

# PARTISAN GERRYMANDERING AS A THREAT TO MULTIRACIAL DEMOCRACY

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## ABSTRACT

In *Common Cause v. Rucho*, the Supreme Court initiated an era of redistricting without restraint. The Court opened the door to state legislatures to engage in the most extreme partisan gerrymandering in American history. As states redistrict after the 2020 census, many will focus on gerrymandering's threat to fair partisan representation at the state and national level. In this Essay, I argue that such gerrymandering poses a greater potential threat to America's multi-racial democratic project.

Gerrymandering's threat to the multi-racial democratic project arises from burgeoning white identity politics and the Republican Party's embrace of such politics. That Republican Party controls most of the state legislatures responsible for redistricting. And those legislatures have drawn a disproportionate number of districts that are not only majority Republican but also include a high number of Americans who see multi-racial democracy as a threat and seek to counter the inclusive representation of minority interests.

In this Essay, I draw from the Supreme Court's racial gerrymandering doctrine to identify the threat to multi-racial democracy from partisan gerrymandering. I argue that the race-based representation the Supreme Court once feared would arise from the state's use of race to draw district lines is more properly associated with the Republican Party's use of partisanship to draw district lines that will inevitably reinforce white identity politics. Thus, if the Court seeks to avoid representatives' race-based neglect of their constituents, which threatens to undermine the multi-racial

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democratic project, it will need to revive a role for itself in policing partisan gerrymandering.

#### INTRODUCTION

Over the past several months, states have engaged in the decennial ritual of deciding the demographic composition of districts. For this ritual, states were subject to three constitutional constraints. First, each district must contain an equal number of people.<sup>1</sup> Second, states cannot intentionally dilute the vote of a racial minority in the districts they create.<sup>2</sup> And third, states are prohibited from relying predominantly on race in their drawing of district lines.<sup>3</sup> All three of these judicially constructed constraints on districting provide constitutional protection for a multiracial democracy comprised of political equals. In an idealized version of this multiracial democracy, individuals would have the opportunity to secure the equal representation of their interests irrespective of the racial group to which they belong.

Recently, the Court decided not to establish a fourth constitutional constraint on districting. In *Common Cause v. Rucho*, the Court rejected a challenge to a state's drawing of district lines that was said to have relied too much on partisan consideration and to have led to unequal opportunities for members of the two major parties to elect their preferred candidates.<sup>4</sup> The Court held that partisan gerrymandering was a nonjusticiable political question because of the challenges associated with developing an administrable standard for policing too much partisanship and the lack of constitutional basis for a right to more equal partisan representation.<sup>5</sup>

In this Essay, I argue that the Court's refusal to adjudicate partisan gerrymandering claims has undercut its capacity to protect America's multiracial democracy—an aim that historically formed the core of its districting jurisprudence. In an era in which the Republican Party has embraced whiteness as central to its identity, Republican partisan gerrymandering threatens to exacerbate racial division and stoke racial hostility. Republican partisan gerrymandering will reward race-based representation in which candidates align with constituents who favor the white identity politics of the Tea Party, Make America Great Again (MAGA)

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1. Bertrall L. Ross II, *The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard*, 81 *FORDHAM L. REV.* 175, 227-28 (2012).

2. *Id.* at 175.

3. *See* *Miller v. Johnson*, 515 U.S. 900 (1995).

4. 139 S. Ct. 2484 (2019).

5. *Id.* at 2506-07.

coalition, white supremacist groups, conspiracy theorists, and anti-government militias. Those white identitarians who see multiracial democracy as threatening and even tyrannical could be well-positioned after the next redistricting round to advance racially regressive agendas in both state legislatures and Congress.

This Essay will be divided into three parts. Part I provides an account of the evolution of racial conservatism in the Republican party. Part II examines the Court's racial gerrymandering doctrine to illuminate the harms to multi-racial democracy that can arise from districting. Part III then argues that the real threat to democracy arises from redistricting in Republican-controlled states.

## I. THE EVOLUTION OF RACIAL CONSERVATISM IN THE REPUBLICAN PARTY

America's progress toward multi-racial democracy took an important step forward when Republican presidential candidate Barry Goldwater lost in a landslide election in 1964. His open and explicit stoking of racial fear, hostility, and resentment secured wins in the deep South, but nowhere else in the country as Americans rallied behind President Lyndon Johnson, who presented himself as a racial moderate.<sup>6</sup> That same year, the United States Supreme Court established the constitutional mandate of majority rule in every legislative body in the United States except the U.S. Senate, reducing the political power of rural and racially regressive white voters.<sup>7</sup> The next year, Congress passed the Voting Rights Act (VRA) of 1965, enfranchising millions of minority voters through the elimination of barriers to registration and voting.<sup>8</sup>

During the decade after the passage of the VRA, the courts interpreted the Constitution and VRA to limit state legislatures' ability to dilute minority votes, thus politically empowering African Americans and other minorities.<sup>9</sup>

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6. IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS* 18-22 (2014) (providing an account of the 1964 presidential campaign and election).

7. See *Reynolds v. Sims*, 377 U.S. 533, 579 (1964) (“[T]he overriding objective [of apportionment] must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.”); see also Ross, *supra* note 1, at 204-05 (describing the disproportionate power of rural voters associated with the malapportioned districts that the Court ultimately dismantled in *Reynolds v. Sims*).

8. 52 U.S.C. § 10101 (originally enacted as the Voting Rights Act; 42 U.S.C. § 1971), 52 U.S.C. § 10301 (original version at 42 U.S.C. § 1973).

9. *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) (establishing a prohibition on districting schemes that “would operate to minimize or cancel out the voting strength of racial or political elements of the voting population”); *White v. Regester*, 412 U.S. 755, 766 (1973) (striking down a

Although a more conservative Court in the 1990s partially limited state legislatures' ability to draw districts to maximize the opportunity of African Americans and other minorities to elect candidates of their choice,<sup>10</sup> it did not impede progress toward democratic racial equality.<sup>11</sup> Finally, the civil rights movement, with the support of a significant enough part of the white cultural, political, and media elite, contributed to a shift away from what political scientist Michael Tesler describes as "old-fashioned racism."<sup>12</sup>

For the Republican Party, centering racial conservatism through openly racist appeals no longer made political sense in a context in which districts were drawn more fairly, African Americans voted and were elected to office in increasing numbers, and vague notions of racial equality were gaining mainstream support in society. The racial conservatism of the Republican Party, however, did not disappear entirely. Republican candidates, including every president since Goldwater's failed campaign, continued to appeal to white voters by dog whistling racist tropes and stereotypes in ways that gave candidates plausible deniability for their racism.<sup>13</sup> That dog whistle politics presented obstacles to the progress toward multi-racial democracy, but they were not insurmountable. For example, such latent racism did not prevent the election of Barack Obama as the first ever African American president, an outcome that appeared to mark the realization of multi-racial democracy in America.

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districting scheme for its failure to provide racial minorities in Texas with the same opportunity as white residents "to participate in the political process[] and to elect legislators of their choice").

10. *Shaw v. Reno*, 509 U.S. 630, 644 (1993) (applying strict scrutiny to "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race'") (quoting *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (subjecting to strict scrutiny when "race [is] the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district").

11. See, e.g., *The Diversifying Electorate—Voting Rates by Race and Hispanic Origin in 2012 (and Other Recent Elections)*, U.S. CENSUS BUREAU 3-4 (2013), <https://www.census.gov/content/dam/Census/library/publications/2013/demo/p20-568.pdf> (finding that black eligible voter rates nearly equaled white eligible voter rates in the 2008 election and black eligible voter rates exceeded white eligible voter rates in the 2012 election); Kristen Bialik, *For the Fifth Time in a Row, the New Congress is the Most Racially and Ethnically Diverse Ever*, PEW. RSCH. CTR. (Feb. 8, 2019), <https://www.pewresearch.org/fact-tank/2019/02/08/for-the-fifth-time-in-a-row-the-new-congress-is-the-most-racially-and-ethnically-diverse-ever/> (describing how the 116th Congress that convened in January 2019 would be the most racially and ethnically diverse ever, with 116 racial minorities elected to Congress comprising 22% of that body).

12. See Michael Tesler, *The Return of Old-Fashioned Racism to White Americans' Partisan Preferences in the Early Obama Era*, 75 J. POL. 110, 110-11 (2013) ("[O]ld-fashioned racism (OFR) all but vanished from elite political discourse during [the] post-civil rights time period . . .").

13. E.g., LOPEZ, *supra* note 6, at 33-54 (describing the strategic racism of post-Goldwater Republican presidents and candidates that involved the use of coded racist appeals in the form of dog whistles).

The moment for celebrating multi-racial democracy, however, proved to be fleeting. The election of President Obama led to an important shift in the Republican Party. After decades in which the party prioritized fiscal and social conservatism over openly racist appeals in its electoral campaigns and governance, a black President with a “foreign-sounding” name proved irresistible to the latent racist elements within the Republican Party.<sup>14</sup>

The Taxed Enough Already (Tea) Party faction within the Republican Party was born out of fiscal conservatives’ opposition to federal government spending under President Bush.<sup>15</sup> This faction, comprised of mostly white, middle-aged, and middle-income conservatives, soon shifted their target to President Obama and his signature proposal to provide affordable health care to Americans.<sup>16</sup> Those attacks on President Obama’s policy agenda quickly evolved into personal attacks on him and his race. Tea Party members, and the candidates seeking their support, combined dog whistling with more open and racist attacks on the president, and in doing so, found broader acceptance within the Republican Party.<sup>17</sup> One of the most salient examples of the racist attacks on President Obama was the birtherism conspiracy claiming that Obama was not born in the United States and was, therefore, ineligible to serve as president.<sup>18</sup> Those challenges to Obama’s American identity received not only the broad support of Tea Party members but also Republicans who were not associated with that faction.<sup>19</sup>

The re-centering of explicit racial conservatism in the Republican Party gave a political opening to one of the leading sponsors of the birtherism

14. CHRISTOPHER S. PARKER & MATT A. BARRETO, *CHANGE THEY CAN’T BELIEVE IN: THE TEA PARTY AND REACTIONARY POLITICS IN AMERICA* 21 (2013) (finding that for the Tea Party, Obama “represent[ed] a threat to the America they’ve come to know, in which American identity is commensurate with being white, male, native-born, English-speaking, Christian, and heterosexual” (footnote omitted)).

15. BRYAN T. GERVAIS & IRWIN L. MORRIS, *REACTIONARY REPUBLICANISM: HOW THE TEA PARTY IN THE HOUSE PAVED THE WAY FOR TRUMP’S VICTORY* 14-16 (2018) (providing an account of the origins of the Tea Party).

16. DONALD R. KINDER & ALLISON DALE-RIDDLE, *THE END OF RACE?: OBAMA, 2008, AND RACIAL POLITICS IN AMERICA* 143 (2012) (describing the demographic characteristics of the typical Tea Party member).

17. *See id.* (detailing some of the Tea Party’s personal and racist attacks on President Obama).

18. Ben Smith & Byron Tau, *Birtherism: Where it All Began*, POLITICO (Apr. 22, 2011, 4:22 AM), <https://www.politico.com/story/2011/04/birtherism-where-it-all-began-053563> (providing an account of the origin and evolution of the birtherism conspiracy movement).

19. *See* Janie Velencia, *Republicans Still Don’t Think Obama is American, But Don’t Care Ted Cruz Was Born in Canada*, HUFFPOST (Jan. 12, 2016, 10:50 AM), [https://www.huffpost.com/entry/republicans-trump-cruz-canadian-birth-eligibility\\_n\\_56940e76e4b0c8beacf7fe2d](https://www.huffpost.com/entry/republicans-trump-cruz-canadian-birth-eligibility_n_56940e76e4b0c8beacf7fe2d) (citing a survey finding that 53% of Republicans did not believe that President Obama was born in the United States).

conspiracy theory, Donald Trump.<sup>20</sup> As a presidential candidate, Trump tapped into the racial conservatism of white voters by advancing a vision of America as divided between white patriots and people of color who are either criminal, foreign, or both.<sup>21</sup> Then, through the airing of white grievances, Trump as president used the powerful platform of his Twitter account to consolidate Republican voter, elected officials, and the Republican Party around his racist vision of America.<sup>22</sup> That racist vision not only inflamed division and stoked hostility, it also contributed to the rise of intra-racial solidarity among white Americans. Those white Americans saw demographic changes in America and progress toward multi-racial democracy as a threat to be resisted rather than an opportunity to be embraced.<sup>23</sup>

Even as America moved on from the Trump presidency after the 2020 election, his hold on the Republican Party and its voters has shown no signs of waning. The racially conservative Republican Party controls the drawing of district lines for a critical plurality of congressional and state legislative districts in the 2020 round of redistricting.<sup>24</sup> In the absence of constitutional intervention from the Court, the Republican Party, through redistricting, will likely contribute to the further retrogression in the American multi-racial democratic project after the Trump presidency.<sup>25</sup> In the next Part, I elaborate

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20. Michael Tesler, *Birtherism Was Why so Many Republicans Liked Trump in the First Place*, WASH. POST (Sept. 19, 2016, 2:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/19/birtherism-was-why-so-many-republicans-liked-trump-in-the-first-place/> (identifying the association between Donald Trump and the birtherist movement and finding that his support for birtherism to be a strong contributor to his popularity in the Republican party).

21. See, e.g., *Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015, 10:03 AM), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/> (quoting Trump's infamously racist campaign announcement speech in which he stereotyped and condemned Mexicans, Muslims, and other non-white persons).

22. See, e.g., Maya King & Laura Barrón-Lopez, *Trump Blames Low-Income People, Minorities for 'Ruining' Suburbia*, POLITICO (Oct. 1, 2020, 8:51 PM), <https://www.politico.com/news/2020/10/01/how-white-grievance-politics-informs-trumps-campaign-playbook-424590> (reporting an example of President Trump's white grievance politics in which he "refused to condemn white supremacists" and willingness to "blame suburban, low-income people of color for 'ruining this American dream.'").

23. ASHLEY JARDINA, *WHITE IDENTITY POLITICS* 184 (2019) (finding through a statistical analysis "evidence that whites high on racial identity are responding to threatening information about demographic change and immigration in a manner quite distinct from whites who possess lower levels of racial solidarity").

24. Ally Mutnick & Sabrina Rodriguez, *'A Decade of Power': Statehouse Wins Position GOP to Dominate Redistricting*, POLITICO (Nov. 4, 2020, 9:09 PM), <https://www.politico.com/news/2020/11/04/statehouse-elections-2020-434108>; see also *State Partisan Composition*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 16, 2021), <https://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx#> (Feb. 1, 2022).

25. Giovanni Russonello, *The Brewing Voting Rights Clash*, N.Y. TIMES (Mar. 2, 2021), <https://www.nytimes.com/2021/03/02/us/politics/voting-rights-supreme-court-georgia->

on the threat from the current round of redistricting and the multi-racial democratic project.

## II. DISTRICTING THE DEMOCRATIC HARMS FROM RACIAL GERRYMANDERING

In the 2020 election, the Democrats, powered by a multi-racial coalition of voters, wrested control of the White House and two houses of Congress from a Republican Party and leader that centered white grievance politics. Yet, despite the efforts of the National Democratic Redistricting Committee chaired by President Obama’s Attorney General, Eric Holder, and its backing of one hundred state legislative candidates, Democrats were unable to put much of a dent in Republican domination of state legislatures.<sup>26</sup> As Politico reported on the day after the election, Democrats did not flip a single statehouse chamber in their favor.<sup>27</sup> As a result, heading into the 2020 round of redistricting, Republicans had full control over the redistricting of 181 congressional districts and all the state legislative districts in fifteen states, while Democrats had full control over the redistricting of seventy-six congressional districts and all the legislative districts in ten states.<sup>28</sup> A commission is responsible for drawing 124 congressional and legislative districts in fourteen states, and map drawing institutions divided between the parties are responsible for drawing forty-seven congressional districts and the state legislative districts in ten states.<sup>29</sup>

The 2020 decennial redistricting is the first round of redistricting since the Supreme Court’s decision in *Rucho v. Common Cause*.<sup>30</sup> In that case, the Court declared challenges to gerrymandering to be nonjusticiable political questions.<sup>31</sup> As a result, we are seeing some of the most partisan gerrymandered districts in the history of this country as state legislatures no

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arizona.html (describing Republican legislation in Georgia and Arizona aimed at restricting voting access “particularly in Black and Brown communities”); *see also, e.g.*, S.B. 202, 156th Gen. Assemb., Reg. Sess. (Ga. 2021) (requiring among several other restrictions, identification for absentee voting applications and limitations on ballot drop boxes); S.B. 1069, 55th Leg., 1st Reg. Sess. (Ariz. 2021) (proposing removals of inactive voters from early voting lists).

26. Mutnick & Rodriguez, *supra* note 24 (reporting an “abysmal showing by Democrats in state legislative races” in the November 2020 election).

27. *Id.*

28. *See id.*; *State Partisan Composition*, *supra* note 24; *Redistricting Commissions*, BALLOTPEdia, [https://ballotpedia.org/Redistricting\\_commissions](https://ballotpedia.org/Redistricting_commissions) (last visited Feb. 15, 2022).

29. *See* Mutnick & Rodriguez, *supra* note 24; *State Partisan Composition*, *supra* note 24; *Redistricting Commissions*, *supra* note 28.

30. 139 S. Ct. 2484 (2019).

31. *Id.* at 2507-08 (finding partisan gerrymandering challenges nonjusticiable explaining that the Court has “no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide . . . the exercise of such authority”).

longer fear judicial review of their districting practices.<sup>32</sup> That potentially extreme partisan gerrymandering is not only a threat to partisan representation in the political process but also the most significant threat to the past half-century of progress toward a multi-racial democracy.

To understand the threat from districting to the multi-racial democratic project, it is necessary to return to the early 1990s racial gerrymandering case of *Shaw v. Reno*.<sup>33</sup> In that case, the Supreme Court properly diagnosed a potential districting threat to America's multi-racial democratic project, but it then proceeded to identify the wrong source of the threat.

In *Shaw*, decided in 1993, the Court addressed a challenge by white voters to the state legislature's use of race to draw districts that provided racial minorities with the opportunity to secure representation in Congress.<sup>34</sup> North Carolina did not do this of its own accord. Rather, it did so in response to the United States Department of Justice's enforcement of section 5 of the Voting Rights Act.<sup>35</sup> Under the Act, states with a history of discrimination had to obtain the approval from the United States Attorney General or the District Court for the District of Columbia for their redistricting plans.<sup>36</sup> As enforced in the early 1990s, the Attorney General typically required that states draw maps in which the number of districts with majority non-white populations was proportionate to the non-white population in the state.<sup>37</sup>

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32. The results from the 2020 round of redistricting thus far is a surprisingly even split in the partisan lean of congressional districts. See Nate Cohn, *A Potential Rarity in American Politics: A Fair Congressional Map*, N.Y. TIMES, (Mar. 10, 2022), <https://www.nytimes.com/2022/03/10/us/politics/redistricting-congressional-maps-elections.html> (deriving from a New York Times analysis that there are 216 to 219 lean Republican districts and 216 to 219 lean Democratic districts). However, the dramatic reduction in the number of competitive congressional districts suggests that the districts are increasingly racially identified with Republican districts likely to be more white and Democratic districts likely to be more non-white after this round. See, e.g., Reid J. Epstein & Nick Corasaniti, "Taking the Voters Out of the Equation": How the Parties are Killing Competition, N.Y. TIMES (Feb. 6, 2022), <https://www.nytimes.com/2022/02/06/us/politics/redistricting-competition-midterms.html> (deriving from a New York Times analysis, that "mapmakers are on pace to draw fewer than 40" competitive congressional districts, a reduction from the 73 competitive congressional districts drawn after the 2010 round of redistricting).

33. 509 U.S. 630 (1993).

34. *Id.* at 636-37 (detailing the constitutional challenges to the congressional districts drawn by the state legislature).

35. *Id.* at 634-35 (describing the United States Attorney General's objection to the original North Carolina congressional districts).

36. 52 U.S.C. § 10304(a)-(b) (originally enacted as the Voting Rights Act, 42 U.S.C. § 1973(c)); see also *Shelby County v. Holder*, 570 U.S. 529 (2013) (invalidating the formula for determining which states and jurisdictions would be subject to section 5 thereby neutering that provision of the Voting Rights Act).

37. See, e.g., Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CALIF. L. REV. 1209, 1223-24 (2003) (describing the



In the early 1990s, African Americans comprised approximately 20% of the population in North Carolina.<sup>38</sup> When the North Carolina state legislature drew only one majority-minority congressional district (out of twelve), the Attorney General objected.<sup>39</sup> The state legislature responded to the Attorney General's objection by drawing a second majority-minority district.<sup>40</sup> However, due to the combination of the demographic spread of African Americans in the state and political considerations, the state drew unusually shaped majority-minority congressional districts. White North Carolinians challenged the state's drawing of those district lines claiming the state impermissibly relied on a suspect racial classification. To support their Equal Protection claim, the challengers pointed to the unusual shape of the districts and the Department of Justice's refusal to approve a districting plan that created less than a proportionate number of majority-minority districts.<sup>41</sup>

The Court held in favor of the challengers. Focusing on the shape of the districts, the Court explained, "In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race."<sup>42</sup> As support for its conclusion, the Court in *Shaw* diagnosed three race-based democratic harms that it said arose from the consideration of race in the drawing of district lines.

First, the Court asserted, "A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid."<sup>43</sup> Second, the Court determined that racial gerrymandering "perpetuat[es] stereotypical notions about members of the same racial group—that they think alike, share the same political interests, and prefer the same candidates . . ."<sup>44</sup> Such perpetuation of stereotypes, the Court continued, "may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract."<sup>45</sup> Third, the Court announced, "When a district obviously is created solely to effectuate the perceived common interests of one racial

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Department of Justice's enforcement practices under section 5 of the Voting Rights Act in the early 1990s).

38. *Shaw*, 509 U.S. at 634.

39. *Id.* at 633.

40. *Id.*

41. *Id.* at 633-37.

42. *Id.* at 646-47 (citation omitted).

43. *Id.* at 647.

44. *Id.* at 631.

45. *Id.* at 648.

group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.”<sup>46</sup> “This,” the Court concluded, “is altogether antithetical to our system of representative democracy.”<sup>47</sup>

The decision in *Shaw* has been broadly criticized.<sup>48</sup> Some view the decision as a retreat from the Court’s prior jurisprudence.<sup>49</sup> In those prior cases, the Court promoted the multi-racial democratic project first by ensuring that urban, more racially diverse voters would have an equal voice in elections and next, by providing opportunities for minorities to elect candidates of their choice.

There is, however, a more sympathetic account of *Shaw* that can be squared with the Court’s earlier jurisprudence. Under this more sympathetic account, the Court in *Shaw*, and the cases that followed,<sup>50</sup> did place limits on the capacity of states to rely exclusively or predominantly on race in the drawing of district lines to advance its colorblind vision of the Constitution.<sup>51</sup> In doing so, the Court took away the easiest tool for states to use to promote minority representation. But the reason the Court took away this tool was because it viewed race as too blunt an instrument, insofar as it failed to account for the political heterogeneity of minority populations. Therefore, using race as the predominant tool to draw district lines might lead states to sacrifice minority substantive representation in favor of minority descriptive representation. Moreover, the Court feared such uses of race might lead to race-based governing that could stoke racial divisions and hostility, thereby undermining the multiracial democratic project.

It could therefore be argued that rather than retreating from the multi-racial democratic project, the Court in *Shaw* advanced a different conservative vision of how to secure a multi-racial democracy. But even this more sympathetic account of *Shaw* cannot help but acknowledge a critical

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46. *Id.*

47. *Id.*

48. See, e.g., Daniel Hays Lowenstein, *You Don’t Have to be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779 (1998) (offering several critiques of the Court’s racial gerrymandering jurisprudence that began with *Shaw v. Reno*).

49. See, e.g., Pamela S. Karlan, *All Over the Map: The Supreme Court’s Voting Rights Trilogy*, 1993 SUP. CT. REV. 245 (1993) (contextualizing *Shaw v. Reno* within the Court’s broader jurisprudence).

50. E.g., *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (establishing the constitutional prohibition on states and jurisdictions predominantly relying on race to draw district lines).

51. For a conservative account that is generally favorable to the Supreme Court’s racial gerrymandering cases, see James F. Blumstein, *Racial Gerrymandering and Vote Dilution: Shaw v. Reno in Doctrinal Context*, 26 RUTGERS L.J. 517 (1995); Katharine Inglis Butler, *Affirmative Racial Gerrymandering: Fair Representation for Minorities or a Dangerous Recognition of Group Rights?*, 26 RUTGERS L.J. 595 (1995).

mistake the Court made in its diagnoses of the democratic harms arising from the use of race in districting. Here I want to focus on the last of the democracy harms that the Court theorized to arise from the use of race in drawing district lines: the threat to democracy associated with an elected official's belief "that their primary obligation is to represent only the members of that group, rather than their constituency as a whole."<sup>52</sup> I will label this harm the "race-based voter neglect harm." I focus on this harm because out of the three harms described by the *Shaw* Court, it represents the greatest threat to multi-racial democracy and has served as the primary basis for ongoing challenges to racial gerrymandering.

There are two main problems associated with the Court's theory that race-based voter neglect arises from the state's use of race to draw majority-minority districts. First, the theory lacks empirical support. Although there is evidence suggesting that minority representatives in majority-minority districts better represent racial minority interests than their white counterparts representing majority white districts, there is no evidence suggesting that minority representatives neglect their white constituents.<sup>53</sup>

In fact, and this goes to the second problem with the Court's theory, it would be entirely irrational for minority representatives, even those from majority-minority districts, to neglect their white constituents. There are two reasons why it would be irrational for minority representative neglect of white constituents. The first arises from the fact that legislators are not unitary executives who get to make policy decisions on their own. Rather, legislators are part of multi-member bodies that make decisions according to majority or super-majority voting rules. As a result, in order for minority representatives to advance their policy goals, they have to build coalitions with some of the white majority of representatives in Congress.<sup>54</sup> Recognizing this, it would be politically irrational for minority legislators to neglect the interests of their white constituents when governing, as this would impede their ability to build cross-racial coalitions even with members of their own party.

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52. *Shaw*, 509 U.S. at 648.

53. See, e.g., CHRISTIAN R. GROSE, CONGRESS IN BLACK AND WHITE: RACE AND REPRESENTATION IN WASHINGTON AND AT HOME 8-9 (2011) (finding that African American legislators provide greater substantive representation than their white counterparts "as measured by the delivery of goods and services to black constituents").

54. See *id.* at 9. Even in the most diverse Congress elected in the history of the United States in 2020, only 23% of representatives in the House of Representatives and Senate are racial or ethnic minorities. Katherine Schaeffer, *Racial, Ethnic Diversity Increases Yet Again with the 117th Congress*, PEW RSCH. CTR. (Jan. 28, 2021), <https://www.pewresearch.org/fact-tank/2021/01/28/racial-ethnic-diversity-increases-yet-again-with-the-117th-congress/>.

The second reason why it is irrational for minority legislators to neglect their white constituents is because white voters in their district and nationwide are likely to be a critical source of campaign finance that is necessary to win elections. The racial wealth gap in the United States has translated into a racial chasm in terms of campaign contributions and expenditures.<sup>55</sup> As a result, minority candidates for office must rely on white contributors and spenders of campaign money for electoral viability. Minority candidates, therefore, literally cannot afford to alienate white voters by neglecting them when running for office or governing.

The Court's idea that majority-minority districts might produce race-based neglect thus has no basis in fact or theory. And the benefits from the consideration of race, which include increasing minority representation and voice in the political process, seem to far outweigh those imaginary harms.

There is, however, a real threat of race-based neglect that does not arise from race-based districting to support minority voting rights. That threat arises from partisan gerrymandering by a party that has white identity politics at the core of its political platform. In the next Part, I focus my analysis on that threat.

### III. THE REAL GERRYMANDERING THREAT TO MULTIRACIAL DEMOCRACY

In 2019, the Pew Research Center found that whites made up 81% of Republican votes despite being 60% of the U.S. population.<sup>56</sup> In Congress, 91.4% of Republicans in the House of Representatives and 94% of Republicans in the Senate are white.<sup>57</sup> The whiteness of the Republican Party has persisted despite a consistent shift in the nation's demographics in favor of people of color. That persistent whiteness of the Republican Party has been associated with a rising racial conservatism that targeted President Obama and his race.

Despite the fact that the Republican Party has increasingly diverged from the changing demographics of the country, it maintained control of the

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55. See Jacob M. Grumbach & Alexander Sahn, *Race and Representation in Campaign Finance*, 114 AM. POL. SCI. REV. 206, 213 (2020) (describing the ethnoracial composition of the contributor class between 1980-2012).

56. John Gramlich, *What the 2020 Electorate Looks Like by Party, Race and Ethnicity, Age, Education and Religion*, PEW RSCH. CTR. (Oct. 26, 2020), <https://www.pewresearch.org/fact-tank/2020/10/26/what-the-2020-electorate-looks-like-by-party-race-and-ethnicity-age-education-and-religion/>; *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> (last visited Feb. 16, 2022).

57. See *Chapter 1: Demographics of Members of Congress*, BROOKINGS INST. 58-63 (Feb. 8, 2021), <https://www.brookings.edu/wp-content/uploads/2021/02/Chpt-1.pdf>.

House of Representatives from the 2010 Tea Party fueled election until the 2018 anti-Trump democratic wave election.<sup>58</sup> And throughout the entire decade, Republicans maintained a firm grip over most state legislatures throughout the country.<sup>59</sup>

A Republican electoral strategy prior to the 2010 decennial redistricting was the key to Republicans maintaining effective control over the House of Representatives and state legislatures throughout the decade. The strategy led by President George W. Bush's chief of staff, Karl Rove, was known as the Redistricting Majority Project, or REDMAP.<sup>60</sup> The strategy's goal was to "keep or win Republican control of state legislatures with the largest impact on Congressional redistricting."<sup>61</sup> In the 2010 midterm election, REDMAP spent \$30 million in state legislative races that typically involved low campaign spending.<sup>62</sup> The strategy proved effective for increasing Republican party control over state legislatures. According to data collected by REDMAP, Republicans increased their control over state legislatures with districting responsibility from ninety-eight jurisdictions in the 2000 round of redistricting (and only five in the 1990 round of redistricting) to 193 in the 2010 round of redistricting.<sup>63</sup> At the same time, Democratic control declined from 135 jurisdictions in the 2000 round of redistricting (and 172 in the 1990 round of redistricting) to forty-four in the 2010 round of redistricting.<sup>64</sup>

The result was extensive partisan gerrymandering by mostly Republican-controlled state legislatures during the 2010 round of redistricting. And due to the mostly white racial composition of the Republican Party, the Republican Party gerrymandering strategy involved creating and maintaining majority white districts for partisan advantage.

The Republican partisan gerrymandering proved to be wildly effective at securing and maintaining Republican control over the House and state

58. *Party Divisions of the House of Representatives, 1789 to Present*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions/> (last visited Mar. 28, 2021).

59. *Historical Partisan Composition of State Legislatures*, BALLOTPEDIA, [https://ballotpedia.org/Historical\\_partisan\\_composition\\_of\\_state\\_legislatures](https://ballotpedia.org/Historical_partisan_composition_of_state_legislatures) (last visited Feb. 16, 2022).

60. "Gerrymandering on Steroids": How Republicans Stacked the Nation's Statehouses, WBUR (July 19, 2016), <https://www.wbur.org/hereandnow/2016/07/19/gerrymandering-republicans-redmap> (detailing the REDMAP strategy); see also Karl Rove, Opinion, *The GOP Targets State Legislatures*, WALL ST. J., Mar. 4, 2010, at A17 (providing the contours of the Republican strategy to control redistricting that would be labeled REDMAP).

61. *2012 REDMAP Summary Report*, THE REDISTRICTING MAJORITY PROJECT (Jan. 4, 2013, 9:23 AM), <http://www.redistrictingmajorityproject.com/?p=646>.

62. *Id.*

63. *Id.*

64. *Id.*

legislatures in the face of changing levels of national support for Republican House candidates. One way that social scientists measure the effectiveness of a partisan gerrymander of Congress is in terms of the seat bonus. A seat bonus is the difference between the percentage of seats won by a party in House elections and the percentage of votes cast for that party in House elections nationwide.<sup>65</sup> From 2012-2016, Republican partisan gerrymandering secured a seat bonus of 6 to 7%, meaning that Republicans won 6 to 7% more seats in the House than votes cast for Republicans nationwide.<sup>66</sup> The seat bonus almost entirely disappeared in the 2018 midterm election as a result of the combination of broad popular antipathy toward President Trump and demographic shifts that made some Republican districts less Republican than they were at the beginning of the decade.<sup>67</sup>

The Republican gerrymanders had not only partisan effects but also important racial effects on representation. In the elections between 2012-2018, at least 90% of House Republicans were elected from majority white districts.<sup>68</sup> At the most recent peak of Republican racial conservatism fueled by President Trump's first two years in office, 94% of House Republicans were elected from majority white districts in the 2018 midterm election.<sup>69</sup> On the other side of the demographic divide, the number of majority Latino districts that elected House Republicans ranged from 6 to 7% between 2012-2016 before dropping to 3% in 2018.<sup>70</sup> Not a single majority black district elected a House Republican between 2012-2018.<sup>71</sup> In fact, none of the districts that elected Republicans between 2012-2018 had a black population that exceeded 36%.<sup>72</sup> Every district with a black population exceeding 30% that elected a Republican was in the South and had a majority white population.<sup>73</sup>

That Republican reliance on majority white districts can be contrasted with the greater diversity of districts that elected Democrats between 2012-

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65. See, e.g., Benjamin Plener Cover, *Quantifying Partisan Gerrymandering: An Evaluation of the Efficiency Gap Proposal*, 70 STAN. L. REV. 1131, 1150-51 (2018) (defining the seat bonus).

66. Seth Moskowitz, *The House's Republican Bias: Does it Exist?*, UVA CTR. FOR POL. fig.1 (Sept. 12, 2019), <https://centerforpolitics.org/crystalball/articles/the-houses-republican-bias-does-it-exist/>.

67. *Id.*

68. The author compiled the data from the United States Census Bureau's American Community Survey and the dataset is on file with the Southwestern Law Review. *American Community Survey*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/acs>.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

2018.<sup>74</sup> The percentage of House Democrats elected from majority white districts never exceeded 51% and was as low as 46% in the 2016 election.<sup>75</sup> The percentage of House Democrats elected from majority Latino districts ranged from 28-31% during this period and the percentage of House Democrats elected from majority black districts ranged from 19- 28%.<sup>76</sup>

Most importantly, from the perspective of *Shaw*'s account of the race-based neglect harm from racial gerrymandering, Republicans from majority white districts comprised a majority of the House in 2012 and 2014 and came up only one seat short in 2016.<sup>77</sup> What this means is that Republicans in the House could have legislated according to the belief that their primary obligation is to represent white Americans, rather than Americans as a whole. Republicans did not need to build coalitions with representatives of non-majority white districts to secure the requisite majorities to pass bills. Furthermore, given that there was also a Republican majority in the Senate from majority white states in 2014, a policy agenda of white racial preferences and minority racial neglect could have, in theory, been advanced through both chambers during that Congress.

It was not only the white racial homogeneity of the districts that Republicans controlled that raised the prospect of the race-based voter neglect harm, but also the racial biases in campaign contributions. According to a recent study by Jacob Grumbach and Alexander Sahn, whites comprised over 90% of donors to House election candidates between 1980-2012.<sup>78</sup> It is likely that this trend continued during this past decade. Republican House candidates, therefore, have the financial capacity to appeal exclusively to white donors during campaigns and Republican representatives in the House can legislate favorably to white donors with minimal consequences.

Thus, unlike for the African American representatives of majority-minority districts who were the focal point in the *Shaw* Court's concern about race-based voter neglect, it is the Republican representatives of majority white districts who have the opportunity and capacity to engage in race-based voter neglect. Whereas African American congressmembers from majority black districts need to build cross-racial coalitions to legislate, Republicans from majority white districts do not. Furthermore, whereas African American congressmembers from majority black districts depend on white donors for their financial viability during campaigns and elections, Republicans from majority white districts do not need the small number of

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74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. See Grumbach & Sahn, *supra* note 55, at 213.

minority donors to maintain their financial viability during campaigns and elections.

This is not to say that Republicans *will* legislate according to the *Shaw* account of race-based voter neglect, but rather only they *can* so legislate in that way at this time. And the evolution of the Republican Party into one that is increasingly and openly racially conservative suggests that they might legislate in this way when the opportunity to do so arises again.

The reason why Republicans might legislate in a manner consistent with the *Shaw* account of race-based voter neglect is because of the rise of white identity politics over the past decade. In an important book on white identity politics, political scientist Ashley Jardina finds that white Americans are increasingly embracing their white racial identity and building solidarity around whiteness.<sup>79</sup> That embrace of white racial identity has been associated with the perceived threat that some white Americans feel about the demographic shifts that will likely result in the country being majority-minority by the middle of this century.<sup>80</sup> Jardina finds that growing out-group prejudice is part of the rise in white racial identity, but it does not explain the whole story.<sup>81</sup> Rather, she finds that the primary motivation behind white racial solidarity is a concern with their in-group and a desire to protect its status in a changing country.<sup>82</sup>

Since the Tea Party's embrace of racial conservatism after the election of President Obama, Republicans have sought to trigger and exploit this white racial solidarity for political ends. Now, as with the party of Trump, white racial grievance targeting minority threats to white status is at the core of Republican partisan identity.<sup>83</sup> And it is this Republican Party that is responsible for drawing a critical plurality of congressional districts during the 2020 redistricting cycle. What is emerging from this round of

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79. JARDINA, *supra* note 23, at 62 (“Between 30 and 40% of white Americans indicate that their racial identity is very, if not extremely, important to them” and an additional “29 percent of whites chose the next highest level of racial identity.”).

80. *Id.* at 118-54 (finding that both in-group solidarity and out group prejudice motivate white racial identity).

81. *See id.* at 42 (“This confluence of events, beginning with immigration, combined with demographic change and the election of Obama, have all served as powerful threats to whites’ dominant status.”).

82. *Id.* at 152-54.

83. Michael Gerson, Opinion, *The GOP is Now Just the Party of White Grievance*, WASH. POST (Mar. 1, 2021, 1:00 PM), [https://www.washingtonpost.com/opinions/the-gop-is-now-just-the-party-of-white-grievance/2021/03/01/67679480-7ab9-11eb-85cd-9b7fa90c8873\\_story.html](https://www.washingtonpost.com/opinions/the-gop-is-now-just-the-party-of-white-grievance/2021/03/01/67679480-7ab9-11eb-85cd-9b7fa90c8873_story.html); *see also* PARKER & BARRETO, *supra* note 14, at 6 (arguing that “people who are attracted to the Tea Party are *reactionary* conservatives: people who fear change of any kind—especially if it threatens to undermine their way of life”). *See generally* GERVAIS & MORRIS, *supra* note 15, at 14-30 (describing the evolution of the Republican Party from the Tea Party to Trump as the party representing racially resentful white Americans).



redistricting are a high proportion of majority white districts with a growing number of white constituents feeling racially aggrieved and willing to embrace white racial solidarity.<sup>84</sup> And if the past is prologue, at least 90% of Republicans elected to the House of Representatives will hail from those majority white districts. Those Republicans will have relied almost entirely on white donors, many of whom will be loyalists to Donald Trump and will seek to protect the status of, and advance the interest of, white Americans.

The 2020 round of redistricting in Republican-controlled states therefore represents the first real occasion for *Shaw*'s fear of race-based voter neglect harm from gerrymandering to be realized. Will the Supreme Court have the same interest in policing such racial gerrymandering when it is hidden behind the veil of partisanship and used to advance white identity politics as opposed to minority representation?

#### CONCLUSION

In *Shaw v. Reno*, the Court announced that the use of race to draw district lines can contribute to the belief that representatives' "primary obligation is to represent only the members of that group, rather than their constituency as a whole."<sup>85</sup> In seeking to draw constitutional limits on the use of race to draw majority-minority districts, the Court in *Shaw* failed to recognize that minority representatives elected from these districts lacked the opportunity or capacity to represent only members of their own group at the expense of white members of their constituency.

The Court in *Shaw* might, however, prove to be quite prescient in diagnosing the democratic harm from racial gerrymandering. A Republican Party that controls redistricting in many states and has embraced white identity politics will have both the opportunity and capacity to legislate according to a theory of racial neglect. The question is whether they will and, if they do, whether the Supreme Court will step in to prevent the democratic harms associated with white racial gerrymandering from undermining the multiracial democratic project.

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84. See, e.g., Michael C. Li, et. al., *Redistricting: A Mid-Cycle Assessment*, BRENNAN CTR FOR JUST., 7-8 (2022) (describing how Republican map drawers are "aggressively targeting communities of color" and drawing more majority-white districts in southern states).

85. 509 U.S. 630, 648 (1993).