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Cover Page Footnote
J.D. Candidate, 2006, Fordham University School of Law. I would like to thank my family and friends for their support, patience, and encouragement during the entire Note-writing process. I would also like to thank Father Whelan for his guidance and assistance.

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"SHOULD I STAY OR SHOULD I GO?": THE CURRENT STATE OF PARTISAN GERRYMANDERING ADJUDICATION AND A PROPOSAL FOR THE FUTURE

JoAnn D. Kamuf*

INTRODUCTION

The results from the 2004 election prove that "[l]egislative redistricting can be an exceedingly dirty business."¹ Partisan gerrymandering efforts greatly influenced the election outcomes,² generated unprecedented media coverage, and caused intense partisan hostility at the state and federal level.³ Texas gained the spotlight in what commentators consider the most egregious example of current legislative gerrymandering practices.⁴

In May of 2003, more than fifty Democratic members of the State Legislature fled Texas in the middle of the night.⁵ The Democrats

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² See, e.g., John M. Broder, Schwarzenegger Proposes Overhaul of Redistricting, Judges Not Legislators, Would Set Maps, N.Y. Times, Jan. 6, 2005, at A16 (demonstrating that in 2004, only thirteen congressional seats changed hands, while in 2000, forty-five seats were considered competitive and in 1990, 151 were considered competitive).

³ See Richard L. Hasen, Looking For Standards (in All the Wrong Places): Partisan Gerrymandering Claims After Vieth, 3 Election L.J. 626, 626 (2004) (describing high expectations for the Vieth decision in light of the districting trends, in which legislators are "increasingly more adept... at, and more brazen in, redistricting to promote partisan goals").

⁴ Session v. Perry, 298 F. Supp. 2d 451, 470 (E.D. Tex. 2004) ("There is little question but that the single-minded purpose of the Texas Legislature in enacting [the districting plan] was to gain partisan advantage."). See infra note 351 for additional examples of extreme partisan gerrymandering.

⁵ Pete Slover & Matt Stiles, Democrats Disappear; Majority of AWOL Lawmakers Where You'd Least Expect: Oklahoma, Dallas Morning News, May 13, 2003, at 1A.
absconded in order to prevent the quorum needed for the session vote in which Republicans planned to approve a new districting plan.6

Texas Republicans were determined to drag their fellow House Democrats back to Texas and conduct the session vote. To expedite the Democrats’ return, the Speaker of the Texas House ordered Texas state officials to arrest the Democrats7 and placed the Democrats’ pictures on milk cartons and playing cards to expedite their return.8 Despite Republican efforts, the Democrats succeeded in killing the vote in the regular session by hiding out in a Holiday Inn in Ardmore, Oklahoma, just across the Texas border.9

In July, Governor Rick Perry called a special legislative session to pass the districting plan.10 Eleven of the twelve Texas Democratic State Senators fled Texas by air, this time heading to Albuquerque, New Mexico, to avoid a quorum a second time.11 Eventually, upon return of the Democrats, the Governor called a third special session and the state legislators passed the districting plan.12

The Texas Legislature’s plan ignored the historically rooted practice of redistricting only after every decennial census,13 redrawing the congressional districts created only one year before by a Texas district court.14 Under the court-mandated plan, Texas Republicans won control of

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6. A quorum in the House and Senate requires two-thirds of each house to be present. Tex. Const. art. III, § 10.
9. See id. at A17; see also R. G. Ratcliffe, Both Sides Believe Time is Their Ally, Houston Chron., Aug. 17, 2003, at 1.
13. Though decennial districting is not constitutionally mandated, the U.S. Supreme Court has functioned under the presumption that failure to do so is presumptively invalid. See Cox, supra note 12, at 758 n.36 (discussing the evolution of the Court instituted decennial districting in Reynolds v. Sims, 377 U.S. 533, 583-84 (1964)); see also Sasha Abramsky, The Redistricting Wars, The Nation, Dec. 29, 2003, at 15, available at http://www.thenation.com/doc.mhtml?i=20031222&s=abrams.
14. District courts have the authority to redraw district plans when the state legislature fails to do so within a reasonable time after the census. See Cox, supra note 12, at 758; see also, e.g., Growe v. Emison, 507 U.S. 25, 33-37 (1993) (discussing circumstances in which federal courts can undertake reapportionment, and emphasizing that federal courts must refrain from intervening until it is clear that the state will otherwise not have a valid plan in time for the next election).
the State House, State Senate, and the executive branch, a concentration of Republican power unseen in 133 years.

Though Republicans had complete control of the state government, the legislature sought, in 2003, to create a new districting scheme to protect the fifteen Republican members of Congress, and displace at least five to seven of the seventeen congressional Democrats. This partisan plan caused the Democrats to flee.

After passage of the legislative districting plan, public interest organizations, congressmen, and voters immediately brought a suit challenging the validity of the Texas plan in the U.S. District Court for the Eastern District of Texas. The court found that the districting plan was valid because plaintiffs failed to show any constitutional violation. The plaintiffs appealed directly to the U.S. Supreme Court, and the Supreme Court remanded for reconsideration in light of its decision in Vieth v. Jubelirer, handed down six months prior to the Texas case.

In Vieth, a plurality of the Supreme Court held that partisan gerrymandering claims were non-justiciable because courts lacked "judicially discernable and manageable standards" to measure such claims. The Vieth plurality overruled the groundbreaking case of Davis v. Bandemer, where the Court held that partisan gerrymandering presented a justiciable equal protection issue. While Vieth appeared as an attempt to close the judicial door on partisan gerrymandering claims, the remand of the Texas case indicates that the Supreme Court is not ready to put an end to judicial review of partisan gerrymandering claims. The Court, however, has failed to define the role that the judiciary should play in regulating partisan redistricting. As a result, the questions of when and how the courts

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17. Session, 298 F. Supp. 2d at 471-72 (citation omitted).
18. Id.; see also Kesavan & Paulsen, supra note 12, at 1588.
19. The plaintiffs claimed that the Texas Legislature violated Article I, Sections 2 and 4, of the United States Constitution, the Equal Protection Clause, and section 2 of the Voting Rights Act of 1964 by drawing mid-decade districting lines, discriminating based on race in violation of the Equal Protection Clause, and enacting a plan that was an unconstitutional partisan gerrymander. Session, 298 F. Supp. 2d at 457, 459-61.
20. Id.
21. See infra note 102.
23. See infra Part I.B.1 for a discussion of justiciability.
24. Vieth, 541 U.S. at 281 (citation omitted).
25. 478 U.S. 109 (1986); see Vieth, 541 U.S. at 281.
26. Davis, 478 U.S. at 109. The Court's holding of justiciability was praised by commentators for "open[ing] to judicial review the only aspect of redistricting that had been seemingly immune from judicial scrutiny, the intentional partisan gerrymander." Bernard Grofman, Unresolved Issues in Partisan Gerrymandering Litigation, in Political Gerrymandering and the Courts 1, 3 (Bernard Grofman ed., 1990).
will measure the constitutionality of partisan gerrymandering claims remain unanswered.

While the Court's memorandum decision remanding the Texas case did not include a rationale,\(^{28}\) it provided an indication that in the future, certain partisan gerrymandering claims may warrant judicial intervention. The direction the Supreme Court will take when presented with other partisan gerrymandering claims remains unclear; the remand signaled a possible willingness to give \textit{Vieth} some teeth.\(^{29}\) The Supreme Court may be ready to set broad guidelines to limit legislative redistricting,\(^{30}\) or to hold that mid-decade redistricting is unconstitutional.\(^{31}\) The one thing that is clear is that not all partisan gerrymandering claims are non-justiciable.

Partisan gerrymandering raises questions about fundamental democratic principles,\(^{32}\) and whether or not the legislature is violating a constitutional right. The "uniquely American practice of self-interested legislative districting"\(^{33}\) dates back to at least 1812,\(^{34}\) and courts have continually looked at the practice with skepticism.\(^{35}\) While the practice is highly contested, the sparse case law in this area of election law does not present clear answers to address these pressing democratic concerns.\(^{36}\)

This Note argues that the First Amendment provides the most appropriate standard for adjudicating partisan gerrymandering claims. Urging the Supreme Court to adjudicate such claims, this Note seeks to define a


\(^{29}\) See Richard H. Pildes, \textit{Principled Limitations on Racial and Partisan Redistricting}, 106 Yale L.J. 2505, 2554 n.157 (1997) [hereinafter \textit{Principled Limitations}] ("While the Constitution purportedly constrains partisan gerrymandering... courts have [not] given this doctrine any teeth at all."); see also Hasen, \textit{supra} note 3, at 626.

\(^{30}\) See, e.g., Richard H. Pildes, \textit{The Constitutionalization of Democratic Politics}, 118 Harv. L. Rev. 28, 70 (2004) [hereinafter \textit{Constitutionalization}] ("Constitutional constraints on excessive partisan gerrymandering might... lead to greater practical brakes on gerrymandering than any constitutional law formally requires."); see also \textit{Principled Limitations}, \textit{supra} note 29, at 2554 n.157 (quoting Samuel Issacharoff & Richard Pildes, \textit{No Place of Partisan Gerrymandering}, Tex. Law., Aug. 5, 1996, at 25 ("[I]n the wake of the recent decisions limiting racial gerrymandering, the court might now feel an obligation to take more seriously the similar problems that political gerrymandering poses.")).

\(^{31}\) See Mitchell Berman, \textit{Putting Fairness on the Map}, L.A. Times, May 28, 2004, at B15 (proposing that the court strike down all mid-decade redistricting plans "adopted by a single-party-dominated legislature, unless narrowly tailored to achieve a compelling interest").


\(^{33}\) \textit{Constitutionalization}, \textit{supra} note 30, at 78.


\(^{35}\) \textit{See infra} Part I.B.3 (discussing judicial treatment of the gerrymander).

\(^{36}\) The Court has only given full consideration to two partisan gerrymandering cases. \textit{See Vieth}, 541 U.S. at 267; Davis v. Bandemer, 478 U.S. 109 (1986). The Court has referred to the practice in dicta since the 1960s. \textit{See infra} Part I.B.3.
"sounder and more prudential basis"\textsuperscript{37} to measure partisan gerrymanders, providing much needed guidance to lower courts.

Part I provides a framework for understanding the districting process. Part I.A analyzes the goals of districting and the constraints placed on legislatures when creating a districting plan. Part I.B presents a historical analysis of judicial involvement in the districting process, discussing the initial judicial entry into this area of election law, and then focusing specifically on partisan gerrymandering claims. Part II examines the current debates surrounding the role of the judiciary in partisan gerrymandering, presenting commentators' arguments for and against judicial regulation of the political process of gerrymandering. It then presents support for the use of a First Amendment standard in the partisan gerrymandering context.

Part III explores the benefits and drawbacks of both the equal protection and First Amendment standards, arguing that the Court should adopt a freedom of association analysis for partisan gerrymandering claims. The freedom of association standard will allow courts to provide relief when legislators create districting plans that discriminate against voters based on their political affiliation, without serving any compelling purpose. This Note concludes with a proposal of how courts could implement the free association standard in a manner that allows state legislatures discretion in the districting process, and protects individual rights.

I. DISTRICTING

This part explains the history of legislative districting practices in the United States. Part I.A describes the legislative task of districting. Part I.A.1 focuses on the tools employed to create a partisan gerrymander. Part I.A.2 discusses the traditional criteria that guide legislators in the districting process, the same criteria that courts use to evaluate districting plans.\textsuperscript{38} Part I.B explores the history of judicial involvement in districting claims, starting with the "reapportionment revolution" of the 1960s and ending with a discussion of the three Supreme Court cases that addressed partisan gerrymandering in 2004.

A. The Legislative Role in Districting

This section will describe the legislative procedures that govern the districting process. Part I.A.1 will discuss the goals of the districting process, particularly partisan gerrymandering. Part I.A.2 will then present the standards that guide legislative districting and aid judicial evaluation of districting plans.

\textsuperscript{37} Vieth, 541 U.S. at 315 (Kennedy, J., concurring).

\textsuperscript{38} This Note focuses on the standards referenced most frequently by the courts.
1. Goals of Legislative Districting

Gerrymandering is one aspect of the task of districting—"[t]he practice of dividing a geographical area into electoral districts." After each census, states must redistrict in order to delegate representatives by the method of "equal proportions." Once Congress reapportions representatives to the states, the state legislators are responsible for drawing internal district lines in accordance with the constitutional and statutory standards discussed in Part I.A.2.

Gerrymandering, typically a pejorative term, occurs when legislators redistrict to account for particular group interests. The term "gerrymandering" refers generally to any act of "intentional alteration of established political boundaries or the creation of artificial 'communities' by the grouping of political units to form temporary election districts for the purpose of effecting an election outcome." Partisan or political gerrymandering, on the other hand, is "[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength."

Recognition of definitional distinctions emphasizes that while every district line affects partisan interests and voting blocs, legislators do not

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41. Both federal congressional districts and state legislative districts require legislative redistricting. See Brennan, supra note 40, at 244 n.39, 257-58 (explaining that while congressional districts are regulated by Article I, Section 2, and state districts are regulated by the Equal Protection Clause, the courts review both using the equal protection doctrine).
44. Vieth v. Jubelirer, 541 U.S. 267, 271 n.1 (2004) (quoting Black's Law Dictionary 696 (7th ed. 1999)). Partisan gerrymandering can be broken down into two types: (1) the bipartisan gerrymander, where a state is divided into politically homogenous districts so that each district favors a particular party and (2) the incumbent-protecting gerrymander, drawn to favor a particular candidate, which can occur where the opponent is from the same, or a different party, and is not reliant on other districts being drawn in favor of one party. See Constitutionalization, supra note 30, at 62-65 (2004) (explaining the two types of gerrymander in depth). Compare Samuel Issacharoff, Gerrymandering and Political Cartels, 116 Harv. L. Rev. 593, 601-11 (2002), with Nathaniel Persily, Reply, In Defense of Foxes Guarding Henhouses: The Case For Judicial Acquiescence To Incumbent-Protecting Gerrymanders, 116 Harv. L. Rev. 649, 661-64 (2002) (debating the severity of the harm caused by the two types of gerrymander). This Note refers to partisan gerrymandering as inclusive of both types because they have the same effect on the individual's right to political association.
45. Robert G. Dixon, Jr., Fair Criteria and Procedures for Establishing Legislative Districts, in Representation and Redistricting Issues 7-8 (Bernard Grofman et al. eds., 1982);
draw all district lines with the specific intent to increase or decrease the power of a particular group of voters.\textsuperscript{46} Gerrymanders can serve to create more “politically fair” results than might occur in an at-large election (where the winner takes all)\textsuperscript{47} because it accounts for preexisting community boundaries and representation of minorities.\textsuperscript{48}

Redistricting is necessary to ensure the equality promised by the Equal Protection Clause and the one-person, one-vote standard.\textsuperscript{49} The process is, however, often executed by legislators who have a vested interest in election outcomes, and districting is likely to reflect partisan interests.\textsuperscript{50} Partisan gerrymandering allows “a party with only a minority of the popular vote [to] assert control over a majority of seats in the state assembly and . . . the national House of Representatives.”\textsuperscript{51} By creating “a majority party or merely increas[ing] the majority’s power, [a districting plan can secure] a partisan imbalance so skillfully that the legislature” becomes unresponsive to the will of the people they represent.\textsuperscript{52}

A successful partisan gerrymander has far-reaching effects.\textsuperscript{53} Beyond creating favorable election results, a partisan gerrymander has the potential to impact “the entire corpus of legislative decisions enacted in its train.”\textsuperscript{54} This is particularly true in the congressional districting context, where representatives can enact or alter federal law and national budgets.\textsuperscript{55}

A partisan gerrymander aims to increase partisan advantage in as many districts in a state as possible, “wasting” the maximum number of votes of the opposition party as possible by “packing” and “cracking” districts.\textsuperscript{56} Legislators design partisan gerrymanders so that a “disadvantaged party

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\textit{cf.} Daniel H. Lowenstein & Jonathan Steinberg, \textit{The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?}, 33 UCLA L. Rev. 1, 10 (1985) (stating that all district lines have political impacts, but are only manipulative if there is an agreed upon standard of political advantage and neutrality).
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\textsuperscript{46} Rush, \textit{supra} note 42, at 4-5 (discussing the role of “malicious intent” in gerrymandering cases). For a discussion of the debate over whether any district lines can be considered neutral, see \textit{infra} Part II.A.


\textsuperscript{48} \textit{Id.} at 125 n.9 (“[N]onpartisan gerrymanders in fact are aimed at guaranteeing rather than infringing [upon] fair group representation.”).


\textsuperscript{50} \textit{Id.} (“[R]edistricting battles are rife with naked self-interest and partisanship; principles of democracy are persistently abandoned to baser motives.”).

\textsuperscript{51} Lewyn, \textit{supra} note 32, at 407 (citation omitted).

\textsuperscript{52} \textit{Id.} at 407-08 (agreeing that gerrymandering causes these harms, and arguing that partisan gerrymandering is an “unmitigated evil”).

\textsuperscript{53} Niemeyer, \textit{supra} note 43, at 248 (explaining that gerrymandering “sets aside the will of the popular majority[; i]t is a species of fraud, deception, and trickery which menaces the perpetuity of the Republic”) (citation omitted).

\textsuperscript{54} Schuck, \textit{supra} note 32, at 1327-31 (arguing that districting should be a legislative, not judicial, task).

\textsuperscript{55} \textit{See id.} at 1331-32.

\textsuperscript{56} \textit{See, e.g.}, Niemeyer, \textit{supra} note 43, at 248.
must poll more votes than the party in control of the districting process in order to win a given percentage of the legislative seats.”

Packing occurs when an over-concentration of a party is placed in a few districts, creating a “supermajority” in those districts but relegating the party to a minority in other districts, in order to “waste” that party’s votes and limit the number of competitive districts. Packing leads to a lack of competition within a district. Cracking, on the other hand, is the division of a political group into multiple districts to ensure that in each district the members of that party constitute a minority. A final gerrymandering tool is “shacking,” where either a representative’s residence is drawn into a district where her constituents do not reside, or two incumbents’ residences are placed in one district, leading to intense partisan competition.

The result of a successful partisan gerrymander is a lower margin of victory in the favored party’s seats than the margin in the disfavored party’s seats (so the opposing party’s votes will count as little as possible). However, if legislators gerrymander incorrectly (that is, the redistricting party miscalculates), the party that created the plan could suffer heavy losses. For that reason, the efficient distribution of votes to seats may involve making previously safe seats riskier, resulting in a “seats-security trade-off.”

With the advent of computer technology, legislators can slice states with precision, relying on partisan interests such as race, age, and other census data, to create multiple plans that incorporate particular voter indicators with ever-increasing efficiency. Legislators can create districting plans meticulously, block-by-block. The practice of districting, which emerged

59. See, e.g., Brennan, supra note 40, at 246-48. In a single-member district, any votes for the winning candidate in excess of fifty percent plus one are considered “wasted.” See Niemeyer, supra note 43, at 248.
62. See Issacharoff & Karlan, supra note 60, at 552-55.
63. See, e.g., Cox, supra note 12, at 768 (explaining that efficiency means lessening, and inefficiency means increasing, the number of the opposition’s “wasted” votes) (citation omitted).
64. Id. at 768-69. But see Criteria, supra note 57, at 112-13 (explaining that a “sophisticated gerrymander,” created by computer, improves the ability to create a gerrymander without risking trade-offs); Lewyn, supra note 32, at 409 (arguing that “a sophisticated gerrymander can avoid such pitfalls by creating ‘districts with a sufficient cushion of [majority party] partisan sympathizers . . . to make the districts safe for that party’”) (quoting Criteria, supra note 57, at 156).
to account for population shifts, is now undertaken on political whim, and the creation of partisan disadvantage is a primary goal. While views on the constitutionality of partisan gerrymandering differ, there is little doubt that the process affects election results. Whether partisan gerrymandering practices warrant judicial intervention depends, however, on broader conceptions of the goals of effective representation and the rights protected by the Constitution.

2. Districting Criteria

When legislators create a districting plan, they are constrained by the Constitution, Congressional legislation, and social science guidelines. This section will lay out the relevant districting parameters in turn.

a. Constitutional Standards

The Constitution itself does not speak directly of districting guidelines. Congressional districts are required to have equal populations based on Article I, Section 2, of the Constitution. The Court has refined this requirement over time, using the equal protection doctrine as a guide.

The Supreme Court first adjudicated partisan gerrymandering claims in 1986, granting justiciability under the Equal Protection Clause, but no court has ever provided relief to plaintiffs on equal protection grounds.

The continual failure of equal protection to provide a judicial remedy in partisan gerrymandering cases opened the door for plaintiffs to pursue other constitutional avenues for redress, particularly the First Amendment.

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67. See infra note 71 and accompanying text.
68. See, e.g., Hasen, supra note 3. This does not mean that partisan advantage was not a consideration in the past, just that the external limitations on success have changed. See generally Cox & Katz, supra note 34.
69. See supra notes 53-54 and accompanying text.
70. See generally Political Gerrymandering and the Courts, supra note 26 (presenting several scholars’ views on the meaning of Bandemer, and theories underlying the Court’s gerrymandering jurisprudence); see also Note, A New Map: Partisan Gerrymandering as a Federalism Injury, 117 Harv. L. Rev. 1196, 1198 (2004) [hereinafter Federalism Injury] (proposing that the court should focus not on individual representational or voting rights, but on the negative effect that gerrymandering has on the federalist nature of our republic).
71. U.S. Const. art. I, § 2, cl. 3, amended by U.S. Const. amend. XIV, § 2 (providing that “[r]epresentatives shall be apportioned among the several States according to their respective numbers .... The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall be Law direct”).
73. Vieth v. Jubelirer, 541 U.S. 267, 280 n.6, 281-82 (2004) (listing the lower court cases that have addressed partisan gerrymandering).
74. It is important at the outset to differentiate the political gerrymander from the racial gerrymander. The Court has adjudicated racial cases since holding that a gerrymandering scheme in an Alabama city election violated the Fourteenth Amendment in Gomillion v. Lightfoot, 364 U.S. 339 (1960). For an in-depth comparison of the treatment of political and racial gerrymandering claims see Luis Fuentes-Rohwer, Doing Our Politics in Court: Gerrymandering, “Fair Representation” and an Exegesis into the Judicial Role, 78 Notre
Vieth was the first Supreme Court case to discuss the applicability of the First Amendment standard to partisan gerrymandering. This standard would measure the effect of a political gerrymander on a citizen's right to "associate for the advancement of political beliefs." The freedom of association standard has not yet been adopted by any court, but it may prove to be the best protection against partisan gerrymanders enacted purely to disadvantage the opposing party at the polls.

The Equal Protection Clause guarantees that states will govern impartially by ensuring that government classifications are justified by sufficient purpose, and that state bodies do not partake in invidious discrimination. This antidiscrimination principle ensures that similarly situated people are treated in an equal manner and prohibits the perpetuation of subordinate classes. Whenever the government draws distinctions based on specific characteristics, or burdens a fundamental right, the Equal Protection Clause applies.

While the equal protection standard controls partisan gerrymandering claims, plaintiffs in partisan gerrymandering suits consistently allege that districting plans violate their First Amendment freedom of association. While no court has found a First Amendment violation to date, there is


75. See infra note 85.
76. See infra Part I.B.3.
77. The remainder of this Note will refer to this right as the freedom to associate, the right to associate, and political association.
78. See infra note 86.
79. See infra Part III.
83. Lewyn, supra note 32, at 429 (describing the characteristics that trigger equal protection "such as race, alienage, or gender").
84. See infra Part I.B.3.
scholarly support for the role of the First Amendment in election law. Justice Anthony Kennedy adopted the First Amendment standard for partisan gerrymandering in Vieth, arguing that the First Amendment could present a “functional” standard for adjudicating political gerrymandering claims.

Justice Kennedy’s freedom of association inquiry would focus on whether the state used political classifications to burden a group’s representational rights. If the state “penalize[s] citizens for their participation in the electoral process, their voting history, their association with a political party, or their expression of political views,” the state must show a compelling interest in order to survive First Amendment scrutiny.

The Constitution does not explicitly mention the right to associate, but courts recognize free association as a fundamental right, integral to free speech and assembly. Freedom to associate 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, whether the rights advanced by association are “political, economic, religious or cultural.”

The right to associate provides individuals the ability to join a party and “to gain a voice” in choosing candidates. The associational right is central to protecting minorities who may express alternative, perhaps

86. See Martin, 980 F.2d at 959 n.29 (citing Michael A. Hess, Beyond Justiciability: Political Gerrymandering After Davis v. Bandemer, 9 Campbell L. Rev. 207, 234 (1987) (“The most readily identifiable voting group is one based on political affiliation and voting patterns.”); Emily M. Calhoun, The First Amendment and Distributional Voting Rights Controversies, 52 Tenn. L. Rev. 549, 588-98 (1985); Harris Weinstein, Partisan Gerrymandering: The Next Hurdle in the Political Thicket?, 1 J.L. & Pol. 357, 373 (1984) (stating that political gerrymanders “strike at the heart of the rights of free speech and free association” because they “are designed to limit the effectiveness of organized political activity”); see also Guy-Uriel E. Charles, Racial Identity, Electoral Structures, and the First Amendment Right of Association, 91 Cal. L. Rev. 1209, 1239-60 (2003). But see Hasen, supra note 3, at 633-38 (discussing the Vieth opinion and rejecting the claim that the First Amendment will offer relief to plaintiffs in partisan gerrymandering).


88. See id. at 314.

89. Id. at 314-15 (acknowledging that courts must also decide on a manageable standard with which to measure the effect on apportionment).

90. See, e.g., Roberts v. U.S. Jaycees, 468 U.S. 609, 617-19 (1984) (recognizing that the First Amendment, while not expressly containing a right of association, does protect certain intimate human relationships, as well as the right to association for the purpose of engaging in those expressive activities otherwise protected by the Constitution). There are two distinct forms of the right to associate: intimate and expressive. Id.


92. Id. at 460-61 (“[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political” ideas; “state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”). This Note will refer to the First Amendment and the freedom of association synonymously.

93. See Kusper v. Pontikes, 414 U.S. 51, 58 (1973) (striking down an Illinois statute which prohibited voters from voting in one party’s primary if they voted in the primary of another party within twenty-three months as a restriction on the ability to change affiliation and “associate effectively”).
unpopular ideas. “Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.” Without this protection, majority groups could impose their will on others, monopolizing the "marketplace of ideas," which underlies our democratic system of governance. In 1974, the Court expressly held that states must show a “compelling state interest” before burdening the First Amendment rights of political parties or their members. The Constitution provides broad guidelines to legislatures, but legislators are bound by additional statutory and traditional social science criteria.

b. Statutory Standards

States are largely responsible for the districting process but Congress has acted under its constitutional authority to regulate districting and prevent legislative abuse of the process. Currently, Congress requires only that congressional districts be single-member districts. Aside from setting districting requirements, Congress has also created special procedures for the adjudication of redistricting and reapportionment claims where the stakes are high and hasty resolution may be required to ensure that districting plans are ready by election time. The special procedures include the availability of a three-judge panel to review every statewide districting plan and appeal of panel decisions to the Supreme Court. Additionally, courts themselves have authority to create

95. NAACP, 357 U.S. at 460.
98. Article I, Section 4, Clause 1 of the U.S. Constitution provides the following: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of ch[oo]sing Senators.”
99. See Brennan, supra note 40, at 244 (explaining the history of congressional districting regulation, which at times have required population equality, compactness, and contiguity).
100. State legislative districts can be either multimember or single member. See id. at 265, 345. Each state may also adopt their own districting requirements. 2 U.S.C. § 2c (2000). For relevant state constitutional provisions see Criteria, supra note 57, at 84-93. Single-member plurality districts of representation ensure that some group of voters are always denied representation because the system is premised on a winner-take-all result. See Rush, supra note 42, at 3. While outside the scope of this Note, alternatives to the single-member plurality scheme are discussed elsewhere. See generally Robert Alexander Schwartz, The Nature of Consent in the American Republic: Substance or Procedure, 38 U.S.F. L. Rev. 467 (2004); see also Constitutionalization, supra note 30, at 2551-52.
101. See Brennan, supra note 40, at 248.
districting plans when legislators fail to act within the required time frame for districting.\textsuperscript{103}

c. Social Science Criteria

While congressional districting involves few legal constraints,\textsuperscript{104} courts rely on past congressional legislation and social science standards as a guide when evaluating district plans.\textsuperscript{105} While it is clear that adherence to the criteria described below does not prevent partisan gerrymandering, traditional criteria can limit the partisan effect of gerrymanders and help frame the appropriate judicial role in gerrymandering.\textsuperscript{106} This section will discuss three major categories of districting criteria: formal, result/outcome oriented, and intent based.\textsuperscript{107}

Formal criteria evaluate districts in terms of political and physical geography.\textsuperscript{108} The first criterion, population equality, is constitutionally required.\textsuperscript{109} A second straightforward measure of districting is contiguity. Contiguity occurs in districting when "every part of a district is reachable from every other part without crossing the district boundary."\textsuperscript{110} Contiguity is a cornerstone of the district-based representation system, which relies on the ability of representatives to reach all members of their constituency.\textsuperscript{111} Contiguity assures that a district is geographically unified.\textsuperscript{112} Political scientists agree with virtual unanimity that population equality and contiguity serve as sound bases for district line drawing.\textsuperscript{113}

A third formal criterion for districting is compactness.\textsuperscript{114} Compactness refers to the territorial shape of a district and while there is not one agreed upon definition of compactness, compact districts are typically in the shape

\textsuperscript{103} See supra note 14.
\textsuperscript{104} James A. Gardner, A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims, 3 Election L.J. 643, 647 (2004) (suggesting that state courts are an appropriate place to begin the judicial fight against partisan gerrymandering because state constitutions refer explicitly to elections, while the federal "Constitution . . . has comparatively little to say").
\textsuperscript{105} See, e.g., Vieth v. Jubelirer, 541 U.S 267 (2004); see also Martin Shapiro, Gerrymandering, Unfairness and the Supreme Court, 33 UCLA L. Rev. 227, 249-51 (1985) (discussing the role of prominent social scientist Bernard Grofman as an expert witness in districting litigation).
\textsuperscript{106} For the debate regarding the ability of courts to apply these standards in a politically neutral manner, see infra Part II.A.
\textsuperscript{107} This tripartite classification is adopted from Criteria, supra note 57, at 77-152. Each social scientist defines the criteria slightly differently. The definitions here are based on a synthesis of several articles. See id.; Lewyn, supra note 32, at 464-75; Lowenstein & Steinberg, supra note 45, at 12-64.
\textsuperscript{108} Lowenstein & Steinberg, supra note 45, at 12.
\textsuperscript{109} The precise mathematical deviation has changed over time. See supra Part I.A.2.a.
\textsuperscript{110} See Criteria, supra note 57, at 84.
\textsuperscript{111} Lowenstein & Steinberg, supra note 45, at 21.
\textsuperscript{112} See, e.g., Criteria, supra note 57, at 84.
\textsuperscript{113} Id.
\textsuperscript{114} See Lewyn, supra note 32, at 465-68.
Though there is no consensus on the role of the compactness standard, courts continue to look at this standard when evaluating gerrymanders, but generally decline to strike down districting plans under this measure unless there are severe departures from compactness in several districts.

A fourth formal criterion used to measure gerrymanders is respect for political subdivisions and communities of interest. This measure of districting requires that line drawers take into account county lines, neighborhoods and common political and economic interests. This is the one criterion that the Supreme Court has permitted to justify district deviation from population equality.

Courts also use intent-based criteria that focus on the process by which legislators created a districting plan, and look beyond the location of district lines. The first intent-based measure is incumbent advantage. Incumbent advantage looks to two different indicia: treatment of the controlling party’s incumbents and treatment of the opposing party’s incumbents. Under this measure, the extent to which the incumbents of one party are paired against each other, or robbed of their past constituents, serves as evidence of pure partisan motives. A second intent-based measure is partisan fairness, or the absence of partisan bias, which defies precise definition but relates closely to the treatment of incumbents.

Results/outcome-oriented criteria include competitiveness and vote-seat ratios. Competitiveness measures the number of closely contested races between members of the two major parties per district, such that it is very difficult to predict a winner. Competitiveness is specific to individual

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115. Compare Criteria, supra note 57, at 84-85, with Lowenstein & Steinberg, supra note 45, at 22-27.
117. See Criteria, supra note 57, at 86, 91 (arguing that there is a tenuous relationship between compactness and political gerrymandering).
118. See Lowenstein & Steinberg, supra note 45, at 28.
119. See id.
120. Id. at 27-28, 28 n.75 (citing Brown v. Thomson, 462 U.S. 835 (1983)) (arguing against the validity of the standard as a public interest criterion).
121. See Criteria, supra note 57, at 99-117; see also Lewyn, supra note 32, at 468-69.
122. See Criteria, supra note 57, at 106-07.
123. Id. at 115-16.
124. See id. (treating opponents negatively is wrong because displacing incumbents in the opposing party is one of the most effective tactics of gerrymandering; by using names and records an incumbent can protect seats in the opposing party’s territory). But see Lowenstein & Steinberg, supra note 45, at 45-46 (arguing that general anti-incumbent bias is arbitrary because favoring a challenger would also lead to a skew in results, and there is no neutral effect).
125. See Criteria, supra note 57, at 108-09; see also Cox, supra note 12, at 755-56 (arguing that partisan fairness, not just population equality, was the goal of redistricting jurisprudence and that Bandemer “constitutionalized” this concern for fairness).
126. Lowenstein & Steinberg, supra note 45, at 37; see also Criteria, supra note 57, at 152.
politicians and particular elections. According to this criterion, the creation of "safe seats," where the district is engineered so that a particular candidate will win the election without much of a contest, could be evidence of improper partisan motive. If districts are not competitive, then even very large changes in vote percentages for the major parties may not lead to a change in which a party gains seats.

The second results-based criterion is the ratio of a party's vote share as compared to the seat share won in an election. Social scientists can measure a vote/seats ratio in two ways: by proportionality or by symmetry. These measures look at the state plan as a whole, not at particular districts, and present the distinct problem of deciding how courts can count voting strength. One example—proportional representation—occurs when the percentage of party members in the electorate is equal to the percentage of the party in the state.

A final measure of districting incorporates all three broader classifications in a "totality of the circumstances" test, which requires courts to look at contours, compactness, political boundaries, intent, process, and impact to measure the validity of the district plan at issue. This test requires courts to balance legislative goals with fairness in the process, intent, and outcome of a districting plan.

Bound by the aforementioned constraints, legislators seek to create districts that preserve, or expand, their political power. Originally, the highly political nature of districting kept the Supreme Court from adjudicating claims that certain districts violated individual constitutional

127. See Persily, supra note 44, at 663-64 (claiming that competitiveness is not correlated to gerrymandering). There are two measures of the competitiveness criterion: weak and strong. See Lowenstein & Steinberg, supra note 45, at 37-40 (arguing both why this standard is difficult for the judiciary to apply in a coherent manner and may even thwart the goal of political stability). But see Fuentes-Rohwer, supra note 74, at 577-79 (explaining why maintaining competitiveness is important to our national system of governance).

128. See Criteria, supra note 57, at 171.

129. Id. at 151-52.

130. Id. at 149-53; see also Lowenstein & Steinberg, supra note 45, at 49-60.

131. No court has adopted the measure of symmetry. See Stephen E. Gottlieb, In 'Vieth', Court Continues to Misunderstand Gerrymandering, N.Y. L.J., Aug. 19, 2004, at 4. For a definition of this criterion and a call for the Court to adopt symmetry, see id. at 7.

132. See, e.g., Lowenstein & Steinberg, supra note 45, at 49-51; see also discussion infra Part II.A. on the ability of courts to measure partisan voting strength.

133. The Supreme Court has rejected proportional representation as a constitutional right. Vieth v. Jubelirer, 541 U.S. 267, 288-89 (2004); see also Criteria, supra note 57, at 12-53. While not mandating proportional representation, courts have allowed it as a legitimate state goal in districting. See, e.g., Gaffney v. Cummings, 412 U.S. 735, 754 (1973).


135. See Lewyn, supra note 32, at 470-71 (arguing that this test is vague and unworkable). But see Charles Backstrom et al., Establishing a Statewide Electoral Effects Baseline, in Political Gerrymandering and the Courts, supra note 26, at 145-70 (discussing the success of this test in racial gerrymandering cases).
rights. The Court declined to hear such cases, declaring districting claims to be non-justiciable, as detailed in this part.

B. The Judicial Role in Districting

This Part provides a chronological analysis of the Court's role in the regulation of districting. Part I.B.1 discusses the Court's initial refusal to enter the districting arena, and presents the justiciability doctrine, which plays a prominent role in the current debate over partisan gerrymandering claims. Part I.B.2 describes the growth of the one-person, one-vote standard for district apportionment. This history provides guidance for the discussion of the appropriate role of the courts in partisan gerrymandering presented in Part II, and a basis for the freedom of association standard advocated in Part III. The early districting cases frequently refer to the harms of partisan gerrymandering and serve as the basis for the equal protection standard that currently controls partisan gerrymandering. Part I.B.3 goes on to explain the current state of partisan gerrymandering in both the Supreme Court and several federal courts.

1. Justiciability

The Supreme Court originally declined to enter the political area of districting in 1946, holding that the Court did not have jurisdiction over districting and the issue was non-justiciable.136

Justiciability encompasses several judicially created doctrines, which are derived from one of two sources: interpretations of Article III, Section 2, of the Constitution, and prudent judicial administration.137 These two sources of justiciability doctrines are closely related to separation of powers,138 which dictates "the role assigned to the judiciary in a tripartite allocation of power" to ensure that courts do not "intrude into areas committed to other branches of government."139

There are five justiciability doctrines that determine which cases federal courts may hear and decide, and which cases the courts must dismiss:140

136. Colegrove v. Green, 328 U.S. 549, 556 (1946) (holding that districting claims were not justiciable under the Guaranty Clause and the regulation of time, place, and manner of elections was left to legislative branches). Colegrove warned against judicial involvement in the "political thicket" of districting because "[t]he Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." Id.
137. Erwin Chemerinsky, Federal Jurisdiction 42 (2d ed. 1994) (explaining that the Constitution's textual description of the nine categories of "cases" and "controversies" imposes limits on the federal judiciary and that the Supreme Court has interpreted the text to create the justiciability doctrines).
138. See id. at 43.
140. See Chemerinsky, supra note 137, at 42. For an in-depth discussion of each justiciability doctrine, see id. at 42-166.
the prohibition against advisory opinions, standing, ripeness, mootness, and the political question doctrine.

The political question doctrine, implicated in the districting context, refers to subject matter that the Supreme Court finds inappropriate for judicial review, even when a case meets all the other requirements of justiciability. In essence, the political question doctrine is one of institutional competence, which prevents the court from deciding cases where other branches have superior expertise, and maintains the Court's political legitimacy.

The most quoted language describing the political question doctrine is found in Baker v. Carr, the seminal case in which the Supreme Court refuted the reasoning of Colegrove v. Green and entered the "political thicket" of districting. Baker v. Carr provided that courts could not adjudicate cases when any of the following factors were present:

- A textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

2. Apportionment: One Person, One Vote

The Supreme Court began adjudicating districting as a response to the failure of southern state legislators to redraw districts in light of new census

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141. See id. at 47 (stating that this doctrine prohibits federal courts from "provid[ing] opinions about the constitutionality of pending legislation or on constitutional questions referred to them by other branches of government"). There is no such prohibition on state courts. Id.

142. See id. at 54 (defining standing as a determination of "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues").

143. See id. at 114 (describing ripeness as a "doctrine [which] seeks to separate matters that are premature for review because the injury is speculative and never may occur, from those cases appropriate for federal court action") (citations omitted).

144. See id. at 125 (referring to mootness as the "doctrine of standing in a time frame," which requires that an actual controversy must exist at all stages of litigation).

145. See infra notes 166-72 and accompanying text.

146. See Chemerinsky, supra note 137, at 142.

147. See id. at 146.


149. 328 U.S. 549 (1946); see also supra note 136 and accompanying text.

150. See supra note 136.

data. Failure to redistrict left states with districts in which urban centers held the majority of the population while rural communities received the most representatives.

By declaring legislative districting claims justiciable in *Baker*, the Court began the "Reapportionment Revolution." *Baker* announced that just because a claim "seeks protection of a political right does not mean it presents a political question." While finding jurisdiction over plaintiff's equal protection claim, *Baker* did not articulate a standard for measuring unconstitutional apportionment. *Baker* also did not set up a clear standard for the role of courts in districting. The *Baker* Court did, however, create some guidelines for districting: Legislators must redraw districts at a minimum after each census and approve court involvement in refashioning districts when the state legislators fail to act.

Only two years later, in *Reynolds v. Sims*, the Court enunciated the "one-person, one-vote" standard as a constitutional requirement for districting. Affirming justiciability, the *Reynolds* Court held that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts ... as nearly of equal population as is practicable." The Court would allow population deviations as long as legislators justified the deviations with legitimate state concerns. The Court declared that the goal of apportionment was "fair and effective representation," and "full and effective participation in [the] political processes of [every citizen's] State's legislative bodies."

Within two years of *Baker*, the Court also acknowledged the justiciability of congressional districting claims. The Court found justification for adjudication of these districting claims not in the Equal Protection Clause, but in Article I, Section 2, of the Constitution, holding that "[w]hile it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making

152. See, e.g., Reynolds v. Sims, 377 U.S. 533, 540 (1964) (explaining that Alabama's state districting plan remained untouched for years and the court stepped in to define an exact standard for measuring constitutionality of the vote dilution claim); *Baker*, 369 U.S. at 193 (discussing the Tennessee legislature's refusal to reapportion congressional districts between 1901 and 1961).
153. See, e.g., *Criteria*, supra note 57, at 80-81.
155. See, e.g., *Cox*, supra note 12, at 755.
159. See supra note 14.
161. Fuentes-Rohwer, supra note 74, at 558 (quoting Reynolds, 377 U.S. at 577).
162. *Id.*
164. Wesberry v. Sanders, 376 U.S. 1, 6-7 (1964).
The Court, in *Wesberry v. Sanders*, reasoned that if the vote of a person in one district weighed more than the vote of someone in another district, elections would violate fundamental democratic principles, including election "by the People." Federal districts must reach population equality "as nearly as is practicable" to ensure one vote was worth as much as another, recognizing that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."

The one-person, one-vote standard protects individuals and ensures that registered voters have the right to cast a vote that has equal value. While the original districting cases focused on mathematical equality and individual claims for "fair and effective representation," it is clear that the Court had concerns that equally populated districts alone could not prevent constitutionally infirm elections.

*Reynolds* recognized that limits on apportionment were only one step towards protecting voters' rights, as the "opportunities for [partisan] gerrymandering are greatest when there is freedom to construct unequally populated districts." The Court noted, however, that by allowing non-compact, noncontiguous districts, there was "an open invitation to partisan gerrymandering."

As the Court refined the equality standard, concerns over partisan gerrymandering continued to play a role in judicial decisions. In *Fortson v. Dorsey*, the Court stated that while a plan may reach population equality, plaintiffs could present a viable constitutional challenge by showing the plan "would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."

In 1969, the Court articulated a strict population standard for evaluating apportionment claims of congressional districts, rejecting a de minimis variance as inconsistent with "as nearly as practicable" language of Article I, Section 2, of the Constitution and equal protection principles. *Kirkpatrick v. Preisler* stands for the idea that precise population equality is

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165. *Id.* at 18. The Court has strictly adhered to population equality in congressional districting, but has been more lenient in state districting plans. See *Criteria*, supra note 57, at 83.

166. 376 U.S. at 1.

167. *Id.* at 8 (citation omitted).

168. *Id.* at 7-8.

169. *Id.* at 17-18.

170. *See id.*


173. 379 U.S. 433 (1965)

174. *Id.* at 439 (failing to address how courts would measure such a challenge in the future).

175. *Kirkpatrick*, 394 U.S. at 530.
necessary in order to avoid the “debasement of voting power” and secure “effective access” to representatives.\textsuperscript{176}

The \textit{Kirkpatrick} Court rejected the state’s rationales for deviation from population equality,\textsuperscript{177} but acknowledged that population shifts could justify deviations if the state was making a “good-faith effort” to reach equal apportionment.\textsuperscript{178} The Court rejected population deviations that were justified solely by the state goal of protecting group interests.\textsuperscript{179}

In concurrence, Justice Abe Fortas defined gerrymandering and noted that the one-person, one-vote standard could serve as “political cover” for incumbent protection gerrymandering.\textsuperscript{180} Justice Fortas would therefore allow population deviations only if it was clear that there was no evidence of gerrymandering.\textsuperscript{181} The dissent noted that “precise adherence to admittedly inexact census figures ... downgrade[s] a restraint on a far greater potential threat to equality of representation, the gerrymander.”\textsuperscript{182}

A majority of the Court spoke on partisan gerrymandering in 1973. \textit{Gaffney v. Cummings} upheld a districting plan drawn in an attempt to guarantee parties “rough” proportional representation in the state legislature.\textsuperscript{183} The Court held that the plan was constitutional because there was a good faith effort to reach population equality.\textsuperscript{184} \textit{Gaffney} was one of the few occasions that the Court recognized protection of a group right to representation as legitimate,\textsuperscript{185} and set forth a criterion of “political fairness” for districting.\textsuperscript{186} The Court directly addressed the use of partisan gerrymandering, but did not base its decision on that ground, finding instead that the Court’s discretion to intervene is at its “lowest ebb” when legislators apportion fairly.\textsuperscript{187}

In \textit{Karcher v. Daggett},\textsuperscript{188} the Court partook in the “backdoor invalidation of a [congressional district] gerrymander.”\textsuperscript{189} The Court supplied additional guidance and flexibility to the apportionment standard from

\textsuperscript{176} \textit{Id.}

\textsuperscript{177} \textit{Id.} at 530-31 (laying out the state’s rationales: preserving areas of interest, accommodating legislative compromise, avoiding fragmentation of political entities, and compactness).

\textsuperscript{178} \textit{Id.} at 537 (Fortas, J., concurring).

\textsuperscript{179} Calhoun, supra note 86, at 596.

\textsuperscript{180} See Silverberg, supra note 49, at 932.

\textsuperscript{181} \textit{Kirkpatrick}, 394 U.S. at 537-40 (Fortas, J., concurring).

\textsuperscript{182} \textit{Id.} at 555 (White, J., dissenting).


\textsuperscript{184} \textit{Id.} at 754.

\textsuperscript{185} Davis v. Bandemer, 478 U.S. 109, 119-20 (1986). \textit{But see id.} at 144, 153 (O'Connor, J., concurring) (rejecting the plurality's reliance on \textit{Gaffney}).

\textsuperscript{186} \textit{Gaffney}, 412 U.S. at 735; \textit{see also} Baker, supra note 134, at 18 (discussing the importance of considering political fairness in districting plans).

\textsuperscript{187} \textit{See Bandemer}, 478 U.S. at 154.

\textsuperscript{188} 462 U.S. 725 (1983).

\textsuperscript{189} Fuentes-Rohwer, supra note 74, at 559 (internal quotation omitted) (explaining that while the Court relied on population deviation to find the districting plan unconstitutional, the Court was concerned with the process, in which Democrats maintained complete control, evincing their partisan intent).
Kirkpatrick, creating a two-step test for measuring a congressional district’s adherence to Article I, Section 2, of the Constitution.\textsuperscript{190} The Court required plaintiffs to show that a district plan existed in which legislatures, through a good faith effort to achieve equality, could have reduced or eliminated population differences.\textsuperscript{191} If the plaintiff showed that the deviations were not part of a good faith effort, then the burden shifted to the state to prove the variance was necessary to reach a legitimate goal.\textsuperscript{192}

In Karcher, five Justices expressed a “constitutionally-based concern about gerrymandering without directly addressing the issue.”\textsuperscript{193} In concurrence, Justice John Paul Stevens proffered the first judicial standard to measure the constitutionality of a partisan gerrymander.\textsuperscript{194} If a districting plan included invidious partisan gerrymandering and an absence of good faith legislative action, the Court should strike the plan down.\textsuperscript{195} Justice Stevens’ test required plaintiffs to show that: (1) they were part of a salient class whose distribution was sufficiently ascertainable to be taken into account in drawing boundaries; (2) proportionate voting influence had been adversely affected either in relevant districts, or in the state as a whole; and (3) plaintiffs had to make a prima facie showing of adverse impacts, and raise a rebuttable presumption of discrimination.\textsuperscript{196} Justice Stevens stated that the one-person, one-vote standard did not protect group rights,\textsuperscript{197} identifying a group claim to discrimination, which opened the door for future adjudication based on membership in a political party.\textsuperscript{198}

3. Partisan Gerrymandering Cases

Just three years after Karcher, the Court granted full consideration to the constitutionality of partisan gerrymandering, the practice so often disparaged in dicta.\textsuperscript{199} In Davis v. Bandemer, members of the Indiana State Democratic Party brought suit alleging that the 1981 districting plan of the Indiana State House of Representatives violated the Equal Protection Clause because the Republican legislators intentionally created a statewide

\textsuperscript{190} Karcher, 462 U.S. at 730-31.
\textsuperscript{191} Id.
\textsuperscript{192} Id. at 731.
\textsuperscript{193} Niemeyer, supra note 43, at 256; see also Lowenstein & Steinberg, supra note 45, at 1-3.
\textsuperscript{194} Karcher, 462 U.S. at 745 (Stevens, J., concurring).
\textsuperscript{195} Id. at 754-56.
\textsuperscript{196} Id. at 754-55.
\textsuperscript{197} Id. at 750-52.
\textsuperscript{198} Brennan, supra note 40, at 264.
\textsuperscript{199} Davis v. Bandemer, 478 U.S. 109 (1986). Prior to Bandemer, the Court summarily affirmed non-justiciability of partisan gerrymandering cases. See, e.g., WMCA Inc. v. Lomenzo, 382 U.S. 4 (1965) (per curiam), vacated, 384 U.S. 887 (1966). Though Bandemer was a long-awaited decision in the election field, the importance of the decision was overlooked by many because the decision was handed down on the same day as Bowers v. Hardwick, 478 U.S. 1039 (1986). Daniel H. Lowenstein, Bandemer’s Gap: Gerrymandering and Equal Protection in Political Gerrymandering and the Courts, supra note 26, at 64.
plan purely to disadvantage Democrats and dilute the power of Democrats’ votes.\textsuperscript{200}

The Indiana plan, created under a Republican Governor and Republican-dominated State Legislature,\textsuperscript{201} largely excluded Democratic legislative involvement. Democrats had no voting power on the conference committee that developed the scheme and were denied access to the Republican-funded study of the effects of each computer-generated program.\textsuperscript{202}

The district court, relying on the three-prong test presented by Justice Stevens in \textit{Karcher},\textsuperscript{203} held that the plaintiff’s claim was justiciable and that the districting plan violated the Equal Protection Clause.\textsuperscript{204} The plaintiffs, Democratic Party members, proved that they were “members of a politically salient class” and that “their proportionate voting influence was adversely affected.”\textsuperscript{205}

The Supreme Court granted certiorari and held that partisan gerrymandering constituted a justiciable equal protection question.\textsuperscript{206} While a majority of the Justices agreed on reversal of the district court decision, only four Justices approved of the plurality’s standard for identifying unconstitutional partisan gerrymandering.\textsuperscript{207}

Writing for the plurality, Justice Byron White rejected the finding that Democratic voters failed to show the requisite “unconstitutional vote dilution” across the state as a whole.\textsuperscript{208} Justice White created a two-prong test that required the challenger to prove that the legislature intentionally discriminated “against an identifiable political group” and that the districting plan resulted in a “discriminatory effect on that group.”\textsuperscript{209} In order to violate the Constitution on a statewide basis, a districting plan must

\textsuperscript{200} \textit{Bandemer}, 478 U.S. at 127. According to the districting plan, the State Senate and House districts were redrawn in 1981 and an election was held in 1982 where Democrats received 51.9% of the vote, but elected only forty-three of the one hundred house seats. The three-judge district panel invalidated the plan on the basis that it “diluted” the Democratic vote, and the defendants appealed. \textit{Id.} at 113-15. For a detailed factual history of \textit{Bandemer}, see Hess, \textit{supra} note 86. \textit{See generally} Political Gerrymandering and the Courts, \textit{supra} note 26.


\textsuperscript{202} \textit{See, e.g.}, Schuck, \textit{supra} note 32, at 1332.

\textsuperscript{203} \textit{See supra} note 195 and accompanying text.

\textsuperscript{204} \textit{Bandemer}, 603 F. Supp. at 1479-80.

\textsuperscript{205} \textit{Id.} at 1492-93 (focusing on the shape of districts, the role of traditional districting standards, and the use of “stacking” and “splitting” techniques) (citations omitted).

\textsuperscript{206} \textit{Davis} v. \textit{Bandemer}, 478 U.S. 109, 113 (1986). The vote was 6-3 to grant justiciability and 7-2 to reverse the lower court invalidation of the plan decision. However, the Court did not produce a majority opinion. Grofman, \textit{supra} note 26, at 3. The decision did not address bipartisan gerrymandering, only pure partisan districting. \textit{Id.} at 6.

\textsuperscript{207} Justice White presented an approach adopted from racial gerrymandering cases. \textit{Bandemer}, 478 U.S. at 127 (citing \textit{Mobile} v. \textit{Bolden}, 446 U.S. 55, 67-68 (1980)).

\textsuperscript{208} \textit{Id.} at 131-32.

\textsuperscript{209} \textit{Id.} at 127. While six Justices agreed that a two-prong test was appropriate, the Justices could not agree on the factors necessary to prove either prong. \textit{Compare id. with id.} at 161-62 (Powell, J., concurring in part and dissenting in part).
"consistently degrade a voter's or a group of voters' influence on the political process as a whole."\footnote{210}

The plurality test required plaintiffs to make a prima facie showing of "unconstitutional vote dilution" in order to establish a "continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process."\footnote{211} Once a challenger demonstrated discriminatory effects, the Court would review the legislative intent.\footnote{212} The Indiana Democrats failed to show the discriminatory effect, and the presence of discriminatory intent alone was not sufficient to invalidate the Indiana districting plan.\footnote{213} "[I]ntentional drawing of district boundaries for partisan ends and for no other reason does not violate equal protection" if discriminatory effects are not proven.\footnote{214} The Court rejected the idea that equal protection required that "each political group . . . should have the same chance to elect representatives of its choice."\footnote{215} While partisan intent was present, the plaintiffs failed to show the required discriminatory effects to sustain a constitutional violation.\footnote{216} The plaintiffs' reliance on just one election failed to meet the requirements of the effects prong.\footnote{217}

Justice Sandra Day O'Connor filed a concurring opinion, which Chief Justice Warren Burger and Justice William Rehnquist joined,\footnote{218} finding that partisan gerrymandering constituted a political question, and refuting the justiciability of partisan gerrymandering claims.\footnote{219} Citing the "nebulous standard" of the plurality,\footnote{220} Justice O'Connor found that the nature of the problem meant that no bright-line rule was possible.\footnote{221}

\footnote{210. Id. at 132-33 (plurality opinion). Justice White outlined differing tests for statewide and district-wide claims. For a district, the "inquiry focuses on the opportunity of members of the group to participate in party deliberations in the slating and nomination of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns and to secure the attention of the winning candidate." Id. For a statewide claim, "the inquiry centers on the voters' direct or indirect influence on the elections of the state legislature as a whole." Id.}

\footnote{211. Id.}

\footnote{212. Id. at 134.}

\footnote{213. Id. at 141-42.}

\footnote{214. Id. at 138.}

\footnote{215. Id. at 124.}

\footnote{216. Id. at 135.}

\footnote{217. Id. But see id. at 169 n.7 (Powell, J., concurring in part and dissenting in part) ("Though effects on election results do not suffice to establish an unconstitutional gerrymander, they certainly are relevant to such a claim, and they may suffice to show that the claimants have been injured by the redistricting they challenge.").}

\footnote{218. Id. at 144 (O'Connor, J., concurring).}

\footnote{219. Id. at 144-45. See infra Part II for further insight into the debates on the justiciability of partisan gerrymandering.}

\footnote{220. Bandemer, 478 U.S. at 145.}

\footnote{221. Id. at 152-55 (stating that partisan gerrymanders are self correcting because district lines are redrawn every decade and people move, change affiliation, and do not always vote along party lines). Additionally, the uncertainty involved in line drawing demonstrated that districting is a "self-limiting enterprise." Id.}
Justice O’Connor chastised the majority for applying the group-rights standard employed in racial gerrymandering cases to the political context because the considerations differed fundamentally. The Equal Protection Clause does not provide a “group right to an equal share of political power,” and to recognize such a right would require that districts reflect proportional representation. Adjudication of these claims would lead to every identifiable group claiming a right to proportional representation. The individual right to an equally weighted vote, which the Court protected in the early reapportionment cases, did not lead to relief here.

Members of the Democratic and Republican Parties can hardly claim to be “shut out of the political process,” as they dominate the system, and any act of gerrymandering risks the success of one party, at the potential gain of its opposing party.

Additionally, the Court found that the Democratic claim of statewide dilution did not encompass an actual harm to an individual in any particular district. Finally, “the impossible task of extirpating politics from what are the essentially political processes of the sovereign States” meant that courts should not partake in the regulation of partisan districting.

Justice Lewis Powell, joined by Justice Stevens, wrote an opinion agreeing with the finding of justiciability, but in contrast to the plurality, Justice Powell found that the Indiana plan violated the Equal Protection Clause. While the majority opinion offered a standard that could protect individuals, the majority standard failed to protect group rights adequately. Members of a losing party need protection because these voters will lack the same influence over state government that winning party members will attain. The essence of the gerrymandering claim is

222. Id. at 151, 156-61 (arguing that racial standards are inapplicable because race is immutable, there is specific protection from racial discrimination provided in the Fourteenth Amendment, and, finally, that race, unlike politics, is not a necessary part of the political/election trade).

223. Id. at 150 (While “the right . . . to vote draws much of its significance from . . . political associations,” that does not translate into a constitutional group right to representation. (quoting Mobile v. Bolden, 446 U.S. 55, 78-79 (1980)).

224. Id. at 145.

225. Id. at 147.

226. Id. at 149.

227. Id. at 152 (citing the plurality opinion).

228. See id. at 156 (explaining that political parties have shifting membership, and people do not always vote along party lines).

229. Id. at 153.

230. Id. (quoting Gaffney v. Cummings, 412 U.S. 735, 754 (1973)).

231. Id. at 162 (Powell, J., concurring in part and dissenting in part) (relying on the definition of gerrymandering set forth in Justice Fortas’s concurrence in Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969), stating that gerrymandering is “the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes”).

232. Id. at 171 (citing Justice Stevens’s concurrence in Karcher v. Daggett, 462 U.S. 725, 752 (1983) (criticizing the power of the one-person, one-vote standard as a measure for group voting rights)).

233. Id. at 169-70.
that members of a particular party have been “denied their right to ‘fair and
effective representation.’” 234

Unlike Justice White, Justice Powell approved of an initial inquiry into
legislative intent, and found that adherence to the one-person, one-vote
standard was not enough to validate a partisan gerrymandering claim. 235
Population equality alone was a necessary, but not sufficient, component of
a constitutional districting plan. 236

Justice Powell framed the constitutional question as whether Indiana
violated the Equal Protection Clause by adopting a plan “designed solely to
preserve the power of the dominant political party.” 237 Justice Powell set
up an intent and effects test, which measured whether the plan served any
purpose aside from favoring one segment of the community over others. 238
If the state presented no legitimate purpose, but simply “purposefully
discriminate[d]” against opposing parties, the plan violated equal
protection. 239 Justice Powell focused on “fairness” and set out five factors
to guide a judge’s inquiry into the fairness of a districting plan: numerical
evidence of dilution, shape of districts, adherence to political subdivisions,
legislative procedures used to adopt the plan, and legislative history of the
redistricting plan. 240 This test would enable courts to differentiate between
the acceptable practice of districting for partisan advantage and an
unconstitutional gerrymandering. 241 Justice Powell also found that courts
would not need more than one set of election results to find a constitutional
violation. 242 Unlike the plurality, Justice Powell would not set a strict
requirement that plaintiffs directly establish “invidious intent” or “a history
of disproportionate results.” 243

Justice Powell criticized the plurality for focusing almost exclusively on
one-person, one-vote, which resulted in the validation of “grotesquely
gerrymandered” districts. 244 Justice Powell highlighted the importance of
reviewing the legislative process, which excluded Democrats, excluded
public participation, and focused purely on partisan advantage. 245
According to Powell, because equal protection requires that the state govern
impartially, the state must treat all voters the same when drawing district
lines, regardless of the voters’ beliefs. 246

234. Id. at 162 (quoting Reynolds v. Sims, 377 U.S. 533, 565 (1964)).
235. Id. at 168.
236. See id. at 168 n.5.
237. Id. at 161.
238. See id. at 174-75.
239. Id. at 174.
240. Id. at 173. The majority opinion criticized these factors and rejected intent alone as
insufficient to prove an equal protection violation. Id. at 138-39.
241. Id. at 165.
242. Id. at 175-78 (discussing the factors that would warrant finding that a districting plan
was unconstitutional).
243. Id. at 173 n.10.
244. Id. at 162.
245. Id. at 162-63, 165.
246. Id. at 166.
Powell’s concurrence explained that it was inappropriate to put the burden of proving intentional discrimination on the plaintiffs where there was direct proof of legislative intent. However, in order to prevent judicial entanglement in an arena of such political consequence, the Court should impose a heavy burden on gerrymandered plaintiffs while striking down plans where a totality of the circumstances revealed the discriminatory purpose of the legislature. Justice Powell concluded that because the Indiana Legislature failed to justify the discriminatory aspects of the plan—not even offering a rational explanation aside from population equality—the Court should find a violation of equal protection.

Bandemer set a very high standard for invalidation of partisan gerrymanders, explaining that the harm must be “sufficiently serious to require intervention,” but the plurality opinion did not reveal any clear guidelines for measuring constitutional violations. The multiple opinions, however, did establish that the “power to influence the political process is not limited to winning elections.” The decision “created a group right to a meaningful and undiluted vote,” recognizing that “each political group in a State should have the same chance . . . to elect representatives of its choice” as any other political group.

For the eighteen years after Bandemer, no court found a constitutional violation using the plurality’s standard. On occasion, the Supreme Court summarily affirmed lower court decisions finding partisan gerrymandering non-justiciable, and the lower courts were left with very little guidance on how to proceed in this politicized area. Bandemer was read as “recondite” and criticized for “serv[ing] as an invitation to litigation without much prospect of redress” and causing “only confusion.” In fact, plaintiffs pursuing a partisan gerrymandering claim received relief in only one gerrymandering case between 1986 and 2004.

While several lower courts applied the Bandemer standard, which requires a showing that voter influence over the political process was “consistently degrade[d],” no court has come up with a widely accepted

247. Id. at 171 n.9-10 (describing the plurality’s reliance on racial cases as erroneous, because in racial cases, the intent is not overt, as it is in partisan gerrymandering).
248. Id. at 184-85.
249. Id. at 184.
250. Id. at 134.
251. See infra notes 256-58 and accompanying text.
253. Brennan, supra note 40, at 265 n.17, 267 (citation omitted).
254. See Vieth v. Jubelirer, 541 U.S. 267, 279 n.5, 280 n.6, 287 n.8 (2004) (citing all the cases where claims for relief were rejected); see also Cox, supra note 12, at 798.
255. See Brennan, supra note 40, at 293.
257. Issacharoff & Karlan, supra note 60, at 550 (citation omitted).
259. See Vieth, 541 U.S. at 279 n.5 (explaining that the one case was for judicial elections, not for state or congressional representatives).
definition of this effects prong. The controlling interpretation of Bandemer emerged in a district court decision in California, summarily affirmed by the Supreme Court.

In Badham v. Eu, the district court applied the Bandemer standard to a claim that the California reapportionment plan violated the Equal Protection Clause and the First Amendment.

The Badham court denied relief under the Equal Protection Clause claim and dismissed the plaintiff’s First Amendment challenge, finding that the party was not precluded from fielding candidates because while “the First Amendment guarantees the right to participate in the political process, it does not guarantee political success.”

The court denied relief because there was no showing of consistent degradation of Republican voter influence on the political process. The court found that the claim failed because the districting plan did not deny Republicans the ability to register voters, organize, fundraise, or campaign. The plaintiffs failed to demonstrate a “strong indicia of lack of political power and the denial of fair representation” and therefore, could not prove a Constitutional violation. Unless a majority party shows it has effectively been unable to participate in the political process at all, the court would not strike down a districting plan. Badham is important because, as one commentator recently concluded, post-Badham courts may not strike down a gerrymander against a major party in the absence of a First Amendment violation.

261. See, e.g., Lewyn, supra note 32, at 443. See generally Lowenstein, supra note 199, at 64-116.

262. See Lewyn, supra note 32, at 439-40. For alternate interpretations of the meaning of Bandemer, compare Grofman, supra note 26, at 29-64 (understanding the plurality test to require intentionally severe discrimination and long-lasting effects), with Lowenstein, supra note 199, at 64-116 (interpreting the decision to preclude majority parties from ever establishing an equal protection violation).

263. Badham v. Eu, 694 F. Supp. 664 (N.D. Cal. 1998). Badham has been criticized as “a complete misreading” of Bandemer “and a violation of common sense.” Grofman, supra note 26, at 50-51; see also Federalism Injury, supra note 70, at 1207 (“While most criticism has focused on the Badham court’s transformation of Bandemer’s reasoning into a standard that eventually foreclosed any successful claims of partisan gerrymandering, surprisingly little attention has been paid to how Bandemer’s holding was extended by Badham to the context of congressional elections.”).

264. Badham, 694 F. Supp. at 675. The court found no indication that Republican views were ignored by Representatives. Id. at 670-73.

265. Id. at 669-70.

266. Id.

267. Id. (quoting Davis v. Bandemer, 478 U.S. 109, 139 (1986)).


269. Lewyn, supra note 32, at 440. But see Terrazas v. Slagle, 821 F. Supp. 1162, 1174 (W.D. Tex. 1993) (rejecting the Badham court’s focus on the First Amendment violations because “[g]errymandering is concerned with dilution of political influence through the manipulation of elective district boundaries, not with other abuses of the electoral process or First Amendment violations”).
The inability of the Court to identify a concrete measure for unconstitutional gerrymanders has left legislators "unchecked" in their districting practices.270 Gerrymandering thus became more precise, and criticism from the domestic and international community mounted against this "uniquely American practice of self-interested redistricting."271

Possibly as a response to political pressure, or as a reaction to mounting media attention,272 the Supreme Court put Bandemer to the test and agreed to give full consideration to a second partisan gerrymandering claim in Vieth v. Jubelirer.273

Vieth arose from challenges to the Pennsylvania congressional districting plan drawn up after the 2000 census.274 In 2000, Pennsylvania’s population shifted.275 As a result, the number of Pennsylvanian Congresspersons was reduced from twenty-one to nineteen, and the Pennsylvania State Legislature embarked on a new redistricting plan.276

Despite the Republican-controlled Pennsylvania Legislature, in 2000 Pennsylvania actually had a closely divided electorate.277 Republicans also controlled the U.S. House of Representatives and the Presidency. The Pennsylvania Legislature created the districting plan at a pivotal moment when Republican party leaders were fighting to maintain control at both the national and the state level.278

The Pennsylvania House and Senate could not agree on a new districting plan and the deadlock led to the appointment of a bipartisan conference committee that eventually passed the plan into law.279 Though the committee was "bipartisan," plaintiffs alleged that Republicans all but locked Democrats out of the process.280

271. See Constitutionalization, supra note 30, at 57.
272. See, e.g., supra notes 12, 13, 27.
274. Id. at 272.
275. Id.
276. Id.
278. See Brennan, supra note 40, at 274-75 (explaining the role of Karl Rove, Dennis Hastert, Rick Santorum, and Thomas Davis in the courting of the Pennsylvania Legislature in order to retain party control); see also Abramsky, supra note 13, at 15 (explaining that although the Republican Party has denied administration involvement in the redistricting power grab, in those states where redistricting has become an issue such as Texas and Colorado, Republican representatives had been contacted by Karl Rove).
280. Although this commission included four Republican members and two Democratic members, it seems that this bipartisanship was illusory. Compare Brief for the Appellants at 6-10, Vieth v. Jubelirer, 541 U.S. 267 (2004) (No. 02-1580), with Brief for the Appellees at 8-10, Vieth v. Jubelirer, 541 U.S. 267 (2004) (No. 02-1580) (refuting the claim of bipartisan
Three Pennsylvania Democrats filed a complaint against Republican members of the Pennsylvania Legislature, alleging that the districting plan ("Act I") violated the standards set forth in *Bandemer*, the one-person, one-vote principle, the First Amendment, the Privileges and Immunities Clause, and § 1983 of the United States Code. The district court granted the defendants' motion to dismiss on all counts except the one-person, one-vote claim (rejecting plaintiffs' claim that Act I constituted an unconstitutional government classification based on political association, and denying a constitutional guarantee to successful participation in the political process). A litany of cases followed, and eventually the Pennsylvania legislators created a revised districting plan ("Act 34") to remedy any impermissible population deviations of the previous plan.

A district court reviewed Act 34 and found that it was a "good faith effort" to remedy the one-vote violation and was valid based on mathematical equality among district populations. The court relied on the rationale from *Badham*, and found that the "[p]laintiffs did not allege facts indicating that they have been shut out of the political process and, therefore, they [cannot establish the threshold requirement of] an actual discriminatory effect... as required by Davis v. Bandemer." Having a more difficult time electing their officials was not a constitutional injury, and because plaintiffs failed to meet the effects prong, the Court affirmed the districting plan.

Convinced that the Pennsylvania plan violated the U.S. Constitution, the Pennsylvania Democrats appealed the court's decision directly to the

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282. Id. at 537-43.
283. Id. at 548 (citing Buckley v. Valeo, 424 U.S. 1, 15 (1976)) (agreeing that the First Amendment protects political association but that the plaintiffs failed to show how Act I violated their First Amendment rights). Additional courts have applied this reasoning. See, e.g., Republican Party of N.C. v. Martin, 980 F.2d 943, 959-60 (4th Cir. 1992); Pope v. Blue, 899 F. Supp at 392, 398 (W.D. N.C. 1992); Badham v. Eu, 694 F. Supp. 664, 675 (N.D. Cal. 1988) aff'd., 488 U.S. 1024 (1989). "Two Pennsylvania Democratic voters filed a [parallel suit] in state court, claiming that the districting plan's partisan bias violated the Pennsylvania Constitution... The [Pennsylvania Supreme Court] found that the plan would produce a 14-to-5 or 13-to-6 Republican advantage in the State's congressional delegation, even if Republican candidates received less than half the votes cast." Ultimately, however, "the Pennsylvania Supreme Court rejected the plaintiffs' state-law claims [as]... deficient because they had not shown that Democrats would be 'shut out of the political process.'" Brief for the Appellants, supra note 280, at 14.

284. For a full description of the proceedings in the lower court, see generally Brennan, supra note 40, at 281-93.
287. *Supra* notes 263-68.
289. Id. at 484-85.
The Democrats alleged that Act 34 included districts that "slic[ed] through municipalities, counties, and communities and creat[ed] bizarrely shaped districts, one which appeared like a "dragon descending on Philadelphia from the west, splitting up towns and communities." The Democrats claimed that Pennsylvania Legislators violated the Equal Protection Clause and Article I, Section 2, of the Constitution, and ignored traditional districting principles, creating districts with the sole purpose of maximizing Republican control of Congress, "to thwart majority rule." Since partisan bias was the predominant intent behind the plan, appellants claimed that the Court should invalidate the plan for giving Republicans an artificial advantage in at least thirteen of the State's nineteen districts.

The Supreme Court, in a plurality opinion, affirmed the district court decision and held that political gerrymandering claims were non-justiciable, overruling Bandemer. Four justices held that all partisan gerrymandering claims were non-justiciable because standards existed to measure them. Justice Kennedy, in concurrence, found that while the Court had to dismiss the case at bar, he would not hold all partisan gerrymandering claims non-justiciable. The dissenters failed to agree on a standard by which to measure the unconstitutionality of a gerrymander.

The plurality held that neither the Equal Protection Clause, nor Article I, Section 2, nor Article I, Section 4, of the Constitution "provide[d] a

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290. Districting claims are decided by three-judge panels, see 28 U.S.C. § 2284 (2000), and the panel decisions can be appealed directly to the Supreme Court, 28 U.S.C. § 1253. “Any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.” Id.

291. See Brief for the Appellants, supra note 280, at 2, 42.

292. Id. at 25-26.

293. Id. at 20.

294. Id. at 2 (stating that Republican legislators admitted that their goal was to "maximize the number of Republicans elected to Congress throughout the decade, while eliminating as many Democratic incumbents as possible").


296. Id. at 267.


298. See Vieth, 541 U.S. at 339 (Stevens, J., dissenting) (advocating a standard that asks "whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles"); id. at 346 (Souter, J., dissenting) (calling for a standard that requires "a plaintiff to satisfy elements of a prima facie cause of action," and then allowing the state to rebut the evidence and "offer an affirmative justification for the districting choices"); id. at 364-65 (Breyer, J., dissenting) (providing indicia to identify the "unjustified entrenching in power of a political party that the voters have rejected"); see also Daniel R. Ortiz, Got Theory?, 153 U. Pa. L. Rev. 459, 491-98 (2004) (discussing the dissension among the Justices).
judicially enforceable limit on the political considerations that the States and Congress may take into account when districting.”

The plurality conceded that partisan gerrymandering was incompatible with democratic principles but reaffirmed the Court’s inability to define a remedy.

Writing for the plurality, Justice Antonin Scalia found that because “judicial action must be governed by a standard” or “by rule,” partisan gerrymandering claims should not fall within the province of the Court. Since “no judicially discernable and manageable standards for adjudicating political gerrymandering claims have emerged,” the plurality concluded that gerrymandering claims were non-justiciable. The plurality, however, failed to address the reasons for the Court’s failure to adopt plausible alternatives to equal protection.

The plurality systematically outlined the existing equal protection standard from Bandemer, and dismissed the Bandemer test as unworkable. Redistricting was a “political calculus” and the “expression of interest group politics [have] substantial political consequences.” Additionally, because parties compete for congressional seats on a districtwide basis, the plurality denied the appropriateness of a statewide claim of discrimination. In one-person, one-vote cases, the claims involve the individual’s ability to have a say in the election of representatives in her district. Gerrymandering, in contrast, involved a group claim to have representation in government according to the size of its membership, and the analysis is neither limited to one district nor easily calculable.

The plurality then refuted the concurring and dissenting opinions of Vieth and described each opinion as a failure to enunciate a clear standard to measure partisan gerrymandering claims. These differing standards supported the conclusion that the issue was non-justiciable.

In concurrence, Justice Kennedy agreed that no “neutral principles for drawing electoral boundaries” existed to render the Pennsylvania claim justiciable and affirmed the district court’s holding. In contrast to the

299. Vieth, 541 U.S. at 305.
300. Id. at 292.
301. Id. at 274-75 (explaining the role of partisan gerrymandering in the history of the American political system).
302. Id. at 281.
303. See id. at 279-83.
304. Id. at 281-84.
305. Id. at 285.
306. Id. (citations omitted).
307. Id. at 288.
308. See, e.g., Reynolds v. Sims, 377 U.S. 533, 562-63 (1964) (utilizing an inquiry involving three factors: where a voter lives, how many voters live in that district, and how many voters are in other districts).
309. Vieth, 541 U.S. at 287-89.
310. Id. at 292-307.
311. Id. at 305-06.
312. Id. at 306-07 (Kennedy, J., concurring).
plurality, Justice Kennedy refused to close the door to future gerrymandering claims, hoping instead that a "limited and precise rationale" could emerge to correct constitutional violations in some cases. Focusing on the potential harm that a lack of legislative restraint could cause to democratic principles, Justice Kennedy believed that holding partisan gerrymandering claims non-justiciable might "erode confidence in the courts," and defy the caution needed when legislation burdens constitutional rights. The evolving state of computer technology, new and sophisticated methods of gerrymandering, legal scholarship, or a First Amendment analysis could lead to a standard that exposes the harms involved in discriminatory districting.

Though Justice Kennedy agreed that an equal protection analysis governed the case at bar, he proffered the First Amendment freedom of association as an alternative measure for determining the constitutionality of partisan gerrymandering. A First Amendment analysis, according to Justice Kennedy, might be a better fit for partisan gerrymandering cases because it does not focus on the "permissibility of an enactment's classifications." The First Amendment inquiry focuses on whether legislation negatively affects voters because of their political beliefs.

In racial gerrymandering, the equal protection analysis is simple: Race is almost always an impermissible class. However, the equal protection analysis is less straightforward when the classification is political affiliation. With a First Amendment analysis, once the government

313. Id. at 306.
314. Id. The plurality believed Justice Kennedy's pronouncement was "not legally available" because the only choice was to declare non-justiciability or find that an alternative relevant standard had not been met. Id. at 301.
315. Id. at 309-10.
316. Id. at 306-14. But see generally Hasen, supra note 3 (refuting each of these potential criteria and arguing that Justice Kennedy's opinion does not point us in a helpful direction, and the Court should wait for a social consensus to emerge about the validity of gerrymandering before adjudicating these claims).
318. Vieth, 541 U.S. at 315. But see Constitutionalization, supra note 30, at 58 (stating that Justice Kennedy's opinion exemplifies the mistaken impulse to frame structural problems in the framework of individual rights, and then to couch those problems in First Amendment terms).
319. Vieth, 541 U.S. at 315 (Kennedy, J., concurring).
320. See id.
321. Id.
makes any viewpoint-based classification, the state must show that the
district was drawn to further a compelling government purpose.322

Ultimately, the inquiry would require an evaluation of the purpose and
effect of legislation,323 but in a manner different from that under the Equal
Protection Clause.324 If the government applied a permissible classification
(political affiliation) in a manner that burdened representational rights
because of "ideology, beliefs, or political association," the state would have
the burden of proffering a compelling state interest.325

The First Amendment is central to representative democracy326 because
it protects individuals against legislation that discriminates based on
political beliefs.327 To be invalid, politics as a classification must be
"applied in an invidious manner or in a way unrelated to any legitimate
legislative objective."328

The plurality viewed Justice Kennedy’s test as a deterrent to the use of
political processes to afford actual relief.329 While acknowledging the First
Amendment standard in a brief paragraph, Justice Scalia stated that "if [the
First Amendment claim] were sustained, [it] would render unlawful all
consideration of political affiliation in districting, just as the [First
Amendment] render[ed] unlawful all consideration of political affiliation in
hiring for non-policy-level government jobs."330

Thus, the plurality denied the applicability of First Amendment cases to
suggest that partisan gerrymanders were subject to strict scrutiny, finding
that "'[n]othing in our case-law compels the conclusion that racial and
political gerrymanders are subject to precisely the same constitutional
scrutiny.'"331

In his dissent, Justice Stevens agreed that statewide partisan
discrimination claims were non-justiciable.332 Justice Stevens would allow
courts to consider individual district gerrymandering claims as courts do in
the racial context, subjecting district claims to strict scrutiny.333 The
plurality rejected this approach, denying similarities between race and

322. Id. at 315 (adding that "all this depends first on courts’ having available a
manageable standard by which to measure the effect of the apportionment and so to conclude
that the State did impose a burden or restriction on the rights of a party’s voters").
323. Id.
324. Id.
325. Id. (suggesting this test was beneficial because it left discretion regarding policy
objectives and methods of implementation to each state).
326. Id. at 314.
327. Id. (citing Elrod v. Burns, 427 U.S. 347 (1976)).
328. Id. at 307.
329. Id. at 304-05 (concluding that the holding of non-justiciability was warranted in the
partisan gerrymandering, which was dissimilar to apportionment cases).
330. Id. at 294. This statement was actually made in reference to Justice Stevens’ use of
First Amendment cases to fashion a justification for the use of equal protection in districting.
Id.
331. Id. at 293 (quoting Shaw v. Reno, 509 U.S. 630, 650 (1993)).
332. Id. at 339 (Stevens, J., dissenting).
333. See id. at 319-22.
political affiliation, and emphasized that the Court has not used strict scrutiny to review political gerrymandering. Justice Stevens's conclusion that "state action that discriminates against a political minority for the sole and unadorned purpose of maximizing the power of the majority plainly violates the decision maker's duty to remain impartial" could not be reconciled with the realities of districting where political success is a valid motive.

Justice David Souter agreed that courts could review partisan gerrymandering claims only on the district level; he proposed a standard in which plaintiffs would have to prove a five-factor prima facie test before succeeding on a partisan districting claim. Once a plaintiff presented these five factors, the burden would shift to the state to justify the lines by "reference to objectives other than naked partisan advantage." Justice Scalia criticized Souter's test as too quantitative to provide guidance to parties or lower courts. Additionally, this test did not address the fundamental question of when gerrymandering reached the level of a constitutional violation, but aimed to uncover only the existence of "an ‘extremity of unfairness.’" For all the stated reasons, this case-by-case analysis was unworkable.

Justice Breyer's dissent stated that "unjustified entrenchment" violated the Constitution and focused on the democratic harms of gerrymandering. Justice Breyer's only clear requirement was that the courts examine claims on a statewide level. The "unjust[] entrenchment" test failed to articulate a clear measure of partisan discrimination and did not provide a manageable standard to regulate gerrymandering.

The Supreme Court evaluated Vieth twice within nine months of writing the decision. Prior to the decision to remand in Jackson v. Perry, the Court affirmed a district court decision in Georgia that purely partisan purposes did not qualify as a legitimate state interest to justify deviation from population equality in districting. While striking down the state

334. Id. at 323-26.
335. Id. at 326.
336. Id. at 292-94.
337. Id. at 346-52 (Souter, J., dissenting) (adopting a set of factors from a combination of Title VII and voting rights case law).
338. Id. at 351.
339. Id. at 296-97.
340. Id.
341. Id. at 295 (quoting Justice Souter's dissent).
342. Id. at 306.
343. Id. at 360.
344. Id. at 356-64 (Breyer, J., dissenting).
345. Id. a 362-63.
346. See id. at 299 (criticizing Justice Breyer's approach).
districting plan for the Georgia House and Senate on one-person, one-vote grounds, the decision stated that "had the Court in Vieth adopted a standard . . . the standard would likely have been satisfied in this case." 349

Lower courts are left with little guidance on how to proceed when faced with political gerrymandering claims in the future. While Justice Scalia summarily rejected the use of the First Amendment or strict scrutiny in partisan gerrymandering claims, 350 a more in-depth analysis is needed to explore the role of the court in the future and the potential manageability of a freedom of association standard.

II. THE PROPER JUDICIAL ROLE

The fact that the Supreme Court addressed partisan gerrymandering claims on three different occasions in 2004 shows that the issue is both timely and complex. The increasing vehemence with which political parties create partisan districting plans is not limited to Texas. 351 In 2001, California House Democrats paid $20,000 apiece to a redistricting consultant for "designer districts." 352 In the 2001 national elections, only four challengers defeated House incumbents, the fewest challenger successes in history. 353 For the third consecutive election less than one in ten House races involved a competitive margin. 354 Both Cox v. Larios 355 and Jackson v. Perry 356 demonstrate that there is much need for guidance in lower courts and legislative chambers. In order to proceed in this area, the Court must clarify the scope of its presence in the partisan gerrymandering context.

The Justices fundamentally disagree on two main issues: whether the judicial branch is the proper watchdog for this legislative task of districting, and whether the Constitution provides a standard that courts can use to measure the effects of a partisan gerrymander. 357 A resolution of these

349. Cox, 124 S. Ct. at 2808.
350. See supra note 331.
352. Republicans agreed to this plan, in exchange for their own safe seats, and the plan worked: Fifty incumbents won by a landslide, and no challenger secured even forty percent of the vote. See Anderson & Richie, supra note 351, at 68.
353. Id.
354. Id. See generally Issacharoff, supra note 44 (proposing that courts define the harm of gerrymandering in terms of competition and take the districting process out of the hands of legislators with a vested interest in the process). But see Persily, supra note 44, at 650 (refuting that declining competition is a result of partisan districting practices because statewide elections are unaffected by gerrymandering).
357. See supra notes 295-346.
issues will dictate the success or failure of future partisan gerrymandering claims. Part II.A discusses the threshold issue of justiciability, clarifying the arguments for and against the role of the judiciary as an arbiter of districting grievances. Part II.B presents case law support for the freedom of association standard in partisan gerrymandering.

A. Is the Court the Proper Arbiter of Partisan Gerrymandering?

Critics of judicial involvement claim that partisan gerrymandering falls squarely within the political question doctrine and that the issue is non-justiciable. This section will address the main academic and legal arguments against justiciability and present responses to those arguments in turn.

1. Districting Is Left to Other Branches of Government

Opponents of judicial regulation of partisan gerrymandering argue that the task of redistricting is inherently political and "textually committed to a coordinate political branch." The constitutional commitment of election regulation to other branches in Article I, Section 5, Article I, Section 4, and the Tenth Amendment precludes judicial regulation of the districting process.

Proponents of judicial intervention respond by highlighting several aspects of judicial precedent which refute this argument. The Supreme Court has found that the constitutional power of legislators to enact election regulations is limited to procedural regulations, not those that are outcome-determinative. Judicial involvement in racial gerrymandering and apportionment demonstrates that there is room for judicial involvement in regulation of these legislative tasks. Additionally, Congress provided special mechanisms to allow judicial involvement in districting through

358. See Davis v. Bandemer, 478 U.S. 109, 144-45 (1986) (O'Connor, J., concurring). But see Lewyn, supra note 32, at 428-29 (finding that "adjudication of partisan gerrymandering cases affects none of the political question factors cited in Baker, and that political gerrymandering cases should be justiciable").

359. See Bandemer v. Davis, 603 F. Supp. 1479, 1484 (S.D. Ind. 1984), rev'd, 478 U.S. 109 (1986); see also Lowenstein & Steinberg, supra note 45, at 4 (positing that there are no coherent public interest criteria for legislative districting, "which constitute[s] the very stuff of politics").


361. U.S. Const. art. 1, § 5 ("Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members").

362. Section 4 of Article I of the Constitution grants the same power to judge elections of its members.

363. The Tenth Amendment provides that powers not delegated to the Federal Government are left to the states.

364. See Lewyn, supra note 32, at 428.

365. See generally Schwartz, supra note 100.

366. See Lewyn, supra note 32, at 438.
special three-judge panels, and allowing court drawn districting.\textsuperscript{367} Finally, the political branches never had exclusive control over gerrymandering.

2. No Judicially Manageable Standard Exists

The second argument against justiciability is the lack of a "judicially discoverable and manageable standard" for resolving partisan gerrymandering claims.\textsuperscript{368} Critics of the judiciary as an arbiter of gerrymandering claims believe that not only is it difficult to agree on the harms caused by gerrymandering, but there is no precise way to measure the harms that do occur. Unlike vote dilution claims, where there is a simple arithmetic formula, infringement on political success is difficult to define.\textsuperscript{369} Many of these critics agree that while partisan gerrymandering may have negative impacts on the political process, it is extremely difficult to measure such impacts.\textsuperscript{370}

The countervailing argument is that the political question doctrine, however, does not require courts to provide an arithmetically precise solution.\textsuperscript{371} Growth of standards can take time,\textsuperscript{372} and the impossibility of perfection should not "paralyze attempts to identify and ameliorate the most egregious gerrymanders, the clearest obstacle to a meaningful concept of representative equality."\textsuperscript{373}

Opponents of intervention claim that the "no manageable standards" argument is a "smokescreen" because the Court has demonstrated an ability to measure violations of mathematical complexity in Title VII employment cases.\textsuperscript{374} Courts have also proven able to measure partisan strength.\textsuperscript{375}

\textsuperscript{367} See supra notes 101-03 and accompanying text.
\textsuperscript{368} Vieth v. Jubelirer, 541 U.S. 267, 277-78 (2004) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)); accord Davis v. Bandemer, 478 U.S. 109, 156 (1986) (O'Connor, J., concurring) (stating that "[v]ote dilution analysis is far less manageable when extended to major political parties than if confined to racial minority groups," because the courts will have to adjudicate competing claims of several groups and "the difficulty of measuring voting strength is heightened in the case of a major political party"). See generally Lowenstein & Steinberg, supra note 45.
\textsuperscript{369} Bandemer, 478 U.S. at 149 (O'Connor, J., concurring).
\textsuperscript{370} See, e.g., Lowenstein & Steinberg, supra note 45, at 33.
\textsuperscript{371} Bandemer, 478 U.S. at 123; Avery v. Midland County, 390 U.S. 474, 510 (1968) (Stewart, J., dissenting) (declaring that apportionment "is far too subtle and complicated a business to be resolved as a matter of constitutional law in terms of sixth-grade arithmetic"); see also Pamela S. Karlan, The Fire Next Time: Reapportionment After the 2000 Census, 50 Stan. L. Rev. 731, 745 (1998).
\textsuperscript{372} See Vieth, 541 U.S. at 307-09 (Kennedy, J., concurring).
\textsuperscript{373} See Gordon Baker, The Unfinished Reapportionment Revolution, in Political Gerrymandering and the Courts, supra note 26, at 24.
\textsuperscript{374} See Criteria, supra note 57, at 154; see also Silverberg, supra note 49, at 940 (explaining that though not neutral in a pure sense, some district lines will be more "fair" than those chosen purely out of partisan self-interest).
\textsuperscript{375} Lewyn, supra note 32, at 438 (citing Hastert v. State Bd. of Elections, 777 F. Supp. 634, 655-60 (N.D. Ill. 1991)) (discussing the ability of courts to measure voting strength in various ways).
Additionally, mathematical formulas are not necessarily required to measure the harms associated with gerrymandering. The argument against manageable standards places too much focus on the effects of gerrymanders, and not enough on the intent of the legislators. A quantitative analysis, in this view, should be replaced with some less formal measure that focuses on the intent of the legislators in the process as a whole, rather than partisan outcomes per election.

Critics still argue that even if courts discovered a standard, it should not be judicially implemented because every line drawn will have political consequences, whether intended or not. Districts, even when created by a "neutral body" such as the courts, have political consequences that would embroil the judiciary in politics and create "grave political and constitutional risks."

The fact that not all measurements of districting may be completely neutral does not prohibit the courts from addressing claims where constitutional harms exist. Commentators rebut that the Court can limit its involvement to ensure constitutional protection, promoting self-enforcement by legislatures, and still allow legislative discretion in constructing the structure of districting plans.

3. Courts Should Not Make Policy Determinations

The third argument in favor of non-justiciability is that courts, by adjudicating partisan gerrymandering claims, will be making policy determinations that should be left to legislators. Any attempt at judicial line drawing involves decisions regarding appropriate levels of representation that require policy decisions regarding proportional representation.

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376. See, e.g., Criteria, supra note 57, at 117-18, 121 (arguing that statistical methods will fail the courts and proposing twelve indicia that courts should use to identify).

377. See Karlan, supra note 371, at 745 (criticizing objective standards because they fail to address the allocation of power).


379. See Hasen, supra note 3, at 632; see also Lewyn, supra note 32, at 426; Lowenstein & Steinberg, supra note 45, at 9.

380. Schuck, supra note 32, at 1330.

381. See, e.g., Shapiro, supra note 105, at 236.

382. See Constitutionalization, supra note 30, at 66-68 (discussing how the standard set in the racial gerrymandering cases led to a self-limiting principle for legislatures, and how this could also happen in the partisan districting context); see also Fuentes-Rohwer, supra note 74, at 534-35 (arguing that the judiciary should play a minimal role in partisan gerrymandering); cf. Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 Stan. L. Rev. 643, 699 (1998) (arguing that for judicial involvement to correct anticompetitive partisan gerrymandering plans, a court should play an active role upholding only a limited type of districting plans).

383. See Bandemer, 478 U.S. at 154-58 (O'Connor, J., concurring); Schuck, supra note 32, at 1326 ("Persistent warnings about the Court's limited ability to reform politics and about the dangers that lay ahead have gone unheeded.").
representation and preferences for nonpartisan gerrymanders over bipartisan districting plans. The people of each state and their representatives should make decisions about democratic structures, not the judiciary. Courts are equipped only to rectify exclusion, not to determine the validity of structures that constrain electoral behavior.

In fact, these critics argue that judicial regulation of gerrymandering may actually harm the electorate because partisan line drawing ensures stability, serving both a legitimacy function and an accountability function. The creation of safe seats and incumbent protections allows voters to elect incumbents who have experience and an ability to lead. Taking partisan factors into account ensures that the system functions smoothly, while a more "politically mindless approach [could produce] the most grossly gerrymandered results."

The counterargument is that these critics do not account for judicial power to intervene and adjust legislative district lines when legislators fail to act. Additionally, judicial oversight of the process does not require courts to dictate the makeup of individual districts or force proportional representation because state legislatures and Congress still have discretion over plans, as long as the plans do not violate the Constitution.

The democratic harms created by gerrymanders—undermining the integrity of the democratic process, shutting out minority viewpoints, diluting the voting power of statewide majority groups, protecting ineffective incumbents, and creating voter apathy—warrant judicial intervention. Without judicial intervention, politicians could set their
own rules for determining future election outcomes, which is contrary to the idea that the will of the people grants legitimacy to the government. Proponents of judicial intervention believe that partisan gerrymandering is a self-perpetuating breakdown of the political process, and intervention is warranted because elected representatives have a “vested interest[] in maintaining the political status quo.” The political question doctrine should not control in the arena of election law, which is already highly regulated by the courts. Gerrymanders severely inhibit the role of voters in democratic institutions and subvert conceptions of the balance of power understood by the framers, and courts must step in to protect the process. Because the beneficiaries (and possibly the architects) of partisan gerrymandering are in Congress, it is appropriate for courts to adjudicate and ensure that democratic processes are functioning correctly.

Future adjudication of partisan gerrymandering relies on more than a declaration that the issue is justiciable. Successful litigation requires that plaintiffs articulate a measurable constitutional standard. To date, plaintiffs have failed to articulate either an associational standard, or an equal protection claim sufficient to garner the majority support needed for the invalidation of a gerrymander. However, as demonstrated by the reapportionment line of cases, manageable standards can develop over time if the necessary constitutional foundation exists. Moving forward, plaintiffs face a choice of continuing to rely on an equal protection standard, or developing a manageable alternative. The remainder of this part will present support for the use of a First Amendment standard in partisan gerrymandering.

("[E]liminating judicial intervention seems particularly risky in a system in which legislators can approve redistricting plans in the face of overwhelming voter disapproval.").

397. See, e.g., Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863) (recognizing the importance of sustaining democracy and freedom and urging “that government of the people, for the people shall not perish from the earth”).
398. See Issacharoff & Pildes, supra note 382, at 709.
400. See Federalism Injury, supra note 70, at 1198; see also Lewyn, supra note 32, at 437 (“This argument is entitled to less weight where legislators have elected themselves through gerrymandering, just as it would be entitled to no weight if the legislators had elected themselves by stuffing ballot boxes.”). But see Vieth v. Jubelirer, 541 U.S. 267, 275 (2004) (“It is significant that the Framers provided a remedy for such practices in the Constitution. Article 1, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to ‘make or alter’ those districts if it wished.”).
401. See, e.g., Baker, supra note 134, at 207-08 (discussing the role of legislative intent in creating districting plans).
403. See supra Part I.B.2.
B. Case Law Support for a Freedom of Association Standard

In Vieth, Justice Kennedy referenced four cases in support of a First Amendment standard. Additional cases also support the power of the courts to step in and strike down legislation that limits voting rights based on voters' political viewpoints. Using precedent from a broader area of voting rights case law, this section demonstrates that the Court has applied strict scrutiny to protect individual First Amendment rights and the integrity of the democratic process.

Part II.B.1 will show that courts have struck down state voting requirement laws out of concern for political viewpoint discrimination, even when using the language of the Equal Protection Clause. Part II.B.2 will discuss the four cases presented in Vieth in support of a manageable freedom of association standard in partisan gerrymandering cases.

These cases implicate the rights involved in partisan gerrymandering claims and provide direction to courts reviewing partisan gerrymandering claims.

1. Vote Distribution Cases

First Amendment issues are particularly evident in a series of cases regarding state distribution of the voting franchise. Interestingly, courts have decided these cases on equal protection grounds, even though the cases discuss viewpoint discrimination in dicta. The Court, while allowing states discretion in adopting voter qualifications, has scrutinized state regulations and struck down laws that do not serve a legitimate state interest. Courts have limited the power of state legislators to guarantee that states do not "exclud[e] persons from an election because of their political opinions."

These cases explicitly express concern for ensuring that the state does not disadvantage citizens with disfavored political views. Even qualifications that might be legitimate to ensure voters were knowledgeable

405. See supra note 317.

406. See Alexander M. Bickel, The Supreme Court and the Idea of Progress 59-60 (1970) (discussing assimilating the right to vote with First Amendment rights in order to avoid subjective judgments in voting rights cases); Charles L. Black, Structure and Relationship in Constitutional Law 9 (1969) (once franchise is extended to people, the state should not be permitted to differentiate voters based on opinion); see also Calhoun, supra note 86 (analyzing historic voting rights cases in support of a First Amendment analysis for distributional voting rights controversies).

407. States have a right to predicate voting qualifications on intelligent use of the ballot and qualifications need only be rationally related to the prescribed qualification. See Calhoun, supra note 86, at 559 (citing Harper v. Va. Bd. of Elections, 383 U.S. 663, 666, 668 (1966)).

408. Id. at 563-66.

409. Id. at 566-67 (discussing the use of First Amendment rhetoric in these voting cases).

410. Id. at 558-63.

411. Id. at 562 (citing Carrington v. Rash, 380 U.S. 89, 94 (1965)).

412. Id. (discussing Carrington, 380 U.S. at 94).
(a permissible goal) could be invalidated if used as a proxy to require that voters held acceptable viewpoints as a prerequisite to voting. 

Judicial scrutiny of viewpoint-based regulations highlights the role that First Amendment protections play in the politicized arena of election regulations and demonstrates that the Court need not defer to state voting laws in all cases.

2. Political Parties and Freedom of Association

The First Amendment, while not central to individual voting rights jurisprudence generally, plays a key role in the regulation of election law and political parties and is instructive in districting litigation. This section will discuss the freedom to associate in the four areas of election law cited by Justice Kennedy in his Vieth concurrence: internal party affairs, primary regulations, third-party ballots access, and patronage cases.

The right to associate in order to pursue political goals is necessary to ensure true democracy. Political parties serve a very particular function in a democratic system by allowing members to "gain a voice" in politics, fostering competitiveness and participation in self-government. State regulation of political parties therefore implicates the fundamental rights of participation and voting, and warrants judicial scrutiny.

State legislation

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413. Id. at 562.
414. The Court has attached a high value to equal participation in the political process, and the commonalities between equal protection and First Amendment concerns have been the focus of scholarship which analyzes Bush v. Gore, 531 U.S. 98 (2000), through the lens of a First Amendment-equal protection doctrine. While specific restraints on speech are outside the purview of this note, these scholars recognize the existence of a "common constitutional value underlying rights of speech and rights of political participation." See Daniel P. Tokaji, First Amendment Equal Protection: On Discretion, Inequality, and Participation, 101 Mich. L. Rev. 2409, 2498 (2003) [hereinafter First Amendment Equal Protection]. These scholars focus specifically on the limits that the Supreme Court has placed on the use of official discretion to restrict speech per se. See also Abner Greene, Is There a First Amendment Defense for Bush v. Gore? 80 Notre Dame L. Rev. 1643 (2005); Daniel P. Tokaji, Political Equality after Bush v. Gore: A First Amendment Approach to Voting Rights, in Final Arbiter: The Consequences of Bush v. Gore for Law and Politics (Christopher P. Banks et al. eds. forthcoming 2005). Daniel Tokaji has noted that "First Amendment Equal Protection cases" could present a justification for entry into the "political thicket" of districting. See First Amendment Equal Protection, supra at 2516-17.
415. See supra note 317.
416. See Charles, supra note 86, at 1239-40 (discussing the fundamental nature of association rights and democracy, which supports the use of association in an electoral context). "[R]ight of association is almost as inalienable as the right of personal liberty" and "freedom of association is necessary to secure the full and informed and effective application of citizens' power of deliberative reasoning...an indispensable prerequisite of democratic societies." Id. (citations and internal quotations omitted).
417. Id. at 1249 (citing Kusper v. Pontikes, 414 U.S. 51, 58 (1973)).
418. See Robert C. Wigton, American Political Parties Under the First Amendment, 7 J.L. & Pol'y 411, 413-15 (1999). Though the Court has expanded First Amendment freedoms to apply to political parties, it has not always done so in a "logical" manner, providing little guidance. See id. at 420 n.24 for a discussion of the Court's efforts in applying the freedom of association. This right to associate applies to a "party in the electorate" (individual party members), a "party in government" (legislators), and a "party
also affects major parties by manipulating the "competitiveness of the electoral terrain."\textsuperscript{419}

In the heavily political area of election primaries, the Court has protected the rights of political party members to associate with whom they choose from regulation by the state. The following cases deal with the rights of political parties and their members, and demonstrate the power of the right to assemble and associate for the purposes of electoral success and the ability of courts to limit government infringement on the right to associate.\textsuperscript{420}

The Court heavily restricts the ability of states to dictate internal party affairs.\textsuperscript{421} States are limited in their ability to regulate internal affairs because such regulations impede a party's ability to ensure orderly and fair elections.\textsuperscript{422} The power of parties to contribute to the elections process outweighs the state interest in regulating party affairs.\textsuperscript{423} In \textit{Eu v. San Francisco County Democratic Central Comittee.}, the Court struck down a California law banning endorsements and restrictions on political parties under a balancing test weighing the state's narrowly tailored compelling interests against the associational rights of party members.\textsuperscript{424} The Court interpreted the right to association broadly, focusing on the importance of banding together in order to select representatives.\textsuperscript{425} The "State's broad power to regulate the time, place, and manner of elections 'does not extinguish the State's responsibility to observe the limits established by the First Amendment.'"\textsuperscript{426}

In \textit{California Democratic Party v. Jones}, both major and minor political parties challenged the California system of blanket primaries, which were adopted via statewide initiative.\textsuperscript{427} Both political parties argued that the system violated their associational freedom by forcing them to allow non-party members to select their nominees and inhibiting their ability to maintain distinct identities.\textsuperscript{428} Using strict scrutiny, the Court found the

\textsuperscript{419} Id. at 440 (arguing that the burden falls most heavily on third parties and that these parties should receive greater protection from the state).

\textsuperscript{420} See V.O. Key Jr., Politics, Parties, & Pressure Groups 163-65 (1958).


\textsuperscript{422} See id. at 223.

\textsuperscript{423} See Wigtom, supra note 418.

\textsuperscript{424} Eu, 489 U.S. at 222-33.

\textsuperscript{425} Id. at 224 ("Freedom of association means . . . the right to identify the people who constitute the association, and to select a standard bearer who best represents the party's ideologies and preferences.") (internal quotations omitted).

\textsuperscript{426} Id. at 222 (internal citation omitted). The Court recognized the State's legitimate interest in ensuring fair and honest elections, but rejected the goal of stable government and party stability as too broad to justify the regulations. Id. at 231-32.


\textsuperscript{428} Id. at 582-86.
State's justifications were legitimate but not compelling. The autonomy of the party as a private entity, and the right to associate trumped the State's interests in better representation, expansion of debate, fairness, greater voter choice, and increases in participation. The Jones court prohibited the state from interfering with the right of party members to associate by limiting their membership.

In the third case cited by Justice Kennedy, Anderson v. Celebrezze, the Court struck down Ohio's early filing deadline, which required independent candidates who wanted to be on the ballot to declare their candidacies earlier than others. The plaintiffs claimed the statute violated their right of association and equal protection. The opinion focused on the harm done to voters, rather than the injury to the rights of the candidate. "[E]xclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views, on the issues of the day, and a candidate serves as a rallying point for like-minded citizens."

The Court addressed electoral structures broadly, finding that "complex election codes" that regulate every step of the process always impact the right to vote and the right to associate. The Court's analysis presented an expansive view of the reach of the right to associate. The Court directly addressed how electoral structure can burden the individual right to associate, and couched the decision in both the equal protection doctrine and the First Amendment, a marked departure from the typical equal

429. Id. at 584-86.
430. Id. at 582-86. The State's interest in enhancing the democratic nature of the election process and the representative capacity of officials did not justify burdening the rights of political association. The Court demonstrated its "solicitude for political association" by finding that state electoral laws or structures that burden associational rights are unconstitutional unless they are narrowly tailored and serve a compelling state interest. See Charles, supra note 86, at 1270-71.
431. Teresa MacDonald, California Democratic Party v. Jones: Invalidation of the Partisan Gerrymander, 29 Pepp. L. Rev. 319, 328 (2002) ("Relying on prior decisions, the Court reiterated that political parties have a constitutional right under the First Amendment to freely associate and to limit their association to people with common goals and ideals."). The Court noted that "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee." Jones, 530 U.S at 575.
432. Anderson v. Celebrezze, 460 U.S. 780 (1983). When the Court first entered ballot access claims, it applied a type of heightened scrutiny. See, e.g., Williams v. Rhodes, 393 U.S. 23, 31-32 (1968) ("The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes . . . . Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.").
435. See id. at 1250-51.
437. Charles, supra note 86, at 1251-52 (admitting that a strict reading could simply mean that freedom to associate is met as long as groups can find a candidate to rally around and discuss issues, but refuting this reading based on an analysis of Anderson, 460 U.S. at 788 n.8) (citations omitted).
protection standard. The Court focused on a party's ability to acquire political power, finding that the "asserted interest in political stability amounts to a desire to protect existing political parties from competition . . . generated by independent candidates who were previously affiliated with the party, an interest that conflicted with First Amendment values.

The fourth case cited by Justice Kennedy, *Elrod v. Burns*, deals with party patronage (the use of political favors by an incumbent party). *Elrod* held that the historically rooted practice violated the First Amendment freedom of association of a county official who was fired when the opposing party came into office. Absent compelling justification, the government cannot base employment decisions on the partisan affiliation of those seeking to work for government.

These cases demonstrate the fundamental nature of associational rights involved in political association, and the ability of the court to balance individual rights against state electoral regulations. The adoption of these precedents in the partisan gerrymandering context requires judicial will, and an understanding of how such balancing would operate in future gerrymandering cases.

III. WHAT'S NEXT: HOW TO ADJUDICATE PARTISAN GERRYMANDERING CLAIMS IN THE FUTURE

Recent Supreme Court decisions and the increasing presence of sophisticated gerrymandering tactics confirm that the judiciary should remain involved in the adjudication of partisan gerrymandering cases. Partisan gerrymandering precedents have left lower courts seeking a "faceless injury," and it is time for courts to step in and protect democracy. A redefinition of the harms caused by partisan gerrymandering is necessary for judicial relief in future cases. The road ahead, however, is anything but clear.

Part III.A discusses the limitations of using the Equal Protection Clause to measure the constitutionality of partisan gerrymandering claims. Part

438. *See id.* at 1251.
439. *Id.* at 1253 n.246 (quoting *Anderson*, 460 U.S. at 792-93) (citations omitted).
440. *Anderson*, 460 U.S. at 801-07. This case is credited with creating a balancing test that applies strict scrutiny to government action if an employee's associational rights are severely burdened. If rights are not severely burdened, the magnitude of the burden on the minor party is balanced against the state interest. *See Wigton*, *supra* note 418, at 441.
442. *Id.* This practice has been restricted further under subsequent cases. *See Wigton*, *supra* note 418, at 442 n.134 (discussing cases which expanded the First Amendment protection to public employees). First Amendment freedom of association may not protect employees with "policymaking duties" because party membership may be a pertinent employment consideration. *Id.* at 448-49. Justice Scalia's plurality opinion rejected the applicability of the First Amendment balancing test to partisan gerrymandering cases. *See supra* note 330 and accompanying text.
444. *See supra* note 316 for criticism of this analysis.
III.B posits the strengths and weaknesses of using the First Amendment freedom of association as a measure for the constitutionality of partisan gerrymandering claims. Finally, Part III.C proposes a framework for how courts can implement the freedom of association standard.

A. Equal Protection: The Constitutional Standard of the Past

The equal protection doctrine repeatedly fails to provide relief to plaintiffs, even where gerrymanders are admittedly the fruits of a politically discriminatory districting plan. Thus, while plaintiffs have no difficulty meeting the requirements of the intent prong of the Bandemer test, the elusive effects prong has limited plaintiffs' success.

The goal of the Equal Protection Clause is to protect minorities (particularly racial minorities) from discrimination by majority groups. The framers of the Fourteenth Amendment did not create the doctrine to provide group rights for a majority group; instead, equal protection should protect individual members of minority groups from discrimination. Partisan gerrymandering claims, as articulated in Bandemer, involve claims by members of the Democratic and Republican parties, who do not constitute a nationwide minority. By invoking the equal protection doctrine, plaintiffs "twist[] [equal protection] out of its intended meaning and use[] [it] to serve a purpose for which it was not designed."

Additionally, because the Supreme Court lacks a coherent definition of fair representation on which to measure the harm to one political group in an election, the effects prong has proved untenable. The baseline group of voters in a political group is elusive because political affiliation, unlike race, shifts over time, and per election issue. The success of the equal protection doctrine in racial gerrymandering cases, therefore, has not carried over to the partisan arena.

The reapportionment cases that served as a precursor to partisan gerrymandering claims involved a distinct constitutional injury, an injury that an intention to discriminate was present . . . but they do not show any actual disadvantage beyond that shown by the election results . . . ."

See supra note 70, at 1196 (proposing that discriminatory intent is rarely hidden and that Democrats also partake in dirty politics, quoting one Democratic districter to a member of the opposition party: "We are going to shove [this map] up your f----- ass and you are going to like it and I'll f--- any Republican I can.") (citation omitted).

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See Davis v. Bandemer, 478 U.S. 109, 140 (1986) ("[The facts] support a finding that an intention to discriminate was present . . . but they do not show any actual disadvantage beyond that shown by the election results . . . ."); see also Federalism Injury, supra note 70, at 1196 (proposing that discriminatory intent is rarely hidden and that Democrats also partake in dirty politics, quoting one Democratic districter to a member of the opposition party: "We are going to shove [this map] up your f----- ass and you are going to like it and I'll f--- any Republican I can.") (citation omitted).

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See supra notes 256-59 and accompanying text.

See, e.g., Bandemer, 478 U.S. at 151-52 (O'Connor, J., concurring).

See James S. Liebman & Brandon L. Garrett, Madisonian Equal Protection, 104 Colum. L. Rev. 837, 963 (2004) (stating that "the framers of the Fourteenth Amendment did at least attempt to bar . . . the entire infinitude of . . . expedients through which majorities oppress minorities") (internal quotation omitted).


See Rush, supra note 42, at 13-14.

which is not easily reconciled with partisan gerrymandering.\textsuperscript{453} The reapportionment revolution involved a first order harm of the quantitative value of the individual vote. In gerrymandering claims, the harm is that districts split the electorate so the aggregation of votes for success is limited. Plaintiffs have the ability to cast a vote, and that vote counts, so it is the power of the individual vote that is at issue. The “attempt[s] to filter . . . questions of democratic politics solely through the two words equal protection [are] limiting, limitless, and ultimately unproductive.”\textsuperscript{454}

B. The Freedom to Associate: The Constitutional Standard for the Future

This section proposes the use of an associational standard in partisan gerrymandering—a standard which may assist in granting voters the right to “full and effective participation.”\textsuperscript{455}

While the \textit{Vieth} plurality summarily rejected the use of the First Amendment strict scrutiny analysis in partisan gerrymandering claims,\textsuperscript{456} a more in-depth analysis provides support for this standard.

The freedom of association standard has proven to be judicially manageable in the political arena. The role of freedom of association in the adjudication of electoral regulation demonstrates that the Court can both create manageable standards to balance the associational right against state interests and strike down state regulations that “severely burden” associational rights.\textsuperscript{457}

Political association is an individual right, which protects “not merely the individual speaker but also organized activities, ranging from political parties and media organizations to protest committees and dissident groups.”\textsuperscript{458} The use of an associational analysis, however, recognizes the importance of groups in the political process and is more appropriate to protecting political party members than the equal protection doctrine.

A freedom of association standard also emphasizes the qualitative and instrumental value of the vote, avoiding the strict quantitative view of voting rights that emerged in the reapportionment cases.\textsuperscript{459} While evidence

\textsuperscript{453}. Baker, \textit{supra} note 373, at 24 (stating that the focus on geographical representation has led to the “[u]nfinished reapportionment revolution,” a “reinvigorated dimension of maldistricting [that] can dilute the effective voting power of some individuals and magnify the real power of others, depending on their geographic location”).

\textsuperscript{454}. Charles, \textit{supra} note 86, at 1214 (internal quotation omitted).

\textsuperscript{455}. \textit{See supra} note 163 and accompanying text. A First Amendment analysis has been proposed to protect against the harms of racial gerrymandering. Charles, \textit{supra} note 86, at 1271.

\textsuperscript{456}. \textit{See supra} note 330.

\textsuperscript{457}. \textit{Constitutionalization, supra} note 30, at 121 n.391.

\textsuperscript{458}. Charles, \textit{supra} note 86, at 1241 (quoting Daniel A. Farber, The First Amendment 225 (1998)).

\textsuperscript{459}. \textit{See} Brennan, \textit{supra} note 40, at 324 (“Focusing solely on the quantitative value of a vote [is] misguided.”).
of discriminatory impacts plays a part in the analysis of a partisan gerrymander, impacts should not be the focus of a judicial inquiry.\textsuperscript{460}

Reviewing legislative districting under an associational rights standard shifts the judicial focus from the disparate impacts\textsuperscript{461} of a districting plan to the legislative intent in forming that plan.\textsuperscript{462} The political association standard does not require courts to recognize political groups as a suspect class in order to implement strict scrutiny, instead, the emphasis is on the burden placed on associational rights.\textsuperscript{463} The focus is not on the government classification itself, but on the goal of government classifications.\textsuperscript{464} The freedom of association doctrine recognizes that the First Amendment protects promotion of particular viewpoints, and that this protection can apply to democratic structures.\textsuperscript{465}

Political bias is the hallmark of a partisan gerrymander, but courts have failed to adopt the associational standard for several reasons. The freedom of association standard is not without its limitations. Courts have denied that the First Amendment guarantees electoral success and have reserved use of the right to association for cases where a state denied individuals access to the election system.\textsuperscript{466}

Finally, some argue that the freedom of association standard does not define adequate group representation and such a standard would require courts to make fact-intensive inquiries into legislative intent.\textsuperscript{467}

The associational analysis is nonetheless well suited to partisan gerrymandering cases. "Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms,"\textsuperscript{468} and the freedom of association standard recognizes the role of political parties as the "most important mechanism for incorporating citizen's preferences" in policy making\textsuperscript{469} and promotes "vigorous, broadly participatory electoral discourse."\textsuperscript{470}

\begin{itemize}
\item \textsuperscript{460} Calhoun, \textit{supra} note 86, at 598-602.
\item \textsuperscript{461} \textit{Supra} Part I.B.2.
\item \textsuperscript{462} Calhoun, \textit{supra} note 86, at 598-602.
\item \textsuperscript{463} This emphasis would dispel some of the fears expressed in \textit{Vieth v. Jubelirer}, 541 U.S. 267, 288 (2004), where the plurality asked, "To begin with, how is a party's majority status to be established?" \textit{Id.} Justices expressed concerns were in prior gerrymandering cases. \textit{See}, e.g., \textit{Davis v. Bandemer}, 478 U.S. 109, 156-61 (1986) (O'Connor, J., concurring).
\item \textsuperscript{464} \textit{Vieth}, 541 U.S. at 315 (Kennedy, J., concurring).
\item \textsuperscript{465} Charles, \textit{supra} note 86, at 1255.
\item \textsuperscript{466} \textit{See supra} Part II.B.2.
\item \textsuperscript{467} Hasen, \textit{supra} note 3, at 634-37; \textit{Constitutionalization}, \textit{supra} note 30, at 58-59.
\item \textsuperscript{468} \textit{Williams v. Rhodes}, 393 U.S. 23, 32 (1968).
\item \textsuperscript{469} \textit{Criteria}, \textit{supra} note 57, at 112-13.
\item \textsuperscript{470} \textit{See Magarian}, \textit{supra} note 96, at 1944.
\end{itemize}
C. The Court's Role: Policing the Outer Boundaries of Partisan Legitimacy

While the courts may not be able to command perfection in districting, they can play a role in regulating the use of partisan-biased legislation. Using the First Amendment, the court can heed the warning of critics who argue against judicial involvement in the regulation of democratic structures\(^471\) while at the same time safeguarding constitutional rights.

To bring an associational claim, a plaintiff must prove that the state severely burdened her associational rights by creating a districting plan with the sole intent of disadvantaging her political party at the polls.

Additionally, a plaintiff cannot challenge the plan on a statewide basis. Instead, a plaintiff must prove that legislators created her particular district with discriminatory intent. This requirement answers much of the debate within the Bandemer decision related to whether individuals could bring statewide discrimination claims\(^472\) by recognizing that representation is on a district-by-district basis, and that elections are districtwide, not statewide. A districting plan can only infringe on an individual’s associational right if the plan affects a specific election for which the voters banded together with other party members to express their belief at the polls.

The associational standard for measuring partisan gerrymandering places a high burden on plaintiffs and will avoid the litany of suits feared by some critics of adjudication of these cases.\(^473\)

Once a plaintiff makes a prima facie showing that partisan discrimination was the only goal of the legislator, relying on computer-generated programs, legislative records, or the use of cracking, packing, or shacking techniques,\(^474\) the burden would shift to legislators to prove that partisan bias was not the only motivation behind their plan.

If legislators proffer a compelling state interest, then the court can allow the plan to stand. The court must balance the state’s declared interest against the burden on individual rights. The state’s compelling interest could be comprised of a number of traditional districting principles articulated in Part I: contiguity, compactness, preservation of community of interests, preservation of competitive districts, equal treatment of incumbents, and creation of symmetry between political parties.\(^475\)

While the court could not accept population equality alone as a compelling state interest, it could accept other formal and intent-based criteria.\(^476\) Population equality is the one standard that is easily manipulated at the touch of a computer button, and there are many ways to construct a districting plan that meets this requirement. Additionally,

\(^{471}\) See supra Part II.A.
\(^{472}\) See supra Part I.B.3.
\(^{473}\) See supra note 225 and accompanying text.
\(^{474}\) See discussion supra Part I.
\(^{475}\) See supra Part I.A.2.c.
\(^{476}\) See supra Part I.A.2.c.
legislators used population equality expressly to defend partisan inequality, and it is the population equality requirement that legislators historically used to justify district plans that included severe partisan gerrymanders.

This model would allow legislative discretion in the creation of a districting plan, while supplying outer limits of constitutionality. The court would not become embroiled in state-level policy decisions. Another benefit of this standard is that it requires legislators to articulate the reasons behind a districting plan and push towards a fairer result over time.

A political association analysis does not require the court to “extirpat[e] politics from the inherently partisan process of districting,” but this analysis recognizes that while not all district lines are neutral, some districting plans involve a deliberate partisan harm, and courts should regulate these particular lines. This standard, while carving only a minimal role for courts would reduce at least the most egregious gerrymanders—those when other parties were completely excluded (such as Vieth) and mid-decade redistricting (such as Perry)—without miring the judiciary in mathematical calculations and statistical analysis based on potentially unreliable political data.

CONCLUSION

Partisan gerrymandering occurs when legislatures provide an “unfair advantage” to a particular party. Courts should continue to adjudicate these claims and strike down legislation when legislatures seek naked partisan advantage. Using the freedom of association analysis, courts can ensure that voters have the ability to join political parties with at least the opportunity to succeed in elections. The reframing of the constitutional injury caused by partisan gerrymandering, and the redefinition of the test for such violations will move our districting system one step closer to realizing the goal of “full and effective participation,” the basis of voting rights and civil rights cases since the 1960s.

478. See, e.g., supra note 178 and accompanying text.
479. See supra note 330 and accompanying text.
480. See supra notes 277-83 and accompanying text.
481. See supra note 13 and accompanying text.