

Partisan Gerrymandering: Is There No Shame in It or Have Politicians Become Shameless?

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“It is hostile to a democratic system to involve the judiciary in the politics of the people.”
Justice Felix Frankfurter, *Colegrove v. Green*¹

“Governments long established should not be changed for light and transient causes; [but] . . .”
Thomas Jefferson, Declaration of Independence

“We are in the business of rigging elections.”
Sen. Mark McDaniel, North Carolina State Senator²

“173 despots would surely be as oppressive as one. . . . An elective despotism was not the government we fought for.”
Thomas Jefferson, *Notes on the State of Virginia*³

I. INTRODUCTION

No one is surprised when a victorious political party gerrymanders district lines to benefit its own candidates. But the extreme impact that the practice can have still shocks many, particularly when a narrow gap between the number of votes cast for each party statewide produces an overwhelming legislative majority.⁴ Are partisan gerrymanders⁵ an ordinary component of the political

1. 328 U.S. 549, 553–54 (1946).

2. John Hoeffel, *Six Incumbents Are a Week away from Easy Election*, WINSTON-SALEM J., Jan. 27, 1998, at B1 (quoting Sen. Mark McDaniel lamenting the North Carolina State General Assembly’s redistricting efforts of his colleagues, resulting in a nay vote against the proposed redistricting).

3. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (William Peden ed., Univ. of N.C. Press, 1954) (1782).

4. *See, e.g., Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015) (acknowledging that numerous members of the Court had found problematic “the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power”).

5. Although the term *gerrymander* is sometimes used to refer to any redistricting that does not lead to a roughly equal percentage of ballots cast for a particular party and that party’s seats in the legislature, this Article uses the term

process? Is there no shame in it? Or have politicians have become shameless?⁶

Thirty years ago, the Court answered that question, holding that gerrymandering districts to favor one party discriminates against those who vote for the disadvantaged party, and thus violates the Equal Protection Clause.⁷ But the Justices have struggled to agree on a test that courts could use to separate acceptable redistricting that may favor one party from unconstitutional gerrymanders that are designed to unfairly entrench one party's control of the legislature.⁸ Although no one describes rigging a district map to give one political party an unfair

partisan gerrymandering more narrowly to describe “only the pernicious and increasingly common type of aggressive gerrymander in which a party draws maps to maximize and lock in a disproportionately large share of seats.” LAURA ROYDEN & MICHAEL LI, *EXTREME MAPS* 3 (2017); *see also* *Davis v. Bandemer*, 478 U.S. 109, 164 n.3 (1986) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged ed. 1961)) (defining gerrymandering as “to divide (a territorial unit) into election districts in an unnatural and unfair way with the purpose of giving one political party an electoral majority in a large number of districts while concentrating the voting strength of the opposition in as few districts as possible” (internal quotation marks omitted)).

6. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 306–17 (2004) (Kennedy, J., concurring in the judgment) (“Whether spoken with concern or pride, it is unfortunate that our legislators have reached the point of declaring that, when it comes to apportionment: ‘We are in the business of rigging elections.’” (quoting Hoeffel, *supra* note 2)); *Whitford v. Gill*, 218 F. Supp. 3d 837, 853 (W.D. Wis. 2016) (highlighting that an aide’s presentation notes for a Republican caucus stated that “[t]he maps we pass will determine who’s here 10 years from now,” and “[w]e have an opportunity and an obligation to draw these maps that Republicans haven’t had in decades” (quoting Trial Exhibit 241 at 1, *Whitford*, 218 F. Supp. 3d 837 (No. 15-CV-421-BBC))), *cert. granted*, 137 S. Ct. 2268 (2017) (mem.); *Daggett v. Kimmelman*, 535 F. Supp. 978, 982, 984 (D.N.J. 1982) (finding that a redistricting plan drafted by a neutral party “was rejected because it did not reflect the leadership’s partisan concerns” and bemoaning that “the harshly partisan tone of Speaker Christopher Jackman’s letter [rejecting the neutral plan] is disedifying, to say the least”).

7. *See* *Davis v. Bandemer*, 478 U.S. 109, 143 (1986) (plurality opinion) (“[W]e hold that political gerrymandering cases are properly justiciable under the Equal Protection Clause. We also concluded, however, that a threshold showing of discriminatory vote dilution is required for a prima facie case of an equal protection violation.”).

8. *Id.* at 118–85 (plurality opinion).

advantage as a *good thing*,⁹ some have come close.¹⁰ And therein lies the rub: if partisan gerrymandering just isn't that bad, it becomes hard to muster the political will to strike it down, even if virtually everyone agrees that some gerrymanders are unconstitutional.¹¹ By granting certiorari in *Gill v. Whitford*—a case in which a three-judge district

9. Even Justice Scalia, in his plurality opinion for four members of the Court arguing that partisan gerrymandering claims should be non-justiciable, agreed that partisan gerrymanders are “incompatib[le] . . . with democratic principles” and that an “*excessive* injection of politics [into redistricting] is *unlawful*.” *Vieth*, 541 U.S. at 292–93 (plurality opinion).

10. See, e.g., *Bandemer*, 478 U.S. at 144 (Burger, C.J., concurring in the judgment) (describing intentional gerrymander to disadvantage Democrats as a mere “perceived ‘injustice’”); *id.* at 153 (O’Connor, J., concurring in the judgment) (dismissing the threat of partisan gerrymandering as “whatever harms political gerrymandering may sometimes occasion”); *Whitford*, 218 F. Supp. 3d at 938 (Griesbach, J., dissenting) (“The Plaintiffs are evidently of the view that the Republicans, having achieved the once-in-a-lifetime feat of controlling both branches of the legislature and the governorship during a redistricting year, should have used that unique opportunity not for self-advantage but instead to draw a map that was *less* favorable to them than even the court-drawn plan that governed the previous decade.”); Larry Alexander, *Lost in the Political Thicket*, 41 FLA. L. REV. 563, 575–78 (1989) (arguing there is “no demonstrable harm” associated with partisan gerrymanders). Cf. Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, “Fair Representation” and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 529–31 (2003) (arguing that courts can do little to solve the “institutional” question of the relationship between gerrymandering and “the difficult concept of representation”); accord generally Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325 (1987) (arguing that courts should refuse to adjudicate partisan gerrymandering claims in part because the difficulty of identifying and remedying any problem would outweigh any benefit).

11. Justice O’Connor put it this way in *Bandemer*: “the costs of judicial intervention will be severe and . . . political gerrymandering simply does not cause intolerable harm to the ability of major political groups to advance their interests.” 478 U.S. at 153 (O’Connor, J., concurring). By contrast, Justice Stevens pointed to a lack of political will: “What is clear is that it is not the unavailability of judicially manageable standards that drives today’s decision. It is, instead, a failure of judicial will to condemn even the most blatant violations of a state legislature’s fundamental duty to govern impartially.” *Vieth*, 541 U.S. at 341 (Stevens, J., dissenting). See also Easha Anand, Comment, *Finding a Path Through the Political Thicket: In Defense of Partisan Gerrymandering’s Justiciability*, 102 CAL. L. REV. 917, 922 (2014) (“The trouble is not, then, solely the unmanageability of the proposed standard, but the absence of a sufficiently compelling countervailing interest.”).

court struck down a state legislative district map as an unlawful partisan gerrymander¹²—the Supreme Court may finally be ready to adopt a test to determine when redistricting violates the Equal Protection Clause.¹³

Perhaps surprisingly, the fundamental question—how bad is partisan gerrymandering—has received little attention.¹⁴ For over a decade, the Supreme Court’s decision in *Vieth v. Jubelirer*¹⁵ has framed the debate.¹⁶ There, a plurality of the Court concluded that “setting out to segregate [voters] by political affiliation is (so long as one doesn’t go too far) lawful and hence ordinary,”¹⁷ and thus it is simply too difficult for a court to determine whether redistricting “is so substantially affected by the excess of an ordinary and lawful motive as to invalidate it.”¹⁸ Although extreme partisan gerrymandering, the

12. *Whitford*, 218 F. Supp. 3d at 938, *cert. granted*, 137 S. Ct. 2268 (2017) (mem.).

13. *Gill v. Whitford*, 137 S. Ct. 2268 (2017) (mem.) (granting *certiorari*).

14. *Cf.* Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1684 (1993) (“Ultimately, the problem is not one of social science methods, but of uncertainty as to what the Court is looking for.”).

15. 541 U.S. 267 (2004).

16. *Vieth*, 541 U.S. at 281–301 (plurality opinion); *see also id.* at 297 (describing the relevant interest as “deprivation of that minimal degree of representation or influence to which a political group is constitutionally entitled”). Justice Stevens has repeatedly pointed out that administrable standards exist for identifying unconstitutional gerrymandering. *Id.* at 341 (Stevens, J., dissenting) (“Thus, the problem . . . is not that there is no judicially manageable standard . . . but rather that the Judiciary lacks the ability to determine when a state legislature has violated its duty to govern impartially.”); *see also* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 447 (2006) (Stevens, J., dissenting) (“This is a suit in which it is perfectly clear that judicially manageable standards enable us to decide the merits of a statewide challenge to a political gerrymander.”); *Cox v. Larios*, 542 U.S. 947, 950 (2004) (Stevens, J., concurring) (“[T]he District Court’s findings make clear that appellees could satisfy either the standard endorsed by the Court in its racial gerrymandering case or that advocated in Justice Powell’s dissent in *Bandemer*.” (citing 478 U.S. at 173–85)).

17. *Vieth*, 541 U.S. at 293.

18. *Id.* at 286; *see also id.* (“[Courts] are not justified in inferring a judicially enforceable constitutional obligation (the obligation not to apply *too much* partisanship in districting) which is both dubious and severely unmanageable.”); *id.* at 297 (“How much political motivation and effect is too much?”).

plurality conceded, crosses the constitutional line, the harm it causes is not bad enough to justify the costs of separating the wheat from the chaff.¹⁹

Justice Kennedy denied the *Vieth* plurality the critical fifth vote to render partisan gerrymandering claims non-justiciable. He saw the practice as a fundamental threat to our democratic traditions, and he argued that the courts should therefore adjudicate partisan gerrymandering claims.²⁰ But, he recognized, the Justices had to agree on a “model of fair and effective representation” that would enable a court to “define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights.”²¹

This Article shows that partisan gerrymanders are anathema to the ideal of American democracy. They produce precisely the type of unchecked decision-making that the Constitution sought to prevent.²² And partisan gerrymandering clashes with the culture of American democracy that respects either (1) historical-boundary-based district voting or (2) proportionality between the percentage of voters who cast ballots for a party statewide and the percentage of representatives from that party in the legislature. Accepting partisan gerrymandering as a tolerable part of the political process would undermine the original understanding of a democratic republic embodied by the Constitution as well as the understandings of Americans throughout the nation’s history.

This Article looks to that history and culture to articulate a standard for assessing redistricting claims. Courts have struggled to draw the line separating permissible and impermissible partisan gerrymandering because *no such line exists*. The *Vieth* plurality’s framing—that a little partisanship is just fine, but too much is, well, too much²³—finds no support in our constitutional, legal, or

19. *Id.* at 281–301 (discussing partisan gerrymandering jurisprudence).

20. *Id.* at 307, 316–17 (Kennedy, J., concurring in the judgment).

21. *Id.* at 307–08.

22. *See infra* Section II.A.

23. *Vieth*, 541 U.S. at 285–86 (distinguishing racial from political gerrymandering on the ground that the use of race in district line-drawing is always wrong, but the use of politics is not) (“Determining whether the shape of a particular district is so substantially affected by the presence of a rare and constitutionally suspect motive as to invalidate it is quite different from determining whether it is so

democratic cultural history. The Court should not treat district line-drawing like the porridge in Goldilocks and the Three Bears: sometimes too hot or too cold, but somewhere in the middle is just right. The question here is one of kind, not degree: some types of district line-drawing accord with our heritage despite partisan effects, and some do not.

Legislators drawing a district map may take partisanship into account—just as they can take race into account²⁴—*to further a legitimate objective of the democratic process*.²⁵ Our constitutional, legal, and democratic cultural history supports the two legitimate goals set out above—district mapping based on historical geographic boundaries or proportionality.²⁶ A partisan advantage may legitimately arise from pursuing one of these goals, because the goal

substantially affected by the excess of an ordinary and lawful motive as to invalidate it.”); *id.* at 291 (reasoning that fairness cannot be an administrable standard because non-contiguous districts and those that straddle subdivisions can be fair in some circumstances); *id.* at 293 (“A purpose to discriminate on the basis of race receives the strictest scrutiny under the Equal Protection Clause, while a similar purpose to discriminate on the basis of politics does not.”). In *Bandemer*, Justice O’Connor identified political gerrymandering as distinct from racial gerrymandering because a racial minority group may be excluded from the political process by a dominant group, however, “members of the Democratic and Republican Parties . . . are the dominant groups, and the Court has offered no reason to believe that they are incapable of fending for themselves through the political process.” 478 U.S. 109, 152 (1986) (O’Connor, J., concurring in the judgment).

24. *Vieth*, 541 U.S. at 293 (plurality opinion) (“Race can be used, for example, as an indicator to achieve the purpose of neighborhood cohesiveness in districting.”); *id.* at 334 (Stevens, J., dissenting) (“The line that divides a racial or ethnic minority unevenly between school districts can be entirely legitimate if chosen on the basis of neutral factors—county lines, for example, or a natural boundary such as a river or major thoroughfare. But if the district lines were chosen for the purpose of limiting the number of minority students in the school, or the number of families holding unpopular religious or political views, that invidious purpose surely would invalidate the district.”); *Bush v. Vera*, 517 U.S. 952, 964–65 (1996) (plurality opinion) (holding that race may be considered in districting).

25. *Cf. Vieth*, 541 U.S. at 314–15 (Kennedy, J., concurring in judgment) (“In the context of partisan gerrymandering . . . concerns arise where an apportionment has the purpose and effect of burdening a group of voters’ representational rights. . . . The inquiry is not whether political classifications were used. The inquiry instead is whether political classifications were used to burden a group’s representational rights.”).

26. *See infra* Part II.

comports with our democratic heritage. By contrast, drawing lines that *disrespect* both historical geographic boundaries *and* the proportional will of all voters—as partisan gerrymandering does—has no rational basis in our shared history, and thus it fails to accord voters on the short end of the partisan-gerrymander stick the equal protection of the law.²⁷ Gerrymandering at the expense of historic boundaries and proportionality—whether the lines drawn produce a small partisan advantage or a large one—is always illegitimate.²⁸ Modern computer software enables courts to analyze voting-district maps quickly to determine whether those maps objectively pursue either of the legitimate goals. When a map reveals disrespect for both goals *and* disproportionate results follow, a court should strike it down.

This Article proceeds in four parts. Part II reviews the history of voting law and culture in the United States, concluding that district line-drawing is constitutionally acceptable so long as it respects either (1) communities defined by historical geographic boundaries or (2) an apportionment that seeks proportionality between the percentage of voters statewide supporting a party and that party's percentage of representatives in the legislature. These goals embody policy choices that legislators should make without court interference. But American law and culture do not allow the entrenchment of one party in power via gerrymandering that ignores historical boundaries *and* the proportional will of the voters statewide. Part III reviews arguments that attempt to minimize the harm that partisan gerrymandering causes. It shows that each is unpersuasive and that gerrymandering improperly distorts the democratic process, undermining faith in the integrity of government. The threat to American democratic culture could not be graver, and courts should thus intervene. Part IV proposes an objective, administrable standard for proving a partisan gerrymandering case and an administrable remedy that would resolve cases quickly without enmeshing the courts in line-drawing exercises. Part V concludes by describing remedies courts could fashion to

27. This conclusion is true whether one looks to the original understanding of voting theory and practice embodied in the original meaning of the Constitution as understood by the founding generation or the evolution of that theory and practice that a living constitutionalist might take into account. Although the importance of majority politics shifted in American culture over time, support for geographically defined shared value communities persisted and never gave way to party politics.

28. *See infra* Section III.D.

provide relief when concluding that an electoral map fails the proposed test.

II. REDISTRICTING LAW & CULTURE

This Part reviews the Constitution, federal law, and American cultural attitudes toward partisan gerrymandering to reveal a relatively clear and consistent pattern. Since the Constitution's ratification, apportioning voters into districts that comport with historical community boundaries has been an acceptable districting method, even if the percentage of representatives from a party deviates from the percentage of votes that party received statewide. Throughout virtually every era in American history, however, some jurisdictions have apportioned voters to produce proportionality between statewide vote totals and the percentage of representatives in the legislature. Although proportionality has never been required, it has always been considered legitimate. By contrast, partisan effects obtained by *disregarding both* historical community boundaries *and* the proportional preferences of the state's voters have always been unacceptable.

Section A looks to the constitutional text and structure as well as early commentary and practice. Section B examines federal legislation, and Section C examines the Supreme Court's one-person, one-vote jurisprudence. Section D then summarizes this part, rejecting the position that political considerations fall into a single category and that the only issue is whether they have gone too far. The history of federal law governing redistricting—as well as American cultural traditions surrounding voting—clearly distinguish between legitimate and illegitimate redistricting.

A. *The Constitution and Early Commentary*

The Constitution does not directly address intra-state apportionment or redistricting. But its structure is consistent with drawing districts that either (1) respect historical boundaries, such as those defining counties, cities, and towns, or (2) produce a percentage of representatives in each party consistent with the percentage of statewide votes cast for that party. Conversely, ignoring these goals to draw district lines ensuring the dominance of one political party finds

no support in the Constitution's language or structure and conflicts with the cultural traditions identified with American democracy.

The constitutional analysis of gerrymandering starts with the Great Compromise, providing each state two Senators holding one legislative vote each.²⁹ On one level, the Compromise simply provided a path to an agreement; a way to enable the Union to form at all.³⁰ On another level, however, the two-Senator rule would not have made sense as a compromise unless the founding generation believed that historical geographic boundaries defined common-interest communities.³¹ A single, nationwide at-large election with the top twenty-six vote-getters forming the first Senate could otherwise have replaced these geographically focused elections.

By giving each state two Senators, the Framers and those who ratified the Constitution demonstrated their belief that each state, regardless of its size, formed a community of interest. And these communities, the Great Compromise recognized, could legitimately be respected, even at the expense of more proportional forms of representation.³²

The second part of the Great Compromise demonstrated that geography was not the *only* proper means of apportionment. To be sure, the requirement that each state have at least one Representative in the House—like the provision relating to the Senate—elevated geography over pure majoritarianism. With respect to the House,

29. U.S. CONST. art. I, § 3, cl. 1; U.S. CONST. amend. XVII (“The Senate of the United States shall be composed of two Senators from each State”); *Wesberry v. Sanders*, 376 U.S. 1, 12–13 (1964).

30. *See Wesberry*, 376 U.S. at 12.

31. The point here is not that each state had a perfectly homogeneous set of preferences differing from every other state. Rather, it is the more limited point that each state was likely to share certain interests that would differ from those in other states, at least at the meta-level, of opposing the ability of large states to control the result of any contentious future legislative decision in a way that would best serve the interests of the large states.

32. This view gains support from James Madison's writing in the *Federalist Papers*: “On a comparison of the different States together, we find a great dissimilarity in their laws, and in many other circumstances connected with the objects of federal legislation” THE FEDERALIST NO. 56 (James Madison).

though, the Constitution allocated seats to the states by population.³³ And the Constitution empowered the states themselves to select the manner of electing representatives with a reserve power in Congress if the states failed to fulfill this duty.³⁴

The Framers' comments suggest that representatives would be chosen from single-member districts, that is, separate geographic districts of roughly equal population, each electing one representative.³⁵ And in the *Federalist Papers*, James Madison confirmed that the Constitution accepted geographically defined districts.³⁶ Responding to the critique that the number of representatives in the House would be too few to embody sufficient knowledge of local issues, Madison argued that states could divide themselves into districts to ensure that representatives came from

33. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2 (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . .”).

34. U.S. CONST. art. I, § 4, cl. 1 (“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 chusing Senators.”).

35. *See, e.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 179–80 (Max Farrand ed., 1911) (statement of James Wilson) (“[E]qual numbers of people ought to have an equal no. of representatives” and representatives “of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other.”). Madison also argued that

[w]henver the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter. What danger could there be in giving a controuling power to the Natl. Legislature?

2 RECORDS OF THE FEDERAL CONVENTION OF 1787 241 (Max Farrand ed., 1911).

36. THE FEDERALIST NO. 56 (James Madison) (“Divide the largest State into ten or twelve districts, and it will be found that there will be no peculiar local interests in either, which will not be within the knowledge of the representative of the district.”); THE FEDERALIST NO. 57 (James Madison) (“The city of Philadelphia is supposed to contain between fifty and sixty thousand souls. It will therefore form nearly two districts for the choice of federal representatives.”).

every geographic area of the state, and thus represented the full spectrum of interests.³⁷ He also cited to and praised the representation system in Great Britain.³⁸

Madison's expectation that single-member districts would form within states, even though the Constitution did not compel them, aligns with the document's structure. Just as states' interests differed in meaningful ways that made the Great Compromise necessary to secure the states' agreement on a new form of government, areas within individual states would likely differ in meaningful ways that each state could take into account when drawing its district lines.

Although the Framers thus clearly approved of the use of single-member geographic districts, nothing in the document or the surrounding commentary compelled the states to use them. Accordingly, some states did not adopt a single-member geographic-district system and instead held statewide at-large elections to select multiple representatives through a single vote.³⁹ Through the early 1840s, at least six states used this practice.⁴⁰

Although examples of partisan gerrymandering existed during the founding era, nothing in the language or structure of the Constitution supports the view that anyone considered it acceptable to manipulate district lines to favor a single party by *disrespecting historical boundaries*. On the contrary, the Framers designed the Constitution to guard against the precise effect that partisan gerrymandering is intended to produce: control of the law-making process by a single faction.⁴¹ The Constitution's checks and balances

37. THE FEDERALIST NO. 56 (James Madison) ("The representatives of each State will not only bring with them . . . a local knowledge of their respective districts, but will probably in all cases have been members . . . of the State legislature, where all the local information and interests of the State are assembled . . .").

38. *Id.*

39. Tory Mast, *The History of Single Member Districts for Congress: Seeking Fair Representation Before Full Representation*, in VOTING AND DEMOCRACY REPORT: 1995 (Matthew Cossolotto ed., 1995), <http://archive.fairvote.org/?page=526>.

40. *Id.*

41. THE FEDERALIST NO. 10 (James Madison) ("Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. . . . [A] faction [is] a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of

structure established a culture of democracy favoring deliberation and compromise.⁴² Partisan gerrymandering to produce a single dominant party capable of governing without check from the minority constitutes the antithesis of that culture.

The Framers also expected that candidates would be judged as individuals and did not anticipate the rise of the party system that has come to dominate American politics.⁴³ They would thus have had no reason to contemplate the possibility that districts could be drawn to ignore historical geographic boundaries and proportionality to instead favor unidentified future candidates simply based on a party affiliation.

This history shows that the founding generation understood the original meaning of the Constitution's language to permit either (1) separate elections in single-member districts defined by historical geographic boundaries or (2) at-large statewide elections reflecting the preference of the entire electorate.

B. Federal Law

With respect to the one specific sort of gerrymandering that the Framers anticipated, they built a provision into the Constitution to prevent it. The Framers required a census every ten years to prevent Congress from passively gerrymandering by ignoring population growth requiring reapportionment.⁴⁴

Beginning with the reapportionment act following the 1840 census, in the Apportionment Act of 1842, Congress began to regulate redistricting, invariably as a negative reaction to partisan gerrymandering.⁴⁵ It first required states to elect representatives “by

interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community.”).

42. THE FEDERALIST NO. 51 (James Madison) (explaining that the system of dual sovereignty, the separate of departments within the federal government, and the size of the federal government all work together to ensure deliberation as opposed to dictatorial control by a single faction).

43. Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 384 (2004) (“Our constitutional framers were essentially ignorant about political parties in the modern sense.”).

44. U.S. CONST. art. 1, § 2, cl. 3; *see also* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 571, 578–88 (Max Farrand ed., 1911).

45. An Act for the Apportionment of Representatives Among the Several States According to the Sixth Census, ch. 47, 5 Stat. 491 (1842).

districts composed of contiguous territory equal in number to the number of representatives to which said State may be entitled, no one district electing more than one Representative.”⁴⁶ It took this step, Andrew Hacker has explained, to remedy what had become a “winner take all” process in some jurisdictions that excluded minority interests.⁴⁷ With the 1850 census, Congress abandoned the geographic district requirement.⁴⁸

In the 1860s, however, two significant developments occurred. First, the states ratified the Fourteenth Amendment, guaranteeing all citizens the equal protection of the laws.⁴⁹ Second, Congress reinitiated the geographic district rule and, over time, supplemented it with requirements that the districts should consist of “as nearly as practicable an equal number of inhabitants”⁵⁰ and “compact territory.”⁵¹ Again, this federal intervention in House district line-drawing favored drawing new district lines that respected historic boundaries or proportionality between the statewide vote and the percentage of representatives in the legislature over partisan gerrymandering.

In 1911, Congress amended the redistricting act to make clear that states may draw district lines “in the manner provided by the [state’s] laws,”⁵² replacing an earlier, more specific reference to the state’s “legislature.”⁵³ Congress made this change to clarify that states

46. § 2, 5 Stat. at 491.

47. Mast, *supra* note 39 (quoting ANDREW HACKER, CONGRESSIONAL DISTRICTING: THE ISSUE OF EQUAL REPRESENTATION 48 (rev. ed. 1964)). A few states defied the district requirement. *Id.*

48. *Id.*

49. U.S. CONST. amend. XIV, § 1.

50. An Act for the Apportionment of Representatives to Congress Among the Several States According to the Ninth Census § 2, ch. 11, 17 Stat. 28 (1872); *see also* An Act Making an Apportionment of Representatives in Congress Among the Several States Under the Tenth Census § 3, ch. 20, 22 Stat. 5, 6 (1882) (“[E]ach subsequent Congress shall be elected by Districts composed of contiguous territory, and containing as nearly as practicable an equal number of inhabitants . . .”).

51. An Act for the Apportionment of Representatives in Congress Among the Several States Under the Thirteenth Census § 3, ch. 5, 37 Stat. 13, 14 (1911).

52. An Act for the Apportionment of Representatives in Congress Among the Several States Under the Thirteenth Census § 4, ch. 5, 37 Stat. at 14.

53. *See* *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2668–69 (2015).

could use alternative procedures to draw district lines other than assigning the task to the politicians who would run in those districts.⁵⁴ Again, partisan gerrymandering concerns appear to have been the motivating factor. For example, in supporting this change, Senator Burton viewed shifting redistricting away from the legislature as a positive move “[i]n view of the very serious evils arising from gerrymanders.”⁵⁵

In 1920, the census reflected a large influx of immigrants into the northeastern states, particularly New York.⁵⁶ As a result, reapportionment would have radically shifted the composition of the House of Representatives. Congress responded with a passive gerrymander, refusing to redistrict at all.⁵⁷ Importantly, this gerrymandering was not viewed as ordinary or acceptable. On the contrary, Congress took steps to prevent it from happening again. In 1929, new legislation placed the redistricting process permanently in the hands of an administrative body and subjected apportionment to a mechanical formula that assigned a number of districts to each state based on the relative state populations.⁵⁸ “The need for legislation of this type,” the legislative history of the 1929 reapportionment act explained, “is confessed by the record of the past nine years during which Congress has refused to translate the 1920 census into a new apportionment. . . . As a result, great American constituencies have been robbed of their rightful share of representation”⁵⁹ When Congress imposed this mechanical reapportionment system, it considered—but did not include—the earlier language relating to

54. *Id.* at 2669 (holding that states could constitutionally use non-partisan commissions to redistrict rather than the state legislature in order to combat gerrymandering).

55. 47 CONG. REC. 3508 (1911). In 1941, Congress used similar language. An Act to Provide for Apportioning Representatives in Congress Among the Several States by the Equal Proportions Method, ch. 470, 55 Stat. 761–62 (1941).

56. Issacharoff, *supra* note 14, at 1664–65.

57. Steve Bickerstaff, *Reapportionment by State Legislatures: A Guide for the 1980's*, 34 Sw. L.J. 607, 610–11 (1980).

58. The newly adopted apportionment process yielded an output—how many representatives each state would have in the House of Representatives—based upon the number of people in each state as determined by the census. *Franklin v. Massachusetts*, 505 U.S. 788, 792 (1992) (describing the mathematical process that Congress adopted).

59. S. REP. NO. 71-2, at 2–3 (1929).

single-member districts, equal numbers, or compactness.⁶⁰ Once again, some states adopted at-large voting schemes.⁶¹ These at-large systems continued until the 1960s, when Congress—again acting in the face of gerrymandering concerns—passed new reapportionment legislation.⁶² This legislation, which remains in force today, requires single-member House districts.⁶³ Once again, Congress acted to combat state legislative efforts to ensure single-party dominance. In this case, it was concerned that southern states would move to multimember districts to combat the impact of the Voting Rights Act of 1965.⁶⁴

This history confirms a constitutional openness to either (1) geographic districts drawn to respect historical boundaries, or (2) multimember districts respecting the relative proportion of voters favoring each party. Although it does not establish that partisan gerrymandering violated the original Constitution—as opposed to the post-Fourteenth Amendment version—it shows that gerrymandering conflicted with the culture of American democracy. Whenever Congress put a thumb on the redistricting scale, it invariably opposed gerrymandering to achieve single-party dominance.

60. *Wood v. Broom*, 287 U.S. 1, 7–8 (1932).

61. *See, e.g., id.* at 4–5.

62. Mast, *supra* note 39 (noting that, as of the early 1960s, “22 of the 435 representatives were elected at-large,” and that Congress responded by requiring single-member districts).

63. *See An Act for the Relief of Doctor Ricardo Vallejo Samala and to Provide for Congressional Redistricting*, Pub. L. No. 90-196, 81 Stat. 581 (1967).

64. 52 U.S.C. § 10301 (2012); Mast, *supra* note 39; *see also Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (quoting *Burns v. Richardson*, 384 U.S. 73, 88 (1966)) (“[M]ultimember districts and at-large voting schemes may ‘operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.’”).

*C. One-Person, One-Vote Rule, Equal Protection, and
Gerrymandering*

After Congress did away with the equal-population requirement that it imposed from the late 1800s through 1930,⁶⁵ some states engaged in passive gerrymanders. These failures to redraw district lines to reflect uneven population growth allowed large population disparities to grow between voting districts.⁶⁶ In 1964, the Supreme Court stepped in, holding that the Equal Protection Clause required fair redistricting, constitutionalizing the one-person, one-vote rule for all intra-state apportionment (House districts as well as state-election voting districts).⁶⁷ Although some commentators have questioned the constitutional underpinnings of applying the Equal Protection Clause to redistricting,⁶⁸ no Supreme Court Justice in over 40 years has argued that the one-person, one-vote rule should be overturned.

Opponents of adjudicating partisan gerrymandering claims, however, have argued that the rule provides sufficient protection.⁶⁹ As long as a state apportions representation on a population basis, this argument runs, it is “obvious that nobody’s vote has been ‘diluted’ in the sense in which that word was used” by the Court in adopting the

65. *Wood*, 287 U.S. at 7–8.

66. *See, e.g., Baker v. Carr*, 369 U.S. 186, 191 (1962) (explaining that Tennessee had not redistricted in over 60 years).

67. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (“[T]he Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.”); *id.* at 577, 579 (“Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multimember or flatorial districts.”); *see also Harris v. Ariz. Indep. Redistricting Comm’n*, 136 S. Ct. 1301, 1306–07 (2016) (citing *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983)) (holding that a plan with population deviation less than 10% is presumptively valid); *Rogers v. Lodge*, 458 U.S. 613, 617, 627–28 (1982) (striking down multi-member district); *White v. Register*, 412 U.S. 755, 766–67 (1973) (same).

68. RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 104 (2d ed. 1997); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 84–90 (1990); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 103 (2000).

69. *Davis v. Bandemer*, 478 U.S. 109, 149–50 (1986) (O’Connor, J., concurring in the judgment); Larry Alexander, *Still Lost in the Political Thicket*, 50 VAND. L. REV. 327, 336 (1997) (“[N]o standard exists beyond the mathematical ‘one-person, one-vote’ by which to measure vote dilution”).

one-person, one-vote rule.⁷⁰ But this view misreads the relevant jurisprudence. To be sure, equalizing district populations initially undermined what was then the most prevalent sort of gerrymandering. But even as the Court adopted the rule, it recognized that unequal voting power flowing from population disparities was *not* the only constitutional concern.⁷¹ In *Reynolds v. Sims*—the seminal one-person, one-vote rule case—the Court spoke in broad terms, stressing that the Equal Protection Clause required apportionment that achieved a “fair and effective representation for all citizens.”⁷² Any form of “[i]ndiscriminate redistricting,” Chief Justice Warren cautioned, would be “an open invitation to partisan gerrymandering.”⁷³

The Court thus recognized that redistricting could unconstitutionally impact a group of voters, even if each individual had equal voting power.⁷⁴ In the initial redistricting cases, the Court

70. *City of Mobile v. Bolden*, 446 U.S. 55, 78 (1979); *see also Bandemer*, 478 U.S. at 151–52 (O’Connor, J., concurring in the judgment) (contrasting racial and partisan gerrymandering).

71. *See, e.g.,* Issacharoff, *supra* note 14, at 1649 (“Despite the focus on individual rights, however, the Court’s adoption of the formal one-person, one-vote rule in *Reynolds* and *Wesberry* was inextricably linked to its instrumental view of the need to develop legal rules to bring the political process into conformity with the loosely articulated substantive standard of political fairness, which the Court initially defined as ‘the achieving of fair and effective representation for all citizens.’”); Richard H. Pildes, Essay, *What Kind of Right Is “The Right To Vote”?*, 93 VA. L. REV. IN BRIEF 45, 47 (2007) (“[I]n well-established, mature democracies, most of the actual conflicts that arise tend to be over aggregation, not over the individual act of participation.”).

72. *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964).

73. *Id.* at 578–79.

74. *See, e.g.,* *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) (“State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment.”); *Burns v. Richardson*, 384 U.S. 73, 88 (1966) (“[A]pportionment schemes . . . will constitute invidious discrimination . . . if it can be shown that ‘designedly or otherwise, a multi-member constituency apportionment scheme . . . would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.’”); *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) (“It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster.”).

recognized that the challenged boundaries improperly “maximized the political strength of rural voters and diluted the political power of urban voters.”⁷⁵ And later, it emphasized that “[t]he very essence of districting is to produce a different—a more ‘politically fair’—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats.”⁷⁶ “An unrealistic overemphasis on raw population figures, a mere nose count in the districts,” Justice White explained for the Court, “may submerge . . . other [partisan gerrymandering] considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement.”⁷⁷ The Court thus distinguished between line-drawing to “minimize or eliminate the political strength of any group or party” and political fairness that entails providing “a rough sort of proportional representation in the legislative halls of the State.”⁷⁸

The Court’s later decisions striking down district maps under the one-person, one-vote rule appear to have been driven by partisan gerrymandering concerns unrelated to population equality. In some cases, the Court upheld maps despite unequal populations, holding that states could legitimately vary from a strict one-person, one-vote standard in order to “maintain[] the integrity of political subdivision lines”⁷⁹ or achieve “a rough approximation of the statewide political

75. *Karcher v. Daggett*, 462 U.S. 725, 747 n.6 (1983) (Stevens, J., concurring) (citing ANDREW HACKER, CONGRESSIONAL DISTRICTING: THE ISSUE OF EQUAL REPRESENTATION 20–26 (rev. ed. 1964)); *see generally* Standards for Congressional Districts (Apportionment): Hearings on H.R. 73, H.R. 575, H.R. 8266, and H.R. 8473 Before Subcomm. No. 2 of the H. Comm. on the Judiciary, 86th Cong. 65–90 (1959) (statements of various stakeholders and interest groups).

76. *Gaffney*, 412 U.S. at 753.

77. *Id.* at 748. “[R]epresentation does not depend solely on mathematical equality among district populations.” *Id.* at 748–49.

78. *Id.* at 754.

79. *Mahan v. Howell*, 410 U.S. 315, 325 (1973); *accord* *Harris v. Ariz. Indep. Redistricting Comm’n*, 136 S. Ct. 1301, 1306 (2016) (“[L]egitimate considerations can include a state interest in maintaining the integrity of political subdivisions.”); *Brown v. Thomson*, 462 U.S. 835, 847–48 (1983) (noting that the state’s policy of preserving county boundaries justified the 16% average deviation and 89% maximum deviation from population equality).

strengths of the Democratic and Republican Parties.”⁸⁰ Yet in other cases, the Court struck down maps with population disparities so small that they fell within the range of anticipated errors in the census data.⁸¹ These latter cases can only be rationally explained—as concurring Justices recognized and acknowledged—by record evidence that the maps had resulted from partisan gerrymandering.⁸² For example, concurring in a 2004 summary affirmance of a decision finding a district map unconstitutional on one-person, one-vote grounds, Justice Stevens wrote:

[H]ad the Court in *Vieth* adopted a standard for adjudicating partisan gerrymandering claims, the standard likely would have been satisfied in this case. . . . [T]he District Court’s detailed factual findings regarding appellees’ equal protection claim confirm that an impermissible partisan gerrymander is visible to the judicial eye and subject to judicially manageable standards.⁸³

80. *Gaffney*, 412 U.S. at 752; *accord Harris*, 136 S.Ct. at 1306 (“[L]egitimate considerations can include . . . the competitive balance among political parties.”); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 419 (2006) (“[A] congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority.”); *Johnson v. De Grandy*, 512 U.S. 997, 1014–15 (1994) (finding that, where minority groups elected representatives in proportion with their statewide numbers, the scheme did not dilute their votes in violation of the Voting Rights Act); *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (“[I]t would seem reasonable that a majority of the people of a State could elect a majority of that State’s legislators.”).

81. *Issacharoff*, *supra* note 14, at 1656–57.

82. *Cox v. Larios*, 542 U.S. 947, 949 (2004) (Stevens, J., concurring). Similarly, Justice Fortas had no trouble identifying evidence of “the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes” from an effort to draw fair district lines. *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (1969) (Fortas, J., concurring). In another case, Justice Stevens condemned redistricting that “serve[d] no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular time, or to disadvantage a politically weak segment of the community” *Karcher v. Daggett*, 462 U.S. 725, 748 (1983) (Stevens, J., concurring).

83. *Cox*, 542 U.S. at 950 (Stevens, J., concurring).

Late-twentieth-century commentators also recognized that the one-person, one-vote rule compelled overall fairness, not just equal populations across districts. In 1968, leading voting-rights commentator Robert Dixon explained that “[w]hat is represented is never merely the individual, but always certain purposes common to groups of individuals.”⁸⁴ Dixon and others recognized that the one-person, one-vote requirement, if interpreted narrowly, “may operate to worsen some of the representation deficiencies of ‘fixed constituency extremism’ unless the forces which have impelled speedy reapportionment also impose restraints on the breadth of reapportioning discretion.”⁸⁵ This problem could arise innocently

84. ROBERT G. DIXON, JR., *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* viii (1968) (internal quotation marks omitted).

85. *Id.* at 56. Others expressed similar views. A 1982 Congressional Quarterly article explained that:

The nobly aimed ‘one-man, one-vote’ principle is coming into increasing use as a weapon for state legislators bent on partisan gerrymandering.

From California to New Jersey and points in between, Republicans and Democrats alike are justifying highly partisan remaps by demonstrating respect for the 1964 Supreme Court mandate that population of congressional districts within states must be made as equal as possible.

Meanwhile, other interests at stake in redistricting—such as the preservation of community boundaries and the grouping of constituencies with similar concerns—are being brushed aside. . . . The emphasis on one-man, one-vote not only permits gerrymandering, it encourages it. In many states, it is impossible to approach population equality without crossing city, county and township lines. Once the legislature recognizes that move must be made, it is only a short step further to the drawing of a line that dances jaggedly through every region of the state. Local interests, informed that it is no longer legally permissible to draw a whole county congressional map in most states, are far less likely to object than they were in the past.

CONGRESSIONAL QUARTERLY, *STATE POLITICS AND REDISTRICTING* 1–2 (Lynda McNeil ed., 1982). See M. JEWELL & S. PATTERSON, *THE LEGISLATIVE PROCESS IN THE UNITED STATES* 19–20 (4th ed. 1986) (finding that the one-person, one-vote principle generally facilitates racial and partisan gerrymandering); Schuck, *supra* note 10, at 1328–29 (“For partisan gerrymandering . . . a traditional objection to judicial activism—that the remedy for the evil should be sought in the legislature, not

from a myopic focus on equalizing population without reference to either proportionality or historical boundaries.⁸⁶ Or, conversely, it could happen nefariously from a desire to maintain the improprieties of the prior era: legislators could create districts of equal populations that are nonetheless gerrymandered to unfairly favor one party because they ignore historical boundaries.⁸⁷

in the courts—seems especially impertinent. Both practices are not merely consequences of constitutionally suspect politics. They are also fundamental causes of it.”); see also Gordon E. Baker, *One Man, One Vote, and Political Fairness*, 23 EMORY L.J. 701, 710 (1974) (“Priority was typically given to miniscule population variations at the expense of any recognition of political subdivisions. Charges of partisan gerrymandering were more widespread than in past decades for two major reasons: the extent of redistricting activity . . . and the lack of emphasis on former norms of compactness and adherence to local boundary lines.”); Robert G. Dixon, Jr., *The Warren Court Crusade for the Holy Grail of “One Man-One Vote,”* 1969 SUP. CT. REV. 219, 231–33 (explaining that the irrelevance of political subdivision boundaries will make gerrymandering easier); Richard Engstrom, *The Supreme Court and Equipopulous Gerrymandering*, 1976 ARIZ. ST. L.J. 277, 278 (1976) (“Not only [has] the Court failed to develop effective checks on the practice of gerrymandering, but in pursuing the goal of population equality to a point of satiety it [has] actually facilitated that practice.”).

86. As Justice Powell explained,

[a] standard that judges the constitutionality of a districting plan solely by reference to the doctrine of “one person, one vote” may . . . [be] perceived [as a] way to avoid litigation, [and thus] legislative bodies may place undue emphasis on mathematical exactitude, subordinating or ignoring entirely other criteria that bear directly on the fairness of redistricting.

Davis v. Bandemer, 478 U.S. 109, 168 (1986) (Powell, J., concurring in part and dissenting in part). See also *Karcher*, 462 U.S. at 753 (Stevens, J., concurring) (“The major shortcoming of the numerical standard is its failure to take account of other relevant—indeed, more important—criteria relating to the fairness of group participation in the political process.”); *id.* at 774 (White, J., dissenting) (“[N]o one can seriously contend that such an inflexible insistence upon mathematical exactness will serve to promote ‘fair and effective representation.’”); *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973) (“An unrealistic overemphasis on raw population figures . . . may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement.”).

87. See, e.g., *Karcher*, 462 U.S. at 751 (Stevens, J., concurring) (quoting Robert G. Dixon, Jr., *The Court, the People, and “One Man, One Vote,”* in REAPPORTIONMENT IN THE 1970S 32 (N. Polsby ed., 1971)) (“Logic, as well as experience, tells us . . . that there can be no total sanctuaries in the political thicket,

By the 1990s, Samuel Issacharoff recognized that the new, less obvious partisan gerrymanders were as damaging as ever. “Once decisionmakers had internalized the new legal regime,” he explained, the one-person, one-vote rule “simply channeled partisan entrenchment efforts into more creative strategies, the development of which was greatly facilitated by the advent of computer technology.”⁸⁸ Barred from using population differences to achieve their desired result, politicians simply turned to other gerrymandering tactics to secure an irrational difference between the majority party’s support among the electorate and its dominance in the legislature.⁸⁹

The Court’s one-person, one-vote jurisprudence is thus best seen as an outgrowth of the spirit of the pre-Fourteenth Amendment Constitution and the American democratic culture flowing from the document’s structure. While on its face, the rule appears to be a

else unfairness will simply shift from one form to another.” (internal quotation marks omitted)); Gordon E. Baker, *Quantitative and Descriptive Guidelines to Minimize Gerrymandering*, 219 ANNALS N.Y. ACAD. SCI. 200, 208 (1973) (“If more specific guidelines to minimize gerrymandering are not forthcoming, then a great democratic principle—one man, one vote—will have degenerated into a simplistic arithmetical facade for discriminatory cartography on an extensive scale.”); Engstrom, *supra* note 85, at 281–82, 285–86, 296 (explaining that computerized mapping programs applying a “one-man, one-vote” standard can create highly discriminatory districts, observing that dissenting members of the Court predicted in various cases that discriminatory districts would result from mechanical application of the standard, and commenting that “the ‘gerrymanderer’s paradise’” persists because the Court has failed to develop standards that allow it to invalidate discriminatory districts).

In 1969, Justice Harlan correctly observed “that the rule of absolute equality is perfectly compatible with ‘gerrymandering’ of the worst sort.” *Wells v. Rockefeller*, 394 U.S. 542, 551 (1969) (Harlan, J., dissenting). “A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues.” *Id.* Since Justice Harlan made that point, computer technology has made the gerrymanderer’s job even easier. “In the 1970’s round of reapportionment, some states were barely able to generate a single reapportionment plan in the time allotted to the task.” NATIONAL CONFERENCE OF STATE LEGISLATURES, REAPPORTIONMENT: LAW AND TECHNOLOGY 55 (June 1980). Now, computers make it possible to generate a large number of alternative plans, consistent with equal population guidelines and various other criteria, in a relatively short period of time, and to analyze the political characteristics of each one in considerable detail.

88. Issacharoff, *supra* note 14, at 1654.

89. DIXON, *supra* note 84, at 56.

mechanical one, it actually embodies a broader principle of voting fairness.

Throughout the nation's history, there appears to have been confidence that one could readily distinguish this type of "fair" redistricting from unfair gerrymandering that violates the Equal Protection Clause. One can trace this cultural understanding from James Madison—who, for example, stressed that representatives should have "an habitual recollection of their dependence on the people"⁹⁰—through Congress's and the Court's repeated responses to gerrymandering concerns, to the Court's declaration in 2016 that "the core principle of republican government [is] that the voters should choose their representatives, not the other way around."⁹¹

III. PARTISAN GERRYMANDERING SERIOUSLY THREATENS AMERICAN DEMOCRACY

For a half century, the Supreme Court has recognized that the Equal Protection Clause guarantees a meaningful right to vote that cannot be satisfied merely by granting each citizen access to a voting booth and counting that vote in some way.⁹² Chief Justice Warren explained:

Full and effective participation by all citizens in . . .
government requires, therefore, that each citizen have
an *equally effective voice* in the election of [his

90. THE FEDERALIST NO. 57 (James Madison).

91. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 781 (2005)); *Vieth v. Jubelirer*, 541 U.S. 267, 331–32 (2004) (Stevens, J., dissenting) (quoting *Session v. Perry*, 298 F. Supp. 2d 451, 516 (E.D. Tex. 2004) (Ward, J., concurring in part and dissenting in part)) ("The parallel danger of a partisan gerrymander is that the representative will perceive that the people who put her in power are those who drew the map rather than those who cast ballots, and she will feel beholden not to a subset of her constituency, but to no part of her constituency at all. The problem, simply put, is that the will of the cartographers rather than the will of the people will govern. As Judge Ward recently wrote, 'extreme partisan gerrymandering leads to a system in which the representatives choose their constituents, rather than vice-versa.'").

92. See *Reynolds v. Sims*, 377 U.S. 553, 568 (1964) (citing U.S. CONST. amend. XIV, § 1).

representatives]. . . . Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status.⁹³

The early redistricting cases dealt with large population disparities between districts within a state, rendering some votes less weighty than others.⁹⁴ But the Court has repeatedly emphasized that population imbalances are not the only constitutional concern.⁹⁵ “[D]istricts perfectly acceptable under equal population standards,” Justice White explained for the Court, may violate the Constitution if they “are employed ‘to minimize or cancel out the voting strength of racial or political elements of the voting population.’”⁹⁶

This Part responds to common arguments attempting to minimize the negative impact of partisan gerrymanders. It shows that each proves unavailing, thereby reinforcing the conclusion that the problem is sufficiently grave to compel judicial intervention.

A. “Everybody Does It, and They Always Have”

Both political parties, this argument runs, gerrymander at every opportunity and have since the country’s earliest days.⁹⁷ The term “gerrymander” emerged in 1812 “by combining the last name of Elbridge Gerry with the word ‘salamander’ in order to describe the ‘fancied resemblance to a salamander . . . of the irregularly shaped

93. *Reynolds*, 377 U.S. at 565–66 (citations omitted).

94. *See, e.g., id.* at 545–46 (“Bullock County, with a population of only 13,462, and Henry County, with a population of only 15,286, each were allocated two seats in the Alabama House, whereas Mobile County, with a population of 314,301, was given only three seats, and Jefferson County, with 634,864 people, had only seven representatives.”); *Gray v. Sanders*, 372 U.S. 368, 371 (1963) (“One unit vote in Echols County represented 938 residents, whereas one unit vote in Fulton County represented 92,721 residents.”).

95. *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 751–52 (1973).

96. *Id.* at 751 (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)).

97. *Vieth v. Jubelirer*, 541 U.S. 267, 272, 274–75 (2004) (plurality opinion) (describing examples).

outline of an election district in northeastern Massachusetts that had been formed for partisan purposes”⁹⁸

This perception of ubiquity, however, does not stand up to scrutiny. Although examples of gerrymandering can be found in any era, habitually conveying unjustified dominance to a single party is not ordinary. It does not happen when bipartisan commissions draw district lines (as they do in many states).⁹⁹ And perhaps more surprisingly, it does not happen in states in which one party actually dominates statewide vote totals.¹⁰⁰

A recent Brennan Center for Justice study used three statistical tools to test for partisan effects, taking account of factors—such as district lines comports with historical geographic boundaries—that could legitimately explain why one party’s percentage of the statewide vote total is disproportionate to the percentage of seats that party holds in the legislature.¹⁰¹ The study found that the Republican party has gerrymandered a net of 16–17 seats in the House of Representatives.¹⁰² Virtually all of those seats are located in just seven states, six of which are highly competitive statewide, and a seventh includes many potentially competitive districts.¹⁰³ In the three most highly gerrymandered states—Michigan, North Carolina, and Pennsylvania—each party has roughly equal support in statewide vote totals.¹⁰⁴ And of the four states that fill out this group—Florida, Ohio, Texas, and Virginia—only the Lone Star state is dominated by one party.¹⁰⁵ Due to Texas’s geographical size and polarized population,

98. *Davis v. Bandemer*, 478 U.S. 109, 164 n.3 (1986) (Powell, J., dissenting).

99. After the 1980 census, in six states, independent line-drawing bodies drew the state legislative district maps while the states’ legislatures themselves drew federal district lines. None of the independently drawn maps were challenged, but five of the six congressional district maps faced successful challenges. *See generally* Issacharoff, *supra* note 14, at 1689 n.234 (collecting cases).

100. ROYDEN & LI, *supra* note 5, at 1–2. A study by the Associated Press reached similar results. The Associated Press, *AP Analysis Shows How Gerrymandering Benefited GOP in 2016*, MICHIGAN NEWS, (June 27, 2017), http://www.mlive.com/news/index.ssf/2017/06/ap_analysis_shows_how_gerryman.html.

101. ROYDEN & LI, *supra* note 5, at 4.

102. *Id.* at 1.

103. *Id.*

104. *Id.* at 1–2.

105. *Id.*

gerrymandering can have a significant impact there despite the Republican Party's substantial share of the statewide vote.¹⁰⁶

Partisan gerrymanders are not ordinary in the sense that they always happen. Rather, they infect states where they will have the most pernicious effect: enabling one party to dominate despite voter preferences that should produce a significant competitive democratic check on the majority party.

Experts and courts have also recognized that modern gerrymandering is worse than historic examples.¹⁰⁷ As early as 2004, a court pointed to redistricting software that was so sophisticated and powerful that accurate maps that once took months to prepare could be generated in a matter of hours.¹⁰⁸ Gerrymanderers could thus pick and choose among different maps until they found the one that produced their desired partisan result while also according with some traditional districting principles and thus triggering the least suspicion.

In *Gill v. Whitford*, the case currently on the Supreme Court's docket,¹⁰⁹ a three-judge district court panel faced exactly this situation.¹¹⁰ The majority found that modern techniques enabled legislators to draw “[a] map that appears congruent and compact to the naked eye [but] in fact [is] an intentional and highly effective partisan gerrymander.”¹¹¹ The gerrymanders, the court recognized, were able to “pursue partisan advantage without sacrificing compliance with traditional districting criteria.”¹¹²

106. Cf. generally Jenny Jarvie, *Why Texas Is Texas: A Gerrymandering Case Cuts to the Core of the State's Transformation*, L.A. TIMES (July 11, 2017, 3:00 AM), <http://www.latimes.com/nation/la-na-texas-gerrymander-20170711-story.html> (“Voting rights advocates have long accused Texas Republicans of working to undermine the growing political clout of Latino and African American voters by intentionally—and unfairly—cramming them into districts or splitting them up so they are outnumbered. Republican legislators still control roughly two-thirds of State House and Senate and congressional seats.”).

107. See Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2516 (1997) (suggesting that various factors in the late-twentieth century combined synergistically to make gerrymandering worse than it had been before).

108. *Larios v. Cox*, 305 F. Supp. 2d 1335, 1342 (N.D. Ga. 2004) (per curiam).

109. *Gill v. Whitford*, 137 S. Ct. 2268 (2017) (mem.).

110. *Whitford v. Gill*, 218 F. Supp. 3d 837, 889 (W.D. Wis. 2016).

111. *Id.*

112. *Id.*

Given modern technologies, the problem could become much worse if the Court ends the judiciary's oversight role. As Justice Kennedy recognized in *Vieth*, if courts refuse to entertain gerrymandering claims, "the temptation to use partisan favoritism in districting in an unconstitutional manner will grow."¹¹³

B. *"Congress Has the Power to Prohibit Gerrymandering, and Therefore Courts Should Abstain from Adjudicating Partisan Gerrymandering Claims"*

In *Vieth*, the plurality suggested that courts need not adjudicate partisan gerrymandering claims—at least with respect to the House—because the Constitution empowered Congress to step into the thicket, as it had in both the nineteenth and early twentieth centuries.¹¹⁴

Historically, however, Congress's failure to act in response to unconstitutional state action has led the courts to intervene, not abstain. After imposing an equal-population requirement on the states for decades, Congress abandoned that requirement in the 1930s, and some states allowed district populations to diverge widely.¹¹⁵ By the 1960s, the Court understood Congress's inaction as a reason to intervene.¹¹⁶ Similarly today, Congress has not acted for 50 years in the face of repeated concerns that states have used the one-person, one-vote rule to justify new and potentially more harmful partisan gerrymanders.

C. *"Only the Legislature Has the Authority to Make the Necessary Policy Decisions on How Best to Apportion Voters"*

Justice O'Connor has argued that developing a test to identify partisan gerrymandering would enmesh the courts in policy choices that properly lie within the legislature's realm.¹¹⁷ For example, she argued that favoring proportionality over partisanship is an important

113. *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring in the judgment).

114. *Id.* at 275–77 (plurality opinion).

115. *See supra* Section II.B.

116. *Wesberry v. Sanders*, 376 U.S. 1, 5–7 (1964).

117. *Davis v. Bandemer*, 478 U.S. 109, 154–55 (1986) (O'Connor, J., concurring in judgment).

policy choice best left to the legislature.¹¹⁸ But courts adjudicating gerrymandering claims would not need to make these policy choices. As Part II shows, redistricting efforts that produce legislatures with representatives either (1) from districts defined by historical geographic boundaries or (2) reflecting the percentage of votes cast for each party statewide have been recognized as legitimate.¹¹⁹ State legislatures may choose either approach without court interference.

By contrast, partisan attempts to unfairly benefit a single party by ignoring both historical geographic boundaries *and* the statewide vote have never been deemed acceptable.¹²⁰ Adjudicating gerrymandering claims would not require courts to make new and controversial policy choices. They need only enforce the choices that flow from our democratic culture and history.

D. “Gerrymandering Is Self-Defeating”

Justice O’Connor has also argued that the courts should not adjudicate gerrymandering claims because the practice is self-defeating.¹²¹ As a result, she believed that “political gerrymandering is an evil that can[] be checked or cured by the people or by the parties themselves.”¹²² In order to create dominance in a state where proportionality would not support it, she contended,

the legislative majority must weaken some of its safe seats, thus exposing its own incumbents to greater risks of defeat [A]n overambitious gerrymander can thus

118. *Id.* at 154–55, 158–60 (“If [a] bipartisan arrangement between two groups of self-interested legislators is constitutionally permissible, . . . then—in terms of the rights of individuals—it should be equally permissible for a legislative majority to employ the same means to pursue its own interests over the opposition of the other party.”).

119. *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973).

120. *See supra* Part II.

121. *Bandemer*, 478 U.S. at 144 (Burger, C.J., concurring in the judgment) (joining Justice O’Connor’s concurrence).

122. *Id.* at 152. “Indeed, there is good reason to think that political gerrymandering is a self-limiting enterprise.” *Id.* *See generally* BRUCE E. CAIN, *THE REAPPORTIONMENT PUZZLE* 151–159 (1984) (discussing party motives for implementing a partisan gerrymander and methods used to create an effective partisan gerrymander).

lead to disaster for the legislative majority: because it has created more seats in which it hopes to win relatively narrow victories, the same swing in overall voting strength [to the opposing party] will tend to cost the legislative majority more and more seats as the gerrymander becomes more ambitious.¹²³

Given the inherently self-defeating nature of gerrymandering, Justice O'Connor concluded, "each major party presumably has ample weapons at its disposal to conduct the partisan struggle"¹²⁴

Historians can debate whether this view of partisan gerrymandering was accurate in 1986 when Justice O'Connor made the argument. But it is not true today. District line-drawing techniques are more precise and powerful than ever. And the results of the worst gerrymanders after the 2010 census—Wisconsin, Michigan, Pennsylvania, North Carolina—support the conclusion that the parties using them face little political risk.¹²⁵

123. *Bandemer*, 478 U.S. at 152; Schuck, *supra* note 10, at 1345 ("[T]he dynamics of political competition and party organizations strongly inhibit partisan gerrymanders and are likely to limit their effects when they do occur. Even if they increase the party's seats in the next election, many of those seats will be more competitive and expensive than before, sowing the seeds of the gerrymander's own destruction or ineffectiveness.").

124. *Bandemer*, 478 U.S. at 152.

125. *See, e.g.*, *Whitford v. Gill*, 218 F. Supp. 3d 837, 889 (W.D. Wis. 2016) (Wisconsin gerrymander stable across two elections and statistical analysis of voting patterns indicates likely continued stability); The Associated Press, *supra* note 100 (noting that despite roughly 50-50 vote split in Michigan, Republicans captured 57% of statehouse seats in 2016, the third consecutive similar result after 2010 redistricting); Ray Gronberg, *Redistricting Worked for GOP, Duke Professor Says*, THE HERALD-SUN, Nov. 8, 2012, *passim*; Eric Ostermeier, *The Historically Undersized Pennsylvania Democratic US House Delegation*, POLITICS PA (June 24, 2013, 10:43 AM), <http://www.politicspa.com/the-historically-undersized-pennsylvania-democratic-us-house-delegation/49007> (analyzing historical trends in party dominance); Sam Wang, *The Great Gerrymander of 2012*, N.Y. TIMES, Feb. 2, 2013, <http://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html> (showing that unbiased districting in North Carolina would like produce seven Democratic representatives in the House and six Republicans, but gerrymandering produced nine Republican seats and only four Democrats).

Although parties gerrymandering with today's technology may face little political risk, they *do* face litigation risk if they use race as a predominant factor in drawing district lines. *Cooper v. Harris*, 137 S. Ct. 1455, 1468–72 (2017) (holding

E. “The Ability to Gerrymander Is But One of the Spoils of Victory at the Ballot Box”

Judge Griesbach, dissenting from the lower court decision in *Gill*, argued that partisan gerrymandering is just one of many perks that a political party receives when it prevails at the ballot box, including control of the legislative agenda and the ability to name committee chairs as well as a majority of each committee’s members.¹²⁶ “[I]t is largely true that individuals who attempt to gain political advantage through map-drawing,” she contended, “are not engaged in foul play or dirty tricks, but are merely using the power the voters have granted them to enact the policies they favor.”¹²⁷ As she saw it, their intent was not “to ‘burden the representational rights of Democratic voters’” or “suppress opposing viewpoints” through district lines that impede “their ability to translate their votes into legislative seats.”¹²⁸ Instead, she believed, gerrymanderers are merely trying “to create partisan majorities . . . because they honestly believe they will then be able to enact the policies that in their view are best for the state, or nation.”¹²⁹

Judge Griesbach’s understanding of the American democratic culture is, to say the least, bizarre and frightening. Rigging a district map to put a party with a slight majority of the statewide vote—or even one with only minority support—into overwhelming control of the legislature fundamentally differs from the other perks of victory. All the others preserve a democratic check on power. Partisan gerrymandering, by contrast, undermines that check.

The party that appropriately wins control of the legislature obtains the tools necessary to advance its policies. Controlling the legislative agenda and the makeup of committees enables the winning party to make good on its campaign promises. But critically, *further election victories will depend on the success of the policies that the party implements*. If the enacted agenda differs from what the party’s candidates promised during the campaign, or if that agenda turns out to be unpopular, the victorious party in one election would likely lose

district unconstitutional because the state legislature announced a racial target that predominated over traditional districting factors).

126. *Gill*, 218 F. Supp. 3d at 938–39 (Griesbach, J., dissenting).

127. *Id.* at 938.

128. *Id.* (quoting the majority, 218 F. Supp. 3d at 910).

129. *Id.* at 939.

its majority position in the next election. That is how democracy works. The ultimate test of a party's policy agenda will be whether the representatives who enacted it retain their jobs.

Partisan gerrymandering insulates policy choices to a significant extent from future voter scrutiny.¹³⁰ The Wisconsin gerrymander struck down in *Gill* is a quintessential example. In the first election after the Republican majority took over, Wisconsin voters expressed their apparent dissatisfaction with that party's policies, casting 51.4% of the two-party vote for Democratic candidates.¹³¹ Nevertheless, the Republican party—despite garnering less than 49% of the vote—retained over 60% of the seats in the legislature.¹³²

A partisan gerrymander is equivalent to wishing for more wishes when a genie grants you three: one need not worry about using the wishes wisely if she has locked up many more. Gerrymandering similarly reduces the need to legislate wisely because it places a thumb on the scale of future elections, insulating the legislative agenda from fair evaluation by structuring districts in a way that makes it extremely difficult to flip control of the legislature, even if the controlling party's agenda is unpopular. The district court in *Gill*, for example, determined that the map would allow Republicans to maintain a majority with as little as 48% of the vote, while Democrats would need 54% to flip the chamber, an unlikely percentage in a relatively equally divided state.¹³³

By placing partisan gerrymandering in the same category as setting the legislative agenda, Judge Griesbach imagines a voting culture in which undermining democratic institutions becomes acceptable when a party “honestly believe[s]” that its policies are good ones.¹³⁴ That view embodies the elitist principles of a dictatorship, not the American culture of democracy. Partisan gerrymandering is a

130. See Schuck, *supra* note 10, at 1329 (“[A] partisan gerrymander’s animating purpose is to influence not only the districting statute but the entire corpus of legislative decisions enacted in its train. It thus ramifies and perpetuates what might otherwise be a majority’s transient political advantage . . .”).

131. See *Gill*, 218 F. Supp. 3d at 853.

132. See *id.*

133. *Id.* at 894.

134. *Id.* at 939 (Griesbach, J., dissenting).

significant threat to democratic values, not just another perk of election victory.

F. “*It All Balances Out in the End*”

Some commentators have speculated that *you win some and you lose some*.¹³⁵ One party may dominate state A through gerrymanders while state B will be dominated by the opposing party that institutes its own gerrymander. And a decade later, a new census may reverse the parties’ roles. It all comes out in the wash. Letting judges stick their uninformed noses into this thicket, the argument runs, will produce more harm than good.

This attitude cheapens the idea of American democracy and the system of checks and balances that compel compromise and the accommodation of shared interests.¹³⁶ American democratic culture presumes that a dispersion of viewpoints and interests will guard against the tyranny of factions and compel negotiation.¹³⁷ For this reason, the Constitution included three separate constituencies to elect the President, the Senators, and the Members of the House.¹³⁸

A pocket of unchecked dominance does not become acceptable simply because another pocket exists somewhere else or will exist at some other time. As Robert Dixon observed at the advent of the one-person, one-vote litigation, “districting decisions are primary

135. For a discussion of various frames in which partisan gerrymanders might balance, see generally Adam B. Cox, *The Temporal Dimension of Voting Rights*, 93 VA. L. REV. 361 (2007).

136. Moreover, in many cases, gerrymandering’s effects do not cancel themselves out. Studies by the Brennan Center for Justice and the Associated Press show that after the 2010 census the practice dramatically favored the Republican party. Compare ROYDEN & LI, *supra* note 5, and The Associated Press, *supra* note 100, with THE FEDERALIST NOS. 56, 57 (James Madison).

137. See THE FEDERALIST NO. 10 (James Madison) (“[T]he smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.”); THE FEDERALIST NO. 51 (James Madison) (explaining that the system of dual sovereignty; the separate of departments within the federal government; and the size of the federal government all work together to ensure deliberation as opposed to dictatorial control by a single faction).

138. See generally U.S. CONST. art. I, §§ 2–3; U.S. CONST. art. II, § 1.

determinants of the quality of representative democracy.”¹³⁹ After all, democracy and the majority rule principle could be satisfied with a single nationwide election. The top vote-getters would receive the seats in the House, and every representative would represent every citizen. But American democracy has never worked that way. As Dixon explained, “from apportionment and districting derive the more personalized and balanced representation features which temper majoritarianism with requirements of deliberation and consensus.”¹⁴⁰

Robert Dahl captured the essence of American democracy this way:

A central guiding thread of American constitutional development has been the evolution of a political system in which all the active and legitimate groups in the population can make themselves heard at some crucial stage in the process of decision When I say that a group is heard “effectively,” I mean more than the simple fact that it makes a noise; I mean that one or more officials are not only ready to listen to the noise, but expect to suffer in some significant way if they do not placate the group, its leaders, or its most vociferous members

Thus the making of governmental decision is not a majestic march of great majorities united upon certain matters of basic policy.¹⁴¹

In this sense, American democracy is not about taking power and solidifying it to enhance your ability to enact your favored policies indefinitely. Dahl’s view of democracy depends on a system “devised to maximize the likelihood that a variety of interests, rather than a few dominant interests, will be represented formally in the processes of government.”¹⁴² This point applies with respect to enabling majorities to run roughshod over minorities.¹⁴³ It should thus apply even more

139. DIXON, *supra* note 84, at 14.

140. *Id.*

141. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 137, 145–46 (1956).

142. DIXON, *supra* note 84, at 41.

143. *See id.*

forcefully to gerrymanders that enable minorities to control government or small majorities to have super-majority positions.

Gerrymandering pushes democracy in the wrong direction. It solidifies single-party dominance even in potentially competitive areas. If gerrymandering can render most districts *safe* for the candidate of one party or the other, then “no return whatsoever can be expected from voting . . . [and] it is irrational to make the effort to vote.”¹⁴⁴ This may now be the case in the majority of Congressional districts.¹⁴⁵ Even if gerrymandering balances out over some geographic or temporal frame, it undercuts the legitimacy of the American democratic process.

IV. A STANDARD AND A REMEDY

The Supreme Court’s *Bandemer* decision established conclusively that equal-protection limitations on redistricting extended beyond the one-person, one-vote rule. There, six Justices agreed (1) that the equal-population rule was not, on its own, sufficient to prevent harmful partisan gerrymandering and (2) that courts could identify and prohibit unconstitutional line-drawing.¹⁴⁶ As in any equal-protection case, a plaintiff challenging a gerrymander would need to prove both discriminatory intent and effect.¹⁴⁷ Since *Bandemer*, however, the Court has struggled to articulate a specific standard that could identify unconstitutional gerrymanders, largely because the Justices mistakenly focused on the legislators’ partisan desires and the results that follow redistricting.¹⁴⁸ Recognizing that packing a party’s voters into a district or cracking those voters across multiple districts can flow from

144. *Id.* at 53.

145. Reihan Salam & Rob Richie, Opinion, *How to Make Congress Bipartisan*, N.Y. TIMES, Jul. 8, 2017, at A19.

146. *Davis v. Bandemer*, 478 U.S. 109, 124–25, 126–27 (1986) (plurality opinion) (joined by Brennan, White, Marshall, and Blackman, J.J.); *id.* at 161 (Powell, J., concurring in part and dissenting in part, joined by Stevens, J.).

147. *Id.* at 127 (plurality opinion).

148. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 412–20 (2006) (rejecting argument that mid-decade redistricting violated the Equal Protection Clause); *Vieth v. Jubelirer*, 541 U.S. 267, 281–91 (2004) (plurality opinion) (reviewing each standard proposed by a Justice of the Court and explaining why it fails to provide an administrable standard for identifying unconstitutional gerrymanders).

both legitimate and illegitimate line-drawing, the Court has struggled to find the dividing line.¹⁴⁹

The key to a workable standard requires a court to focus on whether the district map itself furthers one of the two legitimate redistricting goals. Neither the subjective intent of the legislators nor partisan voting patterns flowing from redistricting should be determinative. The pursuit of partisanship is not *per se* unconstitutional. Instead, a court should focus on whether the map objectively disrespected *both* historic geographical boundaries *and* proportionality. Only a map producing partisan advantage through packing and cracking *that also disrespected both of these legitimate goals* would reveal the discriminatory intent and effect required to hold a redistricting plan unconstitutional.

Sections A and B below show how a court would apply the intent and effect elements of the proposed test. Section C then proposes a remedy for cases in which the plaintiff has proven an equal-protection violation.

A. Discriminatory Intent

A court should adjudicate the intent prong of a partisan-gerrymandering challenge by objectively determining whether the district lines satisfy one of the two legitimate goals.¹⁵⁰ So long as the population of each district is reasonably equal, any map objectively respecting historical boundaries or proportionality would be immune from an equal-protection challenge. The legislators drafting such a map would have had a rational basis for it, and the plaintiff would thus fail to establish the intent prong of an equal-protection challenge. The

149. *Vieth*, 541 U.S. at 289–90 (plurality opinion).

150. Districts that respect historical boundary lines should not be confused with “compact districts.” Although compactness may often be a feature of districts that respect historical boundaries. Historical boundaries may be irregular and non-compact. And districts drawn to be compact may disrespect historical boundaries and thus constitute an improper gerrymander. *See Vieth*, 541 U.S. at 308–09 (Kennedy, J., concurring in judgment) (explaining that even compact districts may produce partisan effects).

court would not need to examine the effects flowing from the map, because effects alone cannot violate the Equal Protection Clause.¹⁵¹

But if an objective analysis of the map reveals that the legislature ignored the legitimate goals—or treated them as obstacles to be overcome to achieve single-party dominance—then the requisite discriminatory intent would be shown. For example, if a legislature drew oddly shaped districts, it would be ignoring the legitimate goal of creating compact districts. Similarly, if a legislature drew compact districts—but ones that did not track historical city or county boundaries—it would be treating a legitimate goal as an obstacle. Legislatures cannot claim a rational basis for disrespecting the legitimate goals of redistricting in order to obtain an illegitimate result.

Approaching the gerrymandering issue from the perspective of whether the legislature disrespected legitimate goals, the map itself would reveal much of the information necessary to assess the intent prong. It either largely respects historical boundaries, or it does not. It either seeks proportional representation or it does not. Additionally, the policy choice about which goal to pursue is a decision for the state legislature, not a court. But if the redistricting map *does not respect either goal*, the burden would shift to the state legislature to justify the map.

A state legislature may justify deviations from historical boundaries or proportionality by showing that they were necessary to (1) obtain districts of roughly equal population¹⁵² or (2) avoid violating the Voting Rights Act.¹⁵³ If the legislature attempts to justify a map in this way, the burden would fall to the plaintiff to present an alternative map that better adhered to the policy choice made by the legislature—historical boundaries or proportionality—while also satisfying the other legitimate requirements on which the state legislature purported to rely.

151. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977) (citing *Washington v. Davis*, 426 U.S. 229 (1976)).

152. *See Connor v. Finch*, 431 U.S. 407, 419 (1977) (“[A] State may properly seek to protect the integrity of political subdivisions or historical boundary lines” even if doing so requires “minor deviations” from the one-person, one-vote rule).

153. *See Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017) (“States enjoy leeway to take race-based [redistricting] action reasonably judged necessary under a proper interpretation of the VRA . . .”).

Courts have accepted the argument that protecting incumbents is another legitimate basis for redistricting.¹⁵⁴ But Justices and commentators have recognized that incumbency-protection is a complicated factor that cannot per se justify a redistricting map.¹⁵⁵ In many cases, protecting incumbents is synonymous with respecting historical boundaries. And in cases where straying from historical boundaries is necessary to achieve other legitimate goals, incumbency-protection makes sense as a guide to new district borders. An affiliation with an existing representative creates at least some sense of commonality in a community. By contrast, partisan gerrymanders that disrespect historical borders *and* seek disproportionate results do not become legitimate simply because the new district lines arguably protect incumbents.

Similarly, neither compactness nor population equality across districts should provide defendant legislatures with a safe harbor. No matter how compact a set of districts may be, and no matter how equal their populations, redistricting that fragments historical communities *and* disrespects proportionality in order to benefit one party over another is unacceptable. As to compactness, Justice Powell explained, “[a] legislator cannot represent his constituents properly—nor can voters from a fragmented district exercise the ballot intelligently—when a voting district is nothing more than an artificial unit divorced from, and indeed often in conflict with, the various communities

154. See, e.g., *Vieth*, 541 U.S. at 300 (describing incumbency protection as a “time-honored” redistricting criteria).

155. Commentators have criticized the notion that incumbency protection should be a legitimate redistricting consideration per se. *Vieth*, 541 U.S. at 351 n.6 (Souter, J., dissenting) (expressing wariness at “lumping all measures aimed at incumbent protection together”); Dean Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last*, 1986 SUP. CT. REV. 175, 227 (1986) (protecting incumbents on a bipartisan basis “cannot be said to discriminate against any political group”); Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 117–18 (1985) (concluding that differential treatment of incumbents suggests a partisan gerrymander); Issacharoff, *supra* note 14, at 1672 (“The doctrine born of the desire to curb self-serving manipulation of the process by incumbent powers has been transformed into a constitutional guarantee of sinecure for the pre-existing power base of those same incumbent forces.”).

established in the State.”¹⁵⁶ As to equal-population redistricting, the Court has granted states considerable leeway when they seek to further legitimate goals, making it relatively straightforward for a court to determine whether deviations from historical boundaries were necessary or driven by partisanship.¹⁵⁷

Much of the debate over the justiciability of partisan gerrymandering claims has assumed that the one-person, one-vote rule is a readily administered standard, while partisan gerrymandering necessarily involves more subjective decision-making and the balancing of interests.¹⁵⁸ But that distinction is overplayed. As the one-person, one-vote jurisprudence makes clear, no bright line exists as to how close a state must come to equalizing population.¹⁵⁹ Deviations are permitted for the same reasons that states may stray from historical boundaries, and the ultimate decisions have tended to turn on judgment calls as to whether a redistricting map constituted a good-faith effort or a partisan gerrymander.¹⁶⁰ With modern computer-assisted mapping techniques, plaintiffs and the courts can assess whether a map pursues historical boundaries as readily as whether it equalizes population. As Justice Kennedy has recognized, constantly improving software “would facilitate court efforts to identify” maps pursuing legitimate goals and those constituting partisan gerrymanders.¹⁶¹

Whitford v. Gill provides an illustrative example.¹⁶² There, the legislature generated multiple maps producing compact districts of roughly equal population.¹⁶³ But rather than select a map that hewed

156. *Karcher v. Daggett*, 462 U.S. 725, 787 (1983) (Powell, J., dissenting); *accord* *Davis v. Bandemer*, 478 U.S. 109, 173 n.13 (1986) (Powell, J., dissenting) (“[I]rrational lines themselves affect the ability of all voters to exercise their political influence.”).

157. *See supra* notes 79–80 and accompanying text.

158. *E.g.*, *Vieth*, 541 U.S. at 290 (referring to the “easily administrable standard of population equality” compared to the uncertain partisan gerrymandering question).

159. *See supra* notes 79–80.

160. *See Vieth*, 541 U.S. at 296.

161. *Id.* at 312–13 (Kennedy, J., concurring in judgment).

162. *See generally* *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016).

163. Motion to Affirm at 7–8, *Gill v. Whitford*, 137 S. Ct. 2268 (2017) (No. 16-1161), 2017 WL 1907756 at *7–8.

closely to historical boundaries, the voting-district drafters chose a map that divided more counties than any districting map in the state's history.¹⁶⁴ And instead of choosing to respect statewide vote totals, the majority party in the legislature used statistical predictions to choose a map that would produce radically disproportional results.¹⁶⁵ Choosing that map revealed the drafters' requisite intent to discriminate: to achieve an illegitimate goal for which no legitimate rational basis existed.¹⁶⁶

B. Discriminatory Effect

If—but only if—a plaintiff has satisfied the intent prong of the equal-protection analysis by showing that the map disrespects both legitimate redistricting goals, it would then need to show discriminatory effect. It must prove that one party dominated the legislature significantly beyond the level that either its statewide vote total or adherence to historical geographic boundaries would be expected to produce. Notably, the *Bandemer* Court held that a single set of election results was not in and of itself enough to show discriminatory effect.¹⁶⁷ A plaintiff is required to show either the results of at least two elections or statistical analysis of likely future voting patterns.¹⁶⁸

Recall that, if disproportional results would legitimately flow from respecting historical boundaries, the test proposed here would require the court to dismiss the case at the intent stage. Given this refined intent analysis, a plaintiff's burden at the effects stage need not be onerous. A plaintiff can prevail by presenting evidence of results from at least one election showing significant disproportionate representation for one party combined with statistical voting-pattern analysis showing that similar results are likely in the future.¹⁶⁹

164. *Id.* at *9.

165. *Id.*

166. *Cf. Vieth*, 541 U.S. at 333 (Stevens, J., dissenting) (“[T]he Equal Protection Clause implements a duty to govern impartially that requires, at the very least, that every decision by the sovereign serve some nonpartisan public purpose.”).

167. *Davis v. Bandemer*, 478 U.S. 109, 135 (1986).

168. *Id.* at 139–41.

169. Statistical tools such as the efficiency gap can be used to show likely future results based on past voting patterns. Nicholas O. Stephanopoulos & Eric M.

Once again, *Gill* provides a helpful example. There, the plaintiff presented evidence that a party with roughly 50% of the statewide two-party vote held over 60% of the seats in the legislature for two consecutive elections.¹⁷⁰ In addition, the plaintiff presented statistical analysis showing that the party controlling the redistricting would hold its majority with as little as 48% of the statewide vote, while the other party would need 54% to take a majority of the seats, a percentage rarely reached by one party in the state's history.¹⁷¹ That showing would be sufficient to establish discriminatory effect.

C. A Proposed Remedy

To summarize the standard proposed above, a court should engage in the familiar two-step inquiry into discriminatory intent and effect as it would for any equal-protection challenge. What is new here is that each step would be grounded in objective analysis. First, the court would examine the redistricting map to determine whether it objectively demonstrates that the legislature pursued one of the two legitimate goals: (1) historical-boundary-based district voting; or (2) proportionality between the percentage of voters who cast ballots for a party statewide and the percentage of representatives from that party in the legislature. Only if the map demonstrates disrespect for both legitimate redistricting goals would the court proceed to the discriminatory effect element. And it would analyze the effect element by comparing actual election results and statistical evidence of likely future results with the results that would be obtained with a map that more closely followed historical boundaries.

A successful plaintiff under this standard would receive a two-step remedy. First, the minority party should be given a seat at the redistricting table, and the legislature should be charged with redrawing the problematic map through a bipartisan process.¹⁷² Given the speed with which modern computer software can generate redistricting maps, the parties should be able to complete this task in

McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 CHI. L. REV. 831, 878 (2015).

170. *Whitford v. Gill*, 218 F. Supp. 3d 837, 853 (W.D. Wis. 2016).

171. *Id.* at 852.

172. See DIXON, *supra* note 84, at 384 (building bipartisanship into the reapportionment process “can be an important guarantee of fairness”).

short order. Independent line-drawing commissions in many states and the English Boundary Commission employ software-based tools that draw district maps to follow historical boundaries as closely as possible without employing partisan tactics.¹⁷³ When a court charges two political parties with the duty to produce a map agreeable to both sides, these non-partisan tools should enable the legislature to generate an even-handed map.¹⁷⁴

Alternatively, a state found to have violated the Equal Protection Clause should be given the option to create a bipartisan redistricting commission. This process has produced positive results in a number of states,¹⁷⁵ and thus it should be open to those who violated the Constitution.

If the parties cannot agree on a bipartisan map within a short period of time, and the state does not create a bipartisan commission to redistrict, the state legislature should be required to select which policy it wishes to pursue: historical boundaries or proportionality. Each party to the case should then be required to submit a map that pursues the state's chosen policy while comporting with both the one-person, one-vote rule and the Voting Rights Act. The court would then use modern software to select which of the two proposed maps best achieves the state's chosen redistricting goal.

V. CONCLUSION

A path to administrable standards in partisan gerrymandering cases emerges once one recognizes that districting to block communities of voters from meaningfully participating in the political process is equally bad whether it comes in small doses or large ones. Asking how much of a bad thing is too much is the wrong question. Instead, a coherent standard to assess partisan gerrymandering claims requires a clear articulation of the redistricting considerations that are permissible and those that are impermissible. When a map objectively reveals that a legislature pursued a legitimate goal, the court can dismiss the case. Partisan effects may flow from that choice, but they

173. See Issacharoff, *supra* note 14, at 1694–95.

174. See *Vieth*, 541 U.S. at 333 (Stevens, J., dissenting) (quoting *Romer v. Evans*, 517 U.S. 620, 623 (1996)) (“The Constitution enforces ‘a commitment to the law’s neutrality where the rights of persons are at stake.’”).

175. See *supra* note 99.

are legitimate because the legislature had a rational basis for its redistricting choices.

But when the legislature has disrespected the legitimate goals to produce a disproportionate result in its favor, however, the courts should not hesitate to step in and declare unfair partisan gerrymandering unconstitutional. A remedy that leaves the line-drawing responsibility largely in the hands of the legislature is readily achievable with modern computer-line-drawing techniques.

The stakes are too high for courts to simply look away. The danger of losing the heart of American democracy is real. Robust two-party government has been far from a universal rule in American society. American history has seen long stretches of single-party dominance in particular geographic areas.¹⁷⁶ In our current day, Republicans dominate the South and Great Plains while Democrats dominate the Northeast and the West Coast. This tendency toward one-party rule must be tempered by the vigilant pursuit of fairness in apportionment and redistricting to allow a meaningful public assessment of government policy. Without that vigilance, voters in the minority may conclude that their vote is useless, and thus the expense and inconvenience of participating in the democratic process—not just the act of voting, but also educating themselves on the candidates and the relevant issues—is not worth the candle.¹⁷⁷

“The ordered working of our Republic, and of the democratic process,” Justice Kennedy has correctly observed, “depends on a sense of decorum and restraint in all branches of government, and in the citizenry itself. . . . [O]ne has the sense that legislative restraint was

176. DIXON, *supra* note 84, at 47.

177. A lifelong Wisconsin democrat recently put this concern in personal terms: Another clear consequence of the unfair districting has been to discourage Wisconsin Democrats from participating in the many activities of democracy. . . . I have worked on campaigns in many districts throughout the state because my goal has always been to elect Democratic majorities in the two branches of the state legislature. Sometimes we won, sometimes we lost. This is to be expected in a politically competitive state. What is not acceptable is what Wisconsin Democrats now face: Since the 2012 election, we have had no chance to elect Democratic majorities in the Legislature, even when we win big electoral majorities.

Bill Whitford, *Why Wisconsin Is Not a Democracy*, TIME (June 23, 2017), <http://time.com/4830145/supreme-court-gerrymandering-wisconsin/>.

abandoned.”¹⁷⁸ The test and remedy proposed here seek to restore that sense of decorum without trampling on the legislature’s ability to make legitimate redistricting policy choices.

178. *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in judgment).