

“A CLOUD OF CONSTITUTIONAL ILLEGITIMACY”: PROSPECTIVITY AND THE DE FACTO DOCTRINE IN THE GERRYMANDERING CONTEXT

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ABSTRACT

Courts have traditionally shielded the acts of malapportioned or otherwise illegally constituted legislatures from dissolution by employing the “de facto doctrine,” an ancient common law policy tool with medieval roots. In its most basic form, the de facto doctrine seeks to safeguard the acts of unlawful but well-intentioned public officials from collateral attack out of concern for third-party reliance and a bald recognition of necessity. However, the doctrine as traditionally articulated only serves to validate past official acts; once the official in question has lost the “color of authority,” the doctrine no longer affords his actions de facto validity. Although this has not prevented courts from extending the doctrine, or something like it, to cover prospective acts in certain scenarios, courts have generally avoided “taking a look under the hood” and wrestling with the policy concerns underlying the doctrine to see if they still apply prospectively.

This Note examines the potential use of the de facto doctrine in the gerrymandering context. Both racial and partisan gerrymandering present distinct challenges for courts seeking to prospectively apply the de facto doctrine to acts of a state legislature: generally, gerrymanders are created intentionally, making it harder to apply any “good faith” exception; illegal gerrymandering by its nature trespasses on important constitutional guarantees; and the traditional motivations for the de facto doctrine—necessity and reliance—arguably do not apply to legislation crafted by an unconstitutional government body seeking to preserve its power. By examining the historical roots of the doctrine,

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tracing its modern development, and considering its underlying policy rationales, this Note seeks to answer two questions: (1) how have courts expanded the de facto doctrine and its animating principles prospectively?; and (2) how do those expansions shape the prospective application of the doctrine in the gerrymandering context?

INTRODUCTION

The iniquitous Law, which cut up and severed this Commonwealth into Districts . . . inflicted a grievous wound on the Constitution,—it in fact subverts and changes our Form of Government, which ceases to be Republican as long as an Aristocratic HOUSE OF LORDS under the form of a Senate tyrannizes over the People, and silences and stifles the voice of the Majority.

When Tyranny and arbitrary Power thus make inroads upon the Rights of the People, what becomes the duty of the citizen? Shall he submit quietly and ignominiously to the decrees of Usurpers?¹

On August 11, 2016, a federal three-judge panel struck down a set of North Carolina state legislative redistricting maps² it later identified as one of “the largest racial gerrymanders ever encountered by a federal court.”³ Collectively, the unconstitutionally drawn districts impacted “nearly 70% of the House and Senate districts, touch[ed] over 75% of the state’s counties, and encompass[ed] 83% of the State’s population—nearly 8 million people.”⁴ Therefore, the state legislature elected under this districting scheme acted under “a cloud of constitutional illegitimacy” that would only be cured when “new

1. Editorial, *The Gerry-Mander, or Essex South District Formed into a Monster!*, SALEM GAZETTE (Apr. 2, 1813), <https://digital.library.cornell.edu/catalog/ss:3293783> [<https://perma.cc/48EQ-QA9F>].

2. *Covington v. North Carolina*, 316 F.R.D. 117, 176 (M.D.N.C. 2016), *aff’d mem.*, 137 S. Ct. 2211 (2017).

3. *Covington v. North Carolina*, 270 F. Supp. 3d 881, 884 (M.D.N.C. 2017), *remanded from* 137 S. Ct. 2211 (2017).

4. *Id.* at 892. Ultimately, 117 legislative districts had to be redrawn, comprising 68 percent of the House and 72 percent of the Senate. N.C. State Conference of the NAACP v. Moore, No. 18 CVS 9806, slip op. at 4 (Wake Cty. Super. Ct. Feb. 22, 2019), *appeal denied*, No. 261P18-2 (N.C. June 11, 2019).

elections [were] held under constitutionally adequate districting plans.”⁵

Nevertheless, after two years, two Supreme Court decisions, and two failed attempts to force a special election, the same racially gerrymandered, Republican-dominated legislature remained in power.⁶ And in the interim, it had not been idle—or demure. In fact, the legislature had embraced controversial attempts to use its veto-proof supermajority to shift control of a state elections board from the state’s Democratic governor to the legislature and institute a voter-ID law, only to be judicially rebuffed.⁷

Yet, the Republican legislature’s days of politically unchecked power were numbered, for two reasons. First, nonracially gerrymandered state districting maps would finally take effect in 2018.⁸ Second, a rumored “blue wave” threatened to unseat Republicans of all stripes across the country.⁹ Due to residual partisan gerrymandering, Democrats were not predicted to fully retake either state legislative chamber,¹⁰ but the Republican party’s iron-clad supermajorities were imperiled.¹¹ In anticipation, the state legislature proposed a slate of six constitutional amendments to be approved by a

5. *Covington*, 270 F. Supp. 3d at 891. In the interim, the state had appealed the decision to the Supreme Court and lost. *Id.* at 884. Following this lengthy appeal, plaintiffs sought to truncate the terms of the state legislators by calling for a special election but were denied by the district court. *Id.* This meant that 2018 was the first year that nongerrymandered maps were used to elect state legislators. *Id.* at 889.

6. *See Covington*, 270 F. Supp. 3d at 884, 887–88 (describing how the Supreme Court vacated the 2016 *Covington* court’s order for a special election and declining to order a special election once more); *Moore*, slip op. at 2–4, 11–12 (noting that the 2018 legislature still suffered from the constitutional defect found in *Covington*).

7. *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) (finding the proposed voter-ID law “target[ed] African Americans with almost surgical precision”); *Cooper v. Berger*, 809 S.E.2d 98, 116 (N.C. 2018) (holding that the state legislature’s attempt to alter the composition of the Board of Elections “impermissibly interfere[d] with the Governor’s ability to faithfully execute the laws in violation” of the North Carolina Constitution).

8. *See Covington*, 270 F. Supp. 3d at 884 (noting that a constitutionally gerrymandered legislature would continue to govern the state until 2018).

9. *See, e.g.,* Alexi McCammond, *Wave Watch: The Blue Wave Is Growing*, AXIOS (Oct. 2, 2018), <https://www.axios.com/signs-of-a-blue-wave-midterms-0742c13a-c11d-4a90-9794-438bea036277.html> [<https://perma.cc/WPX6-8NWP>] (noting the strong possibility of a blue wave in congressional races).

10. Michael Bitzer, *Some Thoughts on NC Legislative Battles Shaping Up on Nov. 6*, OLD N. STATE POLITICS (Nov. 1, 2018), <https://www.oldnorthstatepolitics.com/2018/11/some-thoughts-on-nc-legislative-battles.html> [<https://perma.cc/D4WZ-N7R8>].

11. Laura Leslie, *NC Dems Take Aim at GOP Super-Majorities*, WRAL.COM (Oct. 22, 2018), <https://www.wral.com/nc-dems-take-aim-at-gop-supermajorities/17938059> [<https://perma.cc/S84S-7DJT>].

voter referendum, including—unsurprisingly—amendments to shift control of a state elections board from the governor to the legislature, impose a voter-ID requirement, and strip the governor’s power to fill judicial vacancies, among others.¹² In essence, the oncoming “blue wave” had “pushed Republican state legislators to try and cement their policies into the state’s constitution,”¹³ their illegally gerrymandered advantage notwithstanding.

Legal challenges followed in quick succession.¹⁴ Notably, several nonprofit groups, including the National Association for the Advancement of Colored People (“NAACP”), filed a complaint in state court challenging four of the amendments, alleging the proposed ballot language was either “vague and intentionally misleading” or “vague and incomplete.”¹⁵ In addition, the plaintiffs advanced an alternate theory with ancient roots: that as a result of the federal district court’s earlier racial gerrymandering decision, affirmed by the Supreme Court, the state legislature was a “usurper” that lacked “any *de jure* or *de facto* lawful authority” to place constitutional amendments before state voters.¹⁶ In early 2019, a North Carolina Superior Court sided with the plaintiffs, tossing out two popularly ratified amendments after finding “[a]n illegally constituted General Assembly does not represent the people of North Carolina and is therefore not empowered to pass legislation that would amend the

12. Joel Luther, *What Would the Six Constitutional Amendments on the NC Ballot Do?*, DUKE TODAY (Oct. 25, 2018), <https://today.duke.edu/2018/10/what-would-six-constitutional-amendments-nc-ballot-do> [https://perma.cc/CM4J-4XZY].

13. Reid Wilson, *North Carolina GOP Seeks To Remake State Constitution; Dems See Power Grab*, HILL (June 28, 2018), <https://thehill.com/homenews/state-watch/394650-north-carolina-gop-seeks-to-remake-state-constitution-dems-see-power> [https://perma.cc/3M2L-E9JU]; see also David A. Graham, *The Midterms Could Permanently Change North Carolina Politics*, ATLANTIC (Nov. 2, 2018), <https://www.theatlantic.com/politics/archive/2018/11/north-carolinas-constitutional-amendment-fight/574546> [https://perma.cc/D3WQ-2SF4] (noting that “Republicans are taking steps that would strengthen the legislature’s authority and therefore their own grip on the state” by proposing constitutional amendments that “could change the balance of power between the governor and the legislature for decades to come, placing and preserving more authority in Republican hands”).

14. See, e.g., *Cooper v. Berger*, No. 18 CVS 9805 (Wake Cty. Super. Ct. Aug. 21, 2018) (challenging proposed election-related state constitutional amendments set to be placed on voting ballots).

15. Complaint for Declaratory and Injunctive Relief at 30, N.C. State Conference of the NAACP v. Moore, No. 18 CVS 9806 (Wake Cty. Super. Ct. Aug. 6, 2018).

16. *Id.*

state's Constitution."¹⁷ In doing so, the court revived a doctrinal question held in uneasy abeyance for decades: What powers may a legislature continue to properly exercise after it is found unconstitutional?¹⁸

The answer to this question may lie in a set of muddled policy-driven doctrines dating back to the fifteenth century. The “de facto officer doctrine” and its variants have been used as “tool[s] of equity” for hundreds of years to affirm the validity of acts executed by public officials lacking color of title or authority.¹⁹ Over time, litigants and courts have invoked these doctrines to protect the decisions of unlawfully elected English abbots,²⁰ rulings of judges whose terms of office had expired,²¹ contracts of defectively formed corporations,²² and reapportionment legislation passed by unconstitutionally malapportioned state legislatures,²³ among others. Although the doctrine as traditionally conceived only validates the *past* acts of unlawful officers acting under color of title,²⁴ some courts have extended the policy rationales underlying the doctrine to authorize

17. *Moore*, slip op. at 6, 12 (only two of the four challenged amendments survived a popular referendum—the voter-ID amendment and another proposing a 7 percent income-tax cap; both were declared “void *ab initio*”).

18. This Note uses the adjectives “unconstitutional,” “unlawful,” and “illegal” as shorthand terms to describe public officers lacking color of authority or legislatures constituted in violation of state or federal law.

19. *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 862 (1st Cir.), cert. granted sub nom. *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 139 S. Ct. 2735 (2019).

20. See ALBERT CONSTANTINEAU, PUBLIC OFFICERS AND THE DE FACTO DOCTRINE § 5 (1910) (discussing *The Abbé de Fontaine*, 9 Hen. VI, at 32(3) (1431) (Eng.)).

21. *Cromer v. Boinest*, 3 S.E. 849, 853 (S.C. 1887) (“It seems to us, therefore, that Judge FRASER must be regarded as a *de facto* judge on the sixth of December, 1886, when the decree was originally filed in the clerk’s office, and consequently that the decree must be regarded as a valid decree of the court of common pleas.”).

22. *Duray Dev., LLC v. Perrin*, 792 N.W.2d 749, 759 (Mich. Ct. App. 2010).

23. *City of Cedar Rapids v. Cox*, 108 N.W.2d 253, 262–63 (Iowa 1961). The Iowa Supreme Court held in relevant part:

The State Constitution vests in the legislative branch of the government the law-making function, including the making of rules for the representative apportionment of the assembly itself. If the judicial branch of government could by decree invalidate legislative enactments because of the failure of the Legislature to reapportion itself, chaos would result. We have no intention of attempting any such wholesale destruction of our statutory law.

Id.

24. CONSTANTINEAU, *supra* note 20, § 302 (“The acts of an illegal officer, however, are valid only when the defects in his title are unknown, for when the public or third persons have or should have a knowledge that the officer is not an officer de jure, there is no reason for validating his acts . . .”).

prospective actions.²⁵ Determining when and why courts extend these rationales prospectively, and what lessons they may hold for the gerrymandering context, is the focus of this Note.

This centuries-old debate is particularly relevant today for two reasons. First, additional gerrymandering decisions are on the horizon.²⁶ Although the Supreme Court's decision in *Rucho v. Common Cause*²⁷ effectively slammed the door on claims of partisan gerrymandering in federal court,²⁸ plaintiffs are beginning to have success challenging such gerrymanders in state courts.²⁹ For example, the Pennsylvania Supreme Court recently invalidated a state-level congressional redistricting map in *League of Women Voters v. Commonwealth*³⁰ on the grounds it violated the free-and-equal-elections clause enshrined in the Pennsylvania Constitution.³¹ Eleven other states have similar free-and-equal-elections clauses in their state constitutions,³² meaning the antigerrymandering wave may just be getting under way.³³

25. See, e.g., *Jackman v. Bodine*, 205 A.2d 713, 723 (N.J. 1964) (invoking the “need for governmental order” underlying the de facto doctrine to justify permitting a malapportioned legislature to remain in power).

26. *Partisan Gerrymandering*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/partisan-gerrymandering> [<https://perma.cc/4H3Z-PK9A>] (noting the tide on partisan gerrymandering is shifting, in part thanks to the Supreme Court providing “potential roadmaps to voters looking for fairer maps”).

27. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

28. *Rucho*, 139 S. Ct. at 2506–07 (“[P]artisan gerrymandering claims present political questions beyond the reach of the federal courts.”).

29. Galen Druke, *Partisan Gerrymandering Isn't the Supreme Court's Problem Anymore*, FIVETHIRTYEIGHT (June 27, 2019, 1:34 PM), <https://fivethirtyeight.com/features/partisan-gerrymandering-isnt-the-supreme-courts-problem-anymore> [<https://perma.cc/U8QZ-FCL9>] (noting that reformers were “first successful” in challenging partisan gerrymandering in Pennsylvania state court in 2018).

30. *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 821 (Pa. 2018).

31. *Id.* (“Such a plan, aimed at achieving unfair partisan gain, undermines voters’ ability to exercise their right to vote in free and ‘equal’ elections if the term is to be interpreted in any credible way.”).

32. Joshua A. Douglas, *The Right To Vote Under State Constitutions*, 67 VAND. L. REV. 89, 144–49 (2014) (noting the constitutions of Arizona, Arkansas, Delaware, Illinois, Indiana, Kentucky, Oregon, Pennsylvania, South Dakota, Tennessee, Washington, and Wyoming include similar provisions).

33. In fact, the first cracks in the dike may already be showing. In September 2019, a North Carolina superior court threw out the state’s districting maps for partisan gerrymandering. See, e.g., *Common Cause v. Lewis*, No. 18 CVS 014001, slip op. at 10 (Wake Cty. Super. Ct. Sept. 3, 2019). More challenges are likely to follow. Cf. *About Gerrymandering*, FAIR DISTRICTS PA., <https://www.fairdistrictspa.com/the-problem/about-gerrymandering> [<https://perma.cc/Q993-LW4L>] (noting that both Democrats and Republicans are gearing up for 2020 redistricting that could result in continued gerrymandering). Whether they are successful may depend in part upon

The second reason why this issue demands modern attention flows from the first: Because gerrymandering decisions are coming, many legislatures may be stripped of their de jure authority. If these de facto bodies attempt to cling to power—as history suggests they will³⁴—motivated opponents, in turn, will be only too happy to drag questions about their de facto authority into court.³⁵ If this past is any prologue, courts should be ready to field challenges to reflexive legislative attempts to maintain power following a gerrymandering decision and explain whether these actions are valid under the de facto doctrine or related equitable principles.

The overwhelming weight of authority suggests the de facto doctrine will protect the *past* acts of illegally constituted legislatures.³⁶ Otherwise, the American legal system would be in constant danger of evaporating overnight. This Note attempts to provide a framework explaining how unconstitutionally gerrymandered state legislatures can or cannot act *following* such an adverse decision. Namely, this Note argues that, when evaluating challenges to prospective legislative actions, courts should consider: (1) the act's *legal vehicle*; (2) the illegally constituted body's *level of involvement*; and (3) the *nature* of the act, or what it purports to do.

This Note proceeds in three parts. Part I explores the origins and policy rationales motivating the de facto doctrine, describes how American courts have shaped it, and notes that the doctrine has been unevenly expanded to address new and unique crises like legislative malapportionment. Part II continues by examining the doctrine's

the focus on this Note—judges may be less likely to find illegal gerrymanders if they know a hamstrung legislature is the result.

34. For example, anger over the Pennsylvania Supreme Court's partisan gerrymandering decision quickly spilled into the legislative agenda. Immediately following the judgment, members of the state legislature threatened members of the state supreme court with impeachment. Marc Levy, *Pa. GOP Moves To Remake State Supreme Court After Gerrymandering Ruling*, WASH. TIMES (June 13, 2018), <https://www.washingtontimes.com/news/2018/jun/17/pennsylvania-republicans-move-remake-supreme-court> [<https://perma.cc/8J3Q-FGBK>]. Shortly thereafter, the Pennsylvania Senate passed a bill submitting a constitutional amendment for popular ratification that proposed a dramatic restructuring of the state judiciary by requiring state appellate judges—including the supreme court—be elected from judicial districts. Wes Venteicher, *Proposal Would Change Way Judges Are Elected to Pennsylvania's Highest Courts*, TRIB LIVE (June 16, 2018, 9:30 PM), <https://triblive.com/state/pennsylvania/13756120-74/proposal-would-change-way-judges-are-elected-to-pennsylvanias-highest-courts> [<https://perma.cc/YZ5M-W5T8>].

35. See, e.g., Complaint at 30, N.C. State Conference of the NAACP v. Moore, No. 18 CVS 9806 (Wake Cty. Super. Ct. Feb. 22, 2019) (asking a North Carolina court to “declare that a usurper legislature is not empowered to place constitutional amendments” on the 2018 ballot).

36. See *infra* Part I.B–C.

limits. Courts have placed constitutional and structural bounds on the use of the de facto doctrine in addition to crafting more nuanced, context-dependent limits in both the retrospective and prospective realms. Part III then applies the lessons learned from Parts I and II to the gerrymandering context by weighing the equities for and against applying the doctrine. It establishes that while retrospective actions of a gerrymandered legislature should stand, prospective actions are more suspect. It then proposes a framework for sifting through the prospective actions of illegally gerrymandered legislatures to identify those most in need of judicial scrutiny, before applying it to recent actions of the North Carolina legislature as an illustrative example.

I. THE DE FACTO DOCTRINE(S)

Depending on one's perspective, the origins of the de facto doctrine and its various branchings comprise either a gloriously rich vein of judicial policymaking or a hopelessly convoluted collection of policy rationales masquerading as legal doctrine. What cannot be denied, however, is that the doctrine has persisted for nearly six centuries because it provides an affirmative answer to a thorny question: Are the past acts of public officials who lacked true legal authority to make them nonetheless valid?³⁷

This Part explores the origins and evolution of the de facto doctrine's answer to that question. Section A details how underlying notions of necessity and reliance have perpetuated the use of the doctrine in diverse³⁸ and colorful³⁹ circumstances stretching back to antiquity. Section B examines how American courts have fleshed out these doctrinal roots. Finally, Section C describes how the doctrine has been periodically expanded to meet bigger and bigger challenges, especially during the reapportionment upheavals of the mid-twentieth century.⁴⁰ Although the courts of this era uniformly confirmed that

37. See CONSTANTINEAU, *supra* note 20, § 4.

38. See, e.g., *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 862 (1st Cir.) (using the de facto officer doctrine to uphold the validity of past acts of the Financial Oversight and Management Board of Puerto Rico created by PROMESA to help the island restructure its massive debt), *cert. granted sub nom.* *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 139 S. Ct. 2735 (2019).

39. See, e.g., *State v. Brennan's Liquors*, 25 Conn. 278, 283 (1856) (holding that an unqualified constable's seizure of liquor from a man keeping it in violation of an "act for the suppression of intemperance" was nonetheless valid under the de facto officer doctrine).

40. See *infra* Part I.C.

illegal legislatures' past acts were valid, whether these legislatures could continue to act was—and remains—hotly debated.

A. *Doctrinal Roots: Necessity and Reliance*

The de facto doctrine has deep roots in English common law. The first reported use of the doctrine occurred in 1431, when a court appeared to uphold the validity of a bond issued by an abbot who lost an election yet nevertheless came to occupy the abbacy.⁴¹ Although the justifications for this determination were obscure,⁴² the rationales for the doctrine were fleshed out several decades later during the chaotic Wars of the Roses, in which the Houses of York and Lancaster vied for the throne of England.⁴³ Following the Yorkian ouster of the Lancasters in 1461, the House of Parliament passed a statute “indemnify[ing] those who had submitted to the [de facto] kings of the house of Lancaster . . . to provide for the peace of the kingdom.”⁴⁴ The alternative—a kingdom-wide witch hunt for disloyal aristocrats and commoners alike who, for years, had relied on the laws of the Lancasters—would have resulted in “great public mischief.”⁴⁵ Although many cases that followed did not concern such weighty matters of sovereignty, the English courts continued to invoke the practical necessity of acceding to de facto rulings, decrees, and judgments on which individuals had reasonably relied.⁴⁶

The de facto doctrine's common-sense foundation voyaged with the British colonists across the Atlantic to put down new roots in the American common law tradition.⁴⁷ Hundreds of early cases adopted

41. CONSTANTINEAU, *supra* note 20, § 9 (discussing *The Abbé de Fontaine*, 9 Hen. VI, at 32(3) (1431) (Eng.)). Although it is not clear the court ever decided the matter, the discussion of the judges and counsel seem to suggest the issue was resolved in the bondholder's favor. *See id.* § 5. Interestingly, statements of the judges on the court seem to suggest the doctrine was already well established at the time. *See id.* (“In every case, if a man be made abbot or parson erroneously, and then is removed for precontract, or any like matter, yet a deed made by him and the convent, or by the parson and the patron and the ordinary, is good . . .” (emphasis added) (quoting *The Abbé de Fontaine*, 9 Hen. VI, at 32(3) (Babington, C.J.))).

42. Kathryn A. Clokey, Note, *The De Facto Officer Doctrine: The Case for Continued Application*, 85 COLUM. L. REV. 1121, 1125 (1985).

43. CONSTANTINEAU, *supra* note 20, § 5.

44. *Id.*

45. *State v. Carroll*, 38 Conn. 449, 459 (1871).

46. *See* CONSTANTINEAU, *supra* note 20, § 412 (citing *Knowles v. Luce* (1580) 72 Eng. Rep. 473, Moore (K.B.) 110) (holding that tenants were not obliged to inquire into the authority of a clerk to preside over a manorial court, even though the clerk did not have express authority from his lord to do so).

47. CONSTANTINEAU, *supra* note 20, § 8.

the precepts of the doctrine and adapted it for use in a democratic republic bereft of kings but replete with public officers.⁴⁸ But while the doctrinal dressings changed, the concerns motivating it did not; the purposes of the doctrine remained: (1) avoiding the chaos that would result from a widespread “invalidation of all official acts which occur[ed] while the [de facto] officer [held] an office”;⁴⁹ and relatedly, (2) “protect[ing] the public’s reliance on an officer’s authority and . . . ensur[ing] the orderly administration of government by preventing technical challenges to an officer’s authority.”⁵⁰ In effect, the doctrine maintains the status quo and “order and peace [in] society” by commanding the respect of de facto entities “until, in some regular mode prescribed by law, their title is investigated and determined.”⁵¹

B. *An Americanized Doctrine*

American courts have employed the de facto doctrine since the Founding to recognize the de facto authority of insurrectionist governments,⁵² affirm the validity of corporations organized in a legally deficient manner,⁵³ and validate the official acts of certain public officers lacking de jure legal authority.⁵⁴ This Note is primarily concerned with the development and application of that third category, termed the de facto *officer* doctrine.⁵⁵ This doctrine, in its most general

48. *Id.*

49. *In re Pelfrey*, 419 B.R. 10, 16 (B.A.P. 6th Cir. 2009).

50. 63C AM. JUR. 2D *Public Officers and Employees* § 23 (2019); see also *Ryder v. United States*, 515 U.S. 177, 180 (1995) (noting the purpose of the doctrine is avoiding the “chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the orderly functioning of the government despite technical defects in title to office”); CONSTANTINEAU, *supra* note 20, § 3 (noting a related concern in that “were every officer bound to uphold or defend his title against every one who might choose to deny or attack it in a collateral way, he would often be so much thwarted in the performance of his official duties that his efficiency as an officer might at times be greatly impaired”).

51. *Norton v. Shelby Cty.*, 118 U.S. 425, 441 (1886).

52. *Texas v. White*, 74 U.S. 700, 732 (1868), *overruled in part by Morgan v. United States*, 113 U.S. 476 (1885).

53. *In re Hausman*, 921 N.E.2d 191, 193 (N.Y. 2009) (“Under very limited circumstances, courts may invoke the de facto corporation doctrine where there exists (1) a law under which the corporation might be organized, (2) an attempt to organize the corporation and (3) an exercise of corporate powers thereafter.”).

54. *Ryder v. United States*, 515 U.S. 177, 180–81 (1995).

55. However, the lessons from these other distinct doctrinal areas are still relevant to this inquiry. Because these sister doctrines are based on similar equitable principles, decisions relating to de facto corporations and governments may still be informative in cases involving de facto

form, “confers validity upon acts performed by a person acting under the color of official title” even if that authority is later discovered to be deficient,⁵⁶ so long as those acts “involve[d] the interests of the public and third persons.”⁵⁷ State and federal courts have extended this principle to protect public officials of every stripe, including judges,⁵⁸ notaries,⁵⁹ police officers,⁶⁰ state-environmental-board commissioners,⁶¹ federal oversight boards,⁶² and state legislators.⁶³

To qualify as a de facto officer, one must be in “unobstructed possession of an office and discharge its duties in full view of the public”⁶⁴ under the color of authority⁶⁵ or title,⁶⁶ though possessing no right in fact.⁶⁷ Therefore, “[a] de facto officer is one who enters upon and performs the duties of his office with the acquiescence of the people and the public authorities and has the reputation of being the officer *he assumes to be* and is dealt with as such.”⁶⁸ In addition, the majority of state and federal courts require the office in question have de jure existence,⁶⁹ meaning the acts of an official occupying an unconstitutionally created office are denied de facto protection.⁷⁰

Procedurally, the past acts of a de facto officer may not be collaterally attacked in court.⁷¹ In other words, plaintiffs may not “attack government *action* on the ground that the officials who took

public officers. See CONSTANTINEAU, *supra* note 20, § 2 (noting that while functionaries of de facto governments and corporations can never become more than de facto officers, similar principles apply).

56. *Ryder*, 515 U.S. at 180–81 (discussing the de facto officer doctrine, in particular).

57. 67 C.J.S. *Officers* § 457 (2019).

58. *State v. Lewis*, 12 S.E. 457, 459 (N.C. 1890).

59. *In re Pelfrey*, 419 B.R. 10 (B.A.P. 6th Cir. 2009) (applying Kentucky law).

60. *Jarrett v. State*, 926 So. 2d 429 (Fla. Dist. Ct. App. 2006).

61. *Iowa Farm Bureau Fed’n v. Envtl. Prot. Comm’n*, 850 N.W.2d 403 (Iowa 2014).

62. *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838 (1st Cir.), *cert. granted sub nom. Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 139 S. Ct. 2735 (2019).

63. *City of Cedar Rapids v. Cox*, 108 N.W.2d 253 (Iowa 1961).

64. *Waite v. City of Santa Cruz*, 184 U.S. 302, 323 (1902).

65. *McDowell v. United States*, 159 U.S. 596, 601–02 (1895).

66. *United States ex rel. Doss v. Lindsley*, 148 F.2d 22, 23 (7th Cir. 1945); *see also United States v. Royer*, 268 U.S. 394, 397 (1925) (“A de facto officer is one who is surrounded with the insignia of office, and seems to act with authority.” (citation and quotations omitted)).

67. *State v. O’Reilly*, 785 So. 2d 768, 777 (La. 2001).

68. *State v. Staten*, 267 N.E.2d 122, 125 (Ohio 1971) (emphasis added), *vacated in part on other grounds*, 408 U.S. 938 (1972).

69. Clifford L. Pannam, *Unconstitutional Statutes and De Facto Officers*, 2 FED. L. REV. 37, 51 (1966); *see also Norton v. Shelby Cty.*, 118 U.S. 425, 449 (1886).

70. *Norton*, 118 U.S. at 441–42.

71. *Ball v. United States*, 140 U.S. 118, 129 (1891).

the action were improperly in office,” although plaintiffs may directly attack “the *qualifications* of [an] officer, rather than the actions taken by [said] officer.”⁷² The latter is generally accomplished via a common law *quo warranto* proceeding.⁷³ In contrast, the actions of a “mere usurper”—one acting “without any color of right”⁷⁴—are wholly void⁷⁵ and may be attacked directly or indirectly⁷⁶ at “any time in any proceeding.”⁷⁷ Thus, an individual who was never elected or appointed to a public office but assumes its powers nonetheless cannot hide behind the de facto officer doctrine.⁷⁸ But even a usurper may metamorphize into a de facto officer if “he continues to act for so long a time, or under such circumstances, as to afford presumption of his right to act,”⁷⁹ though the possession of the office in question “is almost universally required to be in good faith.”⁸⁰

As may be expected for a six-hundred-year-old common law doctrine of equity, additional wrinkles and nuances abound, many of which vary from jurisdiction to jurisdiction. Perhaps the most important—and most universal—exception necessarily flows from the color-of-right requirement: once the public becomes aware of an officer’s defective authority, the doctrine no longer protects his

72. *Andrade v. Lauer*, 729 F.2d 1475, 1496–97 (D.C. Cir. 1984) (emphasis added).

73. *Id.* at 1497–98. *Quo warranto* writs are now statutorily codified in the federal system. *Id.*

74. *City of Baton Rouge v. Cooley*, 418 So. 2d 1321, 1324 (La. 1982).

75. *People ex rel. Duncan v. Beach*, 242 S.E.2d 796, 801 (N.C. 1978).

76. Note, *The De Facto Officer Doctrine*, 63 COLUM. L. REV. 909, 912 (1963).

77. *In re Wingler*, 58 S.E.2d 372, 375 (N.C. 1950).

78. *Van Amringe v. Taylor*, 12 S.E. 1005, 1007 (N.C. 1891).

79. *Id.* *Kimball v. Alcorn*, 45 Miss. 151, 158 (1871); see also CONSTANTINEAU, *supra* note 20, §§ 96–108. In *State v. Carroll*, 38 Conn. 449 (1871), the Connecticut Supreme Court succinctly identified four situations in which courts may appropriately apply the de facto officer doctrine: when the duties of the officer were exercised (1) “without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be”; (2) “under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like”; (3) under the color of a known election or appointment, “void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public”; and (4) “under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such.” *Id.* at 471–72.

80. T.C. Williams, Annotation, *Presumption and Burden of Proof as to One’s Status as a De Facto Officer upon Which Validity or Effect of His Act Depends*, 161 A.L.R. 967 (2019); see also *Heyward v. Long*, 183 S.E. 145, 151 (S.C. 1935) (“It is clear from the authorities cited that a de facto officer is one who is in possession of an office, in good faith, entered by right, claiming to be entitled thereto, and discharging its duties under color of authority.”).

actions,⁸¹ and he becomes a mere usurper, lacking color of right.⁸² On the whole, this inference makes logical sense—the doctrine exists to safeguard the interests of those who reasonably relied on an official’s actions,⁸³ but one cannot reasonably rely on the actions of those known to lack the authority to make them.⁸⁴ However, this exception would become an uncomfortable thorn in the side of many courts seeking to craft remedies for a new and expansive dilemma—legislative reapportionment.

C. Mission Drift: “Prospective” Expansion

In the mid-twentieth century, old de facto principles were resurrected to confront the scourge of legislative “malapportionment.” This elegant phrase describes an ugly practice: the creation or preservation of unequally populated electoral districts “so that the ratio of representatives to voters varies across districts.”⁸⁵ Although states had enjoyed malapportioned districts for decades, if not centuries, the Supreme Court’s decision in *Baker v. Carr*⁸⁶ heralded the end of the malapportioned era.⁸⁷ Following the subsequent widespread invalidation of almost every state legislature across the country,⁸⁸ a

81. *Carroll*, 38 Conn. at 467 (“When . . . the public or third persons ha[ve] knowledge that the officer [is] not an officer de jure, the reason for validating the acts to which they submitted, or which they invoked, fail[s], and the law no longer protect[s] them.”); see also CONSTANTINEAU, *supra* note 20, § 93 (“It is obvious that there cannot be color of title or authority, when the pretended official title is known to be bad.”). Although the public may perhaps become aware of the defect in a variety of ways, one of the most common and widely accepted avenues is an adverse finding by a court of competent jurisdiction. CONSTANTINEAU, *supra* note 20, § 94 (“[G]enerally no color of title or authority can exist after the incumbent’s title has been declared invalid by a court of competent jurisdiction.”).

82. *Taylor*, 12 S.E. at 1007 (“[W]hen, without color of authority, [an individual] simply assumes to act, —to exercise authority as an officer,—and the public know the fact, or reasonably ought to know, that he is a usurper, his acts are absolutely void for all purposes.”).

83. See *supra* note 50 and accompanying text (observing a purpose of the de facto officer doctrine to be the protection of the public’s reliance on an officer’s authority).

84. *Williams v. Boynton*, 42 N.E. 184, 186 (N.Y. 1895) (holding that a board-of-supervisors member’s “color of title was wholly destroyed by a public judicial decision, and he became a mere usurper and intruder whose act was challenged at the moment it was done”); see also CONSTANTINEAU, *supra* note 20, § 305 (“[O]ne cannot set up his belief in the legality of something which he positively knows not to be legal.”).

85. Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 785 n.20 (2005).

86. *Baker v. Carr*, 369 U.S. 186, 237 (1962) (holding that an equal protection challenge to the constitutionality of a state reapportionment statute presented a justiciable, nonpolitical question).

87. *Id.*

88. Edward N. Beiser, *The Status of a Malapportioned Legislature*, 72 DICK. L. REV. 553, 570 (1968) (observing that the Supreme Court’s follow-up decision to *Baker—Reynolds v. Sims*, 377 U.S. 533 (1964)—invalidated the legislatures of most states).

spate of plaintiffs used the opportunity to collaterally challenge prior legislative actions ranging from the enactment of a larceny statute⁸⁹ to the passage of an act prohibiting discrimination in commercial housing.⁹⁰ Courts uniformly invoked the de facto doctrine to validate the *past* acts of these now-illegal legislatures,⁹¹ often citing familiar concerns about attendant chaos and the need to maintain law and order.⁹²

In contrast, both state and federal courts struggled to determine what to do once a legislature *was* found to be malapportioned.⁹³ Although this issue predates *Baker*,⁹⁴ two contrasting answers to this problem are tucked within the case's many concurrences and dissents. In a footnote appended to the last sentence of his concurrence, Justice Douglas opined—without analysis—that it is “plainly correct” that “a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act.”⁹⁵ Writing in dissent,

89. *Martin v. Henderson*, 289 F. Supp. 411, 414 (E.D. Tenn. 1967) (holding, with little discussion, that “[t]here is no[] merit to the petitioner’s argument concerning the pertinent statute’s having been enacted by a malapportioned legislature” as that legislature was a legislature “empowered to act” (citing *Baker*, 369 U.S. at 250 n.5 (Douglas, J., concurring))).

90. *Huber v. Pa. Human Relations Comm’n*, 43 Pa. D. & C.2d 437, 438–43 (Pa. Ct. Com. Pl. 1967).

91. *See, e.g., Schaefer v. Thomson*, 251 F. Supp. 450, 453 (D. Wyo. 1965) (“No inference is to be drawn that the laws enacted by the 38th Wyoming State Legislature are invalid by reason of our finding that the representation in the state Senate constitutes an invidious discrimination.”), *aff’d sub nom. Harrison v. Schaefer*, 383 U.S. 269 (1966); *Huber*, 43 Pa. D. & C.2d at 442–43 (“If there were no other reason to support the validity of the acts of the legislature, the de facto doctrine which has been ingrafted upon our law would be sufficient.”); *see also Beiser, supra* note 88, at 563 (“Without exception, both state and federal courts refused to reverse criminal convictions based on statutes adopted by malapportioned legislatures before their apportionment was contested . . .”).

92. *Ryan v. Tinsley*, 316 F.2d 430, 432 (10th Cir. 1963). In *Ryan*, the U.S. Court of Appeals for the Tenth Circuit went on to provide a dramatic prognostication of what would result in the event the court failed to apply the de facto doctrine:

An acceptance of the contentions of the petitioner would produce chaos. A presently unascertainable number of Colorado statutes would be nullified. Property rights would be jeopardized. The marital status of many individuals would be questionable. Tax statutes would be unenforceable. The prison gates would be thrown open. The maintenance of law and order would be imperilled. Government would exist in name only. A recognition of the consequences compels rejection of the arguments.

Id.

93. *Beiser, supra* note 88, at 564.

94. *See, e.g., Kidd v. McCanless*, 292 S.W.2d 40, 44 (Tenn. 1956) (refusing to find a reapportionment act unconstitutional as the result “would be to deprive us of the present Legislature and the means of electing a new one and ultimately bring about the destruction of the State itself” since the de facto doctrine would offer no shield to future actions).

95. *Baker v. Carr*, 369 U.S. 186, 250 n.5 (1962) (Douglas, J., concurring) (citing *City of Cedar Rapids v. Cox*, 108 N.W.2d 253, 262–63 (Iowa 1961)). Interestingly, the case cited by Justice

Justice Frankfurter took a more alarmist approach, noting that “it cannot be doubted that the striking down” of a state’s reapportionment statute “would deprive the State of all valid apportionment legislation and . . . deprive the State of an effective law-based legislative branch.”⁹⁶ Although perhaps not explicit, these competing perspectives are really debates about de facto legislative authority.

At first, many courts embraced Justice Douglas’s position,⁹⁷ primarily by expanding de facto principles to apply prospectively in various creative ways. Several of them, including the Supreme Court, noted that state legislatures are the body tasked with reapportionment⁹⁸—a directive that often comes straight from the state constitution itself⁹⁹—and therefore legislatures must *at least* be allowed to reapportion themselves.¹⁰⁰ At its base, this is essentially an argument of bald necessity; if the state legislature cannot reapportion itself, “the State [as a whole] would be helpless to accomplish the

Douglas does not support his proposition. In *Cedar Rapids*, the Iowa Supreme Court actually rejected an argument that the Iowa legislature was unconstitutionally malapportioned. *Cedar Rapids*, 108 N.W.2d at 262–263. As a result, “its decision does not reflect on the powers of an unconstitutionally apportioned body.” Beiser, *supra* note 88, at 555 n.12.

96. *Baker*, 369 U.S. at 329–30 (Frankfurter, J., dissenting).

97. See, e.g., *Martin v. Henderson*, 289 F. Supp. 411, 414 (E.D. Tenn. 1967) (citing *Baker*, 369 U.S. at 250 n.5 (Douglas, J., concurring)); *Mann v. Davis*, 238 F. Supp. 458, 459 (E.D. Va. 1964) (same), *aff’d sub nom. Hughes v. WMCA, Inc.*, 379 U.S. 694 (1965).

98. See, e.g., *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 676 (1964) (allowing the Maryland legislature an opportunity to reapportion itself following a finding of malapportionment “since [the] primary responsibility for legislative apportionment rests with the legislature itself”).

99. *Cedar Rapids*, 108 N.W.2d at 263 (noting—prior to *Baker*—that “[t]he Iowa Constitution specifically places the responsibility of reapportionment of the Legislature upon the Legislature itself, and provides methods for implementing that function . . . [and i]t is not for the courts to say that constitutional procedures do not protect the citizens”).

100. *Tawes*, 377 U.S. at 675–76 (“[T]he Maryland Legislature *presumably* has the inherent power to enact *at least* temporary reapportionment legislation pending adoption of state constitutional provisions relating to legislative apportionment which comport with federal constitutional requirements.” (emphasis added)); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964) (holding that an Alabama district court “correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so”); *Toombs v. Fortson*, 241 F. Supp. 65, 71 (N.D. Ga. 1965) (accepting “the proposed House plan of apportionment and the current Senate plan of apportionment as interim plans to be used on stated conditions and until proper apportionment becomes a fact”), *aff’d*, 384 U.S. 210 (1966); *Mann*, 238 F. Supp. at 459 (“We think the 1963 Assembly necessarily is empowered to enact the requisite reapportionment laws. There is no other body to do so, and unless its jurisdiction is recognized for this purpose the State would be helpless to accomplish the reapportionment.”).

reapportionment” because “[t]here is no other body to do so.”¹⁰¹ Although this approach may have avoided invoking the de facto doctrine by name, it did conjure up its attendant specter of necessity to effectively bestow de facto status on illegal legislatures.

A few state and lower federal courts, having been given an inch, took a mile, and proceeded to hold that the Supreme Court, “[b]y repeatedly encouraging invalidly apportioned state legislatures to reapportion themselves . . . ha[d] clearly recognized that until a new legislature is elected, the existing legislature may validly legislate.”¹⁰² Commentators¹⁰³ and critics¹⁰⁴ soon followed suit. Several courts, however, were even less circumspect in prospectively extending a traditionally retrospectively oriented doctrine to affirm such shadow legislatures’ plenary authority. These courts found the need to maintain the “governmental order” guaranteed by the de facto officer doctrine “is even more imperative when the spectre proposed is a government without legislative power.”¹⁰⁵ None of these courts attempted to reconcile bestowing de facto status on an illegal legislature with the traditional rule that when color of authority is lost, so is de facto authority.¹⁰⁶

101. *Mann*, 238 F. Supp. at 459.

102. *Silver v. Brown*, 405 P.2d 132, 140 (Cal. 1965); *see also* *People ex rel. Engle v. Kerner*, 205 N.E.2d 33, 39–41 (Ill. 1965) (holding the de facto legislature had “full power to act” going forward).

103. *See, e.g.*, *Beiser*, *supra* note 88, at 577 (opining that the Supreme Court’s decision in *Fortson* confirmed that “a legislature, is a legislature, is a legislature”).

104. *Fortson v. Morris*, 385 U.S. 231, 245 (1966) (Fortas, J., dissenting) (railing against the Court’s decision to allow a malapportioned legislature to select a governor as a “perpetuat[ion of] electoral vices” but conceding that the Court has “declined to deprive a malapportioned legislature of its *de facto* status as a legislature”).

105. *Jackman v. Bodine*, 205 A.2d 713, 723 (N.J. 1964); *see also* *Engle*, 205 N.E.2d at 39–40 (expressly employing the de facto doctrine to permit the unconstitutional Illinois Senate to redistrict via constitutional amendment); *Scholle v. Hare*, 116 N.W.2d 350, 356–57 (Mich. 1962) (twisting several precedents to create a “general rule that where the law creating a public office is declared void the acts of an officer continuing to function thereunder will, *until he is legally succeeded*, be upheld as the acts of a de facto officer” (emphasis added)); *cf.* *Davis v. Synhorst*, 217 F. Supp. 492, 505 (S.D. Iowa 1963) (finding malapportionment but withholding a judicial remedy, noting that “[i]nasmuch as a legislative branch of state government is absolutely essential to carry out and operate state government, including any obligation which may exist with respect to apportionment, nothing should be done at this time which carries any reflection upon the legality of the legislative branch of government”), *aff’d sub nom.* *Hill v. Davis*, 378 U.S. 565 (1964).

106. *See, e.g.*, *Sincock v. Gately*, 262 F. Supp. 739, 851 (D. Del. 1967); *Jonas v. Hearn*, 236 F. Supp. 699, 708 (W.D. Mo. 1964); *League of Neb. Municipalities v. Marsh*, 232 F. Supp. 411, 414 (D. Neb. 1964); *Paulson v. Meier*, 232 F. Supp. 183, 190 (D.N.D. 1964).

However, many judges were uncomfortable with this prospective expansion. Some, still concerned about the problems raised by Justice Frankfurter in *Baker*, avoided the scope-of-authority issue entirely by choosing to find malapportioned legislatures “*prospectively* null and void” and merely proscribed the use of malapportioned districts in future elections.¹⁰⁷ Others attempted to straddle the line by permitting de facto legislative operation subject to certain restrictions.¹⁰⁸ For example, a handful of courts permitted the resumption of full legislative powers *after* passing reapportionment legislation,¹⁰⁹ while others only permitted legislatures to reapportion themselves.¹¹⁰ To add to the confusion, the Supreme Court summarily affirmed such restrictions on three separate occasions, implying these legislatures did *not* have full power to act.¹¹¹

At base, these deep divides in opinion reflect a fundamental discomfort with allowing illegal legislatures to continue legislating. But as those courts that tried to straddle the line between permitting full power to act and creating a legislative vacuum demonstrate, de facto authority is not an all-or-nothing proposition. In fact, courts have crafted many limits on the doctrine over the years that could—and

107. *Davis v. Synhorst*, 225 F. Supp. 689, 694 (S.D. Iowa 1964) (emphasis added), *aff'd sub nom.* *Hill v. Davis*, 378 U.S. 565 (1964); *see also* *Sobel v. Adams*, 208 F. Supp. 316, 318 (S.D. Fla. 1962) (“We conclude that the constitutional and statutory provisions of the State of Florida, which provide for the apportionment and reapportionment, are null, void and prospectively inoperative.”).

108. *Scholle*, 116 N.W.2d at 356 (imposing a time limit on the de facto operation of the Michigan legislature).

109. *See, e.g., Long v. Avery*, 251 F. Supp. 541, 558 (D. Kan. 1965) (“We further hold and direct that *after* the Kansas legislature has enacted a constitutionally valid Senatorial reapportionment statute, *and not before then*, . . . the Senate should not be restrained from considering and passing such legislation as it considers to be in the public interest.” (emphasis added)).

110. *Butterworth v. Dempsey*, 237 F. Supp. 302, 310–13 (D. Conn. 1964) (enjoining the General Assembly of the State of Connecticut “from doing any act or taking any steps in furtherance of [its] legislative functions” following a malapportionment finding; this “restraint on the carrying on of the legislative functions of the General Assembly” was later stayed so long as the legislature adhered to a set of directives that would result in reapportionment).

111. *See generally* *Mann v. Davis*, 238 F. Supp. 458, 459 (E.D. Va. 1964) (stating that the “[General] Assembly necessarily is empowered to enact the requisite reapportionment laws” because “[t]he Supreme Court has tacitly approved such accordance of provisional vitality to the existing legislature”), *aff'd sub nom.* *Hughes v. WMCA, Inc.*, 379 U.S. 694 (1965); *Buckley v. Hoff*, 234 F. Supp. 191, 198 (D. Vt. 1964) (holding that the court is not “restrain[ed] . . . from ordering that the Vermont General Assembly be reapportioned” and that “the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution is being violated by the present apportionment” scheme), *modified sub nom.* *Parsons v. Buckley*, 379 U.S. 359 (1965).

should—be used to police shadow legislatures even if they are allowed to continue governing. The next Part focuses on these limitations.

II. PROSPECTIVE AND RETROSPECTIVE LIMITS ON THE DE FACTO DOCTRINE

At first glance, the de facto doctrine seems categorical—the acts of a de facto officer are as binding as those of a de jure officer.¹¹² But on closer view, this principle is riddled with exceptions, exemptions, and limits. Although most of these limits were ignored or overlooked by many of the reapportionment-era courts described in Part I, they may have provided answers to the tricky scope-of-authority question that so many of them struggled with. This Part describes the formal and functional doctrinal parameters that might help a court craft a satisfactory remedy when faced with a dispute over a gerrymandered legislature’s legal latitude.

Section A starts by describing structural and constitutional limits on the de facto doctrine. Although these limits are primarily retrospective, there is no reason to believe they would not apply prospectively as well. Section B continues by describing various doctrinal limitations, which can be traced back to antiquity. Courts have prohibited retrospective application of the doctrine when it might be used to take advantage of the public; some have gone even further and denied de facto protection to actions not deemed “necessary and proper.” But when considering prospective actions, courts are often caught peeking behind the curtain to consider an act’s *legal vehicle*, the *involvement* of the illegal body, and the *nature* of the act when determining whether validation is proper.

A. *Structural Limits and the Constitutional-Rights Exception*

At the same time lower courts were unevenly expanding the de facto doctrine—or something like it—to prospectively validate certain future acts of malapportioned legislatures, the Supreme Court was busy articulating structural and constitutional-rights-based limits on

112. For example, in *Joseph v. Cawthorn*, 74 Ala. 411 (1883), the Alabama Supreme Court stated that:

There is no distinction in law between the official acts of an officer *de jure*, and those of an officer *de facto*. So far as the public and third persons are concerned, the acts of the one have precisely the same force and effect as the acts of the other. . . . Their official acts are equally valid.

Id. at 415.

the doctrine. The first glimpse of such a contraction is found in the Supreme Court's landmark opinion in *Glidden Co. v. Zdanok*.¹¹³ Writing for a plurality, Justice Harlan declined to invoke the de facto officer doctrine to validate the actions of non–Article III judges sitting on Article III courts pursuant to federal statute.¹¹⁴ Although the doctrine would normally operate to bar private parties like the *Glidden* petitioners from collaterally challenging judges' constitutional authority for the first time on appeal,¹¹⁵ Justice Harlan parsed the Court's previous case law to suggest several important constitutional limits on the doctrine's application. Specifically, the doctrine would not bar untimely challenges when the “alleged defect of authority operates also as a limitation on [the] Court's appellate jurisdiction” or “when the statute claimed to restrict authority is *not merely technical* but embodies a strong policy concerning the proper administration of judicial business”—especially “when the challenge is based upon nonfrivolous constitutional grounds.”¹¹⁶ In other words, the de facto officer doctrine cannot frustrate the operation of the judicial system itself¹¹⁷ or interfere with “basic constitutional protections designed in part for the benefit of litigants.”¹¹⁸

Later Supreme Court decisions imposed additional constraints on the doctrine. For example, in *Ryder v. United States*,¹¹⁹ the Court heard a challenge to an enlisted U.S. Coast Guardman's court-martial conviction. But unlike the plaintiffs in *Glidden*, the *Ryder* petitioner also raised an Article II Appointments Clause challenge to members

113. *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

114. *Id.* at 535–37.

115. *Id.* at 535 (noting that this “rule is founded upon an obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware”).

116. *Id.* at 535–36 (emphasis added).

117. *The De Facto Officer Doctrine*, *supra* note 76, at 921; *see also* *Nguyen v. United States*, 539 U.S. 69, 79 (2003) (elaborating on the *Glidden* holding in rejecting the application of the de facto officer doctrine to a prior decision of an illegally constituted court of appeals on the basis that the circuit court had a “fundamental” defect of authority that violated a federal statute “embody[ing] weighty congressional policy concerning the proper organization of the federal courts”); *Andrade v. Lauer*, 729 F.2d 1475, 1498 (D.C. Cir. 1984) (declining to apply the de facto officer doctrine when a strict application of the doctrine's collateral bar would leave the plaintiffs with only a “cumbersome” *quo warranto* remedy, “effectively bar[ring] their access to court”).

118. *Glidden*, 370 U.S. at 536; *see also* *Clokey*, *supra* note 42, at 1136 (“The Constitution also places limits on the de facto officer doctrine. Particular provisions grant an individual a right to require compliance with constitutional standards for perfect authority. Arguments from stability and efficiency cannot override these personal interests.” (footnote omitted)).

119. *Ryder v. United States*, 515 U.S. 177 (1995).

of the Coast Guard Court of Military Review “before those very judges and prior to their action on his case.”¹²⁰ Although the Court of Military Appeals agreed with the petitioner that the judges presiding over his trial had been unconstitutionally appointed, it “affirmed his conviction on the ground that the actions of these judges were valid *de facto*.”¹²¹ The Supreme Court, however, refused to apply the *de facto* officer doctrine. In keeping with *Glidden*, the Court reasoned that the petitioner had mounted a “timely challenge to the constitutional validity” of the judges’ appointments rather than a mere statutory challenge.¹²² It further emphasized that enforcing “[a]ny other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments.”¹²³

After expanding this limitation on the *de facto* doctrine, the *Ryder* Court took pains to cabin this exception by distinguishing the petitioner’s constitutional challenge from those underlying its earlier decisions in *Connor v. Williams*¹²⁴ and *Buckley v. Valeo*.¹²⁵ In *Connor*, the Court declined to invalidate prior Mississippi legislative elections that it assumed were unconstitutional for the sake of argument,¹²⁶ at least implying that the acts of a potentially illegal legislature “were not therefore void.”¹²⁷ The *Ryder* Court found *Connor* distinguishable on the grounds that its earlier decision, “like other voting rights cases, . . . did not involve a defect in a specific officer’s title, but rather a challenge to the *composition of an entire legislative body*.”¹²⁸ Similarly, in *Buckley*, the Burger Court mechanically invoked vague *de facto* principles to affirm the validity of the Federal Election Commission’s (“FEC”) past acts,¹²⁹ thus preserving the challenged

120. *Id.* at 182.

121. *Id.* at 180.

122. *Id.* at 182–83 (emphasis added).

123. *Id.* at 183.

124. *Connor v. Williams*, 404 U.S. 549 (1972).

125. *Buckley v. Valeo*, 424 U.S. 1 (1976).

126. *Connor*, 404 U.S. at 551–52.

127. *Ryder*, 515 U.S. at 183.

128. *Id.* at 183 (emphasis added) (citations omitted).

129. *Buckley*, 424 U.S. at 142 (holding, somewhat perfunctorily, that “the [FEC’s] inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission’s administrative actions and determinations to this date,” and the “past acts of the Commission are therefore accorded *de facto* validity”). Interestingly, the prior acts of the FEC were not challenged by the plaintiffs and remedies had not been briefed by either party. Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C.L. REV. 481, 530 (2014). Apparently,

actions of an entire *administrative* body. Given the vast differences in scope between the petitioner’s challenge to his court-martial conviction and the prior acts implicitly at stake in *Connor* and *Buckley*—every act of the Mississippi legislature and FEC, respectively—the *Ryder* Court declined to extend whatever de facto principles the *Connor* and *Buckley* Courts “may be thought to have implicitly applied . . . beyond their facts.”¹³⁰ Thus, while the *Ryder* decision solidified a rough constitutional-rights exception to the de facto officer doctrine, it seemingly left open the possibility of applying de facto principles to larger-scale challenges where “the fear of the chaos that would result from the mass invalidation of a public officer’s past acts is at its apex.”¹³¹

Read narrowly, each of these opinions only carves out small exceptions to the de facto officer doctrine in specific factual scenarios. “Collectively, however, they represent a gradual erosion of the doctrine,”¹³² especially in areas where its application would infringe on the ability of plaintiffs to bring constitutional claims. Although de facto principles are still mechanically employed to protect past official actions from “technical” defects,¹³³ *Glidden*, *Ryder*, and others¹³⁴ suggest that the doctrine cannot be used to trump other substantive public interests. As the next Section will demonstrate, further functional limits support this understanding of the doctrine.

five Justices spontaneously created the Court’s de facto-esque remedy during a luncheon. *Id.* at 530 n.272.

130. *Ryder*, 515 U.S. at 184.

131. Deepak Gupta, *The Consumer Protection Bureau and the Constitution*, 65 ADMIN. L. REV. 945, 969–70 (2013) (opining that “[t]here is a significant difference between situations in which the government is engaged in an ongoing action against a particular person”—a la *Ryder*—“and situations in which the government is establishing laws and regulations of general applicability, carrying out investigation, or engaging in general supervision of an industry,” and that the threat of “mass invalidation” of prior acts in the latter situation necessitates applying the de facto officer doctrine).

132. Clokey, *supra* note 42, at 1126.

133. *Nguyen v. United States*, 539 U.S. 69, 77 (2003) (noting that courts still generally find “actions to be valid de facto when there is a ‘merely technical’ defect of statutory authority”).

134. *See, e.g., United States v. Allocco*, 305 F.2d 704, 707 (2d Cir. 1962) (declining to apply the de facto doctrine as a collateral bar to an issue concerning the “separation of powers between the Executive and Legislative branches of our Government” as the case “raise[d] such important constitutional issues that we believe the petitioner should not be foreclosed from asserting them in this collateral proceeding”).

B. *Doctrinal Limits*

The de facto doctrine is not just limited by concerns about constitutional rights and judicial functionality. Over the years, judges have also developed various doctrinal limitations, largely by weighing the equities animating the doctrine's application in the first place. This Section describes two important retrospective limitations on de facto validation before drawing on the limited universe of relevant case law to identify three additional prospective constraints.

1. *Retrospective Limits.* At least two distinct lines of cases stretching back to before the Founding suggest that courts may reach back and invalidate the actions of de facto officers taken even *before* they were unmasked. The first posits that the de facto doctrine may not be used at the public's expense. The roots of this unremarkable proposition are found in English case law, which notes that while "all judicial acts made by [a de facto officer], as admissions, institutions, certificates, and such like, shall be good," they are not empowered to engage in "such voluntary acts as tend to the depauperation of the[ir] successor[s]."¹³⁵ In other words, the doctrine may be used to protect reliance on administrative acts, but it may not be employed to harm others.

American courts picked up and developed this thread, also reasoning that the doctrine, "having been invented to protect the public, [should] not be applied where its application would result in damage and injury to third persons."¹³⁶ Similarly, just as a de facto officer may not act "against the public," he also may not use his office for his own gain—otherwise the doctrine would allow officers to "take advantage of [their] own want of title."¹³⁷ Hence the traditional stipulation that the acts of a de facto officer are only "valid as to *third* persons."¹³⁸

The second line of cases draws a finer distinction: only "necessary and proper" actions taken by a de facto officer are valid. This proposition can be traced as far back as the early sixteenth-century case

135. O'Brian v. Knivan (1619) 79 Eng. Rep. 473, 475; Cro Jac. 552, 554.

136. CONSTANTINEAU, *supra* note 20, § 309; *see also* Old Dominion Bldg. & Loan Ass'n v. Sohn, 46 S.E. 222, 227 (W. Va. 1903) (noting that acts "in the interest of third parties or the public" will be sustained by the de facto doctrine, but acts "as against the public" are invalid); Green v. Burke, 23 Wend. 490, 502 (N.Y. Sup. Ct. 1840) (noting courts using the de facto doctrine "have stopped with preventing mischief to such as confide in officers who are acting without right").

137. *Sohn*, 46 S.E. at 227.

138. Attorney Gen. v. Marston, 22 A. 560, 561 (N.H. 1891).

Rex v. Lisle.¹³⁹ There, the court noted, in an apparent dictum, that even if a usurping mayor had been a de facto officer, he could not nominate another to the position of burgess because his act was “not necessary for the preservation of the [borough].”¹⁴⁰ In doing so, the court drew a distinction between “such acts as are *necessary for the good of the body*, which comprehend judicial and ministerial acts, and such as are *arbitrary and voluntary*.”¹⁴¹ Because electing another burgess was not necessary in the eyes of the court, Lisle’s nomination would have been invalid regardless.

The American judiciary adopted a similar “necessary and proper” restriction on the de facto doctrine in the wake of the Civil War. After the defeat of the Confederacy, both state and federal courts confronted a monumental dilemma: What acts of rebellious state governments, if any, should be legally binding? On the one hand, mechanical application of de facto principles would validate the actions of governments “established in hostility to the Constitution of the United States.”¹⁴² On the other hand, failing to apply some sort of de facto principle would obviate every war-time governmental action in the Confederacy “and the rights that grew up under them during that time[;] . . . a proposition so monstrous and mischievous in its consequences as to shock the sense of justice of any reasonable and dispassionate mind.”¹⁴³

The Supreme Court attempted to thread this needle in a series of Reconstruction-era decisions.¹⁴⁴ First, the Court admitted that even though the secessionist governments could not be regarded as lawful, they were “in the strictest sense of the words, a de facto

139. *R v. Lisle* (1738) 95 Eng. Rep. 345; Andrews 163.

140. *Id.* at 349.

141. *Id.* (emphasis added).

142. *Texas v. White*, 74 U.S. 700, 732 (1868), *overruled in part by* *Morgan v. United States*, 113 U.S. 476 (1885).

143. *Berry v. Bellows*, 30 Ark. 198, 204 (1875).

144. *See, e.g., Horn v. Lockhart*, 84 U.S. 570, 580 (1873) (observing that no governmental action could legitimize raising Confederate bonds for the purpose of waging war against the United States before turning to the “validity of judicial or legislative acts in the insurrectionary States” governing various other subjects); *Thorington v. Smith*, 75 U.S. 1, 9 (1868) (“[T]he Confederate government was never acknowledged by the United States as a de facto government in this sense. . . . But there is another description of government, called also by publicists a government de facto, but which might, perhaps, be more aptly denominated a government of paramount force.”); *White*, 74 U.S. at 732–33 (observing that though the Texas legislature could not be regarded as lawful after the state had seceded, it was the state’s de facto government).

government . . . to some extent.”¹⁴⁵ Second, the Court held that the nature of these de facto governments’ acts would determine their validity. Specifically:

[A]cts *necessary to peace and good order among citizens*, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts *in furtherance or support of rebellion* against the United States, *or intended to defeat the just rights of citizens, and other acts of like nature*, must, in general, be regarded as invalid and void.¹⁴⁶

The state supreme courts, with some initial exceptions,¹⁴⁷ largely followed suit.¹⁴⁸

In sum, the nature of a de facto officer’s or government’s acts may determine their validity, even before they are unmasked or defeated. Actions that either take advantage of one’s defective title or are not “necessary and proper” do not enjoy de facto protection. Presumably, these limits would also apply in the prospective realm, where the

145. *White*, 74 U.S. at 732–33. In a separate decision released the same day, the Court described the distinguishing characteristics of such a de facto government—or “government of paramount force”—as:

(1), that its existence is maintained by active military power, within the territories, and against the rightful authority of an established and lawful government; and (2), that while it exists, it must necessarily be obeyed in civil matters by private citizens who, by acts of obedience, rendered in submission to such force, do not become responsible, as wrongdoers, for those acts, though not warranted by the laws of the rightful government.

Thorington, 75 U.S. at 9.

146. *White*, 74 U.S. at 733 (emphasis added); *see also* *United States v. Reynes*, 50 U.S. 127, 153 (1850) (“[C]laims founded upon the acts of a government de facto must be sustained, if at all, by the *nature and character* of such acts themselves, as proceeding from the exercise of the *inherent and rightful* powers of an independent government.” (emphasis added)).

147. *See, e.g.*, *Penn v. Tollison*, 26 Ark. 545, 579 (1871) (“Successful rebellions found new governments; but the organizations, no matter by what name the rebellious party may call them, which may have been used by a defeated rebellious organization, fall with their cause, and are only evidence of what the government would have been if success had crowned their efforts.”), *overruled in part by Berry*, 30 Ark. 198 (1875).

148. *See, e.g.*, *Berry*, 30 Ark. at 210–11 (quoting *Thorington*, 75 U.S. at 11–12); *Scruggs v. Luster*, 48 Tenn. 150, 155 (1870) (noting that the opinion would follow the Supreme Court’s decision in *Thorington*).

balance of equities favoring de facto validation would have shifted substantially.

2. *Prospective Limits*. Part I illustrated that courts have not hesitated to prospectively extend either the de facto doctrine itself or its underlying policy rationales to allow shadow legislatures at least *some* power. But *which* powers courts permit such legislatures to maintain vary enormously—though not unpredictably.

For example, in *Toombs v. Fortson*,¹⁴⁹ a Georgia district court found the state legislature was malapportioned but allowed upcoming elections to take place.¹⁵⁰ The prospective nature of this decision, however, was put to the test when the legislature attempted to submit a new Constitution to voters, “which would have abolished the provisions for legislative selection of a Governor and have substituted a runoff or special election.”¹⁵¹ To forestall this outcome, the district court issued a revised order that effectively held “that the Georgia Legislature was *so malapportioned* that it could not properly submit to the voters a new Constitution”¹⁵² until the “Assembly is reapportioned in accordance with constitutional standards.”¹⁵³ The Supreme Court heard a challenge to this restriction but declined to reach the merits because the situation might have become moot. Instead, the Court vacated that part of the decree and remanded to the district court, to whom it expressly gave “a wide range in moulding a decree . . . for reconsideration of the desirability and need for the on-going injunction in light of” the changed circumstances.¹⁵⁴ Justice Harlan, concurring in part, believed that this holding impliedly “furnish[ed] a strong practical, if not legal, precedent for other district courts” to limit illegal legislatures’ powers.¹⁵⁵

149. *Toombs v. Fortson*, 205 F. Supp. 248 (N.D. Ga. 1962), *vacated in part*, 379 U.S. 621 (1965) (per curiam), *amended*, 380 U.S. 929 (1965).

150. *Toombs v. Fortson*, Civ. A. No. 7883 (N.D. Ga. June 30, 1964) (final revised order).

151. *Fortson v. Morris*, 385 U.S. 231, 245 (1966) (Fortas, J., dissenting).

152. *Id.* (emphasis added) (describing the revised order issued by the district court in *Toombs*, Civ. A. No. 7883 (N.D. Ga. June 30, 1964)). The district court also limited the new legislature to “to the enactment of such legislation as shall properly come before the said Legislature during the regular 1965 45-day session.” *Toombs*, Civ. A. No. 7883 (N.D. Ga. June 30, 1964).

153. *Toombs*, 379 U.S. at 621 (quoting *Toombs*, Civ. A. No. 7883 (N.D. Ga. June 30, 1964)).

154. *Id.* at 622.

155. *Id.* at 626 (Harlan, J., concurring in part and dissenting in part). At least in Justice Harlan’s opinion, “it seems scarcely open to serious doubt that so long as the federal courts allow this Georgia Legislature to sit, it must be regarded as the de facto legislature of the State, possessing the full panoply of legislative powers accorded by Georgia law.” *Id.*

At least one federal district judge took up this mantle shortly thereafter. Following the Supreme Court's decision in *Baker*, the Utah legislature adopted a resolution calling for a federal constitutional convention to preserve malapportioned state districts.¹⁵⁶ Four years later, Chief District Judge Ritter explicitly held that the malapportioned legislature lacked the power to "adopt a valid Resolution applying to Congress to call an Article V convention for the purpose of continuing its own unconstitutional existence."¹⁵⁷ In his analysis, he reasoned that "state legislature[s] participat[ing] in the amending process" must satisfy the requirements of the U.S. Constitution, which "demand[s] that [a] legislature accurately reflect the only majority by which our system permits impairment of such rights"—one person, one vote.¹⁵⁸ Judge Ritter also drew a clear distinction between "ordinary, customary legislation needed to keep a state government going" that "has been held valid though the legislature is unconstitutionally apportioned" and the Utah "legislators' attempt to continue themselves in their illegal state of unconstitutional apportionment."¹⁵⁹ In short, while "practicalities" supported validating the former, no such "practical problem" counseled against voiding such a blatant power grab.¹⁶⁰

Toombs and Judge Ritter's opinion offer two important lessons. First, the type of legislation passed by the de facto body mattered. Although "ordinary legislation" did not raise concerns, proposals to amend the constitution did. Second, judges who "felt that a legislature based on an unconstitutional apportionment is not a fully valid legislature"¹⁶¹ were uneasy with permitting the same legislature to "directly perpetuate or allow the continuance of its unrepresentative condition"¹⁶² by modifying either the state or federal constitution. However, courts *were* more comfortable with malapportioned

156. *Petuskey v. Rampton*, 307 F. Supp. 231, 233 (D. Utah 1969) (Christensen, J., concurring), *aff'd*, 431 F.2d 378 (10th Cir. 1970).

157. *Petuskey v. Rampton*, 307 F. Supp. 235, 249–51 (D. Utah 1969), *rev'd*, 431 F.2d 378 (10th Cir. 1970).

158. *Id.* (quoting Peter H. Wolf, *An Antireapportionment Amendment: Can It Be Legally Ratified?*, 52 A.B.A. J. 326, 329 (1966)).

159. *Id.* at 253–54.

160. *Id.* The Tenth Circuit reversed on jurisdictional grounds and expressly refrained from addressing the merits. *Petuskey*, 431 F.2d at 383.

161. Beiser, *supra* note 88, at 576.

162. Arthur Earl Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949, 974 (1967) (emphasis added).

legislatures *triggering* an amendment process.¹⁶³ Indeed, even the district court in *Toombs* still permitted the Georgia legislature to call a constitutional convention—it merely forbade the legislature from submitting its own proposal.¹⁶⁴ Thus, while the nature of the act and its legal vehicle are important, so is the illegal body’s level of involvement in the process.

III. THE GERRYMANDERING CONTEXT

This Part explores whether the principles and trends identified in Parts I and II support upholding or discarding the actions of gerrymandered legislatures. A gerrymander is the “deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes.”¹⁶⁵ In more mathematical terms, a gerrymander is an intentionally crafted “district plan that results in one party wasting many more votes than its adversary.”¹⁶⁶

By and large, gerrymandering comes in two distinct flavors: racial and partisan. Racial gerrymanders usually either (1) dilute minority voting power by packing and cracking racial groups,¹⁶⁷ or (2) “segregate citizens into separate voting districts on the basis of race without sufficient justification.”¹⁶⁸ Numerous unconstitutional racial gerrymanders have already been identified and struck down.¹⁶⁹ Political—or partisan—gerrymandering, on the other hand, packs and

163. See, e.g., *West v. Carr*, 370 S.W.2d 469, 472 (Tenn. 1963) (noting that a constitutional convention, unlike a legislature “has no power to take any final action, but can only propose constitutional changes for ratification or rejection by the people”). *But see State ex rel. Smith v. Gore*, 143 S.E.2d 791, 795 (W. Va. 1965) (relying on a provision of the West Virginia Constitution to reject a constitutional convention that drew members from malapportioned districts).

164. *Toombs v. Fortson*, Civ. A. No. 7883 (N.D. Ga. June 30, 1964) (final revised order).

165. *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (1969) (Fortas, J., concurring). Numerous other definitions have been proposed, “but they all boil down to the idea that gerrymandering is the intentional manipulation of districting lines for political advantage.” Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 100 n.94 (1985).

166. Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 849–50 (2015).

167. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (finding that an Alabama legislative act redefining the boundaries of the city of Tuskegee “deprive[d] the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, inter alia, the right to vote in municipal elections”).

168. *Shaw v. Reno*, 509 U.S. 630, 652, 657 (1993) (“Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.”).

169. See *supra* notes 167–168 and accompanying text.

cracks potential voters on the basis of party affiliation.¹⁷⁰ And though some state courts have held that partisan gerrymandering is unconstitutional under their state constitutions,¹⁷¹ the Supreme Court decided in *Rucho v. Common Cause* that such “claims present political questions beyond the reach of the federal courts.”¹⁷² But even if this justiciability distinction between racial and partisan gerrymandering proves to be the rule in the majority of states, its practical effect may be dulled. Because racial groups, especially minorities, remain politically polarized,¹⁷³ state legislative maps vulnerable to partisan-gerrymandering challenges may also be vulnerable to racial challenges, and vice versa.¹⁷⁴

A. *Validity of Actions Taken Before and After an Adverse Gerrymandering Decision*

Although this Note is primarily concerned with the prospective actions of gerrymandered legislatures, Subsection 1 explores the equitable calculus involved in applying the de facto doctrine retrospectively to protect actions taken *before* an adverse court decision. This provides a contrast to prospective application of the doctrine and helps to identify issues that will remain troublesome in the prospective realm. These issues are examined in Subsection 2. To be sure, while the constitutional deficiencies in a gerrymandered legislature may give one pause, the overwhelming weight of authority suggests that prior acts must be validated. But after an adverse

170. Gill v. Whitford, 138 S. Ct. 1916, 1923–24 (2018).

171. See *Common Cause v. Lewis*, 18 CVS 14001, slip op. at 10 (Wake Cty. Super. Ct. Sept. 3, 2019) (holding partisan gerrymandering to be unconstitutional under the North Carolina Constitution); *League of Women Voters of Pa. v. Commonwealth*, 175 A.3d 282, 284 (Pa. 2018) (holding partisan gerrymandering to be unconstitutional under the Pennsylvania Constitution).

172. *Id.* at 2506–07.

173. N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 225 (4th Cir. 2016) (“[I]n North Carolina, African-American race is a better predictor for voting Democratic than party registration.” (citation and quotations omitted)); *Trends in Party Affiliation Among Demographic Groups*, PEW RES. CTR. (Mar. 20, 2018), <http://www.people-press.org/2018/03/20/1-trends-in-party-affiliation-among-demographic-groups> [<https://perma.cc/AT48-3UKW>] (noting that “African American voters remain overwhelmingly Democratic” as “84% identify with or lean toward the Democratic Party,” while “[j]ust 8% of black voters identify in some way with the Republican Party”).

174. Cf. JOHNATHAN WINBURN, *THE REALITIES OF REDISTRICTING: FOLLOWING THE RULES AND LIMITING GERRYMANDERING IN STATE LEGISLATIVE REDISTRICTING* 19 (2008) (noting that “[i]n states with large minority populations, a Republican partisan gerrymander may resemble a racial gerrymander without necessarily focusing” on creating “packed” minority districts).

decision, the equities shift, and courts should be more hesitant to give illegal legislatures blanket authority. At this stage, courts should consider the challenged acts themselves and subject attempts to permanently entrench power to special opprobrium.

1. *Validity of Retrospective Actions.* Several considerations counsel against applying the de facto doctrine even to legislative actions taken before an unconstitutional legislature was deemed unconstitutional. First, any alleged defect in the legislature's authority would be more than "merely technical"—the threshold proposed by the *Glidden* Court.¹⁷⁵ Rather, gerrymanders are *deliberately* crafted to either expand or entrench a party's power,¹⁷⁶ often through the use of highly sophisticated mapmaking technology paired with demographic and personal data skimmed from public records or purchased from private websites.¹⁷⁷ Indeed, some gerrymanders are so sturdily constructed and "so complete" that even their "master designers" cannot pull them back or control their extremes.¹⁷⁸ Therefore, gerrymanders may arguably trespass on the requirement that illegal officers come to possess their offices in "good faith."¹⁷⁹ However, because legislatures are presumed to act in good faith,¹⁸⁰ it seems unlikely that a court would find it lacking, absent exceptional circumstances.¹⁸¹

175. *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962).

176. Michael E. Lewyn, *How To Limit Gerrymandering*, 45 FLA. L. REV. 403, 407 (1993).

177. DAVID DALEY, RAT F**KED: THE TRUE STORY BEHIND THE SECRET PLAN TO STEAL AMERICA'S DEMOCRACY xxv, 51, 56–58 (2016) ("[T]he [demographic and personal] data and the [mapmaking] technology make [gerrymandering] almost as easy as one-click ordering on Amazon. It has made rewiring our democracy as simple as outbidding a rival on eBay, with the additional similarity that the side with the most money wins the prize.").

178. DALEY, *supra* note 177, at 96–97 (noting that extreme gerrymandering created districts that were so protected that "members felt no need to moderate their views," so compromises that may have pushed policies or redistricting forward became more and more difficult to achieve).

179. *See supra* note 80 and accompanying text.

180. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 915 (1995) (noting that in the context of a racial-gerrymandering challenge, "until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed"); *Johnson v. U.S. Food Serv.*, 427 P.3d 996, 1002 (Kan. Ct. App. 2018) ("We presume statutes are constitutional and resolve all doubts in favor of a statute's validity. We interpret a statute in a way that makes it constitutional if there is any reasonable construction that would maintain the Legislature's apparent intent.").

181. This is probably even true for racial gerrymanders, as many racially gerrymandered legislatures assert their districts were drawn in a racially biased manner because of the requirements of the Voting Rights Act. *See Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 143 (E.D. Va. 2018) (noting that defendants "asserted that compliance with Section 5 of the VRA, 52 U.S.C. § 10304, is a compelling state interest justifying the predominant use of

Whether gerrymandering tramples on “basic constitutional protections designed in part for the benefit of litigants”¹⁸² or frustrates the operation of the judicial system itself¹⁸³ is also a more difficult question than it first appears. Gerrymandered legislatures may run afoul of the Elections Clause, the First and Fourteenth Amendments,¹⁸⁴ or state constitutional provisions.¹⁸⁵ Any of these would facially amount to “nonfrivolous constitutional” claims that *Glidden* suggests should be carefully assessed before the application of common law savings doctrines like the de facto officer doctrine. Yet even though these constitutional protections are “designed in part for the benefit of litigants” in the broad sense that many constitutional provisions are, they may not be perfectly analogous to those at issue in the *Glidden* line of cases. Specifically, *Glidden*, *Ryder*, and others¹⁸⁶ all considered collateral attacks to the authority of administrators or judges appointed in violation of the Appointments Clause. While the Appointments Clause is substantively neither more nor less important than other constitutional provisions, it is designed in part to ensure that parties before an Article III court receive judgment at the hands of confirmed judges.¹⁸⁷ In other words, such litigants are *directly* protected from de facto authorities by the Constitution in a way that gerrymandered litigants may not be.

Furthermore, the overwhelming weight of authority suggests that the past acts of illegally constituted legislatures are valid.¹⁸⁸ And even when courts were busy converting the de facto officer doctrine into

race in the 2011 [Virginia state legislative redistricting] plan”), *appeal dismissed*, 139 S. Ct. 1945 (2019); *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 804 (M.D.N.C. 2018) (noting that defendants “[c]laim[ed] (incorrectly) that Section 2 of the Voting Rights Act required the creation of majority-black districts ‘where possible’”), *vacated*, 139 S. Ct. 2484 (2019).

182. *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962).

183. *The De Facto Officer Doctrine*, *supra* note 76, at 921; *see also* *Nguyen v. United States*, 539 U.S. 69, 79 (2003).

184. *Rucho*, 318 F. Supp. 3d at 941.

185. *See supra* note 31 and accompanying text (noting that the Pennsylvania Supreme Court has held that gerrymandering violates the Constitution of Pennsylvania).

186. *See, e.g.*, *Andrade v. Lauer*, 729 F.2d 1475, 1480 (D.C. Cir. 1984) (addressing an Appointments Clause challenge “that neither official ha[d] been appointed by the President or confirmed by the Senate”); *United States v. Allocco*, 305 F.2d 704, 708 (2d Cir. 1962) (concerning an Appointments Clause challenge that the federal judge who had presided over the petitioner’s criminal trial had not been appointed pursuant to the Clause).

187. *See Glidden*, 370 U.S. at 536 (finding that judges who had not been appointed pursuant to the requirements of the Appointments Clause were saddled with a “defect of authority” that “relates to basic constitutional protections designed in part for the benefit of litigants”).

188. *See supra* notes 91–92 and accompanying text.

legal swiss cheese, the Supreme Court made it clear that retrospectively oriented collateral challenges to the composition of legal bodies as a whole were unavailing.¹⁸⁹ Indeed, preventing the chaos that would result from the widespread invalidation of acts that individuals reasonably relied on is the de facto officer doctrine's *raison d'être*.¹⁹⁰ Whether more specific challenges to past acts may nonetheless evade automatic validation still remains an open question, because “[e]ven at common law the de facto doctrine yielded when there were policies involved which outweighed public inconvenience and the frustration of legitimate reliance which are the foundation of the doctrine.”¹⁹¹ It seems clear, however, that truly exceptional circumstances would have to arise for such an act to merit retrospective invalidation.

2. *Validity of Prospective Actions.* After a state legislature is found to be unconstitutionally racially or politically gerrymandered, the equities shift significantly. For the following reasons, courts should resist a blanket and mechanical invocation of the de facto doctrine or its animating principles to protect prospective actions. First, the “color of authority” that invests a de facto officer with power equivalent to that of a de jure officer has entirely evaporated. At that point, the offending officer—or legislature—technically becomes a usurper, whose acts are wholly void.¹⁹² Although such an officer may sometimes be allowed to remain in her position if the defect in her authority is exceedingly trivial,¹⁹³ a gerrymandered legislature’s unconstitutionality is perhaps the furthest thing from trivial. Moreover, as described above, a gerrymandered legislature’s defect is the product of deliberate action undertaken for political gain, not a simple well-intentioned mistake; “good faith” is at best debatable. Whether the citizens of a

189. See *supra* notes 124–131 and accompanying text.

190. See *supra* notes 50–51 and accompanying text.

191. Pannam, *supra* note 69, at 58–59.

192. See *People ex rel. Duncan v. Beach*, 242 S.E.2d 796, 801 (N.C. 1978) (“A usurper in office is distinguished from a de facto officer in that a usurper takes possession of office and undertakes to act officially without any authority, either actual or apparent. Since he is not an officer at all or for any purpose, his acts are absolutely void . . .”).

193. See, e.g., *Leary v. United States*, 268 F.2d 623, 624–27 (9th Cir. 1959) (employing the de facto officer doctrine to affirm the ruling of a trial judge even though the challenger—and the judge himself—knew the judge’s title was defective from the start because the judge started working one day before his tenure officially commenced with the acquiescence of the challenger); see also *The De Facto Officer Doctrine*, *supra* note 76, at 913 (“Although the [*Leary*] court’s opinion is not phrased in terms of the elements of reputation, its decision leads to the conclusion that a known defect may be so insubstantial as not to undermine acquiescence in a claim of authority.”).

state may nevertheless acquiesce to the continued exercise of power by such an illegal legislature—thereby transforming it back into a de facto legislature—is a more difficult, fact-specific inquiry. If current gerrymandering actions are any clue, acquiescence may be the last thing in the minds of many plaintiffs.¹⁹⁴

Second, gerrymandering may also transform the legislature into a usurper under the applicable state constitution. For example, a North Carolina superior court refused to bestow blanket de facto status on its racially gerrymandered legislature¹⁹⁵ because Article I, § 3 of the North Carolina Constitution provides that the “*people* of this State have the inherent, sole, and exclusive right of regulating the internal government . . . and of altering or abolishing their Constitution and form of government.”¹⁹⁶ Because the legislature did not represent “the people,” it could not act to amend the constitution.¹⁹⁷ Although de facto principles and notions of necessity may extend to judicial gray areas, they cannot be used to defeat clear constitutional mandates.¹⁹⁸

Third, even if a court finds that a gerrymandered legislature’s prospective actions evade the de facto doctrine’s many limitations and escape the clutches of state constitutional law, the doctrine’s foundational principles demand searching judicial scrutiny. As described in Part I, the de facto doctrine is entirely a creature of public policy animated primarily by interrelated concerns of necessity and reliance. Necessity-based interests are significantly diminished after an illegal officer is found to be such because no widespread invalidation of past acts is implicated—only those postdating an adverse court decision are at risk. Any attendant concerns of chaos are reduced if fewer laws are at stake.

194. See, e.g., *Covington v. North Carolina*, 270 F. Supp. 3d 881, 901 (M.D.N.C.) (discussing plaintiffs’ request for a special election in part because “the Supreme Court’s summary affirmance of [a racial gerrymandering finding] calls into question, as a matter of state law, the authority of legislators elected in unconstitutional districts to legislate”), *aff’d*, 137 S. Ct. 2211 (2017); Petitioners’ Opening Brief at 74, *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (No. 159 MM 2017), 2018 WL 722927, at *74 (asking the Pennsylvania Supreme Court to give the legislature “two weeks to enact a map using non-partisan criteria” and enjoin the use of the alleged politically gerrymandered maps in elections taking place within the year).

195. N.C. State Conference of the NAACP v. Moore, No. 18 CVS 9806, slip op. at 12 (Wake Cty. Super. Ct. Feb. 22, 2019).

196. N.C. CONST. art. I, § 3 (emphasis added).

197. *Moore*, slip op. at 12.

198. See Gene B. Penland, *The De Jure—De Facto Controversy and Its Effect upon Legal Rights*, 1 WASHBURN L.J. 245, 255 (1961) (“Society would not be demanding too much of its system of jurisprudence to ask that system to follow its own rules.”).

This common-sense proposition finds support in the reapportionment-era decisions. When *Baker* was decided, many malapportioned legislatures had been operating unconstitutionally for over half a century,¹⁹⁹ meaning any failure to apply the de facto doctrine *retrospectively* would wipe out decades' worth of laws, appointments, and adjudications; the need for the doctrine was paramount. In contrast, the need for *prospective* operation of said legislatures was hotly debated,²⁰⁰ so much so that some courts denied illegal legislatures any power at all, aside from the ability to reapportion.²⁰¹ If illegal governments can be limited in one highly analogous context without disaster, it may be proper to limit them in this one as well.

Fourth, the need to closely examine the actions of gerrymandered legislatures increases after a finding of unconstitutionality. Indeed, at least theoretically, if an illegal legislature could continue to act without limitation, it could cure its own unconstitutional defect by simply making it constitutional. Although a state legislature certainly could not amend the *federal* Constitution on its own, future partisan gerrymandering decisions, in particular, may hinge on aspects of *state* constitutions subject to such modification.²⁰² If this scenario seems far-fetched, consider that over thirty state legislatures supported a resolution to amend the U.S. Constitution following *Baker v. Carr* to effectively override that opinion and preserve their power to draw malapportioned districts.²⁰³

199. See *Baker v. Carr*, 369 U.S. 186, 187 (1962) (addressing a 1901 Tennessee districting statute); *Kidd v. McCannless*, 292 S.W.2d 40, 44 (Tenn. 1956) (same).

200. See *supra* Part I.C (discussing *Baker's* approach to this problem).

201. See *supra* note 110 and accompanying text. It is important to note that while the power of illegal legislatures is hotly debated, plaintiffs' standing to challenge legislative actions usually is not. See, e.g., *Moore*, slip op. at 7–8 (noting that the illegally gerrymandered legislative defendants did not even bother to challenge the standing of the lead plaintiff—the NAACP—to bring suit to invalidate proposed constitutional amendments under state law); see also *supra* Part II.B (cataloging multiple cases where plaintiffs were explicitly or implicitly found to have standing to bring challenges to prospective legislative actions).

202. See, e.g., *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 814 (Pa. 2018) (relying on the “Free and Equal Elections Clause” in the Pennsylvania Constitution as the basis for its partisan gerrymander decision).

203. Chris Schmidt, *The Forgotten Backlash Against the Warren Court*, IIT CHICAGO-KENT C. L.: SCOTUS NOW (Dec. 30, 2014), <http://blogs.kentlaw.iit.edu/iscotus/forgotten-backlash-warren-court> [https://perma.cc/CC8H-KGBH] (noting that thirty-two of the required thirty-four states approved resolutions calling for a constitutional convention on an anti-reapportionment amendment that would have allowed “factors other than population” to be considered in at least one house of a bicameral state legislature); see also Wolf, *supra* note 158, at 327 (“These proposed

Even if an unconstitutionally gerrymandered legislature does not take steps to transform itself into a legal legislature, endless opportunities for mischief and power fixing abound. For a prime example, look no further than the voter-ID amendment proposed by the 2018 North Carolina legislature. Two years earlier, the same racially gerrymandered legislature tried to pass a voter-ID requirement that a federal court found “target[ed] African Americans with almost surgical precision,” largely because it excluded the use of IDs disproportionately held by African Americans.²⁰⁴ Because of the structure of the voter-ID amendment,²⁰⁵ this illegal legislature would once again be responsible for determining which IDs qualified for use at the polls. Only this time, it would have a state constitutional mandate behind it.

Undoubtedly, principles of necessity also counsel against throwing a gerrymandered legislature out on the street. For one, the necessity of having the governmental body tasked with redistricting fix its underlying deficiencies remains just as compelling in the gerrymandering context as in the reapportionment context. Courts uniformly held that malapportioned legislatures maintained *at least* the ability to reapportion themselves;²⁰⁶ presumably gerrymandered legislatures are entitled to the same.²⁰⁷ In addition, if gerrymandered

constitutional amendments would allow ‘the rotten boroughs to decide whether they should continue to be rotten.’” (citation omitted)).

204. N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016).

205. See *infra* note 225 and accompanying text (discussing the legislative mechanics of the North Carolina voter-ID amendment).

206. See *supra* note 100 and accompanying text.

207. See, e.g., *League of Women Voters of Pa.*, 178 A.3d at 821–22 (noting in the context of a congressional gerrymander that “the initial and preferred path of legislative and executive action . . . [would assign] primary responsibility and authority for drawing federal congressional legislative districts . . . [to] the state legislature,” but reserving the judiciary’s power to create its own districts). However, it should also be noted that even this power, which many reapportionment-era courts considered foundational, has been tempered by the times. The primary and urgent concern that compelled many reapportionment-era courts to continue to allow malapportioned legislative action was the need to have the legislature reapportion itself—otherwise the legislature would be deprived of a “means of electing a new one and ultimately bring about the destruction of the State itself.” *Kidd v. McCanless*, 292 S.W.2d 40, 44 (Tenn. 1956). Since the reapportionment era, courts have become much more comfortable with inserting themselves into the redistricting process, especially when it comes to hiring independent special masters. See *Stephenson v. Bartlett*, 562 S.E.2d 377, 384 (N.C. 2002) (“Indeed, within the context of state redistricting and reapportionment disputes, it is well within the ‘power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan.’” (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam))); *Jensen v. Wis. Elections Bd.*, 639 N.W.2d 537, 542 (Wis. 2002) (noting the Supreme Court has held that federal courts will defer consideration of redistricting disputes “where the State, through its legislative or judicial branch,

legislatures are prohibited from acting at all until new elections are held, “a potentially dangerous interregnum could result, for there would be no legislature available in an emergency.”²⁰⁸ Layered on top of these considerations is the simple observation that not all gerrymanders are created equal—some are expansive enough to place an entire legislature under a “cloud of constitutional illegitimacy,”²⁰⁹ while others are minor and may only involve a wayward district or two.²¹⁰ Therefore, the necessity of allowing continued legislative activity may be a function of a gerrymander’s size, scope, and animus.

Furthermore, although citizens’ reliance interests may be attenuated after a finding of legislative unconstitutionality, they are not extinguished. If a legislature continues to act following an adverse court decision, some citizens are guaranteed to take it at its word, judicial judgment notwithstanding. While courts have often discounted these interests in the de facto doctrine’s traditional formulation,²¹¹ they are still a part of a court’s “remedial calculus,” which must “balance chaos, third-party interests, and the overall effectiveness of the remedy with respect to the prevailing party, potential future parties, and the political branches.”²¹² Although this “calculus” becomes more difficult after a legislature is found unconstitutional, the competing interests at stake demand that courts wrestle with them to the extent that they can.²¹³ The next Section addresses the question of which postmortem

has begun to address that highly political task itself” and “that any redistricting plan judicially ‘enacted’ by a state court (just like one enacted by a state legislature) would be entitled to presumptive full-faith-and-credit legal effect in federal court”).

208. Cf. *Mann v. Davis*, 238 F. Supp. 458, 459 (E.D. Va. 1964), *aff’d sub nom. Hughes v. WMCA, Inc.*, 379 U.S. 694 (1965) (discussing the reapportionment context).

209. *Covington v. North Carolina*, 270 F. Supp. 3d 881, 884 (M.D.N.C.), *aff’d*, 137 S. Ct. 2211 (2017).

210. Cf. *Shaw v. Reno*, 509 U.S. 630, 635 (1993) (addressing a racial-gerrymandering challenge to two congressional districts in North Carolina).

211. See *supra* notes 81–84 and accompanying text (noting that because the de facto doctrine exists to safeguard the interests of those who reasonably relied on an official’s actions, the doctrine does not extend to situations in which one relies on the actions of those known to lack the authority to make them).

212. Barnett, *supra* note 125, at 534.

213. This does not imply that such actions are nonjusticiable political questions. *Baker* holds that:

Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning

acts, if any, should evade a prospective application of the de facto doctrine or related principles of equity.

B. A Framework for Prospective Actions

After a finding of unconstitutionality, the equities counseling applying or rejecting the de facto doctrine or similar savings principles have shifted. Therefore, courts should feel more comfortable “looking under the hood” and assessing the challenged acts themselves to determine their validity. Drawing on historical lessons from Part II, this Note proposes approaching sticky problems of prospective validity by considering the interplay of three variables: (1) the legal vehicle,²¹⁴ or how an act is proposed to be passed; (2) the level of involvement of the illegal governmental body;²¹⁵ and (3) the nature of the act itself, or what it purports to do.²¹⁶ Properly applied, this test should safeguard the public from particularly egregious examples of legislative overreach while largely preserving a fully functioning government. The remainder of this Section describes this test in greater detail and illustrates its hypothetical application.

With respect to the first factor, as the permanency of the legislative act increases, so should judicial scrutiny.²¹⁷ Even malapportioned legislatures were mostly allowed to pass ordinary legislation; generally, courts only stepped in when constitutional changes were implicated.²¹⁸ This makes some intuitive sense, as constitutional amendments, for example, are generally harder to undo

adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). While it is beyond the scope of this Note to give each of these categories the attention they deserve, their power is likely limited in this context: courts are constitutionally committed to judicial review of legislation; courts have hundreds of years of doctrine and standards to draw upon; courts considering such challenges are hearing cases in equity, not law; and the respect due to a coordinate branch of government is much diminished after that branch of government is found to be illegal.

214. *See supra* Part II.B.2 (describing how courts may differentiate between “ordinary” legislation and constitutional amendments, for example).

215. *See supra* notes 163–164 and accompanying text (describing a case in which the district court permitted the illegal legislature to call a constitutional convention but forbade the legislature from submitting its own constitutional amendments).

216. *See supra* Part II.B (describing how courts treat with suspicion those legislative acts that injure third parties or preserve the maintenance of illegal power).

217. *See supra* notes 152, 159 and accompanying text.

218. *See supra* notes 152, 159 and accompanying text.

than ordinary majority-based enactments.²¹⁹ If a court undoes a state legislative gerrymander, presumably a future, more representative legislature could fix suspect acts passed only by a bare majority.

This logic may not survive closer scrutiny, however. Constitutional amendments often require ratification by popular referendum, whether they are proposed in a constitutional convention, by an act of the legislature, or via citizen initiative.²²⁰ Thus, some authorities submit that even proposals submitted by the most defective authorities can be “cured” by the sovereign authority of the populace.²²¹ Others disagree, noting “the mere right to approve or disapprove a proposed constitution does not afford to the general public a voice in the formulation thereof . . . [but is instead merely] a bare right of veto.”²²² This debate may be solved by the second variable parsed from case law: the level of legislative involvement. Under this factor, while triggering a constitutional amendment may be permissible, any substantial involvement on the part of the illegal legislature may irredeemably taint the process.²²³

As an illustration, consider the two North Carolina constitutional amendments rejected by the Wake County Superior Court. The tax-cap amendment would have changed only one word in the constitution in lowering the cap from “ten” to “seven” percent.²²⁴ This amendment neither contemplated nor required further legislative action. The voter-ID amendment, on the other hand, was not a straight up-or-down vote. Instead, it would have allowed the same illegal legislature to

219. William B. Fisch, *Constitutional Referendum in the United States of America*, 54 AM. J. COMP. L. 485, 493–96 (2006) (noting that most states require a legislative supermajority to call a constitutional convention or propose an amendment; many states have lesser restrictions if the amendment is proposed by popular initiative).

220. *See id.* at 492–504 (describing the variety of ways that states deal with constitutional referendums and initiatives).

221. *West v. Carr*, 370 S.W.2d 469, 473 (Tenn. 1963) (“People who, acting under a proper resolution of the legislature, vote in favor of calling a constitutional convention are presumed to ratify the terms of the legislative call, which thereby becomes the basis of the authority delegated to the convention.” (emphases omitted) (citation omitted)); *cf.* Bonfield, *supra* note 162, at 975. (“If we accept petitions from malapportioned state legislatures as valid applications for a[] [constitutional] convention, we only permit illegitimate power to authorize Congress to initiate or trigger a process which is constituted and operated wholly independently of that illegitimate power.”).

222. *State ex rel. Smith v. Gore*, 143 S.E.2d 791, 795 (W. Va. 1965) (relying on a provision of the West Virginia Constitution requiring “equal representation” in all “appointments of representation” to require a constitutional convention use members selected from proportional districts).

223. *See supra* note 164 and accompanying text.

224. S.B. 75, 2017–18 Gen. Assemb., 2017 Sess. (N.C. 2018).

“enact general laws governing the requirements of such photographic identification” following voters’ affirmation that “photographic identification” is required for in-person voting.²²⁵ Under the second factor, the former presents few problems; the latter, however, gives a racially gerrymandered legislature previously chastised for targeting African American voters with “surgically” precise voter-ID legislation another bite at the apple, this time cloaked in constitutional authority.²²⁶

This leads us to the third variable: the nature of the act itself. Courts have consistently denied *de facto* bodies the privilege of hiding behind the doctrine’s precepts when their actions were bent towards the maintenance of illegal power—at common law, *de facto* officers could not use their office for their own gain;²²⁷ during the Civil War, actions in furtherance of the Confederacy received no *de facto* protections;²²⁸ and in the reapportionment era, attempts to constitutionalize the unconstitutional were rejected.²²⁹ When it comes to gerrymanders, courts should be most concerned by actions that seek to maintain an illegally gerrymandered body in power by perpetuating its “unrepresentative condition.” Because gerrymandering is, at its core, a tool for the entrenchment of partisan or racial power, the category of actions that perpetuate its “unrepresentative condition” may be relatively broad. Gerrymandered power may, for example, be perpetuated by voting restrictions, court packing, and more.

This is not to say that any legislation passed with partisan intent should be struck down. The danger, rather, is at its maximum when that intent is crystallized in legislation that cannot be rectified by judicial or democratic action following a resumption of representative conditions.

225. H.B. 1092, 2017–18 Gen. Assemb., 2017 Sess. (N.C. 2018).

226. This problem is attenuated by two factors. First, it is true that another, more representative legislature could enact general laws changing which photo IDs qualify for voting access without needing to amend the North Carolina Constitution. Thus, while the North Carolina legislature *is* involved in the amendment’s rollout, it is still writing in legislative pencil, not constitutional ink. However, this does not eliminate the potential problem—it just places a potential expiration date on it. Moreover, artfully chosen requirements could still depress an opposing party’s voting base enough to be determinative even in districts that are drawn to be unbiased. So although the requirements may not be truly permanent, they may persist far longer than the defectively gerrymandered legislature that allowed them to be created. Second, any ID requirements still must not conflict with the *federal* Constitution. Political persuasion, however, is not a protected class, meaning an illegal legislature could still use voter-ID legislation to disadvantage an opponent, assuming it does not trespass on other suspect classes.

227. *See supra* note 137 and accompanying text.

228. *See supra* note 146 and accompanying text.

229. *See supra* notes 158–160 and accompanying text.

To return to the North Carolina example, plaintiffs in the Wake County case argued that both the voter-ID and tax-cap amendments would disproportionately harm people of color.²³⁰ But the plaintiffs had a much stronger argument that the former was an attempt to maintain the “unrepresentative condition” than the latter; not only would enforcing a voter-ID requirement literally change the rules governing who elects legislators, but plaintiffs could also point to the 2016 Fourth Circuit decision in *NAACP v. McCrory* as smoking-gun evidence of what would transpire if the legislature was given the chance. Similarly, if the state-elections-board and judicial-vacancy amendments²³¹ had survived their public referenda, they too would have allowed the unrepresentative legislature to preserve its power long after equitable maps were restored. The tax amendment, in contrast, did not perpetuate the gerrymandered legislature’s power, even if it may have had a long-term discriminatory effect.

Under the tripartite framework proposed by this Note, courts should be most concerned about gerrymandered legislatures’ attempts to entrench their power through permanent or enduring means when they play a substantial role in crafting such means. Because the tax-cap amendment, though permanent, did not perpetuate the state legislature’s power and consisted of little more than a proposal to change one word in the constitution, it should have been upheld by the North Carolina superior court. The voter-ID amendment, on the other hand, was not only permanent but also intimately involved a racially gerrymandered legislature in the possible entrenchment of racial and political voting power. Even under the deferential standard proposed by this Note, the voter-ID amendment would have been dead on arrival.

CONCLUSION

Gerrymandering is “nothing new.”²³² Neither is the de facto officer doctrine. But in the coming years, these traditional concepts will clash in novel ways. The equitable calculus that will govern this clash is dependent on the intersection of several factors, including the alleged defect in authority, the status of the officer or government when it chose to act, the nature of the body collaterally attacked and its level

230. N.C. State Conference of the NAACP v. Moore, No. 18 CVS 9806, slip op. at 8 (Wake Cty. Super. Ct. Feb. 22, 2019).

231. See *supra* note 12 and accompanying text.

232. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019).

of involvement in the legislative process, and the nature and medium of the challenged action itself. Given these complex and overlapping considerations, courts should resist a blanket and mechanical invocation of the de facto doctrine in favor of the equitable balancing approach that lies at the doctrine's heart.

A gerrymandered legislature unmasked as such has not only lost its color of authority, but is also burdened with serious, intentionally created constitutional defects that weigh heavily against the sufferance of unfettered power. Moreover, even though widespread invalidation of *past* legislative acts would undoubtedly cause societal chaos, fears of confusion and anarchy are greatly diminished in the prospective realm. Although illegally constituted legislatures must be permitted some authority until they are replaced, courts should be particularly wary of legislative attempts to cling to power. Ultimately, the de facto officer and related savings doctrines were created to protect the public; they should not be used to entrench power at the public's expense.