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Back to the Drawing Board: Revisiting the Supreme Court's Stance on Partisan Gerrymandering

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Back to the Drawing Board: Revisiting the Supreme Court's Stance on Partisan Gerrymandering

Erratum

Law; Civil Rights and Discrimination; Election Law; Legislation; Law and Politics; Law and Race; Law and Society; State and Local Government Law

NOTES

BACK TO THE DRAWING BOARD: REVISITING THE SUPREME COURT'S STANCE ON PARTISAN GERRYMANDERING

*Robert Colton**

In the United States, state legislatures have drawn voting districts to achieve desired election results for hundreds of years. Dating back to the James Madison presidency, various legislatures and iterations of the U.S. Supreme Court have wrestled with the legal and constitutional issues that stem from the practice known as “gerrymandering.” While courts and legislatures have, at times, been successful in eliminating some of the more sinister uses of the tactic, such as racially motivated district-line drawing, gerrymandering inspired by partisan motives remains. Continual improvements in technology coupled with an increasingly divided political culture mean that partisan gerrymandering is at risk of becoming more effective than ever. As a result, the voices of individuals with political ideologies opposing those of the sitting state legislatures risk being quieted to barely audible whispers. Until this year, however, the Supreme Court had contented itself to stand idly by, firmly refusing to wade into the legal and constitutional muck that is partisan gerrymandering.

This Note explores the uses and effects of partisan gerrymandering by modern state legislatures. It then delves into the contentious history of the partisan gerrymandering question at the Supreme Court level, with special focus on a concurring opinion by Justice Kennedy in which he proposed a solution for how to handle future partisan gerrymandering issues. This Note analyzes the validity of Justice Kennedy’s solution and ultimately concludes that his proposal has sound legal and practical support and would allow courts to hold unconstitutional efforts to gerrymander along political lines.

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INTRODUCTION

In 1812, then-Massachusetts Governor and future Vice President Elbridge Gerry reluctantly redrew the district lines of his home state in advance of forthcoming senatorial elections.¹ Upon viewing Governor Gerry’s distorted districts, a cartoonist at the *Boston Gazette* coined the term “gerrymander” because he recognized a striking resemblance in the new pattern to the outline of a salamander.² Although the cartoon arguably bears little resemblance to

1. See Jennifer Davis, *Elbridge Gerry and the Monstrous Gerrymander*, AM. TREASURES LIBR. CONGRESS (Feb. 10, 2017), <https://blogs.loc.gov/law/2017/02/elbridge-gerry-and-the-monstrous-gerrymander/> [https://perma.cc/RG5F-77E5].

2. See *id.*

the amphibian, the term gerrymander was nevertheless born, and has survived for more than two centuries.

Since the days of Elbridge Gerry, gerrymandering has become increasingly sophisticated, and two main strategies have emerged for drawing districts. The first is “packing.” This method entails a state legislature redrawing district lines to fashion a single district with a disproportionate quantity of like-minded voters.³ This method effectively wastes votes; for example, instead of having three separate districts with 100 Democrats in each district, packing creates two districts with fifty Democrats in each, and one district with 200 Democrats. Through packing, Republicans may, as in the above example, outnumber Democrats in two of the three altered districts, thus giving themselves an advantage in the contest to control the legislature.⁴

The second method, called “cracking,” accomplishes the same goal as packing but in the opposite fashion. When there is a naturally occurring high population of like-minded voters in a single district, the political party in power can draw new lines to split the like-minded voters into numerous different districts, creating a slight minority in each.⁵ For example, if there are 300 Democrats in a single district, and 101 Republicans in that same district as well as two other districts, the district lines could be redrawn to place 100 Democrats in each of three districts containing 101 Republicans, causing one fewer Democrat than Republican in each of the resulting districts.

Whether by packing or cracking, the controlling political party in a state legislature can draw district lines to manipulate the proportion of opposing party constituents in any given district, thereby maximizing the chances its own party has to win the majority of districts in the state.⁶

As gerrymandering methodology has become more refined, the U.S. Supreme Court has had occasion to hear a number of cases regarding the constitutionality of different redistricting plans.⁷ However, the Court has failed to establish a majority view of partisan gerrymandering in the past three decades.⁸ In recent years, the question of how to handle gerrymandering has become increasingly more pressing, particularly as district lines have been drawn with an amplified emphasis on political affiliation.⁹

In 2004, the current trajectory of partisan gerrymandering was established in *Vieth v. Jubelirer*,¹⁰ in which the Court ruled that partisan gerrymandering

3. See Michael Weaver, Note, *Uncertainty Maintained: The Split Decision over Partisan Gerrymanders in Vieth v. Jubelirer*, 36 LOY. U. CHI. L.J. 1273, 1279 (2005).

4. *Id.*

5. *Id.*

6. See *id.* at 1279–80 (“Regardless of the method employed, the outcome of gerrymandering is to draw boundaries in such a way that the groups opposing the new boundaries are concentrated so as to minimize their representation and influence.”).

7. See *infra* Part II.A.

8. See *infra* Part II.A.

9. See *infra* Part III.A.

10. 541 U.S. 267 (2004).

is not justiciable.¹¹ The decision was split, with Chief Justice William Rehnquist and Justices Antonin Scalia, Sandra Day O'Connor, and Clarence Thomas making up the plurality.¹² Writing or joining dissenting opinions were Justices John Paul Stevens, Ruth Bader Ginsburg, David Souter, and Stephen Breyer.¹³ Although some names have changed over the years, the same ideological divisions marked the Court's most recent gerrymandering case, decided in 2015.¹⁴ One Justice, however, attempted to bridge the gap between the two distinct factions on the Court. Justice Kennedy's First Amendment solution,¹⁵ hiding in plain sight since 2004, could be the country's path to settling the law on partisan gerrymandering.

This Note explores the past, present, and future of partisan gerrymandering in the United States by analyzing the lengthy case history of the issue at the Supreme Court, an overlooked solution to the gerrymandering problem, and the newest challenge to the current partisan gerrymandering rule. Part I examines the harsh reality that modern American voters face due to partisan gerrymandering and dedicates special attention to troubling electoral patterns in recent elections and the practical effects gerrymandering has had on citizens' decisions to cast ballots. Part II focuses on the long and contentious legal history surrounding partisan gerrymandering. This Part examines the issue from congressional efforts in the nineteenth century, to the massive change in judicial responsibility in 2004, to the most recent potential shift in the Court's governing principles in 2015. Part II then examines Justice Kennedy's proposed solution and assesses its viability. Finally, Part III applies Justice Kennedy's proposal to the gerrymandering problem and discusses the newest partisan gerrymandering case to be considered by the Court.

I. GERRYMANDERING IN MODERN AMERICA

The foundation for legislative control over state redistricting is located in the U.S. Constitution, which states, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."¹⁶ Although this Clause does allow for Congress to intercede and overrule the state legislature, such intervention has never occurred.¹⁷

There are numerous lawful methods state legislatures may use to redraw district lines. Traditionally, districts were required to be contiguous, compact, and, to the extent possible, contain an equal number of

11. *Id.* at 281 (plurality opinion).

12. *See id.* at 271.

13. *See id.* at 317 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting).

14. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2659 (2015).

15. *See Vieth*, 541 U.S. at 314–16 (Kennedy, J., concurring); *infra* Part II.C.

16. U.S. CONST. art. I, § 4, cl. 1.

17. *See* Niel Franzese, Comment, *The Open Our Democracy Act: A Proposal for Effective Election Reform*, 48 CONN. L. REV. 263, 285 (2015).

inhabitants.¹⁸ Those norms have since evolved, and today the only constitutional requirement for redistricting is the “one person, one vote” standard.¹⁹ While redistricting often includes geographic contiguity, geographic compactness, preserving communities of interest, and nesting,²⁰ over the years there have been two impermissible redistricting motivations that have invited judicial scrutiny. The first, racially motivated gerrymandering, is generally the domain of the Supreme Court and is not the focus of this Note.²¹ The second, politically motivated (partisan) gerrymandering, by contrast, requires further analysis.

A. *Why Should We Care About Gerrymandering?*

To explain the severity of partisan gerrymandering, NBC News correspondent Tom Brokaw once said:

The fact is the system is rigged. . . . Seventy-five percent of the congressmen come from gerrymandered districts in which they're bulletproof. They only play to one constituency. There are no swing states. They don't go home and have to prove their case, because they've got a choir back home. And that's a huge part of the problem here.²²

While lack of responsibility is a part of the problem, the rigged system itself is also a significant public policy issue: an elected official shielded from dissenting opinions by the manipulation of electoral districts has little incentive to represent the whole of his or her electorate.

Due to inaction, the judicial system has arguably become part of the problem as well. By maintaining relative silence on the issue of gerrymandering, the Court has effectively washed its hands of the problem.²³ Some legislatures have proved capable of drawing equitable district lines.²⁴ But others have not demonstrated a balanced response to the pressures of gerrymandering, and the Court has appeared content to sit idly by instead of holding legislatures accountable.²⁵ The Court's silence may lead one to believe gerrymandering is not as severe as portrayed by Mr. Brokaw, but facts and figures from recent elections substantiate his concern.

18. See *Vieth*, 541 U.S. at 276 (plurality opinion).

19. See Ethan Weiss, Comment, *Partisan Gerrymandering and the Elusive Standard*, 53 SANTA CLARA L. REV. 693, 697 (2013).

20. See *id.*

21. See *infra* Part II.A.2.

22. Donovan Slack, *Brokaw: 'The System Is Rigged,' POLITICO* (Dec. 30, 2012, 11:34 AM), <http://www.politico.com/blogs/politico-now/2012/12/brokaw-the-system-is-rigged-152993> [<https://perma.cc/5SRR-CVFE>] (offering Brokaw's analysis as to what is wrong with Washington on *Meet the Press*).

23. See *Vieth*, 541 U.S. at 281 (concluding that partisan gerrymandering ought to be nonjusticiable).

24. See *infra* notes 129–32 and accompanying text.

25. See *infra* Part II.B.

1. Hard Numbers from Recent Elections

One way to identify political gerrymandering is to examine the popular vote and the number of seats achieved in the U.S. House of Representatives. A disparity between the overall vote for a given party in a particular state and the proportion of seats that party obtains in the House is not in and of itself cause for alarm; it is likely that no one district is a perfect representation of the state as a whole.²⁶ One would expect these disparities to be minor, yet that is often not the case in the United States, which has a history rife with patterns of political disparity—an indication that gerrymandering has been at play.²⁷

From the end of World War II through 1994, the Democrats enjoyed a disproportionate number of seats in the House of Representatives compared to their popular support.²⁸ The pendulum began to swing, however, with the Republican Revolution of 1994.²⁹ In every election since, the Republican Party has earned more seats in the House of Representatives than their popular vote tally would predict.³⁰ This trend has increased in recent years, with the 6 percent gap achieved by Republicans in 2012 representing the largest disparity between the popular vote and House seats won since the Democrats' win in the 1992 election.³¹ In fact, the 2012 election saw nearly 1.6 million more votes cast for Democratic candidates than were cast for Republican candidates in races for House seats.³² However, when the dust settled, Republicans maintained a thirty-four-seat advantage in the House.³³

This imbalance was no accident. The Republican State Leadership Committee proudly broadcast its winning strategy in an article headlined “How a Strategy of Targeting State Legislative Races in 2010 Led to a Republican U.S. House Majority in 2013.”³⁴

Both Democrats and Republicans have successfully used redistricting to achieve electoral victories disproportionate to the popular vote.³⁵ In 2002, 356 of the 435 total seats in the House were decided by margins greater than 20 percent, which highlights how noncompetitive a redistricting plan can

26. See *Vieth*, 541 U.S. at 289 (“In any winner-take-all district system, there can be no guarantee, no matter how the district lines are drawn, that a majority of party votes statewide will produce a majority of seats for that party.”).

27. See Nathan S. Catanese, Note, *Gerrymandered Gridlock: Addressing the Hazardous Impact of Partisan Redistricting*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 323, 331 (2014).

28. See *id.*

29. See *id.*

30. See *id.*

31. See *id.*

32. See OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 6, 2012, at 73 (2013) (showing the total number of votes cast for each political party).

33. See *id.* at 74.

34. Admin, *2012 REDMAP Summary Report*, REDISTRICTING MAJORITY PROJECT (Jan. 4, 2013, 9:23 AM), <http://www.redistrictingmajorityproject.com/> [<https://perma.cc/W4C9-567D>].

35. See Franzese, *supra* note 17, at 286. Wide margins of victory and strong incumbent success rates in particular demonstrate the power of redistricting.

make an election.³⁶ In all House races, only four incumbents who were pitted against nonincumbents suffered defeat in 2002.³⁷ Two years later, in 2004, incumbent success rates exceeded 98 percent for the fourth consecutive election.³⁸

On a micro level, six states stand out for their gerrymandering-induced electoral anomalies. In Florida, 40 percent of voters are registered Democrats and 36 percent are registered Republicans.³⁹ Yet in 2014, of the 160 total seats in the state legislature, Republicans occupied 108.⁴⁰ This discrepancy between registered Democrats and seats occupied by Democrats has a long history in Florida. Before 2016, the state voted Democrat in four of the six previous presidential elections.⁴¹ But in 2012, Democrats won only twenty-three of the forty-seven available seats, even though they tallied better than 120,000 more votes than Republican candidates in contested races and 52 percent of the overall popular vote.⁴²

Pennsylvania also demonstrates the effects of gerrymandering. In 2012, voters cast 2,701,820 votes for Democrats and 2,626,995 votes for Republicans.⁴³ Nevertheless, only five Democratic candidates were elected to Congress compared to thirteen Republicans.⁴⁴ The 2014 election was similarly affected by gerrymandering. Fifty percent of the electorate were registered Democrats compared to just 37 percent Republicans, but the state legislature was nevertheless composed of 149 Republicans and only 104 Democrats.⁴⁵ The 2014 election showed similar results in Kentucky, Louisiana, North Carolina, and West Virginia.⁴⁶

36. *See id.*

37. *Id.*

38. *Id.*

39. Mark Blumenthal & Ariel Edwards-Levy, *HUFFPOLLSTER: A State-By-State Guide to Party Registration*, HUFFINGTON POST (May 27, 2014, 5:37 PM), http://www.huffingtonpost.com/2014/05/27/state-party-registration_n_5399977.html [<https://perma.cc/SFK8-F7Y6>].

40. *See 2014 State & Legislative Partisan Composition*, NAT'L CONF. ST. LEGISLATURES (Nov. 19, 2014, 10:00 AM) http://www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_2014_Nov19_10am.pdf [<https://perma.cc/T73A-ZD7B>].

41. *See* Devon Ombres, *The Recent History of Gerrymandering in Florida: Revitalizing Davis v. Bandemer and Florida's Constitutional Requirements on Redistricting*, 20 WASH. & LEE J.C.R. & SOC. JUST. 297, 300–01 (2014).

42. *See id.* at 323.

43. Catanese, *supra* note 27, at 329.

44. *Id.*

45. *See 2014 State & Legislative Partisan Composition*, *supra* note 40; Blumenthal & Edwards-Levy, *supra* note 39.

46. Blumenthal & Edwards-Levy, *supra* note 39. In Kentucky, 54 percent of the population registered as Democrats and 39 percent as Republicans, yet 52 percent of the state legislature is Republican. *Id.* In Louisiana, 59 percent of the Louisiana state legislature is Republican, despite 19 percent more voters registering as Democrats than as Republicans. *Id.* North Carolina features a state legislature that is 63.5 percent Republican even though 43 percent of its population is Democratic, with 31 percent Republican. *Id.* Finally, 61 percent of the state legislature of West Virginia is Republican despite a full 50 percent of its electorate being registered as Democrats and only 29 percent as Republicans. *Id.*

2. Practical Effects on Voting Resulting from Gerrymandering

Numbers aside, gerrymandering has real, practical effects. In a competitive race, people are more likely to vote.⁴⁷ Gerrymandering, however, renders races less competitive, making a person's vote essentially moot even years before Election Day.⁴⁸ A would-be voter who suspects years in advance that casting a vote for a particular political party will be for naught is likely to experience a decreased incentive to express a political choice.⁴⁹ The perceived futility of voting in gerrymandered districts has inspired voters to bring petitions against gerrymandering.⁵⁰

Given that the general election is often a foregone conclusion, the only meaningful choice many voters have is in primary elections.⁵¹ However, in some states, primary elections are only open to registered members of a party.⁵² As such, would-be independent voters must register with one of the dominant political parties in order to have any say in who may eventually hold the public office.⁵³ With the primary election often the only contest that matters, more partisan candidates, who often fare better in primaries where they do not have to appeal to the median voter, are never forced to engage seriously with the opposing party.⁵⁴

These effects of partisan gerrymandering could well be heightened in future elections. Unlike the state legislatures in Elbridge Gerry's day, today's state legislatures have the benefit of sophisticated computer programs to create precise lines to maximize packing and cracking techniques.⁵⁵ This new gerrymandering technology allows mapmakers to learn an area's political leanings and adapt that information to create district lines in whatever manner they see fit.⁵⁶ The programs not only allow mapmakers to increase the speed with which they can draw new district lines by creating

47. See Catanese, *supra* note 27, at 340.

48. See *id.*

49. See *id.* (“[Gerrymandering] can have the practical consequence of rendering a person’s vote pointless. . . . For instance, if someone lives in a congressional district in which the results of an election, based on the partisan make-up of the district, are easily predictable, a voter may not have an incentive to vote.”).

50. See Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263, 1271 (2016) (explaining that litigants bring cases because gerrymandering results in candidates who are not representative of the population’s views).

51. See *id.* at 1272 (“[T]he noncompetitive nature of the general election leaves the primary election as the only avenue for voters to affect their representation.”).

52. *Primaries*, FAIRVOTE, http://www.fairvote.org/primaries#open_and_closed_primaries/ [https://perma.cc/LK26-E4BE] (last visited Nov. 19, 2017) (“In a closed primary, only voters registered with a given party can vote in that party’s primary.”).

53. See Wang, *supra* note 50, at 1272.

54. See *Primaries*, *supra* note 52 (“[C]ritics claim that closed primaries can exacerbate the radicalization that often occurs at the primary stage, when candidates must cater to their party’s ‘base’ rather than the political center.”).

55. See Richard E. Levy, *The Nonpartisanship Principle*, 25 KAN. J.L. & PUB. POL’Y 377, 388–89 (2016); Wang, *supra* note 50, at 1267.

56. See Catanese, *supra* note 27, at 333.

massive databases with detailed voter-registration information, but they also allow their calculations to be sensitive to recent voting trends.⁵⁷

Gerrymandered districts often result in representatives who are responsive neither to their constituents nor to shifts in public opinion.⁵⁸ This led Justice Stevens to write that “ample evidence demonstrates that many of today’s congressional representatives owe their election not to ‘the People of the several states’ but to the mercy of state legislatures.”⁵⁹

B. The Glimmer of Hope for a Partisan Gerrymandering Resolution

While the Supreme Court has largely resisted addressing partisan gerrymandering, Justice Kennedy has attempted to find a middle ground between the ideological factions of the Court. In his concurring opinion in *Vieth*,⁶⁰ Justice Kennedy argued that “in another case a standard might emerge that suitably demonstrates how an apportionment’s *de facto* incorporation of partisan classifications burdens rights of fair and effective representation.”⁶¹

In Justice Kennedy’s view, the path to such a suitable standard is through the First Amendment:

First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters’ representational rights.⁶²

The “First Amendment interest” identified by Justice Kennedy is directly involved in partisan gerrymandering because the interest includes “not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.”⁶³ Justice Kennedy, however, did not convince his fellow Justices of his First Amendment solution and none joined his concurring opinion.⁶⁴ Now, more than a decade after Justice Kennedy identified the First Amendment interest, a recent decision may provide the opportunity to revisit his proposed solution.⁶⁵

57. *See id.*

58. *See* Wang, *supra* note 50, at 1320–21.

59. *Vieth v. Jubelirer*, 541 U.S. 267, 331 n.24 (2004) (Stevens, J., dissenting) (quoting Note, *A New Map: Partisan Gerrymandering as a Federalism Injury*, 117 HARV. L. REV. 1196, 1202 (2004)).

60. *See infra* Part II.A.2.

61. *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring).

62. *Id.* at 314.

63. *Id.*

64. *Id.* at 306.

65. *See infra* Part II.A.3.

II. THE CONTENTIOUS REALITY OF
PARTISAN GERRYMANDERING
AT THE SUPREME COURT

Turning to how the Supreme Court has handled cases of partisan gerrymandering and how partisan gerrymandering (which is not per se unconstitutional) differs from racial gerrymandering (which is unconstitutional), Part II refines our understanding of the terms and consequences of the gerrymandering debate.

A. *Setting the Stage:*
A Brief Judicial History of Gerrymandering

Before turning to how and why the Supreme Court has characterized partisan gerrymandering as nonjusticiable, even though the Court has held racial gerrymandering is justiciable, it is instructive to first examine how the Court has generally handled issues concerning gerrymandering.

1. The Early History of Gerrymandering

Before the Supreme Court dealt with gerrymandering, Congress took incremental steps toward mitigating the problem. Beginning in 1842, Congress mandated that districts have a single representative and be contiguous.⁶⁶ In 1872, Congress passed a statute that required districts, to the extent possible, to have an equal number of constituents.⁶⁷

The Supreme Court first considered gerrymandering in 1962 in *Baker v. Carr*.⁶⁸ The Court split six to two, ruled that redistricting was a justiciable issue, and outlined a six-factor test that included the “one person, one vote” standard as well as the requirement that each district have an equal population.⁶⁹ In 1973, the Court again addressed partisan gerrymandering in *Gaffney v. Cummings*.⁷⁰ In *Gaffney*, the Court upheld a Connecticut redistricting plan, but the Justices left open the possibility that certain plans

66. See 1842 Apportionment Act, ch. XLVII, § 2, 5 Stat. 491, 491 (1842) (“[A]pportionment shall be elected by districts composed of contiguous territory equal in number to the number of Representatives to which said State may be entitled, no one district electing more than one Representative.”); Catanese, *supra* note 27, at 326; Justin Levitt, *Where Are the Lines Drawn?*, ALL ABOUT REDISTRICTING, <http://redistricting.ils.edu/where-state.php> [<https://perma.cc/3HUW-TRS9>] (last visited Nov. 17, 2017) (“A district is contiguous if you can travel from any point in the district to any other point in the district without crossing the district’s boundary. Put differently, all portions of the district are physically adjacent.”).

67. See Catanese, *supra* note 27, at 326.

68. 369 U.S. 186 (1962).

69. *Id.* at 208 (explaining that a “citizen’s right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution” with regard to dilution by a false vote tally, a refusal to count votes from select precincts, or by stuffing the ballot box); Franzese, *supra* note 17, at 287.

70. 412 U.S. 735 (1973).

may be unconstitutional if the motivation for redistricting was a desire for political advancement.⁷¹

A more concrete rule concerning partisan gerrymandering was established in 1986 in *Davis v. Bandemer*.⁷² Although the redistricting plan in question was not declared unconstitutional, the Court ruled, for the first time, that partisan gerrymandering was justiciable.⁷³ The Court explained that a challenge to partisan gerrymandering could be successful if a plaintiff was able to show that the state legislature (1) intentionally discriminated against a certain group and (2) utilized gerrymandering in such a way as to cause a discriminatory effect.⁷⁴ Although the Court's majority agreed that partisan gerrymandering was justiciable, *Bandemer* was nevertheless a fractured decision. While a plurality of Justices favored expanding the intent-effect standard, all disagreed over the standard the Court should adopt.⁷⁵ Justice O'Connor wrote a concurring opinion questioning the justiciability of partisan gerrymandering altogether.⁷⁶ While appearing to settle the justiciability of partisan gerrymandering, *Bandemer* ultimately left lower courts with more questions than answers.⁷⁷

2. The Controlling Law: *Vieth v. Jubelirer*

In 2004, *Vieth* marked the end of the *Bandemer* standard.⁷⁸ In *Vieth*, Justice Scalia, writing for a plurality of the Court, overruled *Bandemer* and framed the issue of partisan gerrymandering in the manner we think of it today.⁷⁹ However, the end of the *Bandemer* standard did not mark the beginning of a clear standard on the issue of partisan gerrymandering. In a fractured opinion that did not muster support from a majority of the Justices and spawned a number of separate concurring and dissenting opinions, the only point on which the Justices did agree was that the *Bandemer* standard needed serious change.⁸⁰

71. *See id.* at 754 (“What is done in so arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment.”).

72. 478 U.S. 109 (1986).

73. *Id.* at 125 (“As *Gaffney* demonstrates, that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability.”).

74. *Id.* at 127.

75. *See Weiss, supra* note 19, at 699.

76. *See Bandemer*, 478 U.S. at 144 (O'Connor, J., concurring) (“I would hold that the partisan gerrymandering claims of major political parties raise a nonjusticiable political question.”).

77. *See Weiss, supra* note 19, at 699–700 (“[T]here was only one instance where a court actually found a cognizable unlawful partisan gerrymander under *Bandemer*. Other than this one anomaly, *Bandemer* proved an inapplicable standard.”).

78. *See Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion) (“Eighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application.”).

79. *See id.*

80. *See generally id.* Each of the opinions authored in *Vieth* offered different solutions on how to either change or improve *Bandemer*.

Suppose you learn that New York draws its district lines for the express purpose of diminishing the strength of the votes of African American voters. Odds are that you would get that heavy feeling in your stomach, you would shake your head in some combination of surprise and disgust, and you may even take to Twitter to express your indignation.

Now imagine that New York draws its district lines not to diminish the strength of African American votes but rather to diminish the strength of *Republican* votes. This iteration may not gnaw at your insides in the same way. Why, though, should it matter which class of citizen is being targeted?

Vieth implicitly raised this very issue and the plurality, comprised of Chief Justice Rehnquist and Associate Justices Scalia, O'Connor, and Thomas, maintained that there is an inherent difference between partisan gerrymandering and racial gerrymandering.⁸¹ Although the Court had previously found a workable standard for racial gerrymandering, the plurality believed that the same standard could not be used for partisan gerrymandering.⁸² As such, the plurality held that "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged [since *Bandemer*]. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided."⁸³

For the plurality, neither the plaintiff's predominant-effect test nor the litigant's intent test was sufficient to make the issue justiciable.⁸⁴ According to Justice Scalia, although a predominant intent may be feasible with regard to racial gerrymandering,⁸⁵ it is not feasible with regard to partisan gerrymandering because "[p]olitical affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line."⁸⁶ The plurality further noted that "[t]hese facts make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy."⁸⁷

Indeed, there is a statutory basis for the Court's hard stance on racial gerrymandering that is not present in partisan gerrymandering.⁸⁸ The Voting Rights Act of 1965 explicitly states that no voting procedure should be applied that denies or abridges the right of an American citizen to vote on the basis of race or color.⁸⁹ The Court has invoked this statute in part when explaining why there is a difference between drawing lines to disenfranchise

81. *See id.* at 287 ("[A] person's politics is rarely as readily discernible—and *never* as permanently discernible—as a person's race.").

82. *See id.* at 287–90.

83. *Id.* at 281.

84. *See id.* at 284–85; *see also* Weiss, *supra* note 19, at 701.

85. *See Vieth*, 541 U.S. at 285 ("[A]pplying a 'predominant intent' test to *racial* gerrymandering is easier and less disruptive.").

86. *Id.* at 287.

87. *Id.* (citing *Davis v. Bandemer*, 478 U.S. 109, 156 (1986) (O'Connor, J., concurring)).

88. *See* 52 U.S.C. § 10301 (2012).

89. *Id.*

racial or ethnic minority groups versus doing so to disenfranchise on the basis of political affiliation.⁹⁰

The Court has consistently held that districting based on race is unconstitutional,⁹¹ rejecting any attempt to draw lines where the only conceivable purpose is to segregate voters by race.⁹² Similarly, it has been established that gerrymandering is unconstitutional where race—and not other principles—is the dominant rationale for drawing district lines.⁹³ Yet the plurality declined to apply the judicial history surrounding racial gerrymandering to partisan gerrymandering.⁹⁴

Justice Kennedy concurred with the plurality, agreeing that the plaintiffs had failed to establish a claim, and thus giving the Court the five votes needed to overrule *Bandemer*.⁹⁵ He did not, however, share the plurality's analysis of the distinction between racial and partisan gerrymandering, nor did he agree with the plurality that there could never be a workable standard to make partisan gerrymandering justiciable.⁹⁶

Justice Stevens was the first of the dissenting opinions in *Vieth*.⁹⁷ In this dissent, which no other Justice joined, he stated that there should not be a distinction drawn between racial gerrymandering and partisan gerrymandering:

Gerrymandering always involves the drawing of district boundaries to maximize the voting strength of the dominant political faction and to minimize the strength of one or more groups of opponents. . . . It follows that the standards that enable courts to identify and redress a racial gerrymander could also perform the same function for other species of gerrymanders.⁹⁸

According to Justice Stevens, race can be a factor in assessing the district lines but cannot solely dictate the outcome of the districting process.⁹⁹ He is of the belief that partisanship should also be treated in a similar fashion.¹⁰⁰ Much like Justice Kennedy's opinion, no other Justice joined in Justice Stevens's opinion.

Justice Souter, in a dissent joined by Justice Ginsburg, wrote that a new rule should replace the ineffective *Bandemer* standard.¹⁰¹ Justice Souter's new standard required (1) intent, (2) proof that the plaintiff was in a cohesive political group, (3) proof that the district was drawn against traditional

90. See *Vieth*, 541 U.S. at 286–87.

91. See *id.* at 286 (“[T]he purpose of segregating voters on the basis of race is not a lawful one . . .”).

92. See *Shaw v. Reno*, 509 U.S. 630, 646–47 (1993).

93. See *Miller v. Johnson*, 515 U.S. 900, 913 (1995).

94. See *Vieth*, 541 U.S. at 287.

95. See *id.* at 315–17 (Kennedy, J., concurring).

96. See *id.* at 306; *supra* Part I.B.

97. See *Vieth*, 541 U.S. at 317 (Stevens, J., dissenting).

98. *Id.* at 335–36.

99. *Id.* at 336.

100. *Id.* (“[P]artisanship [can] be a permissible consideration in drawing district lines, so long as it does not predominate.”).

101. *Id.* at 345–50 (Souter, J., dissenting).

criteria, (4) a correlation between drawing and political group, and (5) a proposal for a better district line.¹⁰² This standard was not, however, accepted by the other seven Justices.

Finally, Justice Breyer argued that, though partisan gerrymandering sometimes serves no plausible purpose, it could nevertheless be acceptable in some cases and thus cannot be summarily dismissed.¹⁰³

3. Threats to *Vieth*

The 2006 case *League of United Latin American Citizens v. Perry* (*LULAC*)¹⁰⁴ again dealt with the gerrymandering question. In *LULAC*, the Court, though once again thoroughly divided, upheld *Vieth*.¹⁰⁵ Justice Kennedy, writing for the majority of the Court with respect to just two parts of his opinion, declined to address the broader justiciability question and instead focused on whether the standard proposed by the League of United Latin American Citizens (*LULAC*) was workable.¹⁰⁶ He rejected the plaintiff's standard and wrote that the "sole-intent" standard lacked a showing that there was an actual burden to *LULAC* and that the proposed symmetry standard—which compared results of an election to the hypothetical scenario where the parties' vote shares were reversed—failed to show "how much partisan dominance is too much."¹⁰⁷

Justice Kennedy did, however, explicitly outline the standard necessary for partisan gerrymandering to be ruled unconstitutional. He wrote that "a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do what appellants' sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants' representational rights."¹⁰⁸

In multiple dissents, Justices Stevens, Breyer, and Souter once again argued for the justiciability of partisan gerrymandering.¹⁰⁹ And, yet again, they could not agree with each other on a governing standard: Justice Breyer joined Justice Stevens only in part, and Justice Souter was once again only supported by Justice Ginsburg.¹¹⁰

In 2015, Justice Ginsburg reignited conversation on partisan gerrymandering in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.¹¹¹ This case, unlike *Vieth* and *LULAC*, concerned

102. *See id.*; *see also* Weiss, *supra* note 19, at 702 (outlining the aspects of Justices Souter and Ginsburg's plan, which they believed should replace *Bandemer*).

103. *See Vieth*, 541 U.S. at 355 (Breyer, J., dissenting) ("[P]ure politics often helps to secure constitutionally important democratic objectives. But sometimes it does not. Sometimes purely political 'gerrymandering' will fail to advance any plausible democratic objective while simultaneously threatening serious democratic harm.").

104. 548 U.S. 399 (2006).

105. *Id.* at 410.

106. *See id.* at 414.

107. *Id.* at 418–20; *see also* Weiss, *supra* note 19, at 704–05.

108. *LULAC*, 548 U.S. at 418.

109. *See id.* at 447, 483; *see also* Weiss, *supra* note 19, at 705.

110. *See LULAC*, 548 U.S. at 447, 483.

111. 135 S. Ct. 2652 (2015).

the ability of an *independent commission* to take over the redistricting process, thus seemingly obviating partisan gerrymandering concerns.¹¹² Justice Ginsburg, adopting language from Kennedy's *Vieth* concurrence, stated, "[P]artisan gerrymanders,' this Court has recognized, '[are incompatible] with democratic principles.'"¹¹³

Although the question of justiciability was not central to the decision, *Arizona Independent Redistricting Commission* was a significant setback for supporters of partisan gerrymandering. Finding that independent commissions were constitutional, the Court effectively took district-drawing power away from the Arizona state legislature.¹¹⁴ That Justice Kennedy joined the four liberal justices in the majority opinion on a partisan gerrymandering issue may foreshadow a majority decision on the justiciability of partisan gerrymandering this term.¹¹⁵

B. Weighing the Court's Views on Gerrymandering Justiciability

Having described the divide along ideological lines at the Supreme Court with regard to partisan gerrymandering, the question remains: Why, exactly, does an ideological split exist?

1. The Argument That Partisan Gerrymandering Is Nonjusticiable

In addition to the racial gerrymandering argument,¹¹⁶ Justice Scalia argued that a ban on partisan gerrymandering would be akin to a standard that says groups have a right to proportional representation.¹¹⁷ "[T]he Constitution contains no such principle. It guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. It nowhere says that . . . Republicans or Democrats . . . must be accorded political strength proportionate to their numbers."¹¹⁸

Justice Scalia points to Article 1, Section 4 of the Constitution, the so-called Time, Place and Manner Clause, to justify his argument that the Court should stay out of partisan gerrymandering matters.¹¹⁹ Section 4, however, also states that "Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."¹²⁰ Therefore, absent a Fourteenth Amendment discrimination issue, it is arguable that Congress has a responsibility to stem the tide of partisan gerrymanders, even

112. *See id.* at 2658.

113. *Id.* (alterations in original) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (Kennedy, J., concurring)).

114. *Id.* at 2659 (affirming the district court's dismissal of the Arizona State Legislature's complaint).

115. *See infra* Part III.E.

116. *See supra* Part II.A.2.

117. *See Vieth*, 541 U.S. at 288 (plurality opinion).

118. *Id.*

119. U.S. CONST. art. I, § 4, cl. 1.

120. *Id.*

though such power has never been used before.¹²¹ Support for that notion can be found in *Wesberry v. Sanders*,¹²² which established that judicial intervention is appropriate if a state legislature redistricts to debase voting power,¹²³ thus empowering the judiciary to be an active participant in the outcome of partisan gerrymandering.

Article 1, Section 5 further militates against judicial involvement, as it gives each house of Congress the power to judge its own elections.¹²⁴ In the past, however, this level of autonomy has not been afforded to Congress. In *Powell v. McCormack*,¹²⁵ the Court established boundaries within which Congress must operate when judging its elections.¹²⁶ This ruling could function as the opportunity needed for the Court to overcome a Section 5 challenge by allowing intervention when a legislature redistricts to disadvantage a political party.¹²⁷

2. The Court in a Passive Role

Having discussed Justice Scalia's stance on the Court's relationship with partisan gerrymandering, the pertinent question shifts to the effects of this stance, including how states have responded to gerrymandering in the Court's absence and to what extent gerrymandering actually causes a problem. While the Supreme Court has remained deadlocked in deciding how to handle partisan gerrymandering, some states have taken it upon themselves to tackle the issue head-on in the absence of judicial intervention.¹²⁸

California, for instance, has approved an independent commission to draw district lines.¹²⁹ The commission comprises three registered Democrats, three registered Republicans, and two members who are either unregistered or affiliated with a minor party.¹³⁰ The early returns on the commission are good for California, as four seats changed parties in the 2012 election—the first with the new commission—as compared to the one seat that had changed over the previous ten years.¹³¹ Like California, Washington, Idaho, and

121. *See supra* note 17 and accompanying text.

122. 376 U.S. 1 (1964).

123. *See id.* at 7–8 (arguing that the framers of the Constitution could not have meant for the strength of voters' ballots to be dependent on what district the voters belonged to, and to say otherwise "would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People,' a principle tenaciously fought for and established at the Constitutional Convention").

124. U.S. CONST. art. I, § 5.

125. 395 U.S. 486 (1969).

126. *Id.* at 548 ("[W]e have concluded that Art. I, § 5, is at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution. Therefore, the 'textual commitment' formulation of the political question doctrine does not bar federal courts from adjudicating petitioners' claims.").

127. *See Weiss, supra* note 19, at 710–11.

128. *See Catanese, supra* note 27, at 326–27.

129. *See id.* at 326.

130. *Id.* at 343.

131. *Id.* at 344.

Arizona have all instituted independent commissions to advance similar plans.¹³²

Iowa has similarly made strides in curbing partisan gerrymandering. There, a nonpartisan legislative services agency draws the district lines and presents the map to the state legislature for approval.¹³³ Iowa also has specific laws for how lines must be drawn. For example, counties cannot be divided, districts should be compact, and population size must be within 1 percent of the ideal population size as determined by the state.¹³⁴

Although there is some evidence that gerrymandering is to blame for lopsided election results, there is also evidence that it is not the only culprit. Voters have a tendency to live in politically segregated neighborhoods.¹³⁵ Democratic voters, for example, are more likely to settle in densely populated urban areas,¹³⁶ while Republican voters are likely to settle in more rural areas with low population density.¹³⁷ There is also some evidence that gerrymandering-related problems wane after the first election in the cycle and continue to lessen as time extends further from the date of the last redrawing.¹³⁸

Recent studies have demonstrated that gerrymandering is not to blame for the current polarization in politics.¹³⁹ Indeed, some studies show that the Senate has become equally as polarized as the House of Representatives.¹⁴⁰ The implication here is that the polarization in the House cannot be the result of gerrymandered district lines because Senators are elected by the state as a whole and not by allegedly unfair districts. Studies also show that polarization in the House is not believed to be the cause of the polarization in the Senate, further distancing the connection between polarization and gerrymandering.¹⁴¹

C. Hedging Against the Nonjusticiable Ruling: Justice Kennedy's First Amendment Solution

The counterpoint to Justice Scalia's hard line on the justiciability of partisan gerrymandering is Justice Kennedy's concurrence in *Vieth*.¹⁴² The Supreme Court has consistently left the door ajar on determining whether partisan gerrymandering is justiciable. Justice Kennedy, the swing vote in *Vieth* and the author of the majority opinion in *LULAC*, was not persuaded by the standards proposed in those cases, yet he has consistently written that

132. *See id.*

133. *See id.*

134. *Id.*

135. *See* Wang, *supra* note 50, at 1267–68.

136. *See id.*

137. *Id.*

138. *See id.* at 1268.

139. *See* Franzese, *supra* note 17, at 291 (“Current studies suggest that gerrymandering is not an important cause of polarization . . .”).

140. *See id.*

141. *Id.*

142. *See supra* Part I.B.

he believed a standard could exist.¹⁴³ Given Kennedy's status as the swing vote, the viability of his First Amendment suggestion—specifically the freedoms of association and speech—should be considered by future plaintiffs.

Justice Kennedy's solution has pros and cons. That political affiliation, unlike ethnicity or gender, is easily changeable supports the contention that political affiliation falls under the umbrella of association or speech.¹⁴⁴ The Court has previously utilized the First Amendment to prevent discrimination against political parties.¹⁴⁵ It has leaned on the First Amendment to ensure that parties announce their candidates at the same time as one another to alleviate the burden on the freedom of association.¹⁴⁶ Similarly, the First Amendment is invoked when making employment decisions based on political affiliation.¹⁴⁷

Even so, Justice Scalia opposed the idea of depending upon the First Amendment in *Vieth*.¹⁴⁸ According to Scalia, if a First Amendment claim were to be sustained, it “would render unlawful *all* consideration of political affiliation in districting, just as it renders unlawful *all* consideration of political affiliation in hiring for non-policy-level government jobs.”¹⁴⁹ For Scalia, the First Amendment requires not the equal treatment of political parties but rather that party affiliation be disregarded altogether.¹⁵⁰

Political parties are the “most important mechanism for incorporating [a] citizen's preferences,” and it is the right of association that recognizes parties' vital role.¹⁵¹ The Supreme Court has previously found an acceptable standard that balances the right of association with state interest by striking down instances where associational rights were severely burdened.¹⁵² A First Amendment standard focused on association would not require political parties to be viewed as suspect classes to apply strict scrutiny.¹⁵³ The focus would be on the goal of government classification, as freedom of association

143. See *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 418 (2006) (discussing what a successful claim identifying unconstitutional acts would require).

144. See Wang, *supra* note 50, at 1273–74.

145. See Weiss, *supra* note 19, at 713.

146. *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (reversing the appellate court's holding that Ohio may force third-party candidates to announce their candidacy earlier than candidates of the major parties in order to appear on the ballot).

147. *Elrod v. Burns*, 427 U.S. 347, 363 (1976) (stating that if public employment is to be conditioned on the employee's political support of a party, it must “further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights”).

148. See *Vieth v. Jubelirer*, 541 U.S. 267, 294 (2004) (plurality opinion).

149. *Id.*

150. *Id.*

151. JoAnn D. Kamuf, Note, “*Should I Stay or Should I Go?*”: *The Current State of Partisan Gerrymandering Adjudication and a Proposal for the Future*, 74 FORDHAM L. REV. 163, 210 (2005) (quoting Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 112 (1985)).

152. See *id.* at 209–10.

153. See *id.* at 210.

recognizes First Amendment protections for particular viewpoints, including those of democratic structures.¹⁵⁴

The Supreme Court has stated that the import of the First Amendment is greatest when considering speech taking place during a campaign for political office.

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.¹⁵⁵

Although the Court has accepted nonverbal forms of speech in certain situations (such as campaign finance), it has not explicitly decided whether the act of voting qualifies as speech.¹⁵⁶ Lower courts, however, have on occasion implicitly supported the interpretation of voting as speech.¹⁵⁷

Although the Court has never expressly regarded voting as speech, it has equated casting a ballot to speech with regard to political expression. In *Harper v. Virginia Board of Elections*,¹⁵⁸ the Court explicitly refused to “stop to canvass the relation between voting and political expression.”¹⁵⁹ But *Doe v. Reed*,¹⁶⁰ decided in 2010, offers the most compelling evidence yet that voting itself is an expression of political speech. At issue in *Doe* was the disclosure of information on a referendum petition in Washington.¹⁶¹ Writing for the majority, Chief Justice Roberts stated that an individual expresses a political viewpoint when signing a referendum petition.¹⁶² Furthermore, Roberts stated that expression of a political view falls under the umbrella of the First Amendment.¹⁶³

Roberts, Kennedy, Ginsburg, Breyer, and Alito all believed that the signing of a referendum petition qualified as an expression of political belief—even when the result of the petition is simply to place the issue on the ballot in the next election.¹⁶⁴ Although not stated explicitly, it would follow that those Justices also believe physically casting a vote on the referendum *after* the successful petition is also a political expression.¹⁶⁵

154. *See id.*

155. *Citizens United v. FEC*, 558 U.S. 310, 339 (2010); *see also id.* (“The First Amendment ‘has its fullest and most urgent application to speech uttered during a campaign for political office.’” (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989))).

156. Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 *YALE L. & POL’Y REV.* 471, 485 (2016) (arguing that the Court has never rejected the argument that voting is under the purview of the First Amendment).

157. *See, e.g.*, *Turner v. D.C. Bd. of Elections & Ethics*, 77 F. Supp. 2d 25, 31 (D.D.C. 1999) (“When a citizen steps into the voting booth to cast a vote on a matter properly on the ballot, he or she intends to send a message in support of or in opposition to the candidate or ballot measure at issue.”).

158. 383 U.S. 663 (1966).

159. *Id.* at 665.

160. 561 U.S. 186 (2010).

161. *See id.* at 194.

162. *Id.*

163. *See id.* at 195.

164. *See id.*

165. *See Derfner & Hebert, supra* note 156, at 487 (“Voting and petition-signing plainly express a point of view and represent a decision to sign on to a particular idea in the

Thus, if voting on a referendum were an expression of a political viewpoint, so too is voting for a candidate on Election Day. As such, this vote, like the petition, would be entitled to protection under the First Amendment.

III. PARTISAN GERRYMANDERING JUSTICIABILITY THROUGH THE FIRST AMENDMENT

In light of the Supreme Court's past stance on gerrymandering, as well as its First Amendment jurisprudence, partisan gerrymandering cases should be deemed justiciable by way of First Amendment freedoms. This Note thus argues against the Court's hands-off stance on partisan gerrymandering and instead argues that the freedoms of association and speech illuminate a path forward for clarifying the treatment of partisan gerrymandering. In so doing, this Note examines the most promising attack on *Vieth* to date, *Whitford v. Gill*,¹⁶⁶ which could, at long last, implement Justice Kennedy's vision.

A. *The Court Cannot Rely on Others to Fix the Problem*

Despite some recent promising results, some state-led countergerrymandering initiatives have not proven as successful as the California and Iowa plans.¹⁶⁷ For example, Florida amended its constitution to include the following language:

No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.¹⁶⁸

Despite this seemingly unambiguous wording, some believe that legislators use private accounts to communicate with the Republican Party of Florida to create districts that favor incumbencies.¹⁶⁹ Thus, even if some states can execute a workable gerrymandering solution without the Supreme Court, others are not so able.

The Supreme Court also cannot reliably conclude that the abhorrent results are due solely to actions of citizens. Although politically self-segregated districts may be the result of voter preference, that self-segregation plays a role does not mean that gerrymandering does not still occur in other districts.¹⁷⁰ Additionally, even where districts are the result of political self-segregation, cracking is a tool that can successfully dilute those densely populated districts.¹⁷¹ Moreover, that the effects of gerrymandering diminish

marketplace of ideas or support a particular candidate who best represents the voters' political beliefs.'').

166. 218 F. Supp. 3d 837 (W.D. Wis. 2016), *hearing granted*, 137 S. Ct. 2268 (2017) (No. 16-1161).

167. *See* Catanese, *supra* note 27, at 343–45.

168. FLA. CONST. art. III, § 20(a).

169. *See* Catanese, *supra* note 27, at 345.

170. *See supra* Part I.A.

171. *See supra* note 5 and accompanying text.

following the first election after realignment does not lessen the political fallout from initial gerrymandering.¹⁷² Rather, it means only that the impact of partisan gerrymandering diminishes over time, a phenomenon to be expected because of the mobility of the U.S. population. Furthermore, that polarization in the Senate rivals that in the House of Representatives does not refute mathematical evidence that supports that gerrymandering directly alters voters' choice of who is elected to office.¹⁷³

B. The Roberts Court and the First Amendment in Election Cases

The Roberts Court does not have an expansive track record of First Amendment cases, in part because liberal plaintiffs who would have sought to expand the First Amendment's purview have been hesitant to bring election-related claims out of fear that the Court will make matters worse.¹⁷⁴ The Court has, however, substantially expanded the reach of the First Amendment with regard to campaign finance. In both *Davis v. FEC*¹⁷⁵ and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,¹⁷⁶ the Court struck down financing plans that would have aided candidates running against far wealthier opponents.¹⁷⁷ In both cases, the Court concluded that the First Amendment contains no guarantee of a level playing field.¹⁷⁸ Similarly, *New York State Board of Elections v. Lopez Torres*¹⁷⁹ rejected the view that voters were entitled to a level playing field in the form of competitive elections when the Court struck down a proposal to nominate judges in partisan primaries.¹⁸⁰

In recent years, the Roberts Court appears to be softening on gerrymandering issues. In addition to its holding in *Arizona Independent Redistricting Commission*, the Court held in *Evenwel v. Abbott*¹⁸¹ that states must draw congressional districts with populations as even as possible. The Roberts Court has also ruled against a state legislature in which Republicans were drawing districts with a specific focus on black Democrats—a case that could improve the likelihood of a resolution on partisan gerrymandering.¹⁸²

172. See *supra* note 138 and accompanying text.

173. See Franzese, *supra* note 17, at 291–92.

174. Richard L. Hasen, *Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn but with Speed Bumps and Surprising Twists*, 68 STAN. L. REV. 1597, 1618 (2016).

175. 554 U.S. 724 (2008).

176. 564 U.S. 721 (2011).

177. See Hasen, *supra* note 174, at 1604.

178. See *id.*

179. 552 U.S. 196 (2008).

180. See Hasen, *supra* note 174, at 1612.

181. 136 S. Ct. 1120 (2016). This case represents the Court pulling back from its previous decision in *Tennant v. Jefferson County Commission*, 567 U.S. 758 (2012) (per curiam). See Hasen, *supra* note 174, at 1613. In *Tennant*, the Court did away with strict mathematical equality in drawing districts. *Tennant*, 567 U.S. at 762–64.

182. See Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1262–63 (2015); see also Hasen, *supra* note 174, at 1608–09 (“[Alabama Legislative Black Caucus] should moderately improve the chances for challenging some Republican gerrymanders.”).

C. *The Applicability of the Association Resolution*

Were a plaintiff to bring a claim on associational grounds, even if the claim had merit, it may not be strong enough to persuade the Supreme Court to overrule *Vieth*. The strongest support for an association standard is found in *Tashjian v. Republican Party of Connecticut*.¹⁸³ Justice Thurgood Marshall, writing for the majority, wound together the freedoms of association and speech and stated that “[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”¹⁸⁴ Justice Marshall further erased the line between the political party itself and its members when he stated that interference with freedom of party association is at the same time interference with the freedom of its devotees.¹⁸⁵ Perhaps most strongly, Marshall stated,

[T]he Constitution grants to the States a broad power to prescribe the “Times, Places and Manner of holding Elections for Senators and Representatives,” which power is matched by state control over the election process for state offices. But this authority does not extinguish the State’s responsibility to observe the limits established by the First Amendment rights of the State’s citizens. The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote, . . . or, as here, the freedom of political association.¹⁸⁶

Although *Tashjian* provides some support for the freedom of association, it may not be strong enough. Traditionally, the Supreme Court has reserved the freedom of association for cases in which a state denies an individual access to the electoral system.¹⁸⁷ Additionally, the right of association may just be freedom of speech shrouded in different language—as Justice Marshall hinted at in *Tashjian*. The right of association is derived from the need for speech in political arenas and not from any right of autonomy for political parties and their members.¹⁸⁸

D. *The Applicability of the Speech Resolution*

The most viable standard for the Supreme Court in answering the justiciability question of partisan gerrymandering is the First Amendment freedom of speech. The idea that the government cannot quiet one person’s voice to promote the voices of others is ingrained in the Court’s history:

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed “to secure the widest possible

183. 479 U.S. 208 (1986).

184. *Id.* at 214 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)).

185. *See id.* at 215.

186. *Id.* at 217 (quoting U.S. CONST. art. I, § 4, cl. 1).

187. *See* Kamuf, *supra* note 151, at 210.

188. *See* Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 289 (2001).

dissemination of information from diverse and antagonistic sources,” and “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”¹⁸⁹

This being so, it follows that partisan gerrymandering is repugnant to First Amendment speech.

In *New York Times v. Sullivan*,¹⁹⁰ the Supreme Court held that freedom of speech—especially in the political arena—has long been secured by the First Amendment and may well be the very reason for the First Amendment’s existence:

The constitutional safeguard, we have said, “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” . . . “[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions,” . . . and this opportunity is to be afforded for “vigorous advocacy” no less than “abstract discussion.”¹⁹¹

Given that the purpose of the First Amendment is to embolden the populace to express opinions contrary to the majority, it is unsurprising that plaintiffs have taken umbrage with partisan gerrymandering. When districts are redrawn by state legislatures to dilute a segment of the population’s vote, the “prized American privilege” is cast aside.¹⁹²

The Court in *New York Times* cited Justice Brandeis’s concurring opinion in *Whitney v. California*¹⁹³ to highlight the place that freedom of speech held in the values of the Constitution’s drafters:

Those who won our independence believed . . . that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.¹⁹⁴

This language, woven into the fabric of the Court’s discourse on freedom of speech, speaks rather pointedly to why partisan gerrymandering violates the First Amendment as it was understood at the time of ratification.

The much-maligned decision *Citizens United v. FEC*¹⁹⁵ also contains strong First Amendment language. There, the more conservative Justices on

189. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam) (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 266, 269 (1964)).

190. 376 U.S. 254 (1964).

191. *Id.* at 269 (citations omitted) (first quoting *Roth v. United States*, 354 U.S. 476, 484 (1957); then quoting *Bridges v. California*, 314 U.S. 252, 270 (1941); and then quoting *NAACP v. Button*, 371 U.S. 415, 429 (1963)).

192. *See id.*

193. 274 U.S. 357 (1927).

194. *N.Y. Times*, 376 U.S. at 270 (alteration in original) (quoting *Whitney*, 274 U.S. at 375–76).

195. 558 U.S. 310 (2010). Commentators have criticized the decision. *See* Scott Blackburn, *Citizen’s United: It’s About Free Speech*, WASH. EXAMINER (Jan. 22, 2015, 5:00 AM),

the Court, who have proven less amenable to the justiciability of partisan gerrymandering, constituted the majority.¹⁹⁶ Justice Kennedy, writing the majority opinion, stated that First Amendment standards “must give the benefit of any doubt to protecting rather than stifling speech.”¹⁹⁷ He further noted that speech is most important during a campaign for political office and that speech is a “precondition to enlightened self-government and a necessary means to protect it.”¹⁹⁸

Most applicable to the issue of partisan gerrymandering, Kennedy suggested that “the First Amendment stands against attempts to disfavor certain subjects or viewpoints”¹⁹⁹ and that “restrictions distinguishing among different speakers, allowing speech by some but not others,” are prohibited.²⁰⁰ This is exactly what partisan gerrymandering aims to achieve: district lines are intentionally drawn in such a manner that viewpoints in line with the political party of the state legislature are amplified while differing viewpoints are disfavored.²⁰¹ This appears to be a restriction that allows speech by some, but not by others, as only individuals who agree with the state legislature are heard by their representatives.²⁰²

Even if “disfavor of certain viewpoints” is incidental and not intentional, Justice Kennedy stated in *Citizens United* that “political speech must prevail against laws that would suppress it, whether by design or inadvertence.”²⁰³ Despite being a case about campaign finance, *Citizens United* can be interpreted as a condemnation of partisan gerrymandering when juxtaposing the language in the majority opinion with the facts that surround many redistricting plans.

E. The Future of Gerrymandering Reform: Gill v. Whitford

The preceding Parts argue that there is sufficient legal support for the Supreme Court to adopt Justice Kennedy’s First Amendment solution to the problem of partisan gerrymandering. The Court will soon announce whether it agrees, having heard oral arguments in *Gill v. Whitford*²⁰⁴ on October 3, 2017, its first gerrymandering case since *Arizona Independent Redistricting Commission*.²⁰⁵ Originating in the Western District of Wisconsin, supporters

<http://www.washingtonexaminer.com/citizens-united-its-about-free-speech/article/2559082> [<https://perma.cc/ZYD3-N6LX>]; Eric Posner, *Citizen’s United Is Still Worth Hating*, SLATE (Nov. 9, 2012, 11:55 AM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2012/11/campaign_finance_in_2012_presidential_election_super_pacs_lost_but_citizens.html [<https://perma.cc/4WP7-BX7P>].

196. *Citizens United*, 558 U.S. at 316.

197. *Id.* at 327 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 446, 469 (2007)).

198. *Id.* at 339.

199. *Id.* at 340.

200. *Id.*

201. *See supra* Part I.A.

202. *See supra* Part I.A.

203. *See Citizens United*, 558 U.S. at 340.

204. 137 S. Ct. 2268 (2017) (No. 16-1161).

205. Amy Howe, *Court Releases October Calendar*, SCOTUSBLOG (July 19, 2017, 9:59 PM), <http://www.scotusblog.com/2017/07/court-releases-october-calendar/> [<https://perma.cc/75LY-ZTKY>].

of the Democratic Party and its candidates brought suit against members of the Wisconsin Election Commission for employing gerrymandering techniques to dilute the voting power of Democrats in the state.²⁰⁶

For the first time in forty years, Wisconsin elected a Republican Governor and a Republican majority in both the Wisconsin State Assembly and Senate. In the wake of this electoral success, Republican officials designed a new redistricting plan.²⁰⁷ Plaintiffs—Democratic voters and supporters—brought suit alleging that Republican officials used the packing and cracking techniques to partisan gerrymander and dilute the vote of Democrats in the state.²⁰⁸ Unlike previous plaintiffs in partisan gerrymandering cases, here they created a formula to measure partisan gerrymandering.²⁰⁹ The formula, called the Efficiency Gap (EG), measures the difference between the votes wasted by each party divided by the total number of votes.²¹⁰ The party with the favorable EG result wastes fewer votes and thus is able to better utilize its share of the total votes to populate legislative seats.²¹¹

The plaintiffs used the EG measure to articulate a standard they felt would be workable for the court.²¹² Under the proposed standard, which would create a presumption of unconstitutionality, plaintiffs must (1) establish state intent to partisan gerrymander and (2) prove, via EG, a partisan effect above a specified threshold.²¹³ If the plaintiff meets the above evidentiary threshold, then the defendant would have to rebut the presumption by showing a legitimate state policy or an underlying political geography explaining the problematic EG result.²¹⁴

In *Whitford*, the district court drew heavily upon pre-*Vieth* Supreme Court rulings. After outlining the long history of partisan gerrymandering cases heard by the Court, Judge Kenneth Ripple stated explicitly that “[i]t is clear that the First Amendment and the Equal Protection Clause protect a citizen against state discrimination as to the weight of his or her vote when that discrimination is based on the political preferences of the voter.”²¹⁵ Furthermore, Judge Ripple elucidated that both the First Amendment and the Equal Protection Clause “prohibit a redistricting scheme which (1) is

206. *Whitford v. Gill*, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016), *hearing granted*, 137 S. Ct. 2268 (2017) (No. 16-1161).

207. *See id.* at 846.

208. *See id.* at 854.

209. *See* Michael Wines, *Judges Find Wisconsin Redistricting Unfairly Favored Republicans*, N.Y. TIMES (Nov. 21, 2016), <http://www.nytimes.com/2016/11/21/us/wisconsin-redistricting-found-to-unfairly-favor-republicans.html> [<https://perma.cc/7DRG-P8VJ>] (“Several election-law scholars said the ruling was especially significant because it offered, for the first time, a clear mathematical formula for measuring partisanship in a district, something that had been missing in previous assaults on gerrymandering.”).

210. *See Whitford*, 218 F. Supp. 3d at 854. Wasted votes are determined by the margin of victory for one party over the other. *Id.* at 854 n.80.

211. *See id.* at 854.

212. *See id.*

213. *Id.* at 854–55.

214. *Id.* at 855.

215. *Id.* at 883. Judge Ripple evoked *Fortson v. Dorsey*, 379 U.S. 433 (1965), *Gaffney*, and *Bandemer* in justifying his stance on the First Amendment and Equal Protection Clause. *See Whitford*, 218 F. Supp. 3d at 884.

intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds.”²¹⁶

According to Judge Ripple, discriminatory intent with regard to a redistricting plan involves an intent to entrench a political party in power because it then impinges upon representational rights.²¹⁷ The evidence at trial showed that drafters of the district maps in Wisconsin were concerned with the “durability” of their plan, which meant securing a Republican majority in the assembly under any likely future scenario.²¹⁸

The evidence offered also made clear to Judge Ripple that the discriminatory effect was achieved. Among other factors, Judge Ripple pointed to the fact that in 2012, Republicans garnered merely 48.6 percent of the vote, yet they secured sixty seats.²¹⁹ In the subsequent 2014 election, Republicans achieved 52 percent of the vote but a disproportionate sixty-three seats.²²⁰ Thus, when Democrats achieved nearly the same percentage of the vote as Republicans (51.4 percent compared to 52 percent), the number of seats achieved by the parties differed by twenty-four.²²¹ The evidence in *Whitford* overcomes the problems presented in *Bandemer*, namely that there are now multiple elections included in the data—not just one—and that a few extra percentage points for one party would not definitively swing the majority in the assembly.²²² Although the Constitution does not require proportionality, Judge Ripple’s opinion demonstrates that courts are not barred from considering the ratio of votes to seats to find highly “disproportional” representation.²²³

Finally, Judge Ripple cited Justice Kennedy’s *Vieth* concurrence to argue that gerrymandering that is unrelated to any legitimate legislative objective is unconstitutional.²²⁴ The defendants attempted to show that the disparate results in the election were due to the geography of voters in Wisconsin,²²⁵ but Judge Ripple was unconvinced and concluded instead that the discrepancy was due to the specific districting plan being contested.²²⁶

Judge Ripple’s analysis was seemingly crafted with an eye toward overcoming the *Vieth* hurdle and achieving approval of a majority of the Supreme Court. By declining to enunciate a numerical line for what is

216. *Id.*

217. *Id.* at 887.

218. *Id.* at 895.

219. *Id.* at 899.

220. *Id.*

221. *See id.* at 901.

222. *See id.* at 902. Judge Ripple wrote that the pitfall from *Bandemer* was that the redistricting plan was not proven to be durable but that *Whitford*’s durability is supported by the presence of two elections and the swing analysis of three experts. *See id.* at 902 n.269.

223. *Id.* at 906.

224. *See id.* at 911.

225. *See id.* at 912; *see also supra* note 136 and accompanying text.

226. *See Whitford*, 218 F. Supp. 3d at 926 (stating that the production of multiple maps that did not achieve as drastic a partisan advantage as the allegedly gerrymandered maps did proved that geography alone could not explain the gulf between the number of Republican and Democrat seats).

acceptable, opting instead to highlight when a majority will persist despite reasonable swings in votes, Judge Ripple evaded the indeterminacy problem that felled *Bandemer* in the eyes of the *Vieth* plurality.²²⁷ Additionally, the language “under any likely future electoral scenario for the remainder of the decade,”²²⁸ despite not providing a clear answer to all future gerrymandering questions, still allows future courts to identify exactly what the test is and when the test fails.²²⁹ The efficacy of Judge Ripple’s attack on *Vieth* will be known in the coming months when the Supreme Court issues a decision on *Whitford*.

CONCLUSION

Given the recent trends of the Court, the time is ripe for a majority resolution concerning partisan gerrymandering. Justice Kennedy’s suggestion in his *Vieth* concurrence that the First Amendment is the standard by which the Supreme Court may find partisan gerrymandering justiciable was unsupported by any of his fellow Justices.²³⁰ Nevertheless, there is Supreme Court precedent regarding the First Amendment that refutes Justice Scalia’s *Vieth* claim that there can be no workable standard to make partisan gerrymandering justiciable.²³¹

The First Amendment guarantee of freedom of speech has long been considered most sacred when used with regard to political speech.²³² Although the Court has not explicitly characterized voting as speech, there is ample support for such a characterization in other Supreme Court rulings.²³³ Justice Kennedy’s siding with the liberal wing of the Court in *Arizona Independent Redistricting Commission* makes it likely that the votes exist to make partisan gerrymandering justiciable once *Whitford* is decided.²³⁴

227. See Recent Case, *Whitford v. Gill*, No. 15-cv-421-BBC, 2016 WL 6837229 (W.D. Wis. Nov. 21, 2016), 130 HARV. L. REV. 1954, 1960 (2017).

228. *Whitford*, 218 F. Supp. 3d at 896.

229. See Recent Case, *supra* note 227, at 1961.

230. See *supra* note 64 and accompanying text.

231. See *supra* Part III.D.

232. See *supra* Part III.D.

233. See *supra* Part II.C.

234. See *supra* Part III.E.