THE REDISTRICTING CASES: ORIGINAL MISTAKES AND CURRENT CONSEQUENCES

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One of the most firmly established principles of constitutional law is "one person, one vote,"[1] meaning that legislative districts within each state must be equal in population. There are no dissenters from that proposition on the Supreme Court, and there have been none for decades. Legislatures, litigants, judges, and academics all accept the proposition. Yet as a matter of text and history, that proposition is almost certainly incorrect, and judicial enforcement of it has produced unintended results that are perverse from many different points of view.

In order to bring legislative districts as close to "precise mathematical equality" as possible, states must disregard preexisting political boundaries such as cities, townships, and counties. Adherence to these traditional boundaries was, historically, the principal constraint on creative districting, popularly known as "gerrymandering." Once freed from these traditional constraints by the Supreme Court's "precise mathematical equality rule," legislative line-drawers were able to draw maps to produce the results they desired, rendering elections less a reflection of popular opinion than of legislative craftsmanship. The problem has become particularly acute with modern computer districting software, which allows map-makers to create imaginative districts with the precision of a surgeon. The results? Protection for incumbents, a tendency toward homogeneous—and hence more partisan—districts, racial and partisan gerrymandering, and ultimately, a

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1. *E.g.*, Gray v. Sanders, 372 U.S. 368, 381 (1963).

widespread sense that elections do not matter.

Needless to say, these were not the objectives the Supreme Court thought it was pursuing when it embarked on its great adventure of solving the malapportionment problem. It behooves students of the political process to understand the mistakes that were made, and their results, if only as an object lesson that departure from the actual text and meaning of the Constitution, even in service of well-intentioned goals, can have unintended consequences.

This is not to say that the old system of grossly malapportioned legislatures was constitutionally proper, or that the courts were wrong to take steps to dismantle it. My point, instead, is that the Court adopted a legal theory for addressing the issue that was wrong in principle and mischievous in its consequences. More careful attention to constitutional text and history would have produced a better solution.

I. THE REDISTRICTING PROBLEM BEFORE *BAKER V. CARR*

Until the early 1960s, the federal courts played no role in legislative districting. By almost any measure of democratic legitimacy, however, the districting process was a disaster. Take the example of Tennessee, which was at issue in *Baker v. Carr*.[2] The Tennessee Constitution theoretically required the legislature to draw district lines in accordance with population, but there was no mechanism for judicial enforcement in state court.[3] From 1901 until *Baker* in 1963, the legislature simply left existing district boundaries in place.[4] Yet enormous population shifts had occurred during that time. In 1901, a majority of the American public still lived on the farm. Cities were small; suburbs, in that pre-automobile age, were nonexistent. But Tennessee employed the same district lines in 1960 that had been established in 1901. As a result, the suburbs and cities were grossly underrepresented. For example, rural Moore County, Tennessee, had a single representative[5] for 2,340

2. 369 U.S. 186 (1962).
3. TENN. CONST. art. II, § 6.
4. *See Baker*, 369 U.S. at 191.
5. *See Baker*, 369 U.S. at 237 (app. to opinion of the Court).

voters,[6] whereas urban Shelby County was allotted only eight representatives[7] for its over 312,000 voters[8]—meaning about 44,000 voters per representative as compared to the 2,300 in Moore County. That is an astonishing disparity.

These disparities were not random; they were systematic. This style of malapportionment in Tennessee and elsewhere gave rural and agrarian interests a lock on legislative power, despite their minority status. Voters in rural districts having only 40% of the voting population elected 63 of the 99 members of the state House of Representatives[9]—almost a two-thirds majority. Districts having only 37% of the voting population elected 20 of the 33 Senators[10]—a 61% majority. Moreover, the urban and suburban majority had no peaceful political means for redressing the electoral balance. The state supreme court held that it had no power to order reapportionment, and Tennessee had no mechanism for bypassing the legislature to achieve constitutional reform.[11] No matter how loudly the people of Nashville, Memphis, Chattanooga, and the suburbs complained, the rural legislators had no incentive to respond. They were in control. Why would they give up power when they did not have to?

Tennessee was an extreme case, but this was a national phenomenon. Almost every state legislature in the Union was malapportioned, as were the delegations to the U.S. House of Representatives.[12]

II. JUSTICIABILITY ISSUES AND THE CHOICE OF CONSTITUTIONAL DOCTRINES

A districting scheme so malapportioned that a minority faction is in complete control, without regard to democratic sentiment, violates the basic norms of republican government.

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6. *See id.* at 262 tbl.1 (Clark, J., concurring).
7. *See id.* at 238 (app. to opinion of the Court).
8. *See id.* at 262-64 tbl.1 (Clark, J., concurring).
9. *See id.* at 253.
10. *See id.*
11. *See* Kidd v. McCanless, 292 S.W.2d 40 (Tenn. 1956).
12. *See* Reynolds v. Sims, 377 U.S. 533, 589 & n.2 (1964) (Harlan, J., dissenting) (noting that, under the Court's standard, "all but a few" states' apportionments will be unconstitutional); Wesberry v. Sanders, 376 U.S. 1 (1976) (holding a Georgia congressional district with over twice the population of the average district violated Art. 1, § 2 of the Constitution).

It would thus appear to raise a constitutional question under Article IV, Section 4, which states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."[13] Constitutional standards under the Republican Form of Government Clause are ill-developed, but surely a government is not "republican" if a minority faction maintains control, and the majority has no means of overturning it.

As of the early 1960s, however, Supreme Court precedent held that constitutional challenges based on the Republican Form of Government Clause present nonjusticiable "political questions."[14] The basis for that holding was that the Clause does not provide "judicially manageable standards."[15] Rather than addressing that dubious proposition directly, the Court side-stepped the issue by treating the case as arising under the Equal Protection Clause rather than the Republican Form of Government Clause.[16] According to the Court, "[j]udicial standards under the Equal Protection Clause are well developed and familiar," and thus do not present justiciability problems.[17]

As an interpretation of the political question doctrine, this was nonsense. At the time of *Baker*, the Equal Protection Clause had never been applied to the districting question, and there were any number of possible interpretations, with no judicially manageable means of choosing among them. ("One person, one vote" is obviously a judicially manageable standard, but at the time of *Baker*, the Court had not embraced it.) Conversely, if the Court were inclined to develop judicially manageable

13. U.S. CONST. art. IV, § 4.

14. *See Baker*, 369 U.S. at 223-24.

15. *See id.* at 223-26. In *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), the Court also seemed to reason that the text of the Republican Form of Government Clause vests enforcement power in Congress, but that is a dubious reading. Article IV states that "the United States" is responsible for guaranteeing the republican form of government to the states. This is a unique formulation. It may well be that enforcement is not confined to any one branch of the federal government, in contrast to provisions explicitly vesting enforcement in Congress, or implicitly in the courts. But it is hard to see why it should be interpreted as precluding a role for the courts.

16. *See Baker*, 369 U.S. at 226. The lawyers in *Baker* did not rely on the Republican Form of Government Clause, presumably because of the justiciability problem. Thus, in a sense, one can say that it was not the Court's choice to shift reliance to equal protection. But if the Court had wished to proceed on Republican Form of Government grounds, it undoubtedly could have signaled an intention to do so.

17. *Id.*

standards under the Equal Protection Clause, it could do so equally well under the Republican Form of Government Clause. The existence *vel non* of "judicially manageable standards" was inherent in the underlying issue, not in the constitutional label attached to it. Thus, it is hard to avoid the conclusion that the fateful decision to shift ground to equal protection was made for no reason other than to avoid the *appearance* of a departure from the nonjusticiability precedents.

This was the worst of both worlds. The equal protection approach compounded the justiciability problem with a doctrinal problem. Not only did the Court find itself in the political thicket, as the dissenters warned, but also it was using the wrong tools to get out.

III. PRECISE MATHEMATICAL EQUALITY

The shift to equal protection had serious implications. The essential difference between the Equal Protection Clause and the Republican Form of Government Clause is that the Equal Protection Clause is based on a theory of individual rights, which emphasizes the right of people in a minority to have the same protections as are given the majority. The Republican Form of Government Clause is a structural or institutional guarantee, emphasizing the right of "the People"—the majority—to ultimate political authority. By conceiving the issue as arising under the Equal Protection Clause, the Court committed itself to the norm of equipopulous districts, without proper consideration of whether that is the proper standard. As the Court explained in *Reynolds v. Sims*[18]

> [T]he concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live.[19]

So conceived, the problem of malapportionment is that individual voters are treated unequally by being accorded unequal voting influence. A voter in a district with 1000 voters has ten times the influence of a voter in a district with 10,000

18. 377 U.S. 533 (1964).
19. *Id.* at 565.

voters. As the Court put it in *Gray v. Sanders*,[20] "[h]ow then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?"[21]

In the early cases, the Court held merely that differences in population required rational justification. But this lenient standard almost immediately proved inadequate. Since there are any number of rational theories of representation in competition with "one person, one vote," the Court was forced to be more prescriptive, lest its venture into the field be futile. The logic of the equal protection argument, and the need for judicially manageable standards, thus drove the Court to more and more radical insistence on precise mathematical equality. In *Reynolds* and its companion cases, the Court rejected every argument put forward in defense of population disparities, including some that were eminently reasonable. Among the rejected justifications were considerations of history,[22] economic and other group interests,[23] area,[24] geography,[25] representation for sparsely populated areas,[26] theories of bicameralism,[27] urban-rural balance,[28] majority preference,[29] and the desirability of conforming districts to preexisting political boundaries.[30] The Court held that none of these factors could justify departure from the mandate of equal population. If equal protection is the constitutional standard, the solution is to make all districts as nearly equal in size as is technically feasible.

The Court thus moved inexorably toward a requirement of precise mathematical equality, without ever engaging in serious reflection on whether the logic of our constitutional structure requires this result, or whether the requirement

20. 372 U.S. 368 (1963).
21. *Id.* at 379.
22. *See Reynolds*, 377 U.S. at 579-80; *id.* at 622-23 (Harlan, J., dissenting).
23. *See id.* at 580.; *id.* at 622-23 (Harlan, J., dissenting).
24. *See id.* at 580; *id.* at 622-23 (Harlan, J., dissenting).
25. *See id.* at 580; *id.* at 622-23 (Harlan, J., dissenting).
26. *See id.* at 580-81; *see also id.* at 622-23 (Harlan, J., dissenting).
27. *See id.* at 576-77; *see also id.* at 622-23 (Harlan, J., dissenting).
28. *See id.* at 622-23 (Harlan, J., dissenting).
29. *See id.* (Harlan, J., dissenting).
30. *See id.* at 581; *id.* at 622-23 (Harlan, J., dissenting).

promotes democratic ends. The lack of serious reflection is perhaps best seen in this passage from *Reynolds v. Sims*:

> We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.[31]

That "answer" is, of course, no answer at all. The state's argument that mathematical equality should not be adopted as the standard for political action may not have been correct, but it warranted a response, and an invocation of the Justices' oath of office was not a response. This passage demonstrates the power of the Equal Protection Clause label to dictate the result of the cases.

The movement toward precise mathematical equality reached its point of logical absurdity in *Karcher v. Daggett*.[32] There, the Court invalidated a New Jersey apportionment plan for U.S. House districts that had a maximum deviation of 0.6984%, which was less than the statistically predictable undercount in the census.[33] This may make sense as a matter of equal protection—why should one voter be given even the tiniest fraction more voting influence than another?—but it made no sense as way of establishing a structure for government.

IV. LOGICAL AND PRACTICAL PROBLEMS WITH THE EQUAL PROTECTION THEORY

As constitutional doctrine, the equal protection theory has

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31. *Id.* at 566.

32. 462 U.S. 725 (1983).

33. *See id.* at 728; *id.* at 765-66 (White, J., dissenting). For reasons that make no doctrinal sense, the Court tolerates larger deviations (up to 10%) for state legislative districts, while requiring precise mathematical equality for congressional districts. *Compare* White v. Regester, 412 U.S. 755 (1973) (requiring no justification for state districts with maximum deviation of 9.9%), *with* Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969) (requiring states to "make a good-faith effort to achieve precise mathematical equality.").

certain grave defects. First, it is clear—a word that can rarely be used in this field of law—that the Equal Protection Clause was not originally understood by its framers to encompass voting rights.[34] Indeed, the Fourteenth Amendment was deliberately crafted so as to leave the allocation of political and voting power undisturbed. Supporters and opponents of the Amendment alike understood that it protected civil, but not political or social, rights. That is why it was necessary, one year after ratification of the Fourteenth Amendment, to pass the Fifteenth Amendment, barring racial discrimination in the grant of voting rights.[35] Since that time, three more constitutional amendments have been passed, barring various forms of discrimination in voting rights, all of which would have been unnecessary if the Fourteenth Amendment applied.[36]

Second, it is literally impossible for voters to have equal voting power, in the manner understood by "one person, one vote." As Justice Stevens commented in *Karcher*: "Given the birth rate, the mortality rate, the transient character of modern society, and the acknowledged errors in the census, we all know that such differences may vanish between the date of the census and the date of the next election. Absolute population equality is impossible to achieve."[37] There are many reasons for this. To begin with, the census is taken only every ten years, which means that districts will be malapportioned—in percentages far exceeding those in *Karcher*—most of the time. Voters in districts of declining population will be overrepresented relative to voters in districts of increasing population. To solve this problem, we would have to grant anticipatory greater representation to the suburbs and the sunbelt, or reapportion in advance of every election.

Moreover, districts are apportioned according to population, which often differs dramatically from the voting-eligible population. The main reasons for this are differing birth rates

34. The historical arguments are set forth in Justice Harlan's dissent in *Reynolds*, 377 U.S. at 595-608 (Harlan, J., dissenting). The majority offered no response.

35. *See Reynolds*, 377 U.S. at 593-612 (1964) (Harlan, J., dissenting); *see also* Oregon v. Mitchell, 400 U.S. 112, 164-66 (1970) (Harlan, J., concurring in part and dissenting in part); RAUOL BERGER, GOVERNMENT BY JUDICIARY 70-89 (1997).

36. *See* U.S. CONST. amends. XIX, XXIV, XXVI.

37. *Karcher*, 462 U.S. at 752 (Stevens, J., concurring).

and variations in the population of non-citizens. These factors have very large effects. For example, though the New Jersey districts at issue in *Karcher* were nearly equal in population, they varied enormously in voting age population. The smallest district had a voting age population of 282,000, and the largest of 429,000.[38] As a result of disparities of this sort, voters in places with high birth rates (such as Utah) are over-represented relative to voters in places with low birth rates (such as Florida or Phoenix). And voters in places with high levels of non-citizens (such as southern California) are over-represented relative to voters in places mostly populated by citizens (such as Vermont). Other demographic and behavioral factors also affect voting influence. Voters in districts with low voting registration and turnout levels have more influence over election outcomes than voters in districts with high voting registration and turnout. If the Court's "one person, one vote" doctrine were taken seriously—if the Equal Protection Clause made it unconstitutional to draw districts in which one voter has a different level of influence than another—then our current system, and every conceivable alternative, would be unconstitutional. There is something wrong with a constitutional doctrine that, in principle, can never be satisfied.

Third, even if we overlook differences in voting power based on shifts in population, voting age, non-citizen status, and differential turnout and registration, "one person, one vote" would still be impossible to achieve in light of our structure of government. The Senate is the most conspicuous example. The 481,000 people of Wyoming send the same number of Senators as the 32,667,000 people of California.[39] This might, however, be excused as an artifact of the original large state-small state compromise that formed the Union. There is no historical evidence of any analogous compromise at the heart of state legislative districting schemes. But even the House of Representatives, the members of which supposedly represent "the People," not states, flunks the "one person, one vote" test. Seats in the House of Representatives are allocated among the states as nearly equally as is possible, but that is not very equal.

38. *See id.* at 772 n.6 (White, J., dissenting).

39. *See* UNITED STATES DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 28 (119th ed. 1999).

The smallest district in the country after the last round of reapportionment (Wyoming) had 453,588 voters, and the largest district (Montana) had 799,065 voters[40]—a disparity over 700 times as large as that held unconstitutional in *Karcher*. These disparities cannot be eliminated without violating state boundaries. Evidently, therefore, the basic structure of our Constitution stands for the proposition that other principles, including the integrity of political units, take precedence over equality of voting influence.

When a constitutional theory is contradicted by evidence of original understanding, is inherently impossible in principle, and conflicts with other constitutional principles, there is good reason to suspect that it is not a good fit. But this shift was not just problematic from a theoretical, academic point of view: use of the Equal Protection Clause as the basis for apportionment law has pernicious practical results. Not only does it invite litigation over virtually every plan, but its requirement of precise mathematical equality requires legislators to violate every other traditional constraint on districting, of which adherence to traditional political boundaries was the most important. Both as a matter of state constitutional law and as a matter of custom, legislators used to be extremely reluctant to violate city, county, and township lines. Now, under "one person, one vote," they are required to do so. And once that constraint is lifted, they are liberated to snake lines all over the map to achieve their own purposes. The result, as Justice Harlan warned back in *Reynolds*, is an invitation to gerrymandering.[41]

There are three frequent forms of gerrymandering: partisan gerrymandering, racial gerrymandering, and incumbent protection. All three have a tendency to weaken the link between popular opinion and electoral results, and to create more homogeneous districts. Not only is this pernicious from the point of view of democratic theory, but it also contributes to the popular perception that elections do not matter, to the insulation of incumbents from political accountability, and to increased partisanship and extremism in legislative bodies. In 1998, 208 incumbent members of Congress were reelected with

40. *See id.*

41. *See* Reynolds v. Sims, 377 U.S. 533, 622 (1964) (Harlan, J., dissenting).

either token opposition or no opponent at all.[42] This is attributable partly to deliberate protection for incumbents (an interest that is shared by legislators of both parties) and partly to the fact that the majority party will benefit from packing voters from the other party into supermajority districts, so as to blunt the influence of their votes. Either way, incumbents are rendered effectively secure, which enables them to legislate without real political accountability—and especially without fear that members of the other party will be able to unseat them. Indeed, with politically homogeneous districts, incumbents are more likely to face challenges from within their party, which tend to be from the ideological extremes. This creates an incentive against moderation in politics and is one reason why the House of Representatives, which is heavily gerrymandered, is more politically polarized than the Senate.

Much the same critique may be made of racial gerrymandering. Overwhelmingly black districts tend to elect representatives with a taste for racial polarization, while representatives of overwhelmingly white districts tend to have little concern for minority interests. In mixed districts, politicians have a greater incentive to create coalitions across racial lines. Racial gerrymandering reduces the number of racially mixed districts.

In sum, the effect of the "one person, one vote" doctrine has been to favor entrenched, partisan, politically unaccountable representation and to exacerbate racial polarization.

V. SOLUTIONS

The Supreme Court's response has been to try to cure the gerrymandering problem through direct judicial intervention. In the case of partisan gerrymandering, however, it is virtually impossible to devise judicially manageable standards that distinguish between legitimate and illegitimate districting schemes. Proportional representation cannot serve as a benchmark,[43] and it would be absurd to hold that politicians

42. *See* Mark Tushnet, *The Supreme Court—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 45 (1999). Tushnet makes the interesting argument that this effect, which he agrees is attributable in large part to the Supreme Court's reapportionment decisions, is one of the hallmarks of a "new constitutional order."

43. There is no reason to expect that ungerrymandered districts would

cannot take politics into account in making the most political of all decisions. Thus, the Supreme Court has announced a constitutional "standard" so toothless that it might as well have held partisan gerrymandering nonjusticiable.[44] As to racial gerrymandering, the Court flirts with the idea that race is an illegitimate basis for classification—not an unattractive or unfamiliar understanding of the Equal Protection Clause—but is not quite willing to go the final step.[45] The result, as Melissa Saunders has explained elsewhere in this symposium,[46] is an incoherent and arbitrary series of decisions.

Is the choice, then, between tolerating the flagrant malapportionment of the pre-*Baker* era and unleashing the gerrymandering monster? I think not. The notion that the Constitution requires equipopulous districts is entirely a product of conceptualizing this issue as one of equal protection. Had the litigation proceeded under the Republican Form of Government Clause, it would have been quite different. The gravamen of a Republican Form of Government challenge is not that individual voters are treated unequally, but that the districting scheme systematically prevents effective majority rule.[47] There are many systems of representation that would satisfy the Republicanism requirement. But at a minimum, the Clause must mean that a majority of the whole body of the people ultimately governs.

This is not the occasion to canvass all of the possibilities opened up by the Republican Form of Government Clause. But I wish to note that one solution to the malapportionment problem would seem plainly permissible under that Clause, and plainly more desirable than the requirement of mathematical equality. This solution may be called the "House

approximate proportional representation. If political divisions were evenly divided across an entire state, a political party with a small majority could sweep most of the districts.

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

45. *See* Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

46. *See* Melissa Saunders, *The Dirty Little Secrets of* Shaw, 24 HARV. J.L. & PUB. POL'Y 141 (2000).

47. This is the standard suggested by Justice Stewart in his dissents in *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 754 (1964), and related cases. Justice Stewart, however, proposed this as an interpretation of the Equal Protection Clause. I am unable to understand the connection between this legal standard and the purposes or history of the Equal Protection Clause. It is, however, a very plausible reading of the requirements of the Republican Form of Government Clause.

of Representatives Analogy." The House is apportioned by allocating seats among the states in accordance with relative population, rounding up or down to create the greatest possible mathematical equality without crossing any state boundaries. As already noted, this does not create equipopulous districts. The largest (Montana) is almost half again as populous as the smallest (Wyoming). But these disparities do not threaten the republican character of the scheme. The rounding-off process is purely random. If Montana were slightly larger, it would have gotten two seats, and another state—probably Washington—would have lost one.[48] Purely random population disparities are irrelevant to the values of democratic accountability and majority rule that are at the heart of republican government.

As applied to the state legislative level, the House of Representatives Analogy would suggest that states could retain the traditional requirement that legislative districts conform to pre-existing political boundaries, such as counties, but would require that legislative seats be apportioned among them in accordance with relative population, rounding up or rounding down as is needed. Within large counties, lines could follow city, township, ward, or other boundaries in accordance with the political organization of the state, or use other reasonable methods. This would not create equipopulous districts, but the variances would be random—not favoring urban over rural, or any other identifiable group over another. No minority faction would dominate. Moreover, it would severely constrain (though not eliminate) gerrymandering, making impossible the grotesquely shaped districts that feature so prominently in today's maps. Necessarily, the districts would become somewhat less homogeneous, which would counteract the tendency of the present system to exacerbate partisanship, and it would be more difficult to shield incumbents from effective opposition.[49]

48. Technically, the effect would not be random. Small states have a higher probability of deviation from the mean, meaning that they are more likely to be either significantly over- or under-represented. Because this effect is equally likely to be to their advantage or their disadvantage, however, the overall effect is as if it were random.

49. One change from the House of Representatives Analogy might be necessary. In states with many counties and a relatively small legislative body, it would be necessary either to use political boundaries smaller than counties or to

One further implication of the Republican Form of Government theory should be noted. From the point of view of equal protection, partisan and racial gerrymandering appear to be two species of the same problem, with racial gerrymandering being the worse (since classification along racial lines is closest to the core concerns of the Fourteenth Amendment). From a Republicanism perspective, however, the two phenomena are distinguishable, and racial gerrymandering, if done for the purpose of bringing minority voting strength closer to what it would be under a system of proportional representation, is doctrinally unobjectionable. Partisan gerrymandering is designed to entrench a particular political faction against effective political challenge—sometimes even to give a political minority effective control. That is in obvious tension with the values of Republicanism. Racial gerrymanders of the sort we have seen in recent years, by contrast, do not threaten ultimate majority rule. To be sure, they have other consequences that may well be deemed undesirable—such as the exacerbation of racial polarization in elections—but they are not unrepublican. As long as the majority retains effective control, it is consistent with Republicanism for the majority to give greater influence to minority voices that would otherwise be submerged.[50]

Adopting the Republican Form of Government Clause and abandoning the Equal Protection Clause as the basis for evaluating electoral districting would thus be a practical and judicially manageable means of curbing gerrymandering abuses of all kinds, and it would put an end to the embarrassingly standardless line of cases that began with *Shaw v. Reno*.[51]

VI. CONCLUSION

The landscape of American politics today is not an encouraging sight. All too many Americans have come to the conclusion that elections do not matter. Incumbency retention levels rival the most undemocratic regimes of the world. Partisanship and attack politics are the name of the game.

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combine small counties into single districts. Otherwise, there would be a systematic and significant overrepresentation of rural voters.

50. *See Lucas*, 377 U.S. at 759 (Stewart, J., dissenting).

51. 509 U.S. 630 (1993).

Racial appeals abound. It is fair to say that the responsibility for a great deal of the political problem is to be laid at the feet of the Supreme Court's well-meaning reforms from the early 1960s.

This is not, of course, likely to change. The Court is too firmly entrenched in its *Baker v. Carr* thinking, and does not see the need to reconsider first principles. It is, however, ironic that the Court's great venture into protecting the democratic character of our political system should have produced such perverse results. It is a reminder of the most potent natural law of them all, the law of unintended consequences. And it should serve as a reminder that when faced with questionable precedents, such as the notion that the Republican Form of Government Clause is nonjusticiable, it is usually better to rethink the precedents than to contrive a way to evade them. There is a stiff price to pay when a part of the Constitution, such as the Equal Protection Clause, is twisted out of its intended meaning and used to serve a purpose for which it was not designed.