizens v. Clements, *supra* n. 47, 999 F.2d at 895 (Jones, J., joining in majority opinion).
54. *See* Message from the President of the United States Related to the Right to Vote, 89th Cong., 1st Sess. (March 15, 1965), available at https://www.presidency.ucsb.edu/documents/special-message-the-congress-the-right-vote (last accessed July 21, 2020).
55. Johnson, Lyndon B., Special Message to Congress: The American Promise (March 15, 1965), available at https://www.presidency.ucsb.edu/documents/special-message-the-congress-the-american-promise (last accessed July 21, 2020) (emphasis added).
56. *See* Bartlett v. Strickland, *supra* n. 32, 129 S. Ct. at 1248 (plurality opinion) (pointing to "[o]ur holding that § 2 does not require crossover districts").
57. *Cf*. Gill v. Whitford, 138 S. Ct. 1916, 1929 (2018) (rejecting the contention that the U.S. Supreme Court "can address the problem of political gerrymandering because *it must*") (emphasis in original).
58. Perez v. Abbott, 274 F. 3d 624 (W.D. Tex. 2017) (three-judge court), *reversed on other grounds*, Abbott v. Perez, supra n. 31; *see also* Brewer v. Ham, 876 F. 2d 448, 453 (5th Cir. 1989) ("the determinative question is whether black-supported candidates receive a majority of the Hispanic and Asian vote; whether Hispanic-supported candidates receive a majority of the Black and Asian vote; and whether Asian-supported candidates receive a majority of the black and Hispanic vote in most instances in the [Killeen Independent School District] area.").
59. *Id*., 274 F. 3d at 664–670; *see also* League of United Latin American Citizens v. Perry, supra n. 32, 548 U.S. at 443 (2006) (African American voters in Texas congressional district 24 claim that they control the district because they are 25.7 percent of the population.). In the Gwinnett County litigation, the districts proposed by the plaintiffs had larger African American cohorts than Hispanic and Asian, suggesting that the Hispanic and Asian residents were "filler." Hispanic and Asian witnesses insouciantly testified that this did not bother them.
60. *See* Gaffney v. Cummings, 412 U.S. 735 (1973); Davis v. Bandemer, *supra* n. 4; Vieth v. Jubelirer, *supra* n. 3; Gill v. Whitford, *supra* n. 56; *see also* League of United Latin American Citizens v. Perry, *supra* n. 32.
61. The Court summarily disposed of a political gerrymandering claim in 1965. WMCA, Inc. v. Lorenzo, 382 U.S. 4 (1965). The *Bandemer* majority concluded, "we are not bound by" the prior summary affirmances of lower court decisions rejecting political gerrymandering claims. Bandemer, *supra* n. 4, 478 U.S. at 121.
62. Rucho v. Common Cause, *supra* n. 2.
63. *Id*. at 2506–07.
64. *Id*. at 2507.
65. *Id*. at 2497 (Quoting Vieth v. Jubelirer, *supra* n. 3, 541 U.S. at 296 (plurality opinion)).
66. Vieth, *supra* n. 4, 541 U.S. at 287 (plurality opinion) (emphasis in original); *see also* Davis v. Bandemer, *supra* n. 4, 478 U.S. at 156 (O'Connor, J., concurring in the judgment) ("[W]hile membership in a racial group is an immutable characteristic, voters can—and often do—move from one party to another or support candidates from both parties.").
67. Br. Of Amici Curiae Leadership of the Alabama Senate and House of Representatives: Lowell Barron, Jeff Enfinger, Vivian Davis Figures, Rodger Smitherman, Seth Hammett, Demetrius Newton, and Ken Guin in Support of Appellees, Vieth v. Jubelirer, No. 02–1580, in the Supreme Court of the United States.
68. *Id*. at 2. The amici touted their success, noting "in the 2002 elections, even though Republican candidates polled statewide majorities in congressional and most statewide office contests, Democrats won 52 [percent] of the votes statewide for Senate seats and 51 [percent] of the votes statewide for State House seats. Democrats captured 71 [percent] of the 35 Senate seats and 60 [percent] of the 105 House seats." *Id*.; *but cf*. Vieth, *supra* n. 4, 541 U.S. at 288–89 ("to think that majority status in statewide races establishes majority status for district contests, one would have to believe that the only factor determining voting behavior at all levels is political affiliation. That is assuredly not true.")
69. Rucho, *supra* n. 2, 139 S. Ct. at 2503.

70. *Id*.
71. *Id*.
72. *Id*. (quoting Vieth, *supra* n. 3, 541 U.S. at 306–08 (Kennedy, J., concurring in the judgment)).
73. Davis v. Bandemer, *supra* n. 4, 478 U.S. at 135 (plurality opinion); *see also id*. at 139 ("[A] mere lack of proportionate results in one election cannot suffice.").
74. *Id*. at 131 (plurality opinion) ("Our cases…clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to the contending parties in proportion to what their anticipated statewide vote will be."); *see also id*. at 147 (O'Connor, J., concurring in the judgment) (Entertaining political gerrymandering claims would leave the Court with "no clear stopping point to prevent the gradual evolution of a requirement of roughly proportional representation for every cohesive political group."); 52 U.S.C. § 10301(b) ("Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").
75. Davis v. Bandemer, *supra* n. 4, 478 U.S. at 132.
76. Vieth v. Jubelirer, *supra* n. 3, 541 U.S. at 283 (plurality opinion).
77. *Id*. at 283–84.
78. *Id*. at 286–87.
79. *Id*. at 285.
80. Rucho, *supra* n. 2, 139 S. Ct. at 2497 (quoting Hunt v. Cromartie, 526 U.S. 541, 551 (1999)); *see also id*. at 2502 ("Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.").
81. Vieth, *supra* n. 3, 541 U.S. at 288 (plurality opinion).
82. *Id*.
83. *Id*. at 289 (quoting Daniel Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory*, 33 UCLA L. Rev. 1, 59–60 (1985)).
84. *Id*.
85. 52 U.S.C. § 10301(b). It should go without saying that the "protected class[es]" under the VRA do not include political partisans.
86. Gill v. Whitford, *supra* n. 56, 138 S. Ct. at 1933.
87. *Id*.
88. *Id*.
89. *Id*.
90. *Id*.; *see also* Rucho, *supra* n. 2, 139 S. Ct. at 2500 ("[T]he 'natural political geography' of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts.").
91. Rucho, *supra* n. 2, 139 S. Ct. at 2504; *see also* Badham v. March Fong Eu, 694 F. Supp. 664, 675 (N.D.Ca. 1988) (three-judge court).
92. New York State Board of Elections v. Torres, 552 U.S. 196, 205 (2008) ("None of our cases establishes an individual's constitutional right to have a 'fair shot' at winning the party's nomination.").
93. Rucho, *supra* n. 2, 139 S. Ct. at 2504; *see also* Vieth, *supra* n. 3, 541 U.S. at 294 ("[A] First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting, just as it renders unlawful *all* consideration of political affiliation in hiring for non-policy-level government jobs." (emphasis in original)).
94. League of Women Voters v. Pennsylvania, 178 A. 3d 737, 742 (Pa. 2018).
95. *Id*. at 809–14.
96. *See* Erfer v. Pennsylvania, 794 A. 2d 325, 334 n. 4 (Pa. 2002); *see also* League of Women Voters, *supra* n. 93, 178 A. 3d at 814 ("Neither Article I, Section 5 [the Free Elections Clause] nor any other provision of our Constitution articulates explicit standards which are to be used in the creation of congressional districts.").
97. Felicia Sonmez and Robert Barnes, "North Carolina Court Rules Partisan State Legislative Districts Unconstitutional," Wash. Post (Sept. 3, 2019).