

WITHOUT MORE, THERE IS NO MORE: STANDING AND RACIAL GERRYMANDERING IN *WITTMAN V. PERSONHUBALLAH*

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INTRODUCTION

Racial gerrymandering is the drawing of electoral districts that effectively racially segregates voters for political gain.¹ Racially gerrymandered districts often involve packing minorities into a single district, thereby reducing that group's political efficacy.² In *Wittman v. Personhuballah*,³ the Supreme Court held that congressmen who did not live in or represent a specific congressional district did not have standing to defend racial gerrymandering in that district. The Court did not clarify whether there is a legally cognizable right for incumbents in determining or maintaining the racial makeup of a congressional district, though it had the opportunity to address the issue. As a result, the future of racial gerrymandering claims remains unclear. The Court should have decided there is not a legally cognizable right in maintaining the racial makeup of a congressional district, because to find otherwise would give a right of action not available to other citizens and would potentially incentivize nefarious lawsuits based more on protecting a desired racial makeup, rather than a desired political makeup of a district.

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1. See *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1263 (2015); see also *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (1969) (Fortas, J., concurring) (describing gerrymandering as “the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes”).

2. See *Ala. Legislative Black Caucus*, 135 S. Ct. at 1263 (defining a racial gerrymander as “when the State adds more minority voters than needed for a minority group to elect a candidate of its choice”).

3. 136 S. Ct. 1732 (2016).

I. FACTUAL AND PROCEDURAL BACKGROUND

Wittman v. Personhuballah is a consequence of the redrawing of Virginia’s congressional maps following the 2010 federal census.⁴ The U.S. Constitution requires this reapportionment by the legislature every ten years,⁵ and the Virginia Constitution specifically requires that “[e]very electoral district . . . be composed of contiguous and compact territory and . . . so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district.”⁶ The Voting Rights Act of 1965 created additional requirements for electoral maps aimed at eliminating discriminatory state election laws in states like Virginia with historical records of such discrimination.⁷ Section 2 of the Voting Rights Act disallows states from requiring any qualifications or prerequisites to voting, such as a poll tax or a literacy test, and bans any “standard, practice or procedure” which results in discrimination.⁸ Section 4 allowed courts to retain jurisdiction over and to monitor jurisdictions where a “test or device,” like a literacy or character test, had been used within the past five years and where voter registration or turnout was less than fifty percent;⁹ this has been called the “coverage formula.”¹⁰ Section 5 required those jurisdictions highlighted in Section 4 to undergo approval by the Attorney General prior to making any changes to their voting laws.¹¹ The Attorney General would ensure that the proposed changes did not have the purpose or effect of racial discrimination.¹²

As of 2017, Virginia has 11 congressional districts, with 4 Democrats and 7 Republicans.¹³ Representative Bobby Scott has represented Virginia’s majority African-American Congressional District 3 since 1991, when the district was first created as a response to previous

4. *Page v. Va. State Bd. of Elections*, 58 F. Supp. 3d 533, 538 (E.D. Va. 2014).

5. U.S. CONST. art. I, § 2, cl. 3.

6. VA. CONST. art. II, § 6.

7. *See generally* Voting Rights Act of 1965, 42 U.S.C. §§ 1973 to 1973bb-1 (1994); *see also History of Federal Voting Rights Laws*, U.S. DEP’T OF JUSTICE (Aug. 8, 2015), <https://www.justice.gov/crt/history-federal-voting-rights-laws>.

8. Voting Rights Act of 1965 § 2.

9. *Id.* § 4; *see infra* text accompanying notes 40–43.

10. John Schwartz, *Between the Lines of the Voting Rights Act Opinion*, N.Y. TIMES (June 25, 2013), http://www.nytimes.com/interactive/2013/06/25/us/annotated-supreme-court-decision-on-voting-rights-act.html?_r=0.

11. Voting Rights Act of 1965 § 5.

12. *See id.*

13. *Virginia*, GOVTRACK, <https://www.govtrack.us/congress/members/VA> (last visited Feb. 18, 2017).

electoral maps that were nullified due to racial discrimination.¹⁴ In 1991, the district was 63.98% African-American with a black voting-age population (“BVAP”)¹⁵ of 61.17%.¹⁶

The 2010 census found that Virginia’s population had grown thirteen percent, so the legislature was tasked with reevaluating and redrawing the state’s congressional lines accordingly.¹⁷ With an eye toward the Virginia Constitution and the Voting Rights Act, Delegate Janis drew the new congressional map,¹⁸ which the Virginia House of Delegates adopted six days later.¹⁹ The Senate rejected the map and instead submitted a map created by State Senator Mamie Locke; this led to a stalemate and final redistricting maps were never created.²⁰

Following the 2011 election, the Virginia House and Senate adopted Delegate Janis’s plan as submitted, and it was signed into law on January 25, 2012.²¹ This plan increased the BVAP of Congressional District 3 from 53.1% to 56.3%.²² The Department of Justice approved the 2012 changes on March 14, 2012, finding no “retrogression in the ability of minorities to elect their candidate of choice.”²³

On October 2, 2013,²⁴ three Virginia voters brought suit against the Virginia State Board of Elections challenging the validity of the 2012 redrawing of Congressional District 3, claiming the drawing of the map was entirely predicated on race and therefore constituted a racial gerrymander that violated the Equal Protection Clause of the Fourteenth Amendment.²⁵ Plaintiffs claimed that the new congressional plans used the Voting Rights Act preclearance requirement as a ruse to concentrate African-American voters into the

14. Page v. Va. State Bd. of Elections, 58 F. Supp. 3d 533, 538 (E.D. Va. 2014).

15. *Id.* (stating that the BVAP is “the percentage of persons of voting age who identify as African-American”).

16. *Id.*

17. *Id.*

18. *Id.* at 539.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* At the time the map was created, the Voting Rights Act preclearance requirements were still in place, so all Virginia redistricting maps were sent to the Attorney General for approval before they were implemented. *See id.* at 536; *see also Voting Rights Act Section 5 Preclearance*, VIRGINIA DEPARTMENT OF ELECTIONS (July 2012), <http://www.elections.virginia.gov/GREBHandbook/Files/GREB%20Handbook/Archives/2012%20Chapters/Chapter%2024%20DOJ%20%20Preclearance.pdf>.

24. *Page*, 58 F. Supp. 3d at 540.

25. *Id.* at 536–37.

traditionally African-American District 3 and thereby reduce the influence of African-American voters in other districts.²⁶ In essence, the voters claimed that the new plans purposely increased the BVAP of District 3—facially increasing the black voting population of that district and thereby appeasing the Attorney General under Section 5 of the Voting Rights Act—in order to increase the concentration of black voters in traditionally black districts and reduce their voting power overall.²⁷

On November 25, 2013, eight Virginia congressmen intervened as defendants²⁸ after the Virginia Attorney General and the Virginia State Board of Elections were dismissed from the case through a stipulation of dismissal.²⁹ A month later, on December 20, 2013, Defendants sought summary judgment, which was denied.³⁰ The lower court found that there was sufficient evidence that race was the predominant consideration in the drawing of the congressional maps based on legislative intent and the shape and characteristics of the district.³¹ Because of these findings, the court applied a strict scrutiny test.³² The strict scrutiny test is typically applied in cases where a law might bear a discriminatory purpose.³³ It requires that the law in question be “narrowly tailored to serve a compelling governmental interest.”³⁴

In applying strict scrutiny, the court found that “compliance with the Voting Rights Act is a compelling state interest,”³⁵ but that the map was not “the least race-conscious measure needed to remedy a violation,”³⁶ and it was therefore not narrowly tailored.³⁷ The court found against the defendants and ordered that the legislature draw new districts during its next legislative session.³⁸

26. *Id.* at 540.

27. *Id.*

28. *Id.* Between the November 2013 intervention and the May 2016 Supreme Court decision, the group of intervening Congressmen was reduced to three, including Representatives Randy Forbes, Robert Wittman, and David Brat, as the other representatives no longer claimed to have standing. *See Wittman v. Personhuballah*, 136 S. Ct. 1732, 1734 (2016).

29. *Page*, 58 F. Supp. 3d at 536 n.4.

30. *Id.* at 540.

31. *Id.* at 541–50.

32. *Id.* at 550.

33. *See United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938).

34. *Page*, 58 F. Supp. 3d at 550.

35. *Id.* at 551.

36. *Id.* at 553 (quoting *Prejean v. Foster*, 227 F.3d 504, 518 (5th Cir. 2000)).

37. *Id.* at 553.

38. *Id.* at 555.

The Congressmen appealed to the Supreme Court, which remanded the case based on *Shelby County, Alabama v. Holder*,³⁹ decided in the interim.⁴⁰ In *Shelby County*, the Court found that the Voting Rights Act's Section 4 coverage formula was unconstitutional.⁴¹ Because the Section 4 coverage formula could no longer be the basis for Section 5 preclearance, Section 5 was gutted as well.⁴² The decision left Section 2 intact.⁴³

The Eastern District of Virginia again took up the case and found the plan to be an invalid use of racial gerrymander.⁴⁴ Per the Supreme Court's instructions, the district court delved further into the Voting Rights Act and its lengthy relationship with Virginia, including the state's prior status as a Section 5 "covered jurisdiction" and the subsequent elimination of the Section 4 coverage formula in Shelby County.⁴⁵ The court found that race was the predominant consideration for the new congressional maps based on legislative intent⁴⁶ and the circumstantial evidence of the district's shape and makeup, so it again applied a strict scrutiny test.⁴⁷

In its strict scrutiny analysis, the court found there was a compelling interest in complying with the Voting Rights Act.⁴⁸ In much the same analysis as the first lower court decision, however, the court found that the maps failed under the narrow tailoring analysis.⁴⁹ Again, the court ordered the legislature to redraw the maps in accordance with their advisement.⁵⁰

39. 133 S. Ct. 2612 (2013).

40. *Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015) (mem.). Cases heard and decided by a three-judge panel of a district court, including redistricting cases, are appealed directly to the Supreme Court. 28 U.S.C. § 1253 (2006).

41. *Shelby County*, 133 S. Ct. at 2631.

42. *Id.*

43. *Id.*

44. Page v. Va. State Bd. of Elections, No. 3:13cv678, 2015 WL 3604029 at *6 (E.D. Va. June 5, 2015).

45. *Id.* at 2.

46. *Id.* at 8 ("Delegate Janis emphasized that his 'primary focus' in drawing Virginia's new congressional maps was ensuring that the Third Congressional District maintained at least as large a percentage of African-American voters as had been present in the district under the Benchmark Plan.").

47. *Id.* at 6–14.

48. *Id.* at 16 (noting that the *Shelby County* decision does not affect the question of whether compliance before that decision was a compelling state interest; the question remains "whether the legislature's reliance on racial considerations was, at the time of the redistricting decision, justified by a compelling state interest").

49. *Id.* at 16–17.

50. *Id.* at 18.

The Congressmen again sought Supreme Court review on several issues involving the finding that race predominated the formation of Virginia's districts, the district court's application of the strict scrutiny test, and the question of the Congressmen's standing.⁵¹ Although the Congressmen sought review on a total of five questions, the Supreme Court twice ordered supplemental briefing on the question of standing,⁵² and ultimately decided the case on that ground.⁵³

II. LEGAL BACKGROUND

A. Contemporary Standing Doctrine

In order to bring a suit in federal court, a potential plaintiff must have standing,⁵⁴ a constitutional requirement that derives from the case-or-controversy clause in Article III.⁵⁵ Contemporary standing doctrine relies on three elements. First, a plaintiff must establish that he has suffered an "injury in fact,"⁵⁶ which is "an invasion of a legally protected interest."⁵⁷ That injury must be both "concrete and particularized . . . and . . . actual or imminent."⁵⁸ Second, a plaintiff must show that the defendant's conduct caused his injury.⁵⁹ Finally, a resolution in favor of the plaintiff must be likely to—not merely have the potential to—redress the injury.⁶⁰

B. Racial Gerrymandering and Standing

In *Shaw v. Reno*,⁶¹ the Supreme Court held that voters could bring a claim under the Fourteenth Amendment's Equal Protection Clause by showing a redistricting plan that could only have been created as an

51. Brief for Appellants at ii, *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016) (No. 14-1504).

52. See *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1735 (2016).

53. *Id.* at 1734.

54. *What is "standing?"*, ROTTENSTEIN LAW GROUP LLP, <http://www.rotlaw.com/legal-library/what-is-standing/> (last visited Feb. 18, 2017).

55. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); see also *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (explaining "[t]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III. . . . For there to be such a case or controversy, it is not enough that the party invoking the power of the court have a keen interest in the issue").

56. *Lujan*, 504 U.S. at 560.

57. *Id.*

58. *Id.* (citation omitted).

59. *Id.*

60. *Id.* at 561 (citation omitted).

61. 509 U.S. 630 (1993).

attempt to racially segregate voters.⁶² To challenge the constitutionality of a redistricting plan, a plaintiff has the burden of showing that the legislature's predominant consideration was race; if they make this showing, strict scrutiny is triggered,⁶³ which then shifts the burden back to the defendant to show the plan was narrowly tailored to advance a compelling state interest.⁶⁴

Two years after *Shaw*, in *United States v. Hays*,⁶⁵ the Supreme Court confirmed that those who live in a district with racial gerrymandering have standing to sue, but held that those who do not live in the district and cannot demonstrate they have been victims of racial classification do not have standing.⁶⁶ The plaintiffs in *Hays* could not assert standing simply on the basis of an allegation that the district in which they reside would have a different racial composition if the legislature had drawn another district in another way, because there must have been an actual particularized injury.⁶⁷ In essence, the Court in *Hays* dismissed the potential for a state-wide claim of standing.⁶⁸

III. ARGUMENTS

In addition to each party's brief, the Supreme Court twice directed each party to file supplemental briefs regarding the question of standing.⁶⁹ The first supplemental brief order, issued on September 28, 2015, directed the parties to answer whether the Congressmen had standing in this case.⁷⁰ The second supplemental brief order, issued on November 13, 2015, again directed the parties to discuss standing, but focused on the fact that the Congressmen did not represent the district at issue in the case.⁷¹

62. *Id.* at 658.

63. *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

64. *See Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (citations omitted) ("North Carolina, therefore must show not only that its redistricting plan was in pursuit of a compelling state interest, but also that its districting legislation is narrowly tailored to achieve that compelling interest.").

65. 515 U.S. 737 (1995).

66. *Id.* at 739.

67. *See id.* at 746. ("We have never held that the racial composition of a particular voting district, without more, can violate the Constitution.").

68. *See id.*; *cf. Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) (explaining while voters cannot pursue statewide claims, "[v]oters, of course, can present statewide evidence in order to prove racial gerrymandering in a particular district").

69. *See Wittman v. Personhuballah*, 136 S. Ct. 1732, 1735 (2016).

70. *Id.*

71. *Id.*

A. Appellants' Arguments

The Appellants, the Congressmen, contended that they had standing because the result of the case “w[ould] directly affect at least one of [the Congressmen’s] chances for reelection and interests as a Republican voter.”⁷² The Congressmen put forth three main arguments. First, that the Court previously held that intervenor-defendants had standing even if the original defendants were no longer part of the litigation as long as the case might cause an injury to one of the intervenors.⁷³ Any changes to the map, they claimed, “w[ould] necessarily alter at least one Republican district where an Appellant has previously voted and been elected” by pushing black, traditionally Democratic voters into their district, replacing some of their base.⁷⁴

Second, the Congressmen’s injuries was “more direct, specific, and concrete” than other injuries that the Supreme Court found sufficient for standing.⁷⁵ They argued that their injuries “[were] just as direct and concrete as the injury” in *United States v. Hays*.⁷⁶ The Congressmen asserted that, just as the residents in *Hays* were injured by an unconstitutional district, the Congressmen would be injured if the maps are again redrawn to alter District 3.⁷⁷

Third, the Congressmen asserted that the voter-Appellees only opposed their intervention when it became clear that the Congressmen would be harmed by an adverse judgment.⁷⁸ They claimed they “obviously” had standing to appeal where the order “directly affect[s]” their interests.⁷⁹

B. Appellees' Arguments

The voter-Appellees (“the Voters”) argued that Appellants did not have standing as intervenors because none lived in, currently represented, nor had ever represented District 3.⁸⁰ They asserted that

72. Reply Brief on Standing for Appellants at 1, *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016) (No. 14-1504) (citations omitted).

73. Supplemental Brief on Standing for Appellants at 8, *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016) (No. 14-1504).

74. *Id.* at 9–10.

75. *Id.* at 11.

76. *Id.* at 13.

77. *Id.*

78. *Id.* at 14.

79. *Id.* (alteration in original).

80. Supplemental Brief on Standing for Appellees at 1, *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016) (No. 14-1504).

the Congressmen's claim must fail for five main reasons.⁸¹ First, the Congressmen's claims were contrary to the location-specific requirements of contemporary racial gerrymandering jurisprudence.⁸² If the law requires that a voter reside within a specific district to challenge racial gerrymandering there, how could the law also allow a voter or a congressman to defend that racial gerrymandering without living in that specific district?⁸³ Invoking *Hays*, the Voters acknowledged that any time congressional maps are redrawn, "there will 'undoubtedly' be some effect on other districts in the map," but insisted there was still no claim to standing for some potential changes in the composition of the district.⁸⁴

Second, the Congressmen's claim of harm was too speculative to confer standing, because it was unclear whether the map ultimately put into place would actually cause harm to the interests asserted.⁸⁵ Third, the Congressmen had not demonstrated that their injury would be to a legally protected interest, because the Supreme Court had never found an interest in maintaining the racial makeup of a district.⁸⁶

Fourth, the Congressmen's argument that they had been injured as Republican voters suffered from the same "generalized grievance" issues as their initial argument.⁸⁷ Because they lived outside of the district, the Congressmen still did not have standing.⁸⁸

Fifth and finally, countering a potential argument by the Congressmen, the Voters conceded that the Congressmen might have standing in the future to challenge the plan that is ultimately adopted, "but only if they can make an argument that the remedy violates their

81. *Id.* at 8.

82. *Id.*

83. *See id.* (emphasis in original) ("There is no defensible basis for a rule that provides that, while voters *challenging* a racial gerrymander must live in the district being challenged, voters or office holders *defending* a racial gerrymander may live anywhere in the Commonwealth.").

84. *Id.* at 9–10.

85. *Id.* at 10.

86. *Id.* at 11. In fact, Appellees assert, "[t]aken to its logical (and patently absurd) conclusion, Appellants' argument would confer upon members of Congress, former members of Congress, and voters in general a legally cognizable interest in maintaining the precise partisan composition of the voters in the districts that they represent or live in." *Id.*

87. *Id.* at 14.

88. *See id.* ("Just as a Republican voter may argue that his interest in maintaining the partisan balance of his district in the fact of potential changes to a district elsewhere in the Commonwealth confers standing, a Democratic voter might make the exact same argument about her own district. This is precisely the type of 'generalized grievance' . . . that the Court has found insufficient to meet Article III's standing requirements in *Hays* and elsewhere.").

constitutional or statutory legal rights in some way.”⁸⁹ Because such a violation had not yet occurred, though, the Congressmen could not preemptively litigate that problem.⁹⁰

IV. HOLDING

The Supreme Court held that the Congressmen did not have standing in this case because they did not demonstrate that they were actually harmed.⁹¹ Accordingly, the Court dismissed the appeal before reaching a decision on the merits.⁹² After briefly laying out the standing legal landscape, the Court distinguished the position of the Congressmen as intervenors and the original parties.⁹³ The Court noted that “an intervenor cannot step into the shoes of the original party . . . unless the intervenor independently fulfills the requirements of Article III.”⁹⁴

Representative Forbes claimed that if the enacted plan were not upheld, District 4 would have been transformed from a Republican district to a Democratic district.⁹⁵ As such, this compelled him to run in Congressional District 2 instead of his original district.⁹⁶ However, Representative Forbes’s counsel later notified the Court that he would run in Congressional District 2 “regardless of whether the Enacted Plan is reinstated.”⁹⁷ Because of Representative Forbes’s decision to run in District 2 regardless of the outcome of the litigation, his claimed injury would not “be redressed by a favorable judicial decision.”⁹⁸ Therefore, the Court held that Representative Forbes did not have standing in this case.⁹⁹

In addition, the Court found that Representatives Wittman and Brat did not have standing because they failed to meet their burden of showing their injury.¹⁰⁰ The Court did not decide whether the type of injury—a reduction in the likelihood of their reelection—was a valid

89. *Id.* at 14–15 (emphasis omitted).

90. *Id.* at 15.

91. Wittman v. Personhuballah, 136 S. Ct. 1732, 1734 (2016).

92. *Id.*

93. *Id.* at 1736.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1737.

100. *Id.*

injury to a legally cognizable interest.¹⁰¹ Although the Congressmen claimed the Enacted Plan must be reinstated to prevent a flood of Democratic voters to their district—thereby reducing their chances of reelection—the Court indicated that their briefs did not present any evidence that alternative voting maps would reduce Representative Wittman’s or Brat’s chances at reelection.¹⁰² Further, the Congressmen’s briefs focused on Congressional Districts 3 and 4 with which they are not affiliated, rather than Congressional Districts 1 and 7 which Wittman and Brat represent, respectively.¹⁰³ The Court concluded that the lack of standing decided the case, and dismissed the appeal.¹⁰⁴

V. ANALYSIS

By failing to come to a conclusion on the merits, the Supreme Court leaves a substantial and consequential gap in racial gerrymandering jurisprudence. This instability means the highly political and often divisive task of electoral map-drawing, as well as the potential legal remedy after maps are drawn, is left without answers.

The Court properly decided *Wittman*. Because none of the Congressmen intervening in the case lived in or represented the district in question, they did not have standing. It would be contradictory to find standing among the Congressmen without a direct connection to Congressional District 3 when a citizen without a direct connection to the district clearly does not have standing. Yet in failing to decide the standing issue, the Court evaded the question of whether a Congressman has a legal right to determine or to maintain the racial makeup of his congressional district such that would give rise to standing. The Court should have decided the legal right argument, and should have held that the incumbent Congressmen had no legal right in maintaining the racial makeup of their districts. The importance of such a conclusion becomes clear when one analyzes what such a legal right means in context and the rationale behind arguments for the legal right.

There should not be a cognizable legal injury for congressmen in maintaining the racial demographics of their district. Constituents in a racially gerrymandered district have standing to challenge legislative

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

action because they have “been denied equal treatment” by the legislature.¹⁰⁵ The basis of their injury is a denial of their individual rights as a voter, an attack on a recognized legal right. This differs from a congressman’s claim to a right of maintaining the racial dynamics and makeup of his district. For congressmen, there is clearly not an established legal right; although American politics values incumbents, the value is not derived from an individual right, but from more basic American values, such as stability, responsiveness, and accountability.

What would it mean in practice if there is a legal right associated with maintaining the racial composition of one’s district? Without having addressed the question at all, we are left to our own devices to imagine how far this could extend, and end up with even more questions. Would the legal right only apply to incumbent members of Congress? Although an incumbent congressman is likely the easiest case to imagine, it is possible others might feel wronged by changes in the district in which they are running for Congress, or in which they seek to run. Would it be possible for a congressional nominee who has not yet won a seat to challenge these changes? If so, would it be possible for a potential nominee to make such a challenge?

If the Court is again presented with this issue and it finds an interest in maintaining the legal composition of one’s district confers standing, it should be a relatively narrow interest. The right should be assigned only to incumbent congressmen. Nominees or potential nominees have, at best, a vague and tangential relation to the right asserted. Further, an extension of the right to the nominees would yield far too much power to those nominees with an insufficient connection to the district. One should not be able to claim a right to maintain the racial demographics of a district, and thereby a reduction in his chances of election, when he has never and may never represent that district.

Even if only a limited right is granted, there are serious potential ramifications for redistricting efforts. If an interest in the racial makeup of a district can give rise to standing, redistricting following a census would become nearly impossible. A district redrawn in accordance with state election law and the Voting Rights Act would almost always change the racial demographics of a district at least slightly. This runs the risk of allowing any congressman whose district is affected to bring a case. The Court would have to find some threshold beyond which the right might be triggered, but that line-drawing issue would be

105. *United States v. Hays*, 515 U.S. 737, 745 (1995).

complicated and contentious in itself. Although the Supreme Court should not find such a legal right, if it did, it should decide that case on narrow grounds. This would avoid the onslaught of cases from those with a minimal cognizable interest in the outcome.

In considering whether the right exists, one would be remiss not to consider the rationale behind the politicians seeking such a right, and whether that rationale is a policy should generally be supported. The interest in a specific racial makeup of that district seems sinister. At its core, in asserting this right, it seems as though a congressman is saying that redistricting has resulted in a district that is no longer white enough, or no longer Latino enough, or no longer black enough. When the legal right asserted is the fact of a specific racial dynamic, the congressman can no longer claim that he is only interested in keeping his seat, but that he believes the best or only way to keep his seat is to exclude those of the race he believes will not vote for him.

The assertion of this right is made even more unattractive in *Wittman* because the Congressmen's claimed injury arose from an apparently unconstitutional redistricting map. In essence, the remedy of instituting the map that the Congressmen preferred would overturn the remedy to the constituents of Congressional District 3. Had the Congressmen been granted the right, those rights and groups that have been historically protected—the right to vote among registered voters—would be negated by a newly-found right for those they are supposed to elect.

The Supreme Court has still not handed down a complete answer on the question of whether congressmen have standing to intervene on racial gerrymandering for a district they neither live in nor represent. In a contentious political climate and in the wake of *Shelby County*, an answer seems more important now than ever. Instead, we are left with cases like *Wittman*, in which Representative Bobby Scott, the Congressman whose district is at the center of the case, is not involved in the litigation at all.

CONCLUSION

Although the Court came to the right decision in *Wittman v. Personhuballah*, deciding the case on a standing issue rather than on the merits of the case seems only to delay the inevitable. Cases will continue to arise in various iterations, and ultimately the Court will have to decide whether the success of incumbents at the risk of racial gerrymandering is a legally protected rights.