

Elections and District Boundaries: Strange Shapes and Elections in the USA

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ABSTRACT

La question du découpage des circonscriptions électorales hante les États-Unis depuis ses origines. Le terme même de «gerrymandering» date du début du 19^e siècle. Une des questions fondamentales à ce-propos est la prise en considération des impératifs de juste représentation des minorités raciales. L'arrêt Shelby County v. Holder, rendu par la Cour suprême des États-Unis en 2013 détricote un pan essentiel du Voting Rights Act de 1965, clôturant un chapitre historique du mouvement des droits civiques. Plus récemment, la Cour suprême, dans l'arrêt Arizona Legislature v. Arizona Independent Redistricting Commission (29 juin 2015) s'est penchée sur la question du découpage des circonscriptions électorales effectuée par les citoyens exerçant directement le pouvoir, sans l'intermédiaire de représentants. Dans toutes ces affaires, l'on assiste à une polarisation exacerbée au sein de la Cour suprême entre conservatives et liberals.

As ever, June is the month to pay special attention to the United States Supreme Court. It is at the start of summer that the nine Justices hand down their most challenging rulings before taking off for a three-month break that

most Americans can only dream of⁽¹⁾. June 2015 did not fail to meet expectations. The Court dealt with the President's power to recognize other nations in *Zivotovsky v. Kerry*⁽²⁾. It came back to the persistent problem of racial segregation, most notably regarding discrimination in housing⁽³⁾. It delivered its long-awaited decision on same-sex marriage in *Obergefell v. Hodges*⁽⁴⁾, and it returned to the issue of capital punishment in *Glossip v. Gross*⁽⁵⁾. Elections were also on the Supreme Court's menu this year. More precisely, it dealt with endeavors by voters in the State of Arizona to address the issue of partisan gerrymandering. Before coming to the issue proper, a word is warranted on the meaning of the term "gerrymander".

The drawing of district boundaries in the United States has dogged American politics since the beginning of the Republic⁽⁶⁾. The starting point in these matters may be found in the "Elections Clause" of the U.S. Constitution which provides: "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulation, except as to the places of choosing Senators"⁽⁷⁾. Relying on the Elections Clause, State constitutions usually contain a provision that empowers the State legislature to apportion and draw House election districts⁽⁸⁾. The U.S. Constitution merely requires that congressional seats be reapportioned among the States after every decennial census⁽⁹⁾. With partisan interests in mind, the practice has often been

(1) Speaking in 1983, then Chief Justice Warren Burger proposed the setting-up of a super court of appeals. Fred Fielding, the White House Counsel, asked his associated counsel, John Roberts (now Chief Justice of the U.S. Supreme Court) to evaluate the proposal. Roberts noted, "While some of the tales of woe emanating from the court are enough to bring tears to the eyes, it is true that only Supreme Court justices and schoolchildren are expected to and do take the entire summer off". Cf. Jeffrey TOOBIN, "No More Mr. Nice Guy", *The New Yorker*, May 25, 2009, pp. 42-51, at 46.

(2) *Zivotovsky v. Kerry*, 576 U.S. ____ (2015)(case decided June 8, 2015).

(3) *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. ____ (2015)(case decided June 25, 2015).

(4) *Obergefell v. Hodges*, 576 U.S. ____ (2015)(case decided June 26, 2015).

(5) *Glossip v. Gross*, 576 U.S. ____ (2015)(case decided June 29, 2015).

(6) Patrick Henry attempted to draw district lines to deny James Madison a seat in the first Congress (the two politicians were opposed on the new Constitution). Henry managed to draw district lines that included counties opposed to Madison. See Justin LEVITT, "All About Redistricting", Loyola Law School, Los Angeles, at <http://redistricting.lls.edu/why.php> (visited September 15, 2015).

(7) U.S. Constitution, Article I, § 4, cl. 1.

(8) The issue does not concern the United States Senate since the upper chamber consists of two senators from each State, regardless of the size of the State.

(9) U.S. Constitution, Article I, Section 2(3). The last U.S. Census was conducted in 2010. It was carried out by more than 600,000 "enumerators" and cost \$13 billion. Census 2010 concluded that the population of the United States was 308,745,538, an increase of 9.7% from the census of 2000 (the most populous State being California with a population of 37 million, and the least populous State being Wyoming with a population of 563,000). Title 13 of the U.S. Code requires participation in the U.S. Census. Since the results of each census determine the number of seats that each State receives in the House of Representatives (and it being understood that "Rule 435" still applies), there may be significant shifts. The Census of 2000 thus led States in the northeast to lose Congressional seats in favor of the so-called Sunbelt (similar effects concern the number of votes

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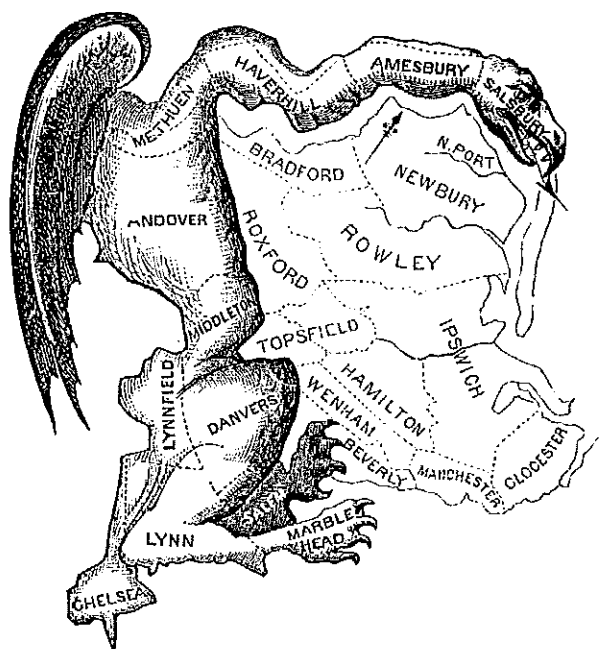
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for State authorities to draw up districts that favor the incumbent party (the party in power). This is first done by “malapportionment”. The practice consists in assigning more voters to minority party districts than to majority party districts (each minority-party voter counting for less). One crude example of districts having radically different populations (each electing one representative) can be found in the State of Michigan in 1960. The sixteenth district had 802,994 people, whereas the twelfth district had only 177,431⁽¹⁰⁾. The process of drawing districts to favor the incumbent party may also lead to “gerrymandering”, a popular expression that designates an unfair apportionment of election districts that usually involves a complex gathering of irregularly shaped election districts. The expression comes from Massachusetts Governor Ellbridge Gerry (1744-1814). Legend has it that he drew a curious – misshapen – district grouping a string of towns north of Boston to the advantage of his own party (Democrat-Republican). When the portraitist Gilbert Stuart (1755-1828) saw the outline of the district, he penciled in claws, wings, and a head and said, “That will do for a salamander”, to which another person allegedly replied, “Better say a gerrymander”.

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each State has in the Electoral College). Census 2010 continued this trend. No less than eighteen States witnessed change, Texas gaining four seats.

⁽¹⁰⁾ Gary WASSERMAN, *The Basics of American Politics*, 13th Ed. (New York: Pearson Longman, 2008), p. 99.

⁽¹¹⁾ Elkanah Tisdale's original “gerrymander”, as it appeared in the *Boston Gazette*, March 26, 1812 (from James PARTON, *Caricature and Other Comic Art* [New York: Harper and Brothers, 1877], p. 316).

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Gerrymandering takes different forms. One consists in drawing up districts so as to guarantee a large majority of supporters and ensure "safe" seats (so-called "packing"). Another consists in the opposite: splitting up opponents' supporters into minorities in a number of districts so as to weaken their influence (so-called "cracking"). The practice of gerrymandering long marred American politics, particularly in the southeastern States. Well into the 1950s, politicians sought to dilute the votes of African-Americans, effectively preventing them from fair representation in Congress. For years, federal court refused to get involved in malapportionment or gerrymandering claims⁽¹²⁾. This reluctance may be explained by the fact that the issue was deemed "political", and not one for federal courts to deal with. It nevertheless addressed a notable example of southern gerrymandering in *Gomillion v. Lightfoot* (1960) because of its conspicuous racial motive⁽¹³⁾. In this case, an act of the Alabama legislature had altered the city limits of Tuskegee from a simple square to "an uncouth twenty-eight sided figure". Writing for a unanimous Supreme Court, Justice Frankfurter acknowledged that States were insulated from judicial review whenever they exercised power "wholly within the State interest"⁽¹⁴⁾. The Court nevertheless held that the redistricting in this case had one purpose in mind – to discriminate against African-Americans and deprive them of political power – and thus violated the Fifteenth Amendment which forbids a State from passing any law which deprives a citizen of his right to vote because of his race⁽¹⁵⁾. Two years later, in *Baker v. Carr* (1962), the Supreme Court took a bolder move: it established that it had the right to review cases of malapportionment⁽¹⁶⁾. Justice Brennan considered that the equal protection issues of the Fourteenth Amendment – raised by the appellants in this case – deserved judicial evaluation. The importance of *Baker* cannot be underestimated⁽¹⁷⁾. Later, in *Davis v. Bandemer*

(12) The seminal case in these matters is *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). See also *Colegrove v. Green*, 328 U.S. 549 (1946). In an opinion by Justice Felix Frankfurter, the United States Supreme Court stated: "[T]he appellants ask of this Court what is beyond its competence to grant. [E]ffective working of our government revealed this issue to be of a particularly political nature and therefore not fit for judicial determination. Authority for dealing with such problems resides elsewhere" (at 552-554). The Court concluded that "[c]ourts ought not to enter this political thicket" (at 556). See also *South v. Peters*, 339 U.S. 276 (1950): "[f]ederal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions" (at 277).

(13) *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960).

(14) 364 U.S. 347.

(15) *Ibidem*: "[...] such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right".

(16) *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). An outdated apportionment in Tennessee led urban voters to argue that Tennessee's reapportionment efforts failed to take account of significant economic and population shifts within the State. Put differently, they alleged there was a "silent gerrymander" or "malapportionment".

(17) According to Erwin Chemerinsky, "the Court's holding that challenges to malapportionment are justiciable was one of the most important rulings in American history". See Erwin CHEMERINSKY, *Constitutional Law. Principles and Policies*, 4th Ed. (New York: Wolters Kluwer, Law & Business,

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(1986), the Supreme Court held that challenges to gerrymandering were clearly justiciable under the Fourteenth Amendment⁽¹⁸⁾. The *Bandemer* Court, however, left unresolved the question of *when* and *how* a partisan districting plan violates the Constitution. With this said and done, now that the Supreme Court recognized the justiciability of legislative apportionment and gerrymandering, it would deliver a string of cases in the 1960s-1970s that would help develop a body of "redistricting principles". First and foremost was that of ensuring virtually exact population equality across a State's congressional districts⁽¹⁹⁾. The above-noted discrepancy for Michigan (a ratio of 4.5) would now be impossible. Besides population equality lie the principle that redistricting must favor compact, contiguous election districts that respect existing municipal boundaries. Having noted as much, the gaping hole left open by the *Bandemer* Court would resurface in 2004, forcing the Supreme Court to resume "its effort to demarcate the elusive boundary between permissible politics and unconstitutional partisanship"⁽²⁰⁾. In *Vieth v. Jubiliter*, the Supreme Court dismissed a challenge to partisan gerrymandering, in effect overruling *Davis v. Bandemer*⁽²¹⁾. Justice Scalia, joined by Chief Justice Rehnquist, and Justices O'Connor and Thomas considered that *Bandemer* had proved impossible to implement. The plurality added that there were no judicially discoverable or manageable standards and no basis for courts to decide when partisan gerrymandering violated the Constitution. Put differently, they held that such suits were *inherently* non-justiciable political questions. If Justice Kennedy concurred in the ruling, he nevertheless disagreed with the majority opinion that challenges to political gerrymandering were *per se* political questions, outside the remit of federal courts' review.

2011), p. 139. Then Chief Justice Earl Warren believed that the most important decisions during his tenure on the Supreme Court were those concerning reapportionment. See "The Warren Court: An Editorial Preface", 67 Mich. L. Rev. 219, 220 (1968). For extended discussion, *cfr* Robert B. MCKAY, "Reapportionment: Success Story of the Warren Court", 67 Mich. L. Rev. 223 (1968-1969).

⁽¹⁸⁾ *Davis v. Bandemer*, 478 U.S. 109 (1986).

⁽¹⁹⁾ The Supreme Court's strong concern for population equality began with *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964). The affair concerned a Georgia redistricting statute that was struck down because its voting districts were unequal in population (one congressional district – largely made up of African-Americans – was two to three times the size of other districts in the State). See also *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, L. Ed. 2d 506 (1964). This case concerned a challenge to the apportionment of the State legislature of Alabama. In a 8-1 decision, the Supreme Court upheld the challenge, holding that the Equal Protection Clause demanded "no less than substantially equal state legislative representation for all citizens". In 1973, the Supreme Court developed a standard of population equality. Legislative districts could not differ by more than 10% from the smallest to the largest, unless justified by some "rational State policy". See *Gaffney v. Cummings*, 412 U.S. 735 (1977); *White v. Regester*, 412 U.S. 755 (1973).

⁽²⁰⁾ "The Supreme Court – Leading Cases", 118 Harv. L. Rev. 343-353, at 344 (2004).

⁽²¹⁾ *Vieth v. Jubiliter*, 541 U.S. 267 (2004). The Supreme Court again refused to address the constitutionality of partisan gerrymandering in *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).

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Kennedy believed workable standards could be developed in the future⁽²²⁾. He further suggested that partisan gerrymandering claims might better be adjudicated under the First Amendment (with respect to rights to political association and expression). Subsequent developments vindicated one author's prediction that the *Vieth* ruling promised "continued confusion"⁽²³⁾. Indeed, still today, the question remains somewhat hazy⁽²⁴⁾. This is most damaging in view of what one regularly observes in American politics today⁽²⁵⁾.

Two recent problems have come up regarding redistricting. The first concerns the question of race (I). If the Supreme Court's work on population equality was complete by the 1970s, it still had some ways to go regarding the treatment of racial and ethnic minorities. The Supreme Court addressed this issue in *Shelby County v. Holder* (2013)⁽²⁶⁾. The second problem concerns the very authority in charge of redistricting, and precisely endeavors by voters themselves to address the issue of partisan gerrymandering (II). The Supreme Court addressed this issue in *Arizona State Legislature v. Arizona Independent Redistricting Commission* (decided June 29, 2015). The divide between the Justices in 2015 was almost exactly the opposite of that which existed in 2013 – with the exception of Justice Anthony Kennedy – often considered the Court's "swing vote".

I. REDISTRICTING AND RACE

Need one emphasize that race remains a blight on American life...? The Fifteenth Amendment, adopted in 1870, on the heels of the Civil War, was supposed to bring respite to the nation. It provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude". It further gives Congress the "power to enforce this article by appropriate legislation". Admittedly, the Amendment had difficulty hitting its mark in the decades that followed. If anything, African-Americans soon became disenfranchised

(22) According to Justice Kennedy, "If workable standards do emerge to measure these burdens, however, courts should be prepared to order relief": *ibid.*, at 316.

(23) "The Supreme Court – Leading Cases", 118 Harv. L. Rev. 343-353, at 350 (2004).

(24) Erwin CHEMERINSKY, *Constitutional Law. Principles and Policies*, *op. cit.*, p. 141. See also pp. 913-914.

(25) Mitchell N. BERMAN, "Managing Gerrymandering", 83 Texas L. Rev. 781 (2005). See also the opinion of Jamal Greene for whom, "[t]he Framers entrusted Congress with oversight of the process fully believing in the power of a kind of vertical political competition that is belied by experience. While they are not competent themselves to do away with gerrymanders, judges can recognize that political party dominance and bipartisan gerrymandering threaten the republican character of the nation. In such circumstances, their institutional voice may be its only hope", in Jamal Greene, "Judging Partisan Gerrymanders Under the Elections Clause", 114 Yale L.J. 1021, at 1061-1062 (2005).

(26) *Shelby County, Alabama v. Holder*, 570 U.S. ____ (2013); 133 S. Ct. 2612 (2013).

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through literacy tests, poll taxes or the placing of voting centers in remote, inac-
cessible locations⁽²⁷⁾. The civil rights movement of the 1950s-1960s sparked off
a period of national introspection that would lead to substantial improvements.
Congress adopted landmark pieces of legislation to overcome discrimination.
The Civil Rights Act of 1964 famously ended segregation in public places and
banned racial discrimination in employment. A follow-up was given to the Civil
Rights Act with the enactment of the Voting Rights Act of 1965 (VRA)⁽²⁸⁾ and
the Fair Housing Act of 1968⁽²⁹⁾. In many academic and civil rights circles, the
Voting Rights Act represented a milestone, reaching near-iconic status. Samuel
Issacharoff writes that "the Act was pivotal in bringing black Americans to the
broad currents of political life – a transformation that shook the foundations of
Jim Crow, triggered the realignment of partisan politics, and set the foundation
for the election of an African American President"⁽³⁰⁾.

Some provisions of the VRA applied nationally, to all 50 States. Sec-
tion 2 of the Act thus prohibited State and local governments from having
election practices or systems that discriminated against minority voters. Other
provisions were more specific because of certain States' past negative practices
in these matters, most notably the maintenance in these States of suspicious
devices (repeated changes in voting systems) or practices (literacy tests or poll
taxes) as a prerequisite to voting, along with a weak voter registration or turn-
out in the Presidential elections of 1964 (estimated at less than 50 percent)⁽³¹⁾.
These States became known as "covered States" or "covered jurisdictions".
According to Section 4(b) of the VRA, the covered States in 1965 included
Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia (as well
as 39 counties in North Carolina and one in Arizona). When *Shelby County*
was decided in 2013, nine States were concerned (mostly in the South) as well
as several additional counties (scattered throughout the country). Section 5
of the Voting Rights Act required these States to obtain "preclearance", i.e.

⁽²⁷⁾ For extended discussion on the history of the suffrage rights of minorities from the Recon-
struction Era to the Civil Rights movement, *cfr* Ashley M. WHITE, "The Demolition of the Voting
Rights Act: The Combat to Overcome Voter Suppression of Disenfranchised Citizens – *Shelby*
County v. Holder", 5 Wake Forest J. L. & Pol'y 193, at 212 (2015).

⁽²⁸⁾ 42 U.S.C. §§ 1973 to 1973bb-1 (2006 & Supp. V 2011).

⁽²⁹⁾ The Fair Housing Act of 1968 banned discrimination in the sale, rental and financing of
property.

⁽³⁰⁾ Samuel ISSACHAROFF, "Beyond the Discrimination Model on Voting", 127 Harv. L. Rev.
95, 2013-2014. See also Erwin CHERMERINSKY, "The Voting Rights Act of 1965 is one of the most
important federal laws adopted in my lifetime", in Erwin CHERMERINSKY, *The Case Against the*
Supreme Court (New York; Viking, 2014), p. 260.

⁽³¹⁾ According to Gary May, potential voters were subject to oral quizzes on State law, and to
legal questions "so abstruse that law professors would fail them": see Gary MAY, *Bending Towards*
Justice: The Voting Rights Act and the Transformation of American Democracy (New York: Basic
Books, 2013). In Mississippi, would-be voters were asked to estimate the number of bubbles in a
bar of soap. Those who did manage to register were subject to harassment and physical violence
at the hands of the Ku Klux Klan and other white vigilantes.

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federal permission in Washington D.C. – either from the Attorney General or a federal district court of three judges – before enacting any law related to voting. All of this was novel in the United States. This was of course based on the remedial powers of Congress under the Reconstruction Amendments. The reason for taking this selective approach was Congress's newfound reaction to past abuse and its determination to address racial discrimination in voting, that the Supreme Court had already characterized as "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution"⁽³²⁾. Furthermore, Congress was fully aware that enforcing the VRA through lawsuits would not be sufficient to put an end to discrimination. Besides the expense and time-consuming nature of litigation, Congress believed that past practices in certain areas of the United States required stringent oversight to ensure that minority voters would no longer be disenfranchised. The Supreme Court upheld the Voting Rights Act almost immediately after it was enacted⁽³³⁾. Its effects were tremendous. Black voter registration increased dramatically. To take but the State of Mississippi, voter registration increased from 6% of eligible African-Americans in 1965 to 44% by 1968⁽³⁴⁾. Over time, the VRA received various extensions (the Act was initially meant to last 5 years)⁽³⁵⁾. With the Act due to expire in 2007, a further extension took place in 2006 following substantial Congressional debate (including 21 hearings and a record of 16,000 pages). During these debates, Congress numbered no less than 650 instances in which preclearance was denied to the covered jurisdictions between 1982 and 2006. At the end of the day, both houses of Congress voted for an additional extension of Section 5 of the VRA by an overwhelming majority. The Senate voted to extend the law by a vote of 98 to 0 and the House of Representatives by 390 to 33. President George W. Bush signed the extension – for 25 years – into law on July 26, 2006⁽³⁶⁾. One of the basic issues in *Shelby County v. Holder* was pre-

⁽³²⁾ *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

⁽³³⁾ *Ibidem*.

⁽³⁴⁾ Henry Louis GATES, Jr., *Life Upon These Shores* (New York: Alfred A. Knopf, 2011), p. 357.

⁽³⁵⁾ A significant number of laws in the United States contain so-called "sunset provisions", meaning that the provision itself, or the benefits contained therein, cease on particular date without reauthorization by the legislature. This periodic review is intended to appraise the rationale for the continued existence of the provision, thus avoiding "legal obsolescence". When seeking reenactment of a sunset provision, the burden of proof lies on those persons in favor of the reenactment and not on those in favor of repeal. Sunset provisions mushroomed in the late 1970s in the wake of the post-Watergate antigovernment sentiment. Fewer and fewer States have government-wide sunset statutes due to the time and money involved in the review process. For extended discussion on legal obsolescence, see Guido CALABRESI, *A Common Law for the Age of Statutes* (Cambridge, MA.: Harvard University Press, 1982).

⁽³⁶⁾ Upon signing the legislation, President Bush declared: "Congress has reaffirmed its belief that all men are created equal", further adding that the Act, originally proposed and signed by then-President Lyndon B. Johnson, "broke the segregationist lock on the voting box", in "Bush signs Voting Rights Act extension amid midterm election season", *USA Today*, July 27, 2006. See also his strong defense of the extension of the Act before the Annual Convention of the NAACP:

Attorney General by law related to course based on amendments. The sound reaction to in voting, that id pervasive evil through unremitt- more, Congress dld not be suffi- time-consuming certain areas of minority voters held the Voting ts were tremen- but the State of rican-Americans rious extensions due to expire in tantial Congres- pages). During which preclear- nd 2006. At the nal extension of : voted to extend es by 390 to 33. rs – into law on Holder was pre-

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reaffirmed its belief posed and signed by oting box", in "Bush y, July 27, 2006. See tion of the NAACP:

cisely whether Congress still had reason to apply these measures to the covered States exclusively fifty years after the enactment of the VRA. The case began in Alabama, where Shelby County was a covered jurisdiction. In 2010, the County brought suit against the U.S. Attorney General seeking a declaratory judgment that Sections 4(b) and 5 of the Voting Rights Act were facially unconstitutional as well as a permanent injunction against their enforcement⁽³⁷⁾. The Federal District Court in Washington D.C. held against the plaintiff and upheld the statute. On appeal, the Court of Appeals for the Federal Circuit affirmed (with one judge dissenting). Reaching the United States Supreme Court, the Court's concern was to determine whether singling out a number of States was constitutionally permissible⁽³⁸⁾. Writing for a 5-4 majority, Chief Justice Roberts came back to the initial endorsement of the Act in 1966 in the case *South Carolina v. Katzenbach*. The Chief Justice acknowledged that "exceptional conditions [could] justify legislative measures not otherwise appropriate"⁽³⁹⁾, and voting discrimination in that case existed "on a pervasive scale"⁽⁴⁰⁾. He nevertheless considered that significant change had taken place by 2013, with voter turnout and registration now reaching parity, not to mention an unprecedented number of minority candidates holding office. Most of the arguments put forward by Chief Justice Roberts lay on the fact that decades-old data for the preclearance formula had not substantially changed over the years and were thus divorced from current conditions. Roberts' main point was to say that the Federal Government did not have a general right to review and veto State enactments before they went into effect. This had been specifically rejected at the Constitutional Convention in the late eighteenth century. Thereupon, the Chief Justice embarked on a lengthy analysis of American federalism. Beyond retaining residual sovereignty under the Tenth Amendment, he insisted that there was a "fundamental principle of equal sovereignty" among the States. The question was thus whether the coverage formula contained in the Voting Rights Act was still constitutional in light of current conditions. The Supreme Court held that it was not. The Court held that Section 4(b) – the provision that singles out which jurisdictions need to obtain preclearance – was unconstitutional. If the formula alone was struck down (leaving the constitutionality of the VRA's

see Charles BABINGTON, "Voting Rights Act Extension Passes in Senate, 98 to 0", *The Washington Post*, July 21, 2006. In part, the President's support for the extension may be attributed to his desire to improve the electoral chances of the Republican-controlled Congress with minorities before the mid-term elections of November 2006.

⁽³⁷⁾ The Attorney General had objected to the County's proposed voting changes.

⁽³⁸⁾ See *Northwest Austin Municipal Util. District No. 1 (NAMUDNO) v. Holder*, 557 U.S. 193 (2009). According to the Supreme Court in this case: "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets" (at p. 203).

⁽³⁹⁾ *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

⁽⁴⁰⁾ *Ibidem*, at 308.

preclearance structure untouched⁽⁴¹⁾), the practical effect of the ruling was to nullify Section 5 of the Voting Rights Act as well.

Heaps of criticism were poured on *Shelby County v. Holder*⁽⁴²⁾. The decision rested on two sources of constitutional doctrine that were both considered to be "more than a little odd"⁽⁴³⁾. The first concerned the principle of equal sovereignty and the idea that this creates a dignitary interest offended by "disparate treatment of the States"⁽⁴⁴⁾. Chief Justice Roberts spent a considerable amount of time on this principle in order to impose a high justification threshold on Congress when States are treated differently. For him, the coverage formula contained in the VRA now represented a clear departure from the cornerstone principle of American federalism that all States enjoy equal sovereignty⁽⁴⁵⁾. To a large extent, Chief Justice Roberts relied on a ruling delivered by the Court four years earlier, in *Northwest Austin Municipal Utility District No. One (NAMUDNO) v. Holder*⁽⁴⁶⁾. The principle of equal sovereignty nevertheless has dubious grounds. One dissenter, Justice Ruth Bader Ginsburg, adamantly insisted that the equal treatment principle was confined to conditions for admission of States to the Union⁽⁴⁷⁾. Numerous scholars believe the principle has questionable authority, *if any* at all. For Erwin Chemerinsky, "[t]he Congress that ratified the Fourteenth Amendment also imposed Reconstruction and military rule on southern States, the antithesis of treating all States the same. And if such a constitutional rule exists, countless federal programs, especially spending programs, are constitutionally vulnerable, because they treat some States differently from others"⁽⁴⁸⁾.

⁽⁴¹⁾ Justice Clarence Thomas, alone in a concurring opinion, considered that Section 5 of the VRA was unconstitutional as well.

⁽⁴²⁾ The dissent in the *Shelby* decision was written by Justice Ruth Bader Ginsburg, and joined by Justices Breyer, Sotomayor, and Kagan. The dissent itself was 37 pages long (compared with 24 pages for the majority opinion of Chief Justice Roberts).

⁽⁴³⁾ Samuel ISSACHAROFF, "Beyond the Discrimination Model on Voting", *op. cit.*, at 100.

⁽⁴⁴⁾ *Shelby County*, 133 S. Ct. at 2619.

⁽⁴⁵⁾ Grounding himself on the 10th Amendment to the U.S. Constitution, Roberts put forward an important body of case law regarding the principle that States retain sovereignty, particularly with respect to the power to regulate elections: *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892); *Carrington v. Rash*, 380 U.S. 89, 91 (1965); *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973); *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991); *Perry v. Perez*, 565 U.S. ___, ___ (2012) (*per curiam*) (*slip op.*, at 3). Chief Justice Roberts also referred to case law regarding the principle of equal sovereignty among the States: *Lessee of Pollard v. Hagan*, 3 How. 212, 223 (1845); *Texas v. White*, 7 Wll. 700, 725-26 (1869); *Coyle v. Smith*, 221 U.S. 559, 567 (1911).

⁽⁴⁶⁾ *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009), 129 S. Ct. 2504 (2009): "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets", at 557 U.S. 203.

⁽⁴⁷⁾ Justice Ginsburg relied on the Court's decision in *Katzenbach* to the effect that the principle "applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared". See 383 U.S. at 328-329.

⁽⁴⁸⁾ Erwin CHERMERINSKY, *The Case Against the Supreme Court*, *op. cit.*, p. 261.

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The second source of constitutional doctrine behind the *Shelby* decision was that of the standard of review to measure the constitutionality of the VRA. The standard was supplied by the *South Carolina v. Katzenbach* decision of 1966⁽⁴⁹⁾. Besides endorsing the VRA, this decision underlined "rational relations" review: "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting"⁽⁵⁰⁾. The Court reaffirmed this standard when faced with subsequent reauthorizations of the VRA. Chief Justice Roberts found the situation in *Shelby* to be measurably different. He found that: "[h]ere, by contrast, the Government's [...] argument does not even attempt to demonstrate the continued relevance of the formula to the problem it targets. And in the context of a decision as significant as this one ... that failure to establish even relevance is fatal"⁽⁵¹⁾. In her dissent, Justice Ginsburg developed a number of reasons to bolster the idea that legislation reauthorizing an existing statute is especially likely to satisfy the minimal requirements of the rational basis test. This of course was not to pass. There is little doubt today that "the VRA is now the most significant congressional act struck down by the Court under rational relations review"⁽⁵²⁾.

In harsh terms, Ruth Bader Ginsburg excoriated the majority for its "lack of care and seriousness" in *Shelby*, underlining the Court's "disturbing lapses" and its absence of respect for Congress when Congress was only seeking to implement the Civil War Amendments. The *Shelby* decision clearly does away with the VRA's *ex-ante* prohibition leaving instead a liability *ex-post* regime, facilitating litigation, as a potential form of regulation. The question remains to see where this will lead to, in tangible terms, in years to come. The persistence of racial discrimination in state politics – and elsewhere – is far from over in the United States. Even with President Barack Obama in the White House, one would be hard-pressed to claim that the political and economic subjection of African-Americans, and humiliation at the hands of the authorities, have been addressed, let alone assuaged. In many respects, and with particular regard for decades of history where voting discrimination was prevalent, it would seem that the Court's decision in *Shelby County* creates more problems than it solves. The nation is now faced with "the burden to ensure that what the Voting Rights

⁽⁴⁹⁾ *South Carolina v. Katzenbach*, 383 U.S. 301 (1996).

⁽⁵⁰⁾ *Ibid.*, at 324.

⁽⁵¹⁾ *Shelby County*, 133 S. Ct. at 2628. Chief Justice Roberts further added that had Congress "started from scratch" in devising a coverage formula, "[i]t would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year old data, when today's statistics tell an entirely different story. And it would have been irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time". *Id.* at 2630-31. *Contra*, see Justice Ginsburg, dissenting: "Congress had more than a reasonable basis to conclude that the existing coverage formula was not out of synch with conditions on the ground in covered areas". *Id.* at 2651.

⁽⁵²⁾ Samuel ISSACHAROFF, "Beyond the Discrimination Model on Voting", *op. cit.*, at 102.

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Act of 1965 in whole has effectually achieved is not diminished by the incursion of equal sovereignty amongst the states"⁽⁵³⁾. Fundamentally, the *Shelby* decision "closes the chapter on the most important and most successful of the civil rights laws from the 1960s"⁽⁵⁴⁾. The ink of the decision was barely dry when the State of Texas sought to establish an election system that had previously been denied preclearance...⁽⁵⁵⁾.

II. REDISTRICTING AUTHORITY

Save the occasional town hall meeting in New England, direct democracy has always been somewhat of a curiosity in the United States. In the instances where it is recognized, it can either take the form of an "initiative" (allowing the electorate to adopt *positive* legislation) or a "referendum" (allowing voters to give a *negative* check to proposed legislative action)⁽⁵⁶⁾. The Supreme Court has traditionally viewed the people's sovereign right in these matters as a non-justiciable political matter⁽⁵⁷⁾. This principle was nevertheless put to the test – with regard to the initiative – in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, decided by the Supreme Court on June 29, 2015⁽⁵⁸⁾.

When the State of Arizona was admitted to the Union in 1912, the freshly adopted Constitution of the State established the electorate as a coordinate source of legislation, on an equal footing with the representative legislative body. Precisely, the people had a right of initiative amounting to a right of proposal of laws and amendments to the State Constitution⁽⁵⁹⁾. In 2000, the

⁽⁵³⁾ Ashley M. WHITE, "The Demolition of the Voting Rights Act: The Combat to Overcome Voter Suppression of Disenfranchised Citizens – *Shelby County v. Holder*", 5 Wake Forest J. L. & Pol'y 193, at 212 (2015).

⁽⁵⁴⁾ Samuel ISSACHAROFF, "Beyond the Discrimination Model on Voting", *op. cit.*, at 100. For Erwin Chemerinsky, "It is the first time since the nineteenth century that the Court has declared unconstitutional a federal civil rights statute concerning race", in Erwin CHEMERINSKY, *The Case Against the Supreme Court*, *op. cit.*, p. 262.

⁽⁵⁵⁾ Erwin CHEMERINSKY, *The Case Against the Supreme Court*, *op. cit.*, p. 263.

⁽⁵⁶⁾ There are nonetheless 21 States that recognize the people's right to initiate ordinary law-making, and 18 States that recognize the people's right to initiate amendments to the State's constitution.

⁽⁵⁷⁾ *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912). The Supreme Court rejected a challenge to a referendum based on Article IV, §4 of the U.S. Constitution that provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government [...]".

⁽⁵⁸⁾ *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. ____ (2015).

⁽⁵⁹⁾ See Arizona Constitution, Article IV, pt. 1, §1: "The legislative authority of the State shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature". See also Article XXII, §14,

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electorate used this power to engage in direct lawmaking, adopting an initiative that became known as "Proposition 106". The proposition amended the State Constitution so as to remove redistricting authority from the State legislature and hand it over to an independent commission, the Arizona Independent Redistricting Commission, or AIRC (the respondent in this case)⁽⁶⁰⁾. The Commission's authority over redistricting would be binding. The proposition was a reaction to past unfortunate practices, namely to put an end to "the practice of gerrymandering and [improve] voter and candidate participation in elections". Prior redistricting plans carried out by the legislature had proven problematic. Federal courts had either rejected them or they were refused preclearance under the Voting Rights Act of 1965. One author referred to a "background of recurring redistricting turmoil"⁽⁶¹⁾. Vested with its new authority, the AIRC established new boundaries after the 2000 census as well as after the 2010 census. Shortly after the AIRC released its second congressional and State legislative maps in January 2012, the State Legislature brought suit against the AIRC before the United States District Court for the District of Arizona. The Arizona legislature's grievance was that Proposition 106, and the maps drawn by the AIRC, were unconstitutional and void, as violating the Elections Clause of the U.S. Constitution. It claimed the word "Legislature" meant "the representative body which makes the laws of the people". Consequently, it had "primary responsibility" for redistricting. The District Court disagreed and dismissed the complaint in full⁽⁶²⁾. It held that the "the word 'Legislature' in the Elections Clause refers to the Legislative process used in [a] State, determined by that State's own constitution and laws"⁽⁶³⁾. Noting that the Arizona's Constitution allowed multiple avenues for lawmaking, one of which was the ballot initiative, the District Court concluded that the Elections Clause permitted the establishment and use of the AIRC. The case reached the United States Supreme Court, this being the first time the Court ever had the opportunity to rule on redistrict-

stating that "[a]ny law which may be enacted by the Legislature under this Constitution may be enacted by the people under the Initiative".

⁽⁶⁰⁾ Arizona Constitution, Article IV, pt. 2, §1, paras. 3-23. The Commission is made up of five members, four of whom are selected by the highest-ranking officer and minority leader of each chamber of the legislature (from a list compiled by Arizona's Commission on Appellate Court Appointments). The fifth member, who is chairperson, is chosen by the four previously selected members (from the same list). The tenure of the Commission is limited to one redistricting cycle (10 years). The Governor of Arizona may remove members only for gross misconduct, substantial neglect of duty, or inability to discharge the duties of office.

⁽⁶¹⁾ CAIN, "Redistricting Commissions: A Better Political Buffer?", 121 Yale L.J. 1808, 1831 (2012).

⁽⁶²⁾ *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 997 F. Supp. 2d 1047 (decided February 21, 2014). The District Court had jurisdiction pursuant to 28 U.S.C. §2284(a). District Judge Rosenblatt concurred in part and dissented in part. He opposed the fact that the Arizona Legislature had no ability to have an outcome-defining effect on the congressional redistricting process: "I believe that Proposition 106's evisceration of that ability is repugnant to the Elections Clause's grant of legislative authority", at 997 F. Supp. 2d 1047, 1058.

⁽⁶³⁾ 997 F. Supp. 2d 1047, 1054.

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ing through the exercise of popular initiative⁽⁶⁴⁾ ⁽⁶⁵⁾. There were two matters of importance in this case. The first concerned the very question of whether the Arizona legislature had standing to sue. The second concerned the merits of the matter and precisely, whether the Elections Clause of the United States Constitution permitted Arizona's use of a commission – established by popular initiative – to adopt congressional districts.

The standing to sue issue was seemingly the easiest part of the case. It concerned whether disputes between governmental branches or departments regarding the allocation of political power constitute “cases” or “controversies” committed to the resolution of federal judicial authority by Article III, §2 of the Constitution. Was the alleged injury suffered by the Arizona legislature too “conjectural” or “hypothetical” to establish standing? Justice Ginsburg thought not: “[t]his dispute [...] ‘will be resolved ... in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action’”⁽⁶⁶⁾. The Supreme Court was of course eagerly awaited on the merits of the case. The first problem to resolve was that of the compatibility of a provision contained in Title 2 of the United States Code (U.S.C.) with the Elections Clause of the U.S. Constitution⁽⁶⁷⁾. Enacted in 1941, the provision – 2 U.S.C. §2a(c) – granted full respect to the redistricting procedures adopted by the States. Precisely, §2a(c) provides: “Until a State is redistricted *in the manner provided by the law thereof* after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner [...]” (emphasis added)⁽⁶⁸⁾. Put differently, the maps that result from State redistricting procedures presumptively become the governing maps for that State. For the Arizona legislature, there was an issue here. The thrust of its argument lay in the fact that the Elections Clause, vesting power to regulate congressional elections in State “Legislature[s]”, precludes Congress from allowing a State to redistrict without the involvement of its representative body.

⁽⁶⁴⁾ The U.S. Supreme Court referred to three precedents that concerned redistricting through referendum and the Governor's veto: *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916); *Hawke v. Smith* (No. 1), 253 U.S. 221 (1920); and *Smiley v. Holm*, 285 U.S. 355 (1932).

⁽⁶⁵⁾ The case was appealed directly to the Supreme Court as the District Court refused to grant an injunction. See 28 U.S.C. §1223 that provides: “Except as otherwise provide by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges”.

⁽⁶⁶⁾ Ginsburg, *slip opinion*, p. 14. The internal quotation is taken from *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). The dissenting opinions of Justices Scalia and Thomas dealt extensively with the standing to sue issue.

⁽⁶⁷⁾ Act of November 15, 1941, ch. 470, 55 Stat. 761-762.

⁽⁶⁸⁾ The provision then sets out five federally prescribed redistricting procedures. Four out of the five default redistricting procedures (1-4) subsequently became unconstitutional by reason of Supreme Court cases delivered after the Act of 1941: see Ginsburg, *slip op.*, p. 22, quoting *Branch v. Smith*, 538 U.S. 254, 273-274 (2003) (plurality opinion).

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Justice Ginsburg brushed this argument aside. For her, "the Elections Clause permits regulation of congressional elections by initiative, leaving no arguable conflict between §2a(c) and the first part of the clause". Inasmuch as the Constitution of the State of Arizona allows lawmaking to occur by initiative of the electorate, Proposition 106 was an acceptable use of that power. She came to this conclusion by developing a series of arguments based on the language of the Elections Clause, the history and purpose of the Clause, and finally, American federalism.

The language problem was quickly disposed of. Justice Ginsburg referred to various authorities – Dr. Johnson, Samuel Sheridan, or Noah Webster – all of whom came to the conclusion that the legislature could be defined as "the power that makes laws". Matching these overlapping definitions with the Constitution of Arizona, the power to make laws lay in representative bodies as well as in voters' initiative. Admittedly, neither the referendum nor the initiative were present when the Constitution was ratified but this alone should not deter from a reading that would allow States to do as they wish and leave the matter of redistricting in the hands of the people. Whereas the dissenters adamantly objected, Justice Ginsburg relied on precedent to the effect that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto. [...] we see no constitutional barrier to a State's empowerment of its people by embracing that form of lawmaking" (*slip op.*, at 19). She then logically came to the question of the history and purpose of the Elections Clause. As is often the case in such circumstances, the *Federalist Papers* came to hand, most notably to apprehend the purpose of the Elections Clause. Historically speaking, the Elections Clause was a matter of Congressional control over the States, not a matter of confining the States in one way or the other in how they enacted their redistricting plans⁽⁶⁹⁾. On a more fundamental plane, Justice Ginsburg developed the issue in terms of American federalism (*slip op.*, pp. 27-31). Much was at offer in this respect. The principal idea is that States are free to establish the governmental processes as they see fit. Louis Brandeis formulated a famous expression of American federalism in 1932, just as the New Deal was about to kick in: "It is one of the happy incidents of the federal system that a courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country"⁽⁷⁰⁾. Why then read the Elections Clause to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process? Beyond these reminders, Justice Ginsburg squared Arizona's ballot

⁽⁶⁹⁾ See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013). For the Supreme Court, the Elections Clause "was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress." *Id.* at ____ (*slip op.*, at 5) (citing *The Federalist* No. 59, pp. 362-363 (C. ROSSITER ed. 1961) (A. Hamilton)).

⁽⁷⁰⁾ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (BRANDEIS, J., dissenting).

initiative with the Constitution's original conception of the people as the font of governmental power. She pressed her argument with a lengthy reference to John Locke for whom:

"[T]he Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a Supreme Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust reposed in them. For all Power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed, the trust must necessarily be forfeited, and the Power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security"⁽⁷¹⁾.

Stirring words written near a century before the formation of the U.S. Constitution (and ever-more powerful two centuries later). These ideas inspired the very first words of the Constitution ("We the People..."). Taking the full measure of these statements, Justice Ginsburg energetically concluded: "it would be perverse to interpret the term 'Legislature' in the Elections Clause so as to exclude lawmaking by the people, particularly where such lawmaking is intended to check legislators' ability to choose the district lines they run in, thereby advancing the prospect that Members of Congress will in fact be 'chosen ... by the people of the several States' (Article I, §2)" (*slip op.*, at 31). Acknowledging that independent redistricting does not lead *ipso facto* to the elimination of partisan suspicions in these matters, Justice Ginsburg ended her opinion with a vibrant defense of direct democracy, drawing on a handful of examples (California, Ohio, Oregon, ...). Were the Supreme Court to go against Proposition 106 in Arizona, state election laws throughout the country might be endangered. Most of these arguments on the merits were bitterly contested by Chief Justice John Roberts in a "devastating dissent" (*dixit* Justice Scalia) that was almost as long as Justice Ginsburg's majority opinion. Resorting to a stretched metaphor that bears evidence of the tension on the bench of the Supreme Court, Roberts considered the Court had itself "gerrymandered" the Constitution (*slip op.*, at p. 2). For Roberts, the text, structure, history and precedent surrounding the Elections Clause supported the conclusion that "the Legislature" was a representative body and nothing else⁽⁷²⁾. At the very least, "the state legislature need not be exclusive in congressional districting, but nei-

⁽⁷¹⁾ *Slip op.*, at 31. The quotation is from John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988), §149.

⁽⁷²⁾ For Chief Justice Roberts, "The majority's contrary understanding ... makes nonsense of the drafting and ratification of the Elections Clause, and breaks with the relevant precedents. In short, the effect of the majority's decision is to erase the words 'by the Legislature thereof' from the Elections Clause. That is a judicial error of the most basic order. 'It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible.' *Marbury v. Madison*, 1 Cranch 137, 174 (1803)", *slip op.*, at 19.

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ther may it be excluded"⁽⁷³⁾. The brunt of Justice Scalia's dissent dealt with the standing issue⁽⁷⁴⁾. As to Justice Clarence Thomas, his main point was that the majority's deference to state lawmaking in the case reeked of "faux federalism". He even managed to fold in the Court's decision of the previous week on same-sex marriage, *Obergefell v. Hodges*, to stigmatize an antithesis of deference to state lawmaking through direct democracy⁽⁷⁵⁾. Ginsburg would have nothing of it. In forceful terms that deserve full quotation, she concluded:

"The people of Arizona turned to the initiative to curb the practice of gerrymandering and, thereby, to ensure that Members of Congress would have 'an habitual recollection of their dependence on the people.' The Federalist No. 57, at 350 (J. Madison). In so acting Arizona voters sought to restore 'the core principle of republican government,' namely, 'that the voters should their representatives, not the other way around.' The Elections Clause does not hinder that endeavor"⁽⁷⁶⁾.

CONCLUSIONS

As mentioned at the outset, the partisan drawing of district boundaries has beguiled American politics since the beginning of the Republic. Besides the *Vieth v. Jubilerer* ruling of 2004, one of the most damaging electoral developments over the past few years has been the decision of the Supreme Court in *Shelby County* to strike down the section of the VRA setting out the criteria used to decide which States must obtain federal preclearance before making changes to voting laws. In retrospect, it is difficult to overstate the courage of the citizens involved in the struggle to obtain passage of the VRA. By way of reminder, students picketed the courthouse in Selma, Alabama holding signs reading "Let Our Parents Vote". Many were arrested and forced out of town under segregationist bully Sheriff Jim Clark (who died in 2007 still believing he did the right thing). Some students were shocked with cattle prods,

⁽⁷³⁾ Chief Justice Roberts, *slip op.*, at 19.

⁽⁷⁴⁾ Justice Scalia nevertheless shared Roberts' outrage on the merits: "[...] the majority's resolution of the merits question ('legislature' means 'the people') is so outrageously wrong, so utterly devoid of textual or historic support, so flatly in contradiction of prior Supreme Court cases, so obviously the willful product of hostility to districting by state legislature, that I cannot avoid adding my vote the devastating dissent of the Chief Justice" (Scalia dissent, *slip op.*, at 6).

⁽⁷⁵⁾ *Obergefell v. Hodges*, 576 U.S. ____ (2015). The case was decided June 26, 2015. Precisely worded, Justice Thomas said the following in his dissent to *Arizona State Legislature v. AIRC*: "The conduct of the Court in so many other cases reveals a different attitude toward the States in general and ballot initiatives in particular. Just last week, in the antithesis of deference to state lawmaking through direct democracy, the Court cast aside state laws across the country – many of which were enacted through ballot initiative – that reflected the traditional definition of marriage", *slip op.*, at 1. Justice Scalia joined in the dissent of Thomas.

⁽⁷⁶⁾ Justice Ginsburg, *slip op.*, at 35. The internal quotation is taken from Mitchell N. BERMAN, "Managing Gerrymandering", 83 Texas L. Rev. 781 (2005).

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others were tear-gassed, clubbed, and set upon by dogs on what has become infamously known in the United States as "Bloody Sunday (March 7, 1965). These tragic events doubtless turned the tide of public (and political) opinion, leading to the enactment of the Voting Rights Act in 1965. Sadly today, "the fight for the franchise is fading into the annals of history"⁽⁷⁷⁾. A paradox haunts America's first African-American president. Those who have fared worst under Barack Obama are the ones who love him the most. The President will leave the country as segregated as he found it. Even in economic terms, the situation has worsened. White households are eight times richer today than their black counterparts. This is not to say that nothing has been done. President Obama has fought Congress to preserve food stamps and long-term unemployment insurance. He also managed to pass the Affordable Care Act in 2010. With measured success, he is trying to correct the racial bias in U.S. federal sentencing. All of these measures have helped African-Americans significantly. Having said this, much remains to be done to give tangible reality to the wishes that Martin Luther King dared to dream in public. Stated bluntly, black lives matter and elections matter.

Taken from another perspective, the decisions analyzed in this comment illustrate acute and increasing "polarization" on the bench of the United States Supreme Court. When John Roberts appeared before the Senate Judiciary Committee at his confirmation hearings, he proclaimed, "Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see an umpire"⁽⁷⁸⁾. All this is very fine but the text of the U.S. Constitution gives Supreme Court Justices tremendous latitude. To a sizeable degree, their decisions are a product of their values. Until now, the Supreme Court has managed to maintain its credibility. As Professor John Hart Ely once observed, "The possibility of judicial emasculation by way of popular reaction against constitutional review by the courts has not in fact materialized in more than a century and a half of American experience"⁽⁷⁹⁾. This may not always be the case.

⁽⁷⁷⁾ Ayana MATHIS, "A dream deferred", *Financial Times*, August 24-25, 2013.

⁽⁷⁸⁾ Confirmation Hearing on the Nomination of John G. Roberts Jr. To Be Chief Justice of the United States. Hearing Before S. Comm. On the Judiciary, 109th Cong. 55 (2005) (statement of John G. Roberts).

⁽⁷⁹⁾ John HART ELY, *Democracy and Distrust* (Cambridge, Mass.: Harvard University Press, 1980), 47-48.