

# PARSING PARTISANSHIP AND PUNISHMENT: AN APPROACH TO PARTISAN GERRYMANDERING AND RACE

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*The threat of extreme and punishing partisan gerrymandering has increased exponentially since 2019 when the Supreme Court held partisan gerrymandering claims nonjusticiable. Although the Court was unanimous in recognizing that partisan gerrymandering can undermine the fair functioning of the electoral process, neither Rucho’s majority nor its dissent acknowledged the unique harm partisan gerrymandering visits upon the operation of our multiracial, multiethnic democracy when coupled with the upsurge of conjoined racial and partisan polarization. The Court’s failure to establish a limiting principle for the degree to which partisanship can usurp the redistricting process means that there is no federal guidance to cabin partisan gerrymandering and no measure to take account of the race-driven effect of the group lockout that partisan gerrymandering often produces. Absent this critical instruction from the Supreme Court, lower courts, civil rights advocates, and affected voters must turn to racial gerrymandering jurisprudence to discern first principles to guide a judicial response to partisan gerrymandering’s particular relation to and compounded effect on account of race. Fortunately, there is a through line from Rucho to the Court’s racial gerrymandering jurisprudence that plausibly permits federal courts to address hybrid racial and partisan gerrymandering claims and parse pure partisanship from punishment—if they are willing.*

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INTRODUCTION

The threat of extreme and punishing partisan gerrymandering<sup>1</sup> has increased exponentially since the Supreme Court’s 2019 decision in *Rucho v. Common Cause*<sup>2</sup> holding that partisan gerrymandering claims are nonjusticiable. Although the Court was unanimous in recognizing that partisan gerrymandering can undermine the fair functioning of the electoral process, neither *Rucho*’s majority opinion nor the dissent acknowledged partisan gerrymandering’s unique harm to the operation of our multiracial, multiethnic democracy when coupled with the upsurge of conjoined racial and partisan polarization—the heightened correlation between party, ideology, and race.<sup>3</sup> Partisan gerrymandering in a context of conjoined racial and partisan polarization skews electoral outcomes in favor of the political party leading the districting process to significantly decrease competition in the electoral arena and create a perpetual “outsider class” of certain groups of voters. When that outsider class disproportionately consists of racial minorities, partisan gerrymandering, or what some have named in its more extreme form “partisan lockup,”<sup>4</sup> submerges minority groups on account of their race and party, effecting an unconstitutional group “lockout.”<sup>5</sup>

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<sup>1</sup> The Supreme Court has defined partisan gerrymandering as “the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power.” *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 791 (2015). However, some have long been of the mind that “[a]ll [d]istricting [i]s ‘[g]errymandering.’” ROBERT G. DIXON, *DEMOCRATIC REPRESENTATION* 462 (1968).

<sup>2</sup> 139 S. Ct. 2484 (2019).

<sup>3</sup> See Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867, 869 (2016) (defining conjoined racial and partisan polarization as “[t]he more consistent alignment of race, party, and ideology since 1965”).

<sup>4</sup> Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648–49 (1998) (“In corporate governance the term ‘lockup’ refers to . . . devices that constrain the effectiveness of the voting power of shareholders by entrenching the incumbent position of firm management. . . . [A] self-conscious judiciary should destabilize political lockups in order to protect the competitive vitality of the electoral process and facilitate more responsive representation.”).

<sup>5</sup> See Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, “Fair Representation” and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 533

The majority's failure to establish a limiting principle for the degree to which partisanship can usurp the redistricting process means that there is no federal guidance to cabin partisan gerrymandering and no measure to take account of the race-driven effect of the group lockout that partisan gerrymandering often produces in a context of conjoined racial and partisan polarization.<sup>6</sup> Moreover, as one scholar put it:

[A]s American culture becomes increasingly diverse, and whites become increasingly anxious about the impending loss of their racial majority status, the Supreme Court appears to have gerrymandered its justiciability doctrines in a way that permits it to perform the social function of facilitating efforts by the white majority to preserve its existing political advantage over racial minorities.<sup>7</sup>

Absent critical instruction from the Supreme Court, lower courts, civil rights advocates, and affected voters must turn to racial gerrymandering jurisprudence to discern first principles that can guide a constitutionally viable judicial response to partisan gerrymandering's particular relation to and compounded effect on account of race.<sup>8</sup> Fortunately, there is a through line from *Rucho* to the Court's racial gerrymandering jurisprudence that permits federal courts to entertain a hybrid racial and partisan gerrymandering claim and parse partisanship from punishment—if they are willing.

This Article advances a hybrid racial and partisan gerrymandering claim that is rooted in racial gerrymandering jurisprudence but not limited to the typical proof of intentional racial discrimination. Instead, this hybrid claim permits federal courts to consider the compounded impact of conjoined racial and partisan polarization and partisan gerrymandering in a manner that distinguishes partisanship's judicially permissible role in districting from the punishment of race-based group lockout. It encourages courts and line-drawers to identify where along the partisan spectrum “benign,” or judicially acceptable, partisanship is cannibalized by excessive, or “distortive,” partisanship

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n.16 (2003) (defining “the difference between lockups, which serve to disadvantage minor parties, and lockouts, which shut them out of the process altogether”).

<sup>6</sup> See Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837, 1840 (2018) (“Although conjoined polarization emerged most strongly in the last two decades, legal doctrine has not yet found a comfortable way to deal with it . . .”).

<sup>7</sup> Girardeau A. Spann, *Gerrymandering Justiciability*, 108 GEO. L.J. 981, 982 (2020).

<sup>8</sup> See Sara Tofighbakhsh, Note, *Racial Gerrymandering After Rucho v. Common Cause: Untangling Race and Party*, 120 COLUM. L. REV. 1885, 1900 (2020) (“Since *Rucho* shut the door on judicial review of purely partisan redistricting, voters have no choice but to go through race to win a judicial remedy for a race and politics problem that may, by design, be functionally impossible for them to vote their way out of.”).

as a result of conjoined racial and partisan polarization. In other words, the hybrid racial and partisan gerrymandering claim fills a void in the Court's gerrymandering jurisprudence by advancing a consideration of race *and* party and departing from the convention of analyzing these interrelated factors as separate legal doctrines.

Part I examines *Rucho* within the current socio-political and legal landscape and proposes replacing the Court's overbroad distinction between race and party with an adjudicatory framework for a hybrid racial and partisan gerrymandering claim that aims to curb democracy distortion<sup>9</sup> that reinforces a political and racial hegemony. Part II analyzes the hybrid racial and partisan gerrymandering claim as a First Amendment associational harm with attendant Equal Protection concerns based on race. This Part begins with an overview of the Court's jurisprudence on race and party and concludes that courts should administer a balancing test that focuses on the "character and magnitude"<sup>10</sup> of a partisan gerrymander's racial impact. Part III analyzes the opportunities and challenges presented by opening up a new front of judicial intervention in the redistricting process through the hybrid racial and partisan gerrymander claim.

## I

### THE CURRENT CONTEXT OF PARTISAN GERRYMANDERING AND RACIAL POLARIZATION

As both major political parties prepare for the 2021 redistricting cycle, the urgency to identify a form of redress that accounts for the durable intersection of race and party is acute. The Court's credibility with respect to ensuring fairness in our democracy is already fraught<sup>11</sup>

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<sup>9</sup> See Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 604–05 (2007) (arguing that the harm done by partisan gerrymandering is "institutional distortion—political elites' manipulation of governance institutions or electoral structures to distort electoral outcomes in order to produce a particular result").

<sup>10</sup> See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) ("A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury . . .' against 'the precise interests put forward by the State . . .,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983))).

<sup>11</sup> The Court's credibility in this area is challenged by two decisions in particular: *Bush v. Gore*, 531 U.S. 98 (2000) and *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). Public polling shows that a sizeable number of voters disagree with the politically charged outcomes of these decisions. See Cristian Farias, *Americans Agree on One Thing: Citizens United Is Terrible*, HUFFPOST (Sept. 29, 2015, 6:17 PM), [https://www.huffpost.com/entry/citizens-united-john-roberts\\_n\\_560acd0ce4b0af3706de129d](https://www.huffpost.com/entry/citizens-united-john-roberts_n_560acd0ce4b0af3706de129d) (citing results of a Bloomberg poll showing 78% of Americans (80% of Republicans and 83% of Democrats) oppose *Citizens United*); Amy Semet, Nathaniel Persily & Stephen Ansolabehere, *Bush v. Gore in the American Mind: Reflections and Survey Results on the Tenth Anniversary of the Decision Ending the 2000 Election Controversy* (noting *Bush v.*

and has only become more so as a result of *Rucho*.<sup>12</sup> Further, the Court's checkered history in the area of race and politics raises significant concerns about its ability to serve as a neutral arbiter on questions with both political and racial implications.<sup>13</sup> And with Justice Kennedy's departure from the Court and the addition of more conservative justices in the past few years, it is increasingly doubtful that this perception will change unless its jurisprudence reflects political and racial realities on the ground.

### A. Demographic Snapshot of Race and Party

Partisan affiliation in the United States is, to varying degrees, a form of association linked to race.<sup>14</sup> The predictive value of other factors, such as age, gender, education, religion, and socioeconomic status on party affiliation is measurably less than that of race.<sup>15</sup> The significance of race in party affiliation is reflected in the colinearity of race and party across varying racial groups and, with respect to Black Americans in particular, the extent to which those correlations are remarkably static.<sup>16</sup> More than partisanship, race has figured prominently in shaping our electoral system. From the Three-Fifths Clause,<sup>17</sup> to the origins of the Electoral College,<sup>18</sup> the abolition of

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*Gore* as statistically significant in negatively affecting Court approval and confidence and as a unique polarizer of public opinion), in ELECTION ADMINISTRATION IN THE UNITED STATES: THE STATE OF REFORM AFTER *BUSH V. GORE* 48, 49 (2014).

<sup>12</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), overturned both *Benisek v. Lamone*, 348 F. Supp. 3d 493, 523 (D. Md. 2018) (finding plaintiffs' associational rights under the First Amendment burdened by partisan gerrymandering) and *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 941 (M.D.N.C. 2018) (finding partisan gerrymander in violation of Equal Protection Clause of the Fourteenth Amendment, the First Amendment, and Article I of the Constitution). These cases follow a line of federal precedent finding partisan gerrymanders unconstitutional that is now undermined by the Supreme Court. See, e.g., *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (2018) (finding partisan gerrymander violated Equal Protection Clause of the Fourteenth Amendment and the First Amendment).

<sup>13</sup> See generally Girardeau A. Spann, *Race Ipsa Loquitur*, 2018 MICH. ST. L. REV. 1025 (2018) (outlining the Court's history of entrenching racial disparities and its failures to meaningfully remedy inequalities).

<sup>14</sup> See Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CALIF. L. REV. 1209, 1246–60 (2003) (analyzing the jurisprudence of associational rights in connection with Black American political identity).

<sup>15</sup> See PEW RSCH. CTR., IN CHANGING U.S. ELECTORATE, RACE AND EDUCATION REMAIN STARK DIVIDING LINES 11 (2020), [https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2020/06/PP\\_2020.06.02\\_Party-ID\\_FINAL.pdf](https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2020/06/PP_2020.06.02_Party-ID_FINAL.pdf).

<sup>16</sup> *Id.* (citing data showing significant and consistent race-party affiliation over time for Black, Latinx, and Asian populations as compared to whites).

<sup>17</sup> U.S. CONST. art. I, § 2, cl. 3, *repealed* by U.S. CONST. amend. XIV, § 2.

<sup>18</sup> See Kamala Kelkar, *Electoral College Is 'Vestige' of Slavery, Say Some Constitutional Scholars*, PBS NEWSHOUR WEEKEND (Nov. 6, 2016, 3:57 PM), <https://www.pbs.org/newshour/politics/electoral-college-slavery-constitution>; Akhil Reed Amar, *The Troubling*

White Primaries,<sup>19</sup> the “Reapportionment Revolution” of the 1960s,<sup>20</sup> and the passage of the Voting Rights Act of 1965 (VRA) and its amendments,<sup>21</sup> race has defined the contours of power and political access in the United States.<sup>22</sup> Moreover, conjoined racial and partisan polarization is prevalent enough to, at a minimum, warrant an inquiry into the racial effects of partisan gerrymandering.<sup>23</sup>

For example, for over two decades, Black Americans have identified as Democrat or Democrat-leaning at a rate of 81% to 88%.<sup>24</sup> Since 1960, the proportion of Black voters who supported Democratic presidential candidates over sixteen general election cycles has fluctuated between 68% and 95%, with an average of 86.8% support.<sup>25</sup> For Latinx<sup>26</sup> and Asians in the U.S., conjoined racial and partisan polarization exists in notable measure, but to a lesser degree than Black

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*Reason the Electoral College Exists*, TIME (Oct. 29, 2020, 11:51 AM), <http://time.com/4558510/electoral-college-history-slavery> (arguing that slavery was “the real demon dooming direct national election in 1787 and 1803”). *But see* Gary L. Gregg II, *No! The Electoral College Was Not About Slavery!*, LAW & LIBERTY (Jan. 3, 2017), <http://www.libertylawsite.org/2017/01/03/no-the-electoral-college-was-not-about-slavery>.

<sup>19</sup> See *Smith v. Allwright*, 321 U.S. 649 (1944) (holding it unconstitutional for states to limit primary participation to white voters).

<sup>20</sup> See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962) (holding that Equal Protection challenges to state apportionment plans are justiciable); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (holding that claims of unconstitutionality in state redistricting plans are justiciable); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (“[T]he Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.”); *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713 (1964) (finding that a state reapportionment plan based on nonpopulation factors violated the Fourteenth Amendment). The reapportionment cases of the 1960s largely sought to resolve representation imbalances between rural and urban spaces that favored inhabitants of the former. The racial subtext to these cases arose from the increased migration of Black Americans to urban areas that caused the population shifts that led to malapportionment.

<sup>21</sup> Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1).

<sup>22</sup> See Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1404 (2015) (“Race bore the burden of creating a law of democracy in the United States . . .”).

<sup>23</sup> Moreover, the racial effects that partisan gerrymandering can produce are not predicated on conjoined racial and partisan polarization, rather they are exacerbated by this phenomenon.

<sup>24</sup> *Party Identification Among Black Registered Voters 1994-2019*, PEW RSCH. CTR., <https://docs.google.com/spreadsheets/d/1v58Nt6SW832ZUq7xLI6N8qdDs3qN4qWoDU-2EyEOGZg/edit#gid=1767687530> (last visited Jan. 30, 2021).

<sup>25</sup> DAVID A. BOSITIS, JOINT CTR. FOR POL. & ECON. STUD., BLACKS & THE 2012 DEMOCRATIC NATIONAL CONVENTION 9 tbl.1 (2012), <https://jointcenter.org/wp-content/uploads/2020/10/Blacks-and-the-2012-Democratic-National-Convention.pdf> (nonpartisan quadrennial research report); *How Groups Voted*, ROPER CTR., <https://ropercenter.cornell.edu/polls/us-elections/how-groups-voted> (last visited Jan. 30, 2021) (presenting statistics from exit polls in each presidential election from 1976 to 2020).

<sup>26</sup> I use the gender-neutral term “Latinx” to refer collectively to Latinos, Latinas, nonbinary persons of Latin American background, and those persons identifying as Hispanic.

Americans. Roughly two thirds of Latinx voters identified or leaned Democratic between 2008 and 2016,<sup>27</sup> and charted even greater margins of support by the eve of the 2020 election.<sup>28</sup> Since 2004, over 50% of Asian Americans supported or leaned Democratic, with rates exceeding 60% since 2016.<sup>29</sup> As a result of this persistent skew, purely partisan effects in the electoral arena rarely exist; race is nearly always implicated.<sup>30</sup> Accordingly, recognizing the hybridity of racial and partisan gerrymandering can afford important constitutional protections to historically marginalized racial groups in the political process and prevent democracy distortion.

Democracy distortion occurs when “political elites’ manipulation of governance institutions or electoral structures . . . distort electoral outcomes in order to produce a particular result.”<sup>31</sup> Distortion results from a set of structural and individual harms that interfere with the natural calibration of majoritarian choices and minority protections. In other words, democracy distortion is concerned with counter-majoritarian outcomes, as well as persistent suppression of minority interests. This principle is consistent with James Madison’s foundational edicts on factionalism and the benefits of a representative republic.<sup>32</sup> Political lockout occurs when the system is so rigged that

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<sup>27</sup> MARK HUGO LOPEZ, ANA GONZALEZ-BARRERA, JENS MANUEL KROGSTAD & GUSTAVO LÓPEZ, PEW RSCH. CTR., DEMOCRATS MAINTAIN EDGE AS PARTY ‘MORE CONCERNED’ FOR LATINOS, BUT VIEWS SIMILAR TO 2012, at 27 (2016), [https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2016/10/PH\\_2016.10.11\\_Politics\\_FINAL4.pdf](https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2016/10/PH_2016.10.11_Politics_FINAL4.pdf).

<sup>28</sup> AMERICAN ELECTION EVE POLL 2020, <https://electioneve2020.com/poll/#/en/demographics/latino> (last visited Jan. 31, 2021) (showing 70% support among all Latinx voters polled for Democratic nominee Joe Biden and 69% support for Democratic House of Representatives candidates).

<sup>29</sup> *Party Identification Among Registered Asian American (English Speaking) Voters 1994-2019*, PEW RSCH. CTR., <https://docs.google.com/spreadsheets/d/1v58Nt6SW83ZUq7xLI6N8qdDs3qN4qWoDU-2EyEOGZg/edit#gid=1396246928> (last visited Jan. 31, 2021); see also Kimmy Yam, *Asian Americans Voted for Biden 63% to 31%, but the Reality Is More Complex*, NBC NEWS (Nov. 9, 2020, 6:00 PM), <https://www.nbcnews.com/news/asian-america/asian-americans-voted-biden-63-31-reality-more-complex-n1247171>.

<sup>30</sup> To be sure, while partisan gerrymandering in states such as Maine, New Hampshire, West Virginia, Iowa, Idaho, and Wyoming, whose respective minority populations comprise less than 10% of the state’s total population, may not immediately trigger concerns about adverse racial impact on a statewide basis, concerns may arise in urban centers and other areas with concentrated minority populations. Moreover, even in the absence of sizeable minority populations, and perhaps because of it, white voters’ partisan affiliation may be informed by race.

<sup>31</sup> Charles, *supra* note 9, at 604–05. Both institutional distortion and democracy distortion share the same aim of ensuring that electoral systems “reflect as accurately as possible the preferences of the relevant electorate.” *Id.* at 605.

<sup>32</sup> See THE FEDERALIST NO. 10, at 46 (James Madison) (Clinton Rossiter ed., 1961) (referring to a faction as a “number of citizens, whether amounting to a majority or

natural alliances are thwarted by partisan manipulation. As Professors Samuel Issacharoff and Richard Pildes have argued, “[W]hen interpreting the various constitutional provisions that protect self-government, such as the First Amendment, the Court should construe those provisions against a background conception of democracy that recognizes the importance of competitive political markets to ensuring appropriately responsive representation.”<sup>33</sup> To the extent that race forms part of “the partisan lockup,” such group lockout is the crux of the hybrid racial and partisan gerrymandering claim and its distortive effect.

When viewpoint or other expressive or associational activity derives from the protected class status of race, incursions on that activity effect a double assault and compounded constitutional violation. The racial effects of invidious partisan gerrymandering should, therefore, form part of a complex appraisal courts administer in determining hybrid racial and partisan gerrymandering claims under the Constitution. Indeed, “[i]f *quantitative* vote dilution (in the form of malapportioned districts) unconstitutionally denies ‘fair and effective representation,’ then why does *qualitative* vote dilution (in the form of districts that systematically weaken an identifiable political group) not do the same?”<sup>34</sup> This notion is consonant with the Court’s holding in *Reynolds v. Sims* that the “basic aim” of reapportionment and redistricting is to provide “fair and effective representation for *all* citizens.”<sup>35</sup>

### B. *The Legal Landscape*

Unlike reapportionment, the Court’s gerrymandering jurisprudence is still evolving, as evidenced by its most recent gerrymandering decision in 2019 in *Rucho*, holding that partisan gerrymandering claims are nonjusticiable. Indeed, the legal claim of partisan gerrymandering did not come into the general public consciousness until the mid-1960s, despite coinage of the term “gerrymander” in the early

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minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community”).

<sup>33</sup> Issacharoff & Pildes, *supra* note 4, at 673.

<sup>34</sup> Daniel P. Tokaji, *Gerrymandering and Association*, 59 WM. & MARY L. REV. 2159, 2167 (2018).

<sup>35</sup> 377 U.S. 533, 565–66 (1964) (emphasis added). In addition, the Court has recognized that political processes do not reliably protect “discrete and insular minorities,” and laws restricting political processes may be subject to more exacting scrutiny. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).



1800s.<sup>36</sup> In early cases such as *Fortson v. Dorsey*<sup>37</sup> and *Burns v. Richardson*,<sup>38</sup> the Court warned of the potential for reapportionment to “minimize or cancel out the voting strength of racial or political elements,”<sup>39</sup> but it did not indicate that partisan gerrymandering could be justiciable until 1986 in *Davis v. Bandemer*.<sup>40</sup> Despite a smattering of intervening cases,<sup>41</sup> partisan gerrymandering claims were in legal limbo until *Rucho* foreclosed federal adjudication of pure partisan gerrymandering claims altogether.<sup>42</sup>

Notably, *Rucho* did not address the substance of the alleged partisan gerrymanders; rather it held that there was no historical foundation or present-day mechanism for adjudicating fairness in the districting process when it comes to partisan influence.<sup>43</sup> The *Rucho* majority opinion pointedly distinguished partisan gerrymanders from racial ones: “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.”<sup>44</sup>

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<sup>36</sup> See Erick Trickey, *Where Did the Term ‘Gerrymander’ Come From?*, SMITHSONIAN MAG. (July 20, 2017), <https://www.smithsonianmag.com/history/where-did-term-gerrymander-come-180964118>.

<sup>37</sup> 379 U.S. 433, 439 (1965).

<sup>38</sup> 384 U.S. 73, 88 (1966).

<sup>39</sup> *Fortson*, 379 U.S. at 439.

<sup>40</sup> 478 U.S. 109, 124–25 (1986). Although prior to *Davis* the Court had decided another partisan gerrymandering claim in *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973), the holding in that case was limited to the constitutionality of reapportionment plans whose purpose was to provide districts that would achieve “political fairness” between political parties. It was not until *Davis* that the Court held that partisan gerrymandering could be justiciable.

<sup>41</sup> Some twenty years after *Davis*, the Court decided two cases, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) and *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006), which encapsulate the Court’s binary approach to partisan and racial gerrymandering. *LULAC*, which involved allegations of partisan and racial gerrymandering under Section Two of the Voting Rights Act, found a violation of Latinx voting rights under a racial gerrymandering scheme but reached no standard to address alleged partisan gerrymandering in the same case. 548 U.S. at 442. In *Vieth*, the Court’s four liberal justices proposed three different potential standards for partisan gerrymandering, but none garnered a majority. 541 U.S. at 292–305.

<sup>42</sup> *But see* Benjamin Plener Cover, *Rucho for Minimalists*, 71 MERCER L. REV. 695 (2020) (arguing that *Rucho* has not foreclosed adjudication of all forms of pure partisan gerrymanders).

<sup>43</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019). *See also* Michael Gentithes, *Gobbledygook: Political Questions, Manageability, & Partisan Gerrymandering*, 105 IOWA L. REV. 1081, 1088–89 (2020) (critiquing Chief Justice Roberts’s overreliance on manageability standards to hold partisan gerrymandering claims nonjusticiable).

<sup>44</sup> *Rucho*, 139 S. Ct. at 2502.

What the Court misses, however, is that both racial and partisan gerrymandering claims are, at bottom, concerned with a fair shot rather than a fair share. Recognizing that many factors, including incumbency and candidate viability, etc., may determine the share of political power, proponents of both claims seek the removal of structural impediments to groups—be they racial or political—having a fair and equal shot at influencing the allocation of political power.<sup>45</sup> When the impediments are both racial and political because of conjoined racial and political polarization, the hybrid racial and partisan gerrymandering claim applies.

Despite their interconnection, racial gerrymandering and partisan gerrymandering have always been doctrinally distinct. Professor Richard Hasen’s analysis of the conjunction of race and party comes the closest to threading the race-party needle in the scholarship on this issue.<sup>46</sup> Professor Hasen artfully identifies three ways in which race and party might interact when courts adjudicate partisan-influenced laws.<sup>47</sup> The first, framed as “race or party,” follows the conventional model of separate and distinct claims for racial and partisan gerrymandering in which race and party are measured only for the degree to which either one masks the predominant motive of the districting process.<sup>48</sup> Defendants can use race to prove that partisan intent did not prevail and vice versa. The second approach, “race as a proxy for party,” operates as a proxy effect and searches for instances when line-drawers use party to camouflage intentional racial discrimination or manipulate voters based on race for partisan interest.<sup>49</sup> Like “race or party,” “race as party” focuses on line-drawers’ intent and whether they used race inappropriately in the construction of the districting map. Professor Hasen’s third and preferred approach, which he labels tongue-in-cheek as “party all the time,” is a strict partisan analysis of the burden on voters.<sup>50</sup> Importantly, similar to the *Rucho* majority’s holding, this third option excludes an application to redistricting on the theory that “there is no way to separate permissible

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<sup>45</sup> See, e.g., Bruce W. Hardy, *Candidate Traits and Political Choice* (charting relationship between candidate traits and voters’ choices), in *THE OXFORD HANDBOOK OF POLITICAL COMMUNICATION* 437, 437–38 (Kate Kenski & Kathleen Hall Jamieson eds., 2014), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199793471.001.0001/oxfordhb-9780199793471-e-017?print=pdf>.

<sup>46</sup> Hasen, *supra* note 6.

<sup>47</sup> *Id.* at 1840–42.

<sup>48</sup> *Id.* at 1840–41.

<sup>49</sup> *Id.* at 1841–42.

<sup>50</sup> *Id.* at 1842.

from impermissible consideration of party information in redistricting.”<sup>51</sup>

However, this singular focus on partisan motivation—especially if it were applied to redistricting—misses the forest for the trees. Building on Professor Hasen’s construct, this Article proposes a fourth alternative: “race *and* party.” The “race and party” approach mandates consideration of conjoined racial and partisan polarization, adding more nuance to the partisan gerrymandering equation. In sharp contrast to a party-only approach outlawed by *Rucho*, and to the false dichotomy of either the “race or party” method or “race as party” proxy model, the “race and party” approach proposed here takes full measure of the interplay of these defining forces in our electoral process.

If the goal of regulating partisan gerrymandering is to mitigate manipulation of the electoral system,<sup>52</sup> then any analysis of partisan harm must account for the concomitant race-based effect of group lockout and its distortive effect. The hybrid racial and partisan gerrymandering claim is straightforward: In evaluating the impact of a challenged gerrymander, evidence of conjoined racial and partisan polarization should form part of the calculus—even if the racial impact does not constitute a racial gerrymander under the Fourteenth Amendment or the partisan gerrymander is nonjusticiable by itself. Rather, the two can combine to evade *Rucho*’s concern of nonjusticiability by leveraging racial gerrymandering jurisprudence’s underlying principle that race should not “predominate” or overdetermine redistricting while tolerating some measure of partisan influence.<sup>53</sup>

### C. *The Urgency of Judicial Intervention*

The urgency of judicial intervention to address the conundrum of unchecked partisan gerrymandering and the upsurge of conjoined racial and partisan polarization is threefold. First, because of the Supreme Court’s highly controversial 5–4 decision in *Shelby County v. Holder* in 2013,<sup>54</sup> the redistricting process is now unmoored from the Voting Rights Act’s prophylactic and muscular protections, which helped prevent racial discrimination in some of the most recidivist

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<sup>51</sup> *Id.* at 1879.

<sup>52</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2517 (2019) (“[W]hen political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes too far.”).

<sup>53</sup> *See, e.g., Miller v. Johnson*, 515 U.S. 900, 920 (1995) (finding that gerrymanders where race is the “predominant, overriding factor” are subject to strict scrutiny).

<sup>54</sup> 570 U.S. 529 (2013) (holding that federal “preclearance” of voting changes that is triggered by a formula based on historical racial discrimination and not current conditions exceeds Congress’s enforcement powers).

jurisdictions in our country. *Shelby County* disabled federal oversight previously required under Section 5 of the Act, despite the existence of numerous redistricting challenges in covered jurisdictions. The absence of Section 5 as a checkpoint and deterrent in a redistricting cycle for the first time in fifty years will undoubtedly unleash an unprecedented wave of deeply distortive districting practices in the 2021 redistricting cycle if there is no federal judicial backstop to limit the racial effects of partisan gerrymandering.<sup>55</sup>

Relatedly, Section 2 of the Voting Rights Act, as presently interpreted by the Court in the vote dilution context, is ill-equipped to prevent the racialized consequences of partisan gerrymandering. Although its text derives from Congress's broad remedial powers under the Fourteenth and Fifteenth Amendments, Section 2 has been jurisprudentially bound to a strict formulaic application predicated upon a group's ability to elect a candidate of its choice. Under *Thornburg v. Gingles*, successful redistricting claims require a minority population that is sizeable yet compact and unable to elect candidates of its choice due to racially polarized voting.<sup>56</sup> These threshold factors then give way to a more complex and nuanced assessment of historical and socioeconomic factors.<sup>57</sup> However, even if

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<sup>55</sup> See Vishal Agraharkar, *50 Years Later, Voting Rights Act Under Unprecedented Assault*, BRENNAN CTR. FOR JUST. (Aug. 2, 2015), <https://www.brennancenter.org/our-work/research-reports/50-years-later-voting-rights-act-under-unprecedented-assault> (noting the "recent rash of discriminatory voting laws, unleashed by the Shelby County decision," for example, "mere hours after the high court ruling, Texas implemented a strict photo ID law," and "that summer, the North Carolina legislature . . . also instituted a stringent photo ID requirement, eliminated same-day registration, and cut back on early voting"). Although Section 2 of the Act remains in force, it was never intended to be duplicative of Section 5 and cannot serve as an adequate stand-in.

<sup>56</sup> 478 U.S. 30, 47 (1986). See generally Travis Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. 261 (2020) (summarizing the history of racially polarized voting).

<sup>57</sup> In a lengthy Report, the Senate Judiciary Committee in 1982 enumerated nine additional factors relating to history of discrimination and racialized voting procedures. See S. REP. NO. 97-417, at 28-29 (1982), as reprinted in 1982 U.S.C.A.N. 177, 206-07. The following seven Senate factors are typical indicia of voting practices that deny minority voters an equal opportunity to participate in the political process and to elect candidates of their choice: (1) "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;" (2) "the extent to which voting in the elections of the state or political subdivision is racially polarized;" (3) "the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;" (4) "if there is a candidate slating process, whether the members of the minority group have been denied access to that process;" (5) "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;" (6) "whether political campaigns have been characterized by overt

a jurisdiction produces the maximum number of majority-minority districts under Section 2, that does not necessarily prevent the partisan manipulation of the remainder of the districts in a manner that nullifies the effectiveness and statewide impact of the majority-minority districts. In other words, even if minority communities maximize the number of majority-minority districts under Section 2, if other seats are not allocated fairly, the substantive representation that those districts have the potential to produce may be minimized. In many ways, this doctrinal gap is exacerbated by the Court's determination that Section 2 does not protect *influence districts*<sup>58</sup>—districts in which minority voters cannot comprise a majority alone but are sizeable enough to influence the outcome of an election on their own or can join with like-minded or allied white voters to influence the outcome of an election and become part of a governing coalition.

Even if minority voters maximize the number of seats they can potentially control, they may effectively be denied substantive representation in a system that does not fairly allocate “white” seats for partisan gain. This can occur in a Republican gerrymander, for example, where packed minority communities can handily elect candidates who will, however, be dominated by the partisan stranglehold of the broader districting plan. This can also occur in Democratic gerrymanders in which minority communities are cracked to maximize Democratic power and, as a result, receive only diluted substantive representation. Accordingly, the loss of Section 5, which even when not suspended only applies to limited jurisdictions, and the scope of Section 2 leave no statutory fix for the democracy distortion that excessive partisan influence produces in a context of conjoined racial and partisan polarization.

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or subtle racial appeals;” and (7) “the extent to which members of the minority group have been elected to public office in the jurisdiction.” *Id.* The Senate Report identified two additional factors that are relevant proof in certain cases: (1) “whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;” and (2) “whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.” *Id.* at 29. The Senate Report makes clear, and the Supreme Court has affirmed, that “there is no requirement that any particular number of factors be proved or that a majority of them point one way or the other.” *Id.*; see *Thornburg v. Gingles*, 478 U.S. 30, 36–37 (1986); *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2340 (2021). The Report further states that the “ultimate test” for racial discrimination under Section 2 is “whether, in the particular situation, the practice operated to deny the minority plaintiff an equal opportunity to participate and to elect candidates of their choice.” S. REP. NO. 97-417, at 30.

<sup>58</sup> See *Bartlett v. Strickland*, 566 U.S. 1, 25–26 (2009) (holding that the VRA only requires that minority groups receive an equal opportunity to elect candidates of choice).

Second, over the past two decades, the country has witnessed a meteoric rise in hyperpartisanship and conjoined racial and partisan polarization.<sup>59</sup> Standing alone, hyperpartisanship has exacerbated widely held concerns that the electoral process is rigged, unequal, overly politicized, and distorted.<sup>60</sup> Reinforcing these fears is an increasing number of partisan gerrymanders whose countermajoritarian effect relegates political majorities to a minority power status.<sup>61</sup> As Professors Samuel Issacharoff and Pamela Karlan have written, “While there have been few if any examples of the limiting case, there are plenty of jurisdictions in which a party manages to obtain a substantial majority of the seats with a minority of the votes.”<sup>62</sup> When there are high degrees of conjoined racial and partisan polarization, the political divide often cleaves alarmingly on racial and ideological lines. In short, redistricting has never been set in a context so universally polarized.

Third, the disabling of Section 5, stiffening hyperpartisanship, and conjoined racial and partisan polarization are occurring alongside a seismic demographic shift fueled by a rapidly diversifying electorate. As soon as 2042, the United States will likely comprise a majority-

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<sup>59</sup> See, e.g., Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 273, 276 n.2 (2011) (contending that “[w]e have not seen the intensity of political conflict and the radical separation between the two major political parties that characterizes our age since the late nineteenth century” and citing various studies reaching the same conclusion through different measures); see also, e.g., *The Partisan Divide on Political Values Grows Even Wider: Sharp Shifts Among Democrats on Aid to Needy, Race, Immigration*, PEW RSCH. CTR. (Oct. 5, 2017), <https://www.pewresearch.org/politics/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider>; Steven Shepard, *Study: Americans More Divided Along Party Lines than Ever*, POLITICO (Oct. 5, 2017, 11:00 AM), <https://www.politico.com/story/2017/10/05/poll-americans-divided-party-lines-243466> (“The widening gap between Democrats and Republicans isn’t just a short-term trend: When Pew first asked the question in 1994, there was a 21-point difference between Democratic and Republican respondents, less than half the 47-point rift now.”). In addition, a 2015 study by Professor Simon Jackman of Stanford University shows that, of the ten worst political gerrymanders of the past forty years, five have occurred since 2010. Expert Report of Simon Jackman, *Assessing the Current Wisconsin State Legislative Redistricting Plan at 44*, *Whitford v. Nichol*, 180 F. Supp. 3d 583 (W.D. Wis. 2016) (No. 15-cv-421), ECF No. 62.

<sup>60</sup> See, e.g., Editorial, *The U.S. Needs a Democracy Overhaul. Here’s What Biden’s First Step Should Be*, WASH. POST (Jan. 2, 2021, 10:00 AM), [https://www.washingtonpost.com/opinions/the-us-needs-a-democracy-overhaul-heres-what-bidens-first-step-should-be/2021/01/01/48c92c8a-498a-11eb-a9f4-0e668b9772ba\\_story.html](https://www.washingtonpost.com/opinions/the-us-needs-a-democracy-overhaul-heres-what-bidens-first-step-should-be/2021/01/01/48c92c8a-498a-11eb-a9f4-0e668b9772ba_story.html).

<sup>61</sup> The underlying facts in *Gill v. Whitford* are emblematic of this disparity where, despite winning a majority of the 2012 statewide Assembly vote, the Democratic Party secured fewer than 40% of Wisconsin’s Assembly seats. See *Whitford v. Gill*, 218 F. Supp. 3d 837, 853 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018).

<sup>62</sup> Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 546 (2004).

minority population.<sup>63</sup> People of color are already 39.9% of the population, and that growth will continue to trend upward due to projected birth rates of people of color and death rates of whites.<sup>64</sup> Unsurprisingly, concerns about the United States's evolution into a "majority-minority" nation are already affecting policy preferences and political outcomes.<sup>65</sup>

Technology threatens to complicate these issues further.<sup>66</sup> Map drawers can now create near infinite maps better able to disguise pernicious motives.<sup>67</sup> The rudimentary tools of the 1970s have given way

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<sup>63</sup> See Press Release, U.S. Census Bureau, U.S. Census Bureau Projections Show a Slower Growing, Older, More Diverse Nation a Half Century from Now (Dec. 12, 2012), <https://www.census.gov/newsroom/releases/archives/population/cb12-243.html> ("The U.S. is projected to become a majority-minority nation for the first time in 2043. While the non-Hispanic white population will remain the largest single group, no group will make up a majority."). The number of Latinx voters has increased from 3.7 million in 1988 to 11.2 million in 2012. See Jens Manuel Krogstad, *Key Facts About the Latino Vote in 2016*, PEW RESEARCH CENTER (Oct. 14, 2016), <https://www.pewresearch.org/fact-tank/2016/10/14/key-facts-about-the-latino-vote-in-2016>. In 2016, millennials made up 44% of Latinx eligible voters. *Id.* In addition, the proportion of Asian voters rose from around 1% of total U.S. voters in 1992 to 4% in 2020. *How Groups Voted in 2020*, ROPER CENTER, <https://ropercenter.cornell.edu/polls/us-elections/how-groups-voted> (last visited May 17, 2021) (presenting statistics from exit polls in each presidential election from 1976 to 2020).

<sup>64</sup> See *Quickfacts: V2019*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045216> (last visited May 22, 2021) (reporting that non-Latinx, non-Hispanic whites comprised 60.1% in 2019); Tara Bahrapour, *In a Third of the U.S., More White People Are Now Dying than Being Born*, WASH. POST (Nov. 29, 2016), [https://www.washingtonpost.com/local/social-issues/in-a-third-of-the-us-more-white-people-are-now-dying-than-being-born/2016/11/29/df671c58-b67d-11e6-b8df-600bd9d38a02\\_story.html](https://www.washingtonpost.com/local/social-issues/in-a-third-of-the-us-more-white-people-are-now-dying-than-being-born/2016/11/29/df671c58-b67d-11e6-b8df-600bd9d38a02_story.html) (noting that the birth-to-death ratio is "much higher for minority groups," at 5.4 births-per-death for Latinx people, 1.94 births-per-death for Black people, and 1.75 births-per-death for Asian people).

<sup>65</sup> See, e.g., Lila Abed, *Affluent Washington DC Suburb Becomes Focal Point in National Critical Race Theory Debate*, LAPOLÍTICA ONLINE (June 7, 2021) <https://www.lapoliticaonline.com.mx/nota/137196-affluent-washington-dc-suburb-becomes-focal-point-in-national-critical-race-theory-debate> (noting that changing demographics in Loudoun County, Virginia over the last two decades that resulted in students of color comprising a majority of the students in the school district also precipitated the current backlash against diversity, equity and inclusion in the district's curriculum); Ronald Brownstein, *Why Republican Voter Restrictions Are a Race Against Time*, CNN (Mar. 23, 2021, 5:19 PM), <https://www.cnn.com/2021/03/23/politics/voting-rights-republicans-bills-demographics/index.html> (arguing that the recent spate of severe voter suppression laws reflects partisan panic over changing racial and generational demographics); Clive Myrie, *US Election 2020: Why Racism Is Still a Problem for the World's Most Powerful Country*, BBC NEWS (Oct. 30, 2020), <https://www.bbc.com/news/election-us-2020-54738922> (arguing that a racist mindset has pervaded American history and, therefore, American politics). See also Grace Tatter & Meghna Chakrabarti, *The Racist Roots of the Capitol Insurrection*, WBUR (Jan. 14, 2021), <https://www.wbur.org/onpoint/2021/01/14/the-racist-roots-of-the-capitol-insurrection>.

<sup>66</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring) ("Technology is both a threat and a promise.").

<sup>67</sup> Wendy K. Tam Cho & Bruce E. Cain, *Human-Centered Redistricting Automation in the Age of AI*, SCIENCE (2020), <https://www.science.org/doi/abs/10.1126/science.abd1879>

to advances whereby twenty-first century line-drawers can use cartographical software that processes massive files of raw data on the electorate, including longitudinal studies of race, wealth, voting activity, and party affiliation.<sup>68</sup> The proliferation of supercomputers that can produce hundreds of map simulations, the use of algorithms that can optimize partisan outcomes, and the deluge of money to fund the multimillion-dollar enterprise of redistricting have effectively launched a political “arms race.”<sup>69</sup> These overlapping and intersecting influences show no signs of abating and highlight the need for federal courts to develop a mechanism to address the confluence of racial and partisan gerrymandering in all its complexity. Put another way, these conditions beckon a legal counterweight to outsized partisan influence and its racial fallout. The strong and sustained link between race and party, especially among Black Americans, means that excessive partisan influence can produce commensurate racial effects in a context of conjoined racial and partisan polarization. All these factors bear upon the need to parse partisanship—which the Court has held is

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(“Recent technological advances have enabled new computational redistricting algorithms, deployable on supercomputers, that can explore trillions of possible electoral maps without human intervention.”).

<sup>68</sup> See, e.g., Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race*, ATLANTIC (Oct. 28, 2017), <https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888> (describing the history of technology in gerrymandering); Jordan Ellenberg, *How Computers Turned Gerrymandering into a Science*, N.Y. TIMES (Oct. 6, 2017), <https://www.nytimes.com/2017/10/06/opinion/sunday/computers-gerrymandering-wisconsin.html> (describing the sophisticated algorithms used to gerrymand); cf. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2513 (2019) (Kagan, J., dissenting) (“What was possible with paper and pen—or even with Windows 95—doesn’t hold a candle (or an LED bulb?) to what will become possible with developments like machine learning. And someplace along this road, ‘we the people’ become sovereign no longer.”). Moreover, the failure of gerrymandering jurisprudence to account for advances in technology is not unlike the Fourth Amendment’s stagnant search and seizure doctrine, which the Supreme Court admits has been outpaced by technology. See, e.g., Transcript of Oral Argument at 35, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402) (showing Justice Breyer referring to technology in the context of the Fourth Amendment as an “open box” and conceding that the Court knows “not where we go”).

<sup>69</sup> See Newkirk, *supra* note 68. But see Louise Matsakis, *Big Data Supercharged Gerrymandering. It Could Help Stop It Too*, WIRED (June 28, 2019, 2:01 PM), <https://www.wired.com/story/big-data-supercharged-gerrymandering-supreme-court> (“The good news is that the technology needed to crunch census data and draw district maps has been democratized.”).



inherent to the redistricting process<sup>70</sup>—and punishment based on political and racial association.<sup>71</sup>

## II

### JOINING PARTISAN GERRYMANDERING AND RACIAL GERRYMANDERING

In its most recent racial gerrymandering cases the Court has opened an aperture to see the role of race in gerrymandering more clearly: the consolidated cases of *Alabama Democratic Conference v. Alabama* and *Alabama Legislative Black Caucus v. Alabama*<sup>72</sup> (collectively, *Alabama*), *Bethune-Hill v. Virginia State Board of Elections (I and II)*,<sup>73</sup> *Cooper v. Harris* (North Carolina),<sup>74</sup> and *Abbott v. Perez* (Texas).<sup>75</sup> These cases suggest that, despite *Rucho*'s ban on pure partisan gerrymandering jurisprudence claims, a hybrid racial and partisan gerrymandering claim is legally viable by leveraging the underlying principle in racial gerrymandering jurisprudence that race should not predominate the districting process.

#### A. *The Jurisprudential Case for Hybrid Racial and Partisan Gerrymandering Claims*

Beginning with the White Primary Cases, followed by the apportionment challenges of the 1960s, to the current doctrine on racial gerrymandering, the Court has had a long tradition of mischaracterizing racial discrimination as ordinary politics. When the Court has come around to acknowledging racial discrimination in the political process, it has done so at the expense of recognizing the compounded force of race and party, forcing an unnatural doctrinal competition. The Court remains locked in a self-imposed dilemma of adjudicating either partisan gerrymandering, which it has held it does not have jurisdiction to do, or racial gerrymandering based on a theory of predominance—

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<sup>70</sup> *Rucho*, 139 S. Ct. at 2502 (“A partisan gerrymandering claim cannot ask for the elimination of partisanship.”); see also *Vieth*, 541 U.S. at 285 (Scalia, J., plurality opinion) (“The Constitution clearly contemplates districting by political entities . . . and unsurprisingly that turns out to be root-and-branch a matter of politics.” (citation omitted)).

<sup>71</sup> Professor Justin Levitt has described this punishment as “tribal partisanship.” Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787, 1798 (2014) (defining tribal partisanship as “[t]he exclusive focus is the intent to aid one’s own team or injure the other side”).

<sup>72</sup> 135 S. Ct. 1257 (2015).

<sup>73</sup> *Bethune-Hill v. Va. State Bd. of Elections (Bethune-Hill v. Virginia State Board of Elections I)*, 137 S. Ct. 788 (2017); *Va. House of Delegates v. Bethune-Hill (Bethune-Hill v. Virginia State Board of Elections II)*, 139 S. Ct. 1945 (2019).

<sup>74</sup> 137 S. Ct. 1455 (2017).

<sup>75</sup> 138 S. Ct. 2305 (2018).

that is, whether race or party had the greatest influence in the districting plan. While courts have often acknowledged the link between race and party, they have yet to create a mechanism for accounting for that link in the form of a hybrid racial and partisan gerrymandering claim.<sup>76</sup> With one notable exception, however, the Court's most recent racial gerrymandering decisions subtly communicate a more textured and expansive conception of proving discrimination than earlier cases, which support the conception of a hybrid racial and partisan gerrymandering claim.

*Shaw v. Reno*,<sup>77</sup> one of the earliest cases involving majority-minority districts, and its progeny established that strict scrutiny must apply when government actors use race as a predominant factor in drawing districts, including those drawn to benefit racial minorities.<sup>78</sup> *Shaw* instigated a marked deceleration of the creation of minority-majority districts and made existing districts vulnerable to constitutional challenge. As if to complicate the landscape further, at the onset of the redistricting cycle that followed the 2000 Census, the Court held in *Easley v. Cromartie* that line-drawers could rely on voting patterns by race when constructing electoral districts for partisan advantage.<sup>79</sup> In short, the Court effectively sanctioned the manipulation of racial minorities so long as it was for partisan ends. *Vieth*, decided just three years later, did little to clarify the appropriate role of partisanship, let alone the limits on the use of race in this context.

In the years since *Vieth*, courts have struggled mightily to discern whether race or party dictated a districting plan within the context of racial gerrymandering doctrine, and in absence of partisan gerrymandering doctrine, beyond the question of justiciability.<sup>80</sup> Collectively, *Alabama*, *Bethune-Hill I* and *II*, and *Cooper*<sup>81</sup> affirm a judicial fidelity to the Voting Rights Act and, by extension, protection against racial discrimination in the electoral process even when complicated by par-

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<sup>76</sup> See, e.g., *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 600 (M.D.N.C. 2018) (acknowledging that "race and politics are highly correlated"), *vacated*, 138 S. Ct. 2679 (2018).

<sup>77</sup> 509 U.S. 630 (1993).

<sup>78</sup> See, e.g., *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (finding that gerrymanders where race is the "predominant, overriding factor" are subject to strict scrutiny).

<sup>79</sup> 532 U.S. 234, 258 (2001).

<sup>80</sup> See, e.g., *Bethune-Hill v. Va. State Bd. of Elections (Bethune-Hill v. Virginia State Board of Elections I)*, 137 S. Ct. 788 (2017); *Va. House of Delegates v. Bethune-Hill (Bethune-Hill v. Virginia State Board of Elections II)*, 139 S. Ct. 1945 (2019); *Cooper v. Harris*, 137 S. Ct. 1455, 1473 (2017).

<sup>81</sup> It bears noting that these cases arise out of two states, Alabama and Virginia, which were fully covered, and North Carolina, which was substantially covered by the now-suspended Section 5.

tisan aims. These cases also demonstrate a commitment to guarding a nuanced understanding of intent in the redistricting context. In addition, they underscore the Court's increased discomfort with the limitations of the racial gerrymandering doctrine when it confronts defenses of partisanship, which provides support for a hybrid racial and partisan gerrymandering claim.<sup>82</sup>

The consolidated cases of *Alabama Democratic Caucus v. Alabama* and *Alabama Legislative Caucus v. Alabama* are one of two decisions involving the Voting Rights Act since the *Shelby County* decision. Plaintiffs challenged the state legislative redistricting plan on the grounds that the 2012 Republican-led effort violated the Equal Protection Clause. The plan diluted Black electoral power by systematically relocating more than 100,000 Black residents to "pack" them into majority-minority districts. The legislature defended its efforts by asserting that Section 5 compelled Black population percentages in majority-minority districts at nearly identical levels as in the previous plan.

The core issue, however, was whether race predominated in the construction of the newly packed majority-minority districts.<sup>83</sup> Overturning a divided three-judge panel in a 5–4 opinion by Justice Breyer, the Court held that "there is strong, perhaps overwhelming evidence that race did predominate as a factor" in at least one district.<sup>84</sup> However, during oral argument, Justice Kennedy, who joined the majority, fixated on the conflation of race and party. Specifically, he queried about the legality of a districting process in which "Party A" and subsequently "Party B" "use race, but it's purely partisan."<sup>85</sup> Justice

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<sup>82</sup> By contrast, *Abbott v. Perez*, which involved a racial gerrymander in Texas, does not fall into this camp and is a decidedly narrower, fact-specific ruling. 138 S. Ct. 2305 (2018). On the last day of the 2017 term, the Supreme Court also issued a per curiam opinion affirming a district court's finding of a racial gerrymander in four of North Carolina's state legislative districts but reversing its decision to override the legislature's remedial map based on state constitutional claims. *North Carolina v. Covington*, 138 S. Ct. 2548 (2018) (per curiam). Specifically, the Court held that the lower court's factfinding "turned up sufficient circumstantial evidence that race was the predominant factor governing the shape of those four districts." *Id.* at 2553.

<sup>83</sup> On the matter of predominance, the Court rejected the argument that One-Person, One-Vote (OPOV) is a traditional redistricting principle. *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1271 (2015) (finding that OPOV "is not a factor to be treated like other nonracial factors when a court determines whether race predominated over other, 'traditional' factors in the drawing of district boundaries").

<sup>84</sup> The legislature's compliance defense was further undermined by the Republican Party's challenge roughly a decade earlier to a redistricting plan with nearly identical Black population percentages created by Democrats to enable Black voters to elect candidates of choice.

<sup>85</sup> Professor Richard Pildes, who argued on behalf of the Alabama Democratic Conference, rightly responded that "race can't be used excessively and unjustifiably in

Kennedy's questioning suggests that race can be used in purely partisan ways. However, as Solicitor General Donald Verrilli indicated, if line-drawers' intentions are purely partisan, then racial demographic data are irrelevant.<sup>86</sup>

The idea that legislatures can use race for partisan gain without violating the Constitution has been firmly debunked by the Court's most recent decisions but may still carry some residual weight, as Justice Kennedy's question reveals. However, regardless of whether line-drawers are aware of racial data, "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>87</sup> With partisan gerrymandering claims foreclosed by *Rucho*, the next best and, arguably more accurate measure, is a hybrid racial and partisan gerrymandering claim.

In *Bethune-Hill* and *Cooper*, the Court refined certain aspects of racial gerrymandering doctrine and issued important correctives. In *Bethune-Hill*, the Court reviewed the lower court's determination that there were no constitutional violations among twelve of Virginia's challenged state legislative districts, despite the court's finding that race predominated in the construction of one.<sup>88</sup> Writing for the majority, Justice Kennedy clarified that "showing a deviation from, or conflict with, traditional redistricting principles is not a necessary prerequisite to establishing racial predominance."<sup>89</sup> Instead, plaintiffs can prove race predominated based on "direct evidence of the legislative purpose and intent"<sup>90</sup> or circumstantial evidence such as "a district's shape and demographics."<sup>91</sup>

The Court also emphasized that the inquiry should consider the district as a whole and not just the areas where there may have been a

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either case. . . . If, for partisan purposes, a legislature passed a race-based voting barrier to voting that would surely be unconstitutional." Transcript of Oral Argument at 10–11, Ala. Legis. Black Caucus v. Alabama and Ala. Democratic Caucus v. Alabama, 575 U.S. 254 (2015) (No. 13-895).

<sup>86</sup> As I have written elsewhere, if party—not race—were the sole consideration, "the line-drawer would likely rely on electoral districts based on electoral outcome and not on census tract data." Janai Nelson, *Race Reasoning in Alabama Redistricting: A View from the Supreme Court*, HAMILTON & GRIFFIN ON RIGHTS (Nov. 14, 2014), <https://casetext.com/analysis/guest-blog-janai-nelson-race-reasoning-in-alabama-redistricting-a-view-from-the-supreme-court>.

<sup>87</sup> Richard L. Hasen, *Racial Gerrymandering's Questionable Revival*, 67 ALA. L. REV. 365, 384 (2015).

<sup>88</sup> 141 F. Supp. 3d 505 (E.D. Va. 2015), *aff'd in part, vacated in part*, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017).

<sup>89</sup> *Bethune-Hill*, 137 S. Ct. at 799.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 798 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).

deviation from traditional districting principles and remanded for reconsideration of the eleven districts consistent with this guidance. With respect to the single district where the lower court found that race did predominate, the Court affirmed the lower court's finding that the use of race survived strict scrutiny. Specifically, the Court held that legislatures purporting to use race to comply with the Voting Rights Act do not have to be accurate in their determination that reliance on race is "actually . . . necessary" so long as they have "good reasons to believe" they need to use race to satisfy the Act.<sup>92</sup> In so doing, the Court loosened the standard for accepting what I have termed elsewhere the "do-good districting defense,"<sup>93</sup> in which legislators claim compliance with the Voting Rights Act in defense of exploitative manipulation of minority populations. Paired with *Alabama*, however, the Court's "good reason" language in *Bethune-Hill* reflects a nuanced understanding of pretext that does not rule out plausible justifications for VRA compliance. According to the Court, the Alabama legislature had no plausible reason for believing that the VRA required the state's districts to be nearly identical to those in its previous plan, whereas the Court was convinced that Virginia *did* have "good reasons" to believe the Act compelled the racial composition of District 75, reinforcing an expansive view of intent.<sup>94</sup>

Relatedly, *Cooper* is most important for what it reveals about the Court's ongoing struggle with intent. Plaintiffs sued the state, alleging that Districts 1 and 12<sup>95</sup> constituted impermissible racial gerrymanders. In both districts, a Republican-led legislature increased the Black voting-age population from 48.6% to 52.7% and 43.8% to 50.7%, respectively.<sup>96</sup> Justice Kagan, writing for the Court's 5–3 majority, reaffirmed several critical doctrinal precepts. First, the Court affirmed the district court's finding that race predominated in the

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<sup>92</sup> *Id.* at 801 (quoting Ala. Legis. Black Caucus v. Alabama, 135 S. Ct. 1257, 1274 (2015)).

<sup>93</sup> Nelson, *supra* note 86 (describing how the court ascribed entirely benevolent motives to Alabama, which argued that its districting plan intended to maintain the same proportion of minority voters in majority-minority districts, despite that these high concentrations may no longer be necessary to protect the voters' ability to elect).

<sup>94</sup> In June 2018, following the second bench trial, a three-judge District Court in the Eastern District of Virginia, held two to one that, in eleven of the districts, "the [S]tate ha[d] [unconstitutionally] sorted voters . . . based on the color of their skin." *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 180 (2018).

<sup>95</sup> District 12 had been challenged before the Court four times before this latest foray, starting with *Shaw v. Reno*, 509 U.S. 630 (1993). *Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017) ("We now look west to District 12, making its fifth(!) appearance before this Court.").

<sup>96</sup> *Cooper*, 137 S. Ct. at 1466.

drawing of both districts<sup>97</sup> and jettisoned the notion that plaintiffs must show an alternate plan to prove motive.<sup>98</sup> Second, the Court also doubled down on the principle that the “use of race as a proxy” for “political interest[s] [is] prohibit[ed].”<sup>99</sup> In recognizing the distinction between race and party, Justice Kagan wrote that parsing race and party in redistricting requires a “sensitive inquiry” into the intent of the line-drawer in light of the fact that a conjoined racial and partisan polarization can lead to similar results whether the aim is racial or partisan gerrymandering.<sup>100</sup> Finally, like the Alabama cases, *Cooper* also reinforced the notion that compliance with the Voting Rights Act does not compel unnecessary reliance on race and cannot provide cover for overreliance on race.<sup>101</sup>

Like *Bethune-Hill*, however, one of *Cooper*’s most important contributions to racial gerrymandering doctrine is that it affirmed the expansiveness of the intent standard and clarified the misuse of race as a proxy for party.<sup>102</sup> Both the Court’s abandonment of the alternative map requirement and emphasis on Alabama’s “strong basis”<sup>103</sup> and “good reasons”<sup>104</sup> to meet the narrow tailoring requirement for a VRA defense reinforce that the Court is willing to infer intent from a variety of sources and will reject efforts to scapegoat the VRA as a means of justifying racial discrimination to a partisan end.

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<sup>97</sup> To conclude that narrow tailoring was practically nonexistent, especially with respect to Congressional District 12, the lower court decision relied on factors such as: (1) the movement of large populations of Black voters into the district and white voters out of the district; (2) tenuous justifications by the state for its use of race; and (3) statements by elected officials admitting to “racial considerations” and racial targets to comply with the Voting Rights Act. “North Carolina’s 2011 Congressional Redistricting Plan [did not comply] with the VRA, and therefore fail[ed] strict scrutiny.” *Harris v. McCrory*, 159 F. Supp. 3d 600, 610–11 (M.D.N.C. 2016).

<sup>98</sup> *Cooper*, 137 S. Ct. at 1479. (“[I]n no area of our equal protection law have we forced plaintiffs to submit one particular form of proof to prevail.” (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977))). Notably, *Cooper* dispenses with the assumed mandate for an alternative map in *Easley v. Cromartie*, 532 U.S. 234 (2001), thus rendering intent in gerrymandering doctrine more consistent with the intent doctrine as broadly articulated in *Arlington Heights*, 429 U.S. at 252. Justice Kagan rightly recognized that the work the alternative map performs is to provide evidence of pretext, which can be established through other credible evidence.

<sup>99</sup> See *Cooper*, 137 S. Ct. at 1463–64 (citing *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).

<sup>100</sup> *Id.* at 1473 (quoting *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999)).

<sup>101</sup> *Id.* at 1468.

<sup>102</sup> See Michael Li & Yuriy Rudensky, *Rethinking the Redistricting Toolbox*, 62 *How. L.J.* 713, 734 (2019) (arguing that *Cooper* can help “tackl[e] the artificial race vs. politics distinction . . . where politics is used as the excuse for maps that adversely impact communities of color”).

<sup>103</sup> *Cooper*, 137 S. Ct. at 1464 (quoting *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015)).

<sup>104</sup> *Id.* (quoting *Ala. Legis. Black Caucus*, 135 S. Ct. at 1274).

Justice Kagan also instructed that “the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics.”<sup>105</sup> Here Justice Kagan relies on a classic “race as party” proxy theory, which looks at the intentional use of race for partisan gain and fits these actions squarely in the racial gerrymandering camp. While sufficient to address the harm in *Cooper*, where there was evidence of intentional use of race, “race as proxy” would be insufficient to address the effect of a partisan gerrymander that leverages race unintentionally. In his dissent in *Cooper*, Justice Alito partially acknowledges this paradox, albeit to suggest that all such claims are nonjusticiable. He specifically remarked on the conjoined racial and partisan polarization that complicates the adjudication of these cases: “If around 90% of African-American voters cast their ballots for the Democratic candidate, as they have in recent elections, a plan that packs Democratic voters will look very much like a plans [sic] that packs African-American voters.”<sup>106</sup> Justice Alito defended this practice by stating that *Shaw v. Reno* and *Bush v. Vera* hold “that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be Black Democrats and even if the State were conscious of that fact.”<sup>107</sup> He further warned that, unless courts exercise abundant caution in “distin-

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<sup>105</sup> *Id.* at 1473 n.7. Scholars have debated whether *Cooper* creates new law on the use of race as a proxy or whether it simply affirms the predominance theory that has guided its intent analysis in the area of racial gerrymandering all along. Compare Erwin Chemerinsky, *Racial Gerrymandering Can No Longer Be Justified as a Proxy for Party Affiliation*, ABA J. (June 1, 2017, 8:30 AM), [https://www.abajournal.com/news/article/chemerinsky\\_the\\_supreme\\_court\\_race\\_and\\_voting\\_districts](https://www.abajournal.com/news/article/chemerinsky_the_supreme_court_race_and_voting_districts) (arguing that *Cooper* ends the “is it race or is it party” quandry by affirming that strict scrutiny applies whenever race is the predominant factor, even if its purpose is partisan gerrymandering), and Richard Hasen, *Breaking and Analysis: Supreme Court on 5-3 Vote Affirms NC Racial Gerrymandering Case, with Thomas in Majority and Roberts in Dissent*, ELECTION L. BLOG (May 22, 2017, 7:06 AM), <https://electionlawblog.org/?p=92675> (contending that *Cooper* confirms that “race and party are not really discrete categories and that discriminating on the basis of party in places of conjoined polarization is equivalent, at least some-times, to making race the predominant factor in redistricting”), with Richard Pildes, *Disagreeing with Rick Hasen on the North Carolina Case*, ELECTION L. BLOG (May 22, 2017, 12:06 PM) <https://electionlawblog.org/?p=92706> (arguing that the *Cooper* “majority [did not hold] anything like the principle that it will treat partisan-based districting (or partisanly-motivated election regulation more generally) as a proxy for race-based districting (or race-based election regulation)”), and Justin Levitt, *NC Redistricting, from Someone Not Named Rick*, ELECTION L. BLOG (May 22, 2017, 11:44 AM), <https://electionlawblog.org/?p=92700> (contending that the *Cooper* ruling “did not treat race and party as proxies for each other”).

<sup>106</sup> *Cooper*, 137 S. Ct. at 1488 (Alito, J., concurring in part and dissenting in part) (footnote omitted).

<sup>107</sup> *Id.* (emphasis omitted) (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)).

guishing race-based redistricting from politics-based redistricting,” parties will misuse courts as “weapons of political warfare,” inviting “losers in the redistricting process to seek to obtain in court what they could not achieve in the political arena.”<sup>108</sup> Justice Alito articulates a widely held belief that race and politics can and should be considered in isolation when determining the constitutionality of districting plans and the intent of legislative actors.

By contrast, the hybrid racial and partisan gerrymandering claim this Article proposes starts from the premise that partisan gerrymandering overdetermined by race is an independent, qualitative harm within a context of conjoined racial and partisan polarization. Justice Alito’s rhetorical question regarding whether the Court was correct in saying “race, not politics, accounted for the district’s reconfiguration”<sup>109</sup> is misplaced. In reality, race and politics together—in deeply concerning ways—account for the district’s configuration. Race was the means to achieve a democracy-distorting end. Both the use of race to that end violates the law as does the use of race to the end of distortive partisan gerrymandering because it inflicts a compounded harm on affected minority groups on account of both their race and party.

Indeed, *Cooper* underscores how the lack of a hybrid racial and partisan gerrymandering doctrine can provide an escape hatch for race manipulation that does not rise to the level of an independent constitutional violation. And given the composition of the Court since Justice Kennedy’s departure and the passing of Justice Ginsburg, it is unclear whether the strength of *Cooper*’s holding will endure.<sup>110</sup> The hybrid racial and partisan gerrymandering claim, at least theoretically, is one way to fill that void. While it is likely that he would be no more appeased by a hybrid racial and partisan gerrymandering cause of action than with a pure partisan gerrymandering claim, Justice Alito might find that a transparent focus on effects eliminates the concern that the wrong motive is ascribed to line-drawers in favor of a commitment to a standard that discerns between benign politics and actual political warfare. Justice Alito’s deference to the “good faith” of legislative bodies undergirds his approach to both racial and partisan gerrymandering claims.<sup>111</sup> Considering conjoined racial and partisan

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<sup>108</sup> *Id.* at 1490.

<sup>109</sup> *Id.* at 1474 (majority opinion).

<sup>110</sup> See Richard L. Hasen, *Resurrection: Cooper v. Harris and the Transformation of Racial Gerrymandering into a Voting Rights Tool* (“[I]t would not be surprising to see a new, more conservative Supreme Court revert to its original treatment of the gerrymandering claim as a tool to limit minority voting power.”), in *AM. CONST. SOC’Y, SUPREME COURT REVIEW*, 2016-2017, at 105, 106 (Steven D. Schwinn ed., 2017).

<sup>111</sup> See, e.g., *Abbott v. Perez*, 138 S. Ct. 2305, 2328 (2018) (“It [is] the plaintiffs’ burden to overcome the presumption of legislative good faith and show that the . . . Legislature



polarization as a part of a hybrid racial and partisan gerrymandering claim short-circuits the need to prove racial intent when the effect is the same: Minority voters are punished both for their race and their party affiliation, whether intended or not.<sup>112</sup>

### *B. Framing the Hybrid Racial and Partisan Gerrymandering Claim*

Hybrid racial and partisan gerrymandering primarily implicates two aspects of the First Amendment—speech and associational rights—as well as the Equal Protection Clause.<sup>113</sup> A First Amendment analysis can account for equality and associational principles;<sup>114</sup> and the Equal Protection Clause offers specific protection against harms visited upon individuals or groups on account of race.<sup>115</sup> Specifically, the concept of First Amendment Equal Protection,<sup>116</sup> which asserts “that all citizens should have an equal opportunity to participate in the political process,”<sup>117</sup> can do important work in advancing the

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acted with invidious intent.”); Jake van Leer, *The Answers Are Right Here: Partisan Gerrymandering Oral Arguments*, YALE L. SCH. MEDIA FREEDOM & INFO. ACCESS CLINIC (Apr. 9, 2019), <https://law.yale.edu/mfia/case-disclosed/answers-are-right-here-partisan-gerrymandering-oral-arguments>.

<sup>112</sup> For example, in *Abbott v. Perez*, the Court reversed the district court’s invalidation of several districts in Texas’s legislative reapportionment plan under Section 2 of the Voting Rights Act, based in part on a strong presumption of legislative good faith despite evidence of intentional discrimination. 138 S. Ct. 2305, 2326–29 (2018).

<sup>113</sup> Hybrid racial and partisan gerrymandering claims may also violate the Due Process Clause of the Fourteenth Amendment, the Elections Clause, the Fifteenth Amendment, the Voting Rights Act of 1965 and its amendments, state constitutional protections, and other laws.

<sup>114</sup> See Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2426 (2003) (“While the First Amendment is not exclusively concerned with equality, there is a widely shared consensus that equality—particularly the idea that government should not favor some speakers over others because of their point of view—lies at its core.”).

<sup>115</sup> FOURTEENTH AMENDMENT—RIGHTS GUARANTEED: PRIVILEGES AND IMMUNITIES OF CITIZENSHIP, DUE PROCESS, AND EQUAL PROTECTION, S. DOC. NO. 112-9, at 2134 (2d Sess. 2017), <https://www.govinfo.gov/app/details/GPO-CONAN-2017/GPO-CONAN-2017-10-15> (“The Fourteenth Amendment ‘is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy.’”).

<sup>116</sup> The phrase “First Amendment Equal Protection” was coined by Professor Daniel Tokaji and riffs off of Professor Henry Monaghan’s theory of “First Amendment Due Process.” See Tokaji, *supra* note 114, at 2410 n.7 (“The use of [First Amendment Equal Protection] is meant to recall Professor Monaghan’s use of the term ‘First Amendment Due Process’ in his article of the same title.” (citing Henry P. Monaghan, *First Amendment “Due Process,”* 83 HARV. L. REV. 518 (1970))); see also Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975) (observing that “the principle of equal liberty lies at the heart of the first amendment’s protections against government regulation of the content of speech”).

<sup>117</sup> Tokaji, *supra* note 114, at 2410.

hybrid racial and partisan gerrymandering claim where both equality and association interests are at stake. First Amendment Equal Protection permits consideration of how the conjunction of race and politics exacerbates the constitutional harms visited by partisan gerrymandering.

The overlap of associational and equality interests has historical precedent. In fact, race was at the center of the origins of associational theory under the First Amendment. In *NAACP v. Alabama ex rel. Patterson*,<sup>118</sup> a group of Black Americans and their political allies formed part of the Alabama chapter of the National Association of the Advancement of Colored People (NAACP).<sup>119</sup> After a failed attempt to thwart the chapter's operation, the state sought to subpoena the names of its members.<sup>120</sup> Writing for a unanimous Court, Justice John Marshall Harlan II held that the state scrutiny imposed by the subpoena interfered with the rights of NAACP members "to associate freely with others," including for the "advancement of beliefs and ideas."<sup>121</sup> The state's interest in the disclosure of membership lists was subordinate to the freedom to associate, a freedom the Court deemed "an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."<sup>122</sup>

The Court expanded the concept of freedom of association in another case involving the NAACP. *NAACP v. Button*,<sup>123</sup> decided five years after *Patterson*, like its predecessor, involved a thinly veiled attempt to derail desegregation efforts in the South by challenging the organizing activities of the NAACP.<sup>124</sup> Instead of seeking disclosure of membership lists, the State of Virginia sought to criminalize the NAACP's litigation pursuits through ethics laws.<sup>125</sup> In a 6–3 decision, the Court held that activities of the NAACP were protected "modes of expression and association" under the First and Fourteenth Amendments "which Virginia may not prohibit,"<sup>126</sup> and its litigation

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<sup>118</sup> 357 U.S. 449 (1958).

<sup>119</sup> *Id.* at 452.

<sup>120</sup> *See id.* at 452–53.

<sup>121</sup> *Id.* at 466.

<sup>122</sup> *Id.* at 460, 466.

<sup>123</sup> 371 U.S. 415 (1963).

<sup>124</sup> *See generally id.* at 420, 423–26, 428 (detailing the desegregation efforts of the NAACP in Virginia and outlining the methodical frustration of those efforts through the policies at issue).

<sup>125</sup> *See generally id.* at 423–26.

<sup>126</sup> *Id.* at 428–29.

in pursuit of racial equality was “a form of political expression” and not “a technique of resolving private differences.”<sup>127</sup>

Association with a political party, particularly in a context of conjoined racial and partisan polarization, raises similar concerns. Constraints on a political party’s ability to operate, including, first and foremost, its ability to translate electoral support into political power is a tactical limitation on its operation and unfairly discriminates against its members. Professor Daniel Tokaji has analyzed the parallels between the First Amendment’s right of expressive association and its protection against content and viewpoint discrimination through a series of cases involving the right of political association.<sup>128</sup> He argues that the disparate partisan impact, in the form of associational rights, of any restriction merits acute attention: “While disparate effects on racial groups, people with disabilities, and economic status are important, political party association is especially important.”<sup>129</sup> In this calculus, it is impossible to isolate race and party as independent claims. When the manipulation of the redistricting process results in the majority party being relegated to minority power when that party represents the associational interests of racial minority voters, those associated interests are harmed.<sup>130</sup> As the late Professor Terry Smith has argued, the Court has used the First Amendment in ways that have expanded voting rights for whites through campaign-finance laws, the elimination of patronage, and the protection of independent voters.<sup>131</sup> One way to counter the massive impact of these decisions is to extend the First Amendment’s protection of political participation to racial minorities. While it may appear to be a stretch “to say that the First Amendment protects association among voters, candidates, and parties *in the electoral process*,”<sup>132</sup> the Court has already made the link between the right of association and

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<sup>127</sup> *Id.* at 429.

<sup>128</sup> Daniel P. Tokaji, *Voting Is Association*, 43 FLA. ST. U. L. REV. 763, 784 (2016).

<sup>129</sup> *Id.* at 784, 787 (“Recognition of the associational rights implicated by voting cases would allow courts to focus on the real harm, the dominant political party disadvantaging supporters of its main rival.”).

<sup>130</sup> It appears that Professor Tokaji would not extend this analysis to address the confluence of race and party: “It is difficult—and practically meaningless—to ask whether race or party predominates where there is a high correlation between the two.” *Id.* at 788. “[T]he racially disparate impact of the law is relevant because it is closely related to its partisan effects.” *Id.* at 789. Building on Professor Tokaji’s foundational work in concretizing how the Court might extend associational rights to evaluate partisan gerrymandering, I propose a further extension to include an analysis of race.

<sup>131</sup> See Terry Smith, *Parties and Transformative Politics*, 100 COLUM. L. REV. 845, 847–48 (2000) (observing that voters of color have experienced more voting restrictions while the Supreme Court’s First Amendment jurisprudence has expanded voting rights for whites).

<sup>132</sup> Tokaji, *supra* note 34, at 2182.

the right to vote, laying the groundwork for applying associational rights to gerrymandering.<sup>133</sup> This link is most tangibly seen in the balancing framework established in two cases that rely on an assessment of a law's character and magnitude.

For example, in cases where election laws burden, but do not completely deny, a citizen's right to vote, the Court has often applied a balancing test that emerged from two ballot-access cases: *Anderson v. Celebrezze*<sup>134</sup> and *Burdick v. Takushi*.<sup>135</sup> The *Anderson-Burdick* balancing test requires an analysis of the "character and magnitude" of a state's infringement on associational and voting rights against the state's interests and imposes a sliding scale of scrutiny depending on the severity of the burden.<sup>136</sup> Both cases involved state laws that narrowed the candidate pool from which voters could choose by limiting or burdening access to the ballot.<sup>137</sup> Faced with an indirect burden on the right to vote, the Court in *Anderson* eschewed a strict constitutional analysis in favor of an "analytical process" in which it "consider[ed] the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" balanced against "the precise interests put forward by the State as justifications for the burden imposed by its rule."<sup>138</sup> Applying the same balancing test in *Burdick*, the Court found that the law "impose[d] only a limited burden on voters' rights to make free choices and to associate politically through the vote."<sup>139</sup> Severe burdens warrant strict scrutiny, and lesser burdens warrant what is akin to a rational basis-plus review, requiring the state's interest to be important to withstand challenge.<sup>140</sup> In the context of hybrid racial and partisan gerrymandering, courts should likewise administer a balancing test that focuses on the "character and magnitude" of the partisan gerrymander, with the racial impact of a partisan gerrymander being a key factor in defining its character.

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<sup>133</sup> Justice Kennedy presciently wrote that the "First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. . . . [There is] the First Amendment interest of not . . . penalizing citizens because of their participation in the electoral process . . . or their expression of political views. . . . [T]hose burdens . . . are unconstitutional absent a compelling government interest." *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring) (citing *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (plurality opinion)).

<sup>134</sup> 460 U.S. 780 (1983).

<sup>135</sup> 504 U.S. 428 (1992).

<sup>136</sup> *Anderson*, 460 U.S. at 789; *Burdick*, 504 U.S. at 434.

<sup>137</sup> See *Anderson*, 460 U.S. at 782; *Burdick*, 504 U.S. at 430.

<sup>138</sup> *Anderson*, 460 U.S. at 789.

<sup>139</sup> *Burdick*, 504 U.S. at 438–39.

<sup>140</sup> See *infra* notes 142–45 and accompanying text.

## III

PROVING THE HYBRID RACIAL AND PARTISAN  
GERRYMANDERING CLAIM

Viewing hybrid racial and partisan gerrymandering as an associational harm explains its relationship to First Amendment concerns and the collection of group rights that racial and partisan gerrymandering threatens. Applying a balancing test advances a more nuanced understanding of racial and partisan gerrymandering, but even that more sophisticated analysis is not enough to fully unpack the potential distortive impact of this compounded form of gerrymandering. Racial minorities who find themselves in the crosshairs of partisan gerrymandering may not always be targeted “‘because of,’ not merely ‘in spite of,’”<sup>141</sup> their race. First Amendment concerns arise when race and party choice are linked so closely and consistently that punishing one is tantamount to punishing the other.

The *Anderson-Burdick* balancing test measures the “character and magnitude”<sup>142</sup> of the injury a partisan gerrymander exacts against the precise interests of the state to justify that injury as a necessary burden.<sup>143</sup> Under this analysis, where partisan impact and conjoined racial and partisan polarization are at their peak, the injury that results from that compounded distortion is severe, requiring courts to apply strict scrutiny.<sup>144</sup> By contrast, under the proposed race and party theory, cases where partisan impact is high but conjoined racial and partisan polarization is low are most likely constitutional but may be subject to intermediate scrutiny to account for any distortive impact. Cases where partisan impact is low but conjoined racial and partisan polarization is high are similarly likely to be constitutional under the hybrid claim requiring a lesser degree of scrutiny on the sliding scale that the *Anderson-Burdick* test contemplates where minor burdens

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<sup>141</sup> See *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (observing that discriminatory purpose means that the state actor pursued a particular action “‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”); see also *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (noting that discriminatory impact by itself is usually not enough to demonstrate invidious discriminatory purpose).

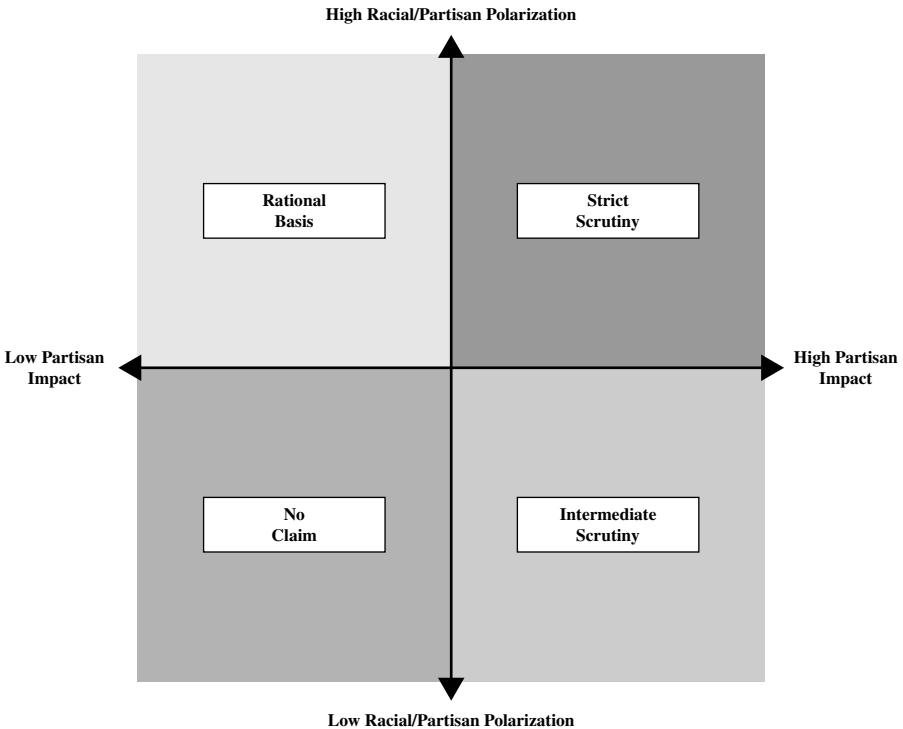
<sup>142</sup> See *Burdick*, 504 U.S. at 434 (“A court considering a challenge to a state election law must weigh ‘the character and magnitude of the asserted injury . . .’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule’ . . . .” (citing *Anderson*, 460 U.S. at 789)).

<sup>143</sup> *Id.*

<sup>144</sup> See *id.* at 433–34 (“[A]s we have recognized when . . . rights are subjected to ‘severe’ restrictions, the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’” (citing *Norman v. Reed*, 502 U.S. 279, 288–89 (1992))).

can be justified by a reasonable state interest.<sup>145</sup> In such instances, there may still be a viable traditional racial gerrymandering claim to pursue. Finally, where conjoined polarization and partisan impact are low, the hybrid racial and partisan gerrymandering claim offers no relief. Indeed, court intervention is only justified when there are compounded racial and partisan harms at stake in the form of stifled partisan competition<sup>146</sup> and racial group lockout.<sup>147</sup>

FIGURE 1. PARTISAN POLARIZATION-IMPACT MEASURE



<sup>145</sup> See *Burdick*, at 434–35 (noting that all election regulations inevitably impact the right to vote).

<sup>146</sup> See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 630 (2002) (arguing that redistricting cases should be reassessed “under a competition-reinforcing approach”); *id.* (expressing that “ensuring appropriately competitive interorganizational conditions” would help realize central democratic values (quoting Richard H. Pildes, Commentary, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1611 (1999))). To be clear, democracy distortion is concerned less about producing competition and more concerned with the punishment of groups and voters who are locked out of competition because of associational and ideological choices. See Charles, *supra* note 9, at 607 n.23 (distinguishing distortion from competition—while the latter is still important in the distortion framework, distortion is focused on “mirroring the underlying preferences of the electorate”).

<sup>147</sup> See Fuentes-Rohwer, *supra* note 5, at 533 n.16, 556, 565–66.

Courts could also operationalize a similar analysis as part of a burden-shifting apparatus, accepting entrenched partisanship and conjoined racial and partisan polarization as rebuttable evidence of unconstitutional, distortive gerrymandering. If a plan is presumptively unconstitutional as a distortive racial and partisan gerrymander, the jurisdiction would then bear the burden of proving that it serves a compelling state interest. The jurisdiction can rebut the underlying data or demonstrate that the conjoined racial and partisan polarization or partisan advantage are not durable. It will necessarily be more difficult to disprove the durability of conjoined racial and partisan polarization which, by definition, is premised on polarization over time. However, it is possible for jurisdictions to demonstrate that disproportionate political outcomes are not entrenched or are, perhaps, coincidental or caused by neutral factors like geography. For example, if minority voters are concentrated within a political boundary, respect for boundaries across the state may require courts to accept a degree of democracy distortion. This burden-shifting approach is aimed at influencing the process of redistricting, requiring line-drawers to “articulate publicly the factors that will govern the process and the relative weight”<sup>148</sup> of these factors, rather than an exclusively “outcome-oriented” mechanism that focuses on what partisan results a given election or set of elections produces. Nor does this framework preclude consideration of other measures should the court determine that they are relevant.<sup>149</sup>

Taking account of conjoined racial and partisan polarization allows courts to look at the identity of the groups that are entrenched in addition to the magnitude of the entrenchment.<sup>150</sup> Taking account of conjoined racial and partisan polarization as a measure of the character and magnitude of a gerrymander prevents partisan lockup of the

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<sup>148</sup> See Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 *YALE L.J.* 2505, 2548 (1997) (discussing a process approach that could place legal constraints on the districting process by forcing redistricters to precommit to certain policies, thereby constraining factors such as special treatment for incumbents); see also Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 *COLUM. L. REV.* 2143, 2147–49 (2015) (“By shifting the burden of persuasion to defendants, the courts acknowledge that partisan motives do not merit the same presumption of legitimacy in jurisdictions where the partisan payoff to racial discrimination is exceptional.”).

<sup>149</sup> See, e.g., Andrew C. Maxfield, Comment, *Litigating the Line Drawers: Why Courts Should Apply Anderson-Burdick to Redistricting Commissions*, 87 *U. CHI. L. REV.* 1845, 1848–49 (2020) (arguing for a sliding scale approach under the *Anderson-Burdick* balancing test for associational-rights claims against redistricting commission provisions).

<sup>150</sup> Issacharoff & Karlan, *supra* note 62, at 543 (noting that recent opinions “entirely ignore the question whether judicial intervention should be directed at entrenchment itself, rather than the secondary question of who gets to be entrenched”).

worst kind. Party is not considered by itself; rather it is its interaction with race and the distortion produced when the two are combined that triggers judicial intervention.<sup>151</sup> In other words, by definition, the hybrid claim requires an analysis of the intersection of race and party since harms based on race alone fall within the traditional racial gerrymandering doctrine, and harms based on party alone are nonjusticiable.

### A. *Opportunities*

Race operates as a “black light” in our political system by illuminating its most insidious structural contaminants that thwart fair and effective representation.<sup>152</sup> More than an early signal of toxins in the political atmosphere, conjoined racial and partisan polarization is a code-red marker of diseased politics. When partisan manipulation intersects with conjoined racial and partisan polarization and harms a minority group that has chosen to coalesce politically, there is a qualitative harm to the functioning of our representative democracy. Instead of promoting a competitive electoral arena in which issue-based coalitions form and “political race”—not racial constructs—defines interests, conjoined racial and partisan polarization over time suggests that our democracy will be increasingly divided in entrenched, racially defined political camps if excessive partisanship influence in districting remains unchecked.<sup>153</sup> By acknowledging the hybridity of racial and partisan gerrymandering, we do not ghettoize racial groups or cast them as a permanent monolith. Rather, confronting the racial impact of partisan gerrymandering recognizes the political consequences of racism and race discrimination and the

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<sup>151</sup> Professor Hasen has argued that, “in times of conjoined [racial and partisan] polarization, the exercise of parsing racial from partisan intent is nonsensical and counterproductive.” Hasen, *supra* note 6, at 1852. This sense of futility in attempting to distinguish race consciousness from racial predominance indicates the challenge in making that distinction. *Id.* at 1853 (“It is impossible in this heated polarized environment to say precisely when racial consciousness slides into racial predominance.”).

<sup>152</sup> Professors Lani Guinier and Gerald Torres have advanced the theory that problems of race serve as an early warning system of deeper democratic failures. LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 11 (2003). Identifying and correcting those failures, they have argued, can lead to the creation of “political race” where cross-racial coalitions form around policy interests, enhancing participatory democracy. *Id.* at 12, 17, 18–19 (“Political race . . . encompasses the view that race still matters because racialized communities provide the early warning signs of poison in the social atmosphere.”).

<sup>153</sup> Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1411 (2020) (noting that issues of race exacerbate “partisan realignment and the restoration of hyperpartisanship over the longer term”).



importance of protecting the political process as a democratic means of effecting change.

In the same way that courts have relied on bizarre district shapes or other abnormalities in the districting process to signal potential racial discrimination,<sup>154</sup> extreme polarization along the lines of race, party, and ideology indicates severe democracy distortion. This holds true even if vote denial or vote dilution based exclusively on race cannot be proved.<sup>155</sup> Having a tool to account for the confluence of racial and partisan gerrymandering also avoids doctrinal distortion of pure racial gerrymandering claims.<sup>156</sup> It is clear that the increasing confluence of race and party demands a third conception of gerrymandering that takes into consideration how these two forces interact to affect “what really matters: the allocation of political power by self-interested actors in a situation in which race and party are inextricably intertwined.”<sup>157</sup>

The hybrid racial and partisan gerrymandering claim maintains a focus on the effects of partisan gerrymandering and the political reality of conjoined racial and partisan polarization. Most importantly, it safeguards the districting process from some of the most extreme and detrimental distortion. Professor Justin Levitt’s typology of political gerrymandering is helpful in defining that spectrum.<sup>158</sup> Professor Levitt deconstructs partisanship into four categories: (1) “coincidental partisanship,” where alignment between a lawmaker’s policies and the voters attracted to them occurs by happenstance; (2) “ideological partisanship,” where a lawmaker’s party choice reflects a shared ideology; (3) “responsive partisanship,” where a lawmaker’s policy choices respond to the partisan interests of the supporting electorate even if

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<sup>154</sup> See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Others have noted the Court’s heightened sensitivity to democracy distortion based on race. See Issacharoff & Pildes, *supra* note 4, at 673–74 (analyzing the difference in the Court’s response in the White Primary Cases to ballot access cases by arguing that “[b]ecause these [whites-only] policies also violated the rights of a suspect class, the Court found the Fourteenth Amendment readily available. In *Burdick*, by contrast, the Court could find no constitutional basis for overturning a partisan lockup that it failed utterly to see”).

<sup>155</sup> As Professor Hasen has argued, “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.” Hasen, *supra* note 87, at 366. Likewise, Professor Pildes has long argued that the racial gerrymandering framework is an inadequate vehicle for partisan claims. See Pildes, *supra* note 148, at 2505 (“Three years after recognizing a new cause of action for racial redistricting in *Shaw v. Reno*, the Supreme Court’s voting rights jurisprudence still teeters on the brink of legal incoherence and political chaos.” (citation omitted)).

<sup>156</sup> Some have argued that the lack of tools to address partisan gerrymandering has led to an abuse of racial gerrymandering. See, e.g., Tofighbakhsh, *supra* note 8, at 1915–16.

<sup>157</sup> See Hasen, *supra* note 87, at 385.

<sup>158</sup> Levitt, *supra* note 71, at 1794–1801.

they do not reflect a personal viewpoint or judgment; and (4) “tribal partisanship,” where a lawmaker’s actions are decidedly animated more by an intent to harm a partisan competitor or benefit a chosen party than by judgment or merit.<sup>159</sup>

Mirroring this typology, courts should, at a minimum, identify where along the partisanship spectrum coincidental and ideological partisanship are cannibalized by responsive or, worse, tribal partisanship that is overdetermined by race.<sup>160</sup> In other words, although the Court has held pure partisan gerrymandering claims nonjusticiable, partisanship in the districting process can be justiciable when it combines with conjoined racial and partisan polarization to produce group lockout. Because party policy attracts and is driven by party membership which correlates with race, conjoined racial and partisan polarization reflects both “ideological partisanship” and “responsive partisanship,”<sup>161</sup> which can be compromised by “tribal partisanship” by punishing voters grouped by race for their political and ideological preferences.

### B. Challenges

In light of the high degree of conjoined racial and partisan polarization among Black Americans with the Democratic Party—and, to a somewhat lesser extent, among other voters of color—it may seem that hybrid racial and partisan gerrymandering claims will naturally disfavor the Republican Party. I do not examine here whether or to what degree the hybrid racial and partisan gerrymandering claims may benefit one party over another.<sup>162</sup> However, to the extent that consid-

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<sup>159</sup> *Id.*

<sup>160</sup> There are innumerable baseline metrics to indicate whether the electoral process is functioning unfairly. For example, in the consolidated cases of *Turzai v. League of Women Voters of Pennsylvania* and *McCann v. League of Women Voters of Pennsylvania*, the court employed multiple measures to determine that the challenged plan was a partisan gerrymander. See *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 816–21 (Pa. 2018) (noting factors such as compactness, contiguity, minimization of the division of political subdivisions, and maintenance of population equality among congressional districts). Using a menu of measures can help ensure that courts are not overly chaste in locking onto a single metric but have the license to evaluate a districting plan through an array of measures that may reveal the democracy distortion.

<sup>161</sup> See Levitt, *supra* note 71, at 1794–1801.

<sup>162</sup> History proves that current racial and political correlations are not inviolable. There was a time when the ideology of the Democratic Party in the South was diametrically opposed to the Black political interests, which were disproportionately aligned with the Republican Party as defined by President Lincoln. See, e.g., Karen Grigsby Bates, *Why Did Black Voters Flee the Republican Party in the 1960s?*, NPR (July 14, 2014), <https://www.npr.org/sections/codeswitch/2014/07/14/331298996/why-did-black-voters-flee-the-republican-party-in-the-1960s>. There continues to be no structural impediment to a

eration of race benefits one party more than the other, it is due to demographics and not by design.<sup>163</sup>

Moreover, the framework that Justice Kagan set out for an associational claim leans heavily on injury to a political party which may privilege political parties as litigants of such claims, especially if they are predicated upon a statewide injury.<sup>164</sup> This potentially places minority communities in tension with the interests of the party with which they may be aligned. For example, Black Americans are closely aligned with the Democratic Party which might seek to maximize representation by spreading Black voters across more districts to elect more Democrats at the risk of reducing majority-minority districts. This age-old conflict of interest may result in Democrats using evidence of conjoined racial and partisan polarization to establish liability but then compromising minority representation when it comes to remedy.<sup>165</sup> It remains to be seen what impact taking account of conjoined racial and partisan polarization and the racial effects it exacerbates in a racial and partisan gerrymandering claim could have on the power dynamics between specific racial groups and the parties with which they are most closely aligned. Suffice it to say that even this more comprehensive assessment does not shift the awkward power dynamic between political parties and their constituent groups that characterizes the redistricting process.

With respect to the manageability or utility of a hybrid racial and partisan gerrymandering claim, there are three primary challenges. First is the concern that it will be hard to distinguish “good” gerrymandering from the bad. For example, there may be circumstances when incumbency protection of a minority-preferred elected official requires concentrating racial minority voters in districts. Second,

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political realignment that could alter the calculus on which party is likely to benefit from the hybrid claim.

<sup>163</sup> See Spann, *supra* note 7, at 1013 (“In theory, there is no reason why treating partisan gerrymandering as a nonjusticiable political question should favor Republicans and whites over Democrats and racial minorities.”).

<sup>164</sup> See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2513–25 (2019) (Kagan, J., dissenting) (distilling a three-part vote dilution test based on intent, effect, and causation such that plaintiffs must show state officials’ intent to entrench their own party while diluting the votes of rival party supporters, and plaintiffs must show that the newly drawn lines did have the effect of significantly diluting their votes based on their affiliation with the rival party).

<sup>165</sup> Notably, with the exception of the consolidated cases of *Alabama Democratic Caucus v. Alabama* and *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1263 (2015), all of the Court’s redistricting cases over the past six years were litigated by the Democratic Party’s counsel as racial gerrymandering cases, even though there was no allegation that additional majority-minority districts could be created. Rather, the concern in these cases was the intentional manipulation of Black voters in a manner that thwarted Democratic representation.

hybrid racial and partisan gerrymandering claims might result in different legal outcomes in different jurisdictions using similar plans. A third concern questions whether a hybrid racial and partisan gerrymandering claim is the functional equivalent of a racial gerrymandering claim. I address these arguments in turn.

First, compliance with the Voting Rights Act will remain a compelling state interest sufficient to justify any attendant distortion it may cause. As noted above, districting claims under the Act are predicated upon racially polarized voting.<sup>166</sup> The hybrid racial and partisan gerrymandering claim recognizes that some degree of partisan manipulation will exist that is constitutionally permissible, and that pure partisan gerrymandering is beyond judicial review.

Second, the concern that hybrid racial and partisan gerrymandering claims may produce inconsistent outcomes such that an identical map may be constitutional in one place but not in another fades upon closer examination. Professor Hasen flags this issue in the context of vote denial cases under a “race as party” approach. His concern illustrates this conundrum in which “a law that is illegal in North Carolina may be legal in Wisconsin, even if motivated by the same partisan intent, because of the difference in racial makeup between the two states.”<sup>167</sup> He argues that “[i]t is odd [for example] to have a rule saying that a strict voter identification law that makes it harder for African Americans and Democrats to vote is illegal in North Carolina but legal in Wisconsin.”<sup>168</sup>

This concern is decidedly limited to voter access rules such as voter identification laws and not redistricting.<sup>169</sup> Further, it involves a critique of race *as* party, not race *and* party, which significantly cabins the concern.<sup>170</sup> Unlike voter access laws, redistricting plans for different jurisdictions cannot be identical given the specific local considerations that inform each plan, including geography, incumbency, and the existing districting structure. In addition, race as party operates on a proxy theory without interrogating fully whether the presumed equivalence is valid. Race *and* party, by contrast, measures both factors, providing a more accurate reflection of the influence of each. At least theoretically, however, the question of “inconsistent” results remains. The short answer is that the same districting plan applied to jurisdictions with different racial and ethnic demographics might, in fact, produce a different constitutional outcome depending on the

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<sup>166</sup> See *supra* note 56 and accompanying text.

<sup>167</sup> Hasen, *supra* note 6, at 1842.

<sup>168</sup> *Id.* at 1875.

<sup>169</sup> *Id.* at 1878–79.

<sup>170</sup> *Id.* at 1865.

degree of conjoined racial and partisan polarization in the jurisdiction. There is nothing particularly concerning about this. Indeed, that is the point—to limit the racial impact of partisan gerrymandering because of its deleterious effects on a multiracial, multiethnic democracy with conjoined racial and partisan polarization. If the negative fallout of partisan gerrymandering is consistently borne by one racial group, the cost of the partisan enterprise is too high. More importantly, allowing for different outcomes in different jurisdictions depending on the specific political and demographic landscape is precisely the sort of customized analysis that the Court indicated the Constitution commands in *Shelby County v. Holder*.<sup>171</sup>

Third, the hybrid racial and partisan gerrymandering claim is not the functional equivalent of a racial gerrymandering claim. In many ways, the hybrid racial and partisan gerrymandering claim responds to the limitations of racial gerrymandering doctrine, which requires racial animus and intentional racial manipulation. By contrast, the hybrid racial and partisan gerrymandering claim does not require any showing of intent or predominance.<sup>172</sup> The problem with predominance is that it creates a standard higher than the intent standard in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*<sup>173</sup> and accepts a degree of purposeful use of race so long as it is not the primary factor.<sup>174</sup> *Arlington Heights* prohibits the invidious use of race, even if the decision is based *in part* on race.<sup>175</sup> One of the limitations of racial gerrymandering doctrine is its preoccupation with inadvertently punishing the awareness of race when such awareness is seemingly inherent to the demographic calculations of redistricting. But *Arlington Heights* has a solution for this concern as well. Consistent with the racial gerrymandering cases, it holds that mere awareness of race is insufficient to prove intent. Indeed, awareness of the foreseeable consequences linked to race is not enough.<sup>176</sup> Plaintiffs must show that a given action was “‘because of,’ not merely ‘in

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<sup>171</sup> See 570 U.S. 529, 552–53 (2013) (noting that Congress needed to modify and assess its coverage formula based on current needs).

<sup>172</sup> See generally Pildes, *supra* note 105 (“[I]t would be doctrinally radical for the Court to conclude that partisan gerrymandering is equivalent to racial gerrymandering.”).

<sup>173</sup> 429 U.S. 252 (1977).

<sup>174</sup> In *Bethune-Hill v. Virginia State Board of Elections*, the Court noted that “[t]he racial predominance inquiry concerns the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications the legislature in theory could have used but in reality did not.” 137 S. Ct. 788, 799 (2017). This is in sharp contrast to cases where a plausible alternative explanation could unravel an intent claim.

<sup>175</sup> See *Arlington Heights*, 429 U.S. at 265.

<sup>176</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 280 (1987). See generally *Pers. Adm’r v. Feeney*, 442 U.S. 256, 257–58 (1979).

spite of,'” race.<sup>177</sup> Nonetheless, a less intent-driven analysis may appeal to those members of the Court who most loathe ascribing improper intent to legislatures in districting decisions.<sup>178</sup> Motive will, of course, continue to lurk beneath the surface of hybrid racial and partisan gerrymandering claims, but it need not be the primary inquiry when it comes to race. While regulating intent can create important prophylactic norms, at the end of the day, effect is the most concerning aspect of any action in redistricting.

Finally, some may argue that importing a race analysis to fashion a remedy that considers the political salience of the construct of race does more to reify it than if race were ignored. Ignoring race when it presents in such extreme measure as conjoined racial and partisan polarization does grave harm by allowing the unmitigated perpetuation of a flawed construct. Taking account of the intersection of race and political identity safeguards against racial manipulation either by intent or effect. The idea of capturing how factors internal to the political process interact with external ones borrows from the effects analysis of Section 2 of the Voting Rights Act, which considers an election law, policy, or practice’s interaction with historical factors and contemporary socioeconomic factors.<sup>179</sup> When the constitutional principle being enforced is freedom of association under the First Amendment, as opposed to the Equal Protection Clause, a law’s interaction with sociopolitical factors is most relevant.<sup>180</sup>

Ultimately, the utility of the hybrid racial and partisan gerrymandering claim is that it permits courts to enforce a ceiling on the degree to which the confluence of race and partisanship is permitted to dictate outcomes in a democracy by submerging the voices of racial minorities. By considering race, courts and line-drawers are able to address the unique challenges of an increasingly multiracial electorate whose partisan allegiances may shift over time and become more complex and less conjoined. This framework may also serve to protect whites in the long run, as they increasingly and inevitably become less of a majority of the polity and, thus, become more vulnerable to group lockout. At bottom, “[w]hen enough whites can accept being one

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<sup>177</sup> *McCleskey*, 481 U.S. at 298.

<sup>178</sup> This contradicts Professor Hasen’s pessimistic predictions of the future of voting rights and the law of racial gerrymandering. See Hasen, *supra* note 110, at 128–29 (“Despite *Cooper*, the end times do not look like good times for voting rights.”).

<sup>179</sup> See *supra* note 57 and accompanying text.

<sup>180</sup> See generally Gordon E. Baker, *The “Totality of Circumstances” Approach* (proposing a totality of the circumstances approach to partisan gerrymandering that considers sociopolitical factors, such as discriminatory partisan impact and electoral responsiveness in addition to traditional redistricting factors), in *POLITICAL GERRYMANDERING AND THE COURTS* 203 (Bernard Grofman ed., 1990).

voice among many in a robust democracy, politics in America could finally become functional.”<sup>181</sup> The hybrid racial and partisan gerrymandering claim is one method to measure our multiracial, multiethnic democracy’s advancement toward increased functionality, decreased distortion, and less punishment on the basis of race and party.

### CONCLUSION

There is, perhaps, no more confounding influence on our political system than the intersection of race and party. Both are constructs that political actors manipulate to such extremes that they distort the functioning of our democracy by constraining the agency of voters in favor of the will of political parties. In no area of the political process is this excess more demonstrable than in the redistricting process, where race and party converge to thwart the ability of democratic processes to accurately reflect the will of the electorate and protect minority interests. While increasing polarization on the Supreme Court itself suggests that it may not adopt a claim to fill this breach, failure to account for the distortion that hyperpartisanship and conjoined racial and partisan polarization cause means there will be no outer limit for the most egregious manifestation of partisan gerrymandering that we are likely ever to have seen. The hybrid racial and partisan gerrymandering claim provides a doctrinal offramp from this looming political dystopia and a sensible boundary to extreme and punishing partisanship in our democracy.

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<sup>181</sup> Sheryll Cashin, Opinion, *How Interracial Love Is Saving America*, N.Y. TIMES (June 3, 2017), <https://www.nytimes.com/2017/06/03/opinion/sunday/how-interracial-love-is-saving-america.html>.