

## PREVENTING UNCONSTITUTIONAL GERRYMANDERING: ESCAPING THE INTENT/EFFECTS QUAGMIRE

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Gerrymandering describes “[t]he practice of dividing a geographical area into electoral districts . . . to give one political party an unfair advantage by diluting the opposition’s voting strength.”<sup>1</sup> In other words, gerrymandering involves aligning electoral districts so that the favored political party will receive the majority of votes in a majority of districts. The Supreme Court of the United States has accepted that gerrymandering is unconstitutional in certain circumstances.<sup>2</sup> The Court has stated that unconstitutional gerrymandering occurs “when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.”<sup>3</sup> As the Supreme Court has recognized, the right to vote is a fundamental right guaranteed under the United States Constitution.<sup>4</sup> Gerrymandering is therefore undesirable and unconstitutional because, according to the Court, “a particular [political] group [may be] . . . denied its chance to effectively influence the political process.”<sup>5</sup>

Since the Supreme Court first began deciding claims of partisan gerrymandering, the Court has consistently struggled to determine whether a particular redistricting plan violates the Constitution, specifically the Equal Protection Clause<sup>6</sup> of the Fourteenth Amend-

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<sup>1</sup> BLACK’S LAW DICTIONARY 304 (2d pocket ed. 2001).

<sup>2</sup> See *Davis v. Bandemer*, 478 U.S. 109, 132 (1986).

<sup>3</sup> *Id.*

<sup>4</sup> *Reynolds v. Sims*, 377 U.S. 533, 561–64 (1964).

<sup>5</sup> *Davis*, 478 U.S. at 132–33.

<sup>6</sup> U.S. CONST. amend. XIV, § 1.

ment.<sup>7</sup> Today, the Court remains fractured as to whether any manageable standard exists.<sup>8</sup>

Gerrymandering rose to the forefront of election law shortly after the Supreme Court announced that the Equal Protection Clause requires equal population size in the electoral districts within each state.<sup>9</sup> This rule, known as the “one-person, one-vote” principle, ostensibly solved the problem of vote dilution caused by population shifts (otherwise known as malapportionment) by requiring equality in voting-age population between state and congressional electoral districts.<sup>10</sup> However, by holding states to that objectively measurable standard, the “one-person, one-vote” principle allowed state legislatures to dilute the voting power of certain political groups by organizing districts to assure that, while each is equal in population size, a majority of citizens in a majority of electoral districts represent the incumbent political party.<sup>11</sup> Such reapportionment, although complying with “one-person, one-vote”, dilutes the voting strength of the disfavored party.<sup>12</sup>

The failure by the Supreme Court to discern a manageable gerrymandering standard reflects the difficulty in distinguishing between regular, non-partisan redistricting and unconstitutional gerrymandering. This is primarily because, whether or not a given redistricting plan is motivated by partisan concerns, one political party will always defeat the other.<sup>13</sup> Thus, gerrymandering cannot be objectively measured, unlike malapportionment, by the effects of the redistrict-

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<sup>7</sup> See, e.g., *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594 (2006); *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

<sup>8</sup> See *Perry*, 126 S. Ct. 2594 (2006); see also *infra* Part III.

<sup>9</sup> *Reynolds v. Sims*, 377 U.S. 533, 561–64 (1964) (holding that voting is a fundamental right under the Constitution and the “one-person, one-vote” principle applies to state legislative electoral districts under the Equal Protection Clause); *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (holding that the “one-person, one-vote” principle applies to districts electing members of the House of Representatives under Art. I, § 2, of the Constitution, which requires that House members be elected “by the People of the several States”).

<sup>10</sup> See *Reynolds*, 377 U.S. at 568 (holding that “the Equal Protection Clause requires . . . [apportionment] on a population basis”).

<sup>11</sup> See Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 546 (2004).

<sup>12</sup> *Id.*

<sup>13</sup> See *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (“A group’s electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.”).

ing plan on elections. Because of this, the Court continues to struggle with determining when a redistricting plan becomes unconstitutional despite complying with the “one-person, one-vote” standard.

This Comment proposes that, instead of analyzing the effects of redistricting, the Court can much more easily prevent gerrymandering by protecting the process of redistricting and ensuring that there is little to no opportunity or incentive to gerrymander for the sake of protecting legislative incumbents. Specifically, the Court should adopt an irrebuttable presumption of validity for any redistricting done by an independent, nonpartisan redistricting committee. In addition, the Court should hold that mid-decade redistricting<sup>14</sup> is presumptively unconstitutional, allowable only where the State can prove a legitimate interest, such as a more accurate reflection in population changes, rather than a change in the political party controlling the redistricting. In conjunction, these two changes work to eliminate partisan redistricting by creating an incentive to adopt a nonpartisan redistricting committee and a disincentive to utilize mid-decade redistricting, unless related to a legitimate interest, not partisan motivations. In this way, the Court can ensure that partisan motivations do not influence the redistricting process. In addition, the Court avoids analyzing the effects of redistricting, which has thus far produced no manageable standards.

Part I of this Comment will discuss the history of malapportionment and analyze the Court’s “one-person, one-vote” standard. Part II of this Comment will review and discuss the Court’s gerrymandering jurisprudence. Part III of this Comment will analyze the Court’s current gerrymandering jurisprudence as compared with its malapportionment decisions and discuss why, so far, the Court has failed to address adequately the problem of gerrymandering in light of its malapportionment jurisprudence. Part IV of this Comment will offer a new solution that avoids the problems associated with the Court’s current gerrymandering jurisprudence by focusing on the process, not the effects, of gerrymandering, and will discuss the potential viability and legal ramifications of the proposed solution. Finally, Part

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<sup>14</sup> The U.S. Census Bureau is required to provide decennial population counts of voting districts for the purposes of redistricting. 13 U.S.C. § 141 (2000). After such information is furnished, the public body responsible for redistricting within each state must use this information to correct any population deviations between districts. *Id.* Mid-decade redistricting, on the other hand, involves the replacement of a districting plan enacted pursuant to a census report “in the middle of a decade, for the sole purpose of maximizing partisan advantage.” *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2631 (2006) (Stevens, J., dissenting).

V of this Comment will conclude with a summary of the argument and proposed solution.

### I. THE HISTORY OF MALAPPORTIONMENT

*“Courts ought not to enter this political thicket.”*<sup>15</sup>

The Supreme Court of the United States’ malapportionment jurisprudence has played a critical role in the subsequent cases dealing with partisan gerrymandering. The Court’s prior analyses in the various cases dealing with malapportionment have clearly influenced the Court’s current gerrymandering jurisprudence.<sup>16</sup> The Court’s focus on the effects of malapportionment with respect to electoral districts led to the “one-person, one-vote” standard that objectively measures whether a constitutional violation has occurred.<sup>17</sup> In turn, this has led the Court to focus similarly on the objective effects of partisan gerrymandering.<sup>18</sup> Because of its case-by-case focus on the effects of gerrymandering, the Court has failed to articulate an objective standard to determine whether an Equal Protection violation has occurred.<sup>19</sup> In order to understand the problems facing the Court in the gerrymandering context, it is important to understand the history of malapportionment in the Court, the response of the Court to malapportioned election districts, and the constitutional standards that the Court has adopted. The first section of this part will discuss the Court’s initial reluctance to decide such cases, and the second section will trace the Court’s more recent approach to malapportionment under the Fourteenth Amendment.

#### A. *The Court’s Move Toward Justiciability*

Article IV, Section 4, of the United States Constitution<sup>20</sup> states that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.”<sup>21</sup> In interpreting this provision, the Supreme Court has historically refused to adjudicate claims alleging a violation of the Guarantee Clause<sup>22</sup> and has stated that this

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<sup>15</sup> *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

<sup>16</sup> *See infra* Part II.

<sup>17</sup> *See Gray v. Sanders*, 372 U.S. 368, 379–80 (1963).

<sup>18</sup> *See infra* Parts II, III.

<sup>19</sup> *See infra* Part II.

<sup>20</sup> U.S. CONST. art. IV, § 4.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

clause presents a nonjusticiable political issue.<sup>23</sup> In *Colegrove v. Green*,<sup>24</sup> Justice Frankfurter, writing for the Court, held that a challenge to a legislative redistricting was a nonjusticiable political question.<sup>25</sup> The plaintiffs in *Colegrove* attempted to invalidate congressional districts in Illinois because of the population inequalities between districts.<sup>26</sup> Justice Frankfurter stated that “[t]o sustain this action would cut very deep into the very being of Congress.”<sup>27</sup> Thus, the Supreme Court was initially adamant in its refusal to adjudicate claims dealing with apportionment and districting, despite the presence of objectively measurable shifts in population and subsequent vote dilution.<sup>28</sup> However, the Court soon found a vehicle for change in the Reconstruction Era Amendments.<sup>29</sup>

In *Gomillion v. Lightfoot*,<sup>30</sup> the Supreme Court reversed the United States Court of Appeals for the Fifth Circuit’s dismissal of the plaintiffs’ complaint.<sup>31</sup> The plaintiffs alleged that an act passed by the Alabama Legislature deprived them of the right to vote by reapportioning their district to “remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident.”<sup>32</sup> Justice Frankfurter, again writing for the Court, held that, if disenfranchisement was proved, the plaintiffs would have a justiciable cause of action under the Fifteenth Amendment,<sup>33</sup> which prohibits the states from depriving any citizen of his or her right to vote on the basis of race.<sup>34</sup> The Court in *Gomillion* based its reasoning on the observation that, prior to the legislative redistricting, the district in question was shaped like a regular square, but, as a result of the al-

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<sup>23</sup> See, e.g., *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

<sup>24</sup> 328 U.S. 549 (1946).

<sup>25</sup> *Id.* at 556.

<sup>26</sup> *Id.* at 550–51.

<sup>27</sup> *Id.* at 556.

<sup>28</sup> *Id.* at 566–67 (Black, J., dissenting). Justice Black noted that the population range between the congressional election districts in question ranged from 612,000 to 914,000, and additional districts in Illinois ranged from 112,116 to 385,207. *Id.* at 566. In addition, Justice Black noted that congressional electoral districts in Illinois were last apportioned in 1901, and every Census through 1940 “showed a growth of population in Illinois and a substantial shift in the distribution of population among the districts established in 1901.” *Colegrove*, 328 U.S. at 567.

<sup>29</sup> U.S. CONST. amends. XIII–XV.

<sup>30</sup> 364 U.S. 339 (1960).

<sup>31</sup> *Id.* at 348.

<sup>32</sup> *Id.* at 341.

<sup>33</sup> U.S. CONST. amend. XV.

<sup>34</sup> See *Gomillion*, 364 U.S. at 341–42.

leged legislative disenfranchisement, it was transformed into an irregular twenty-eight-sided figure, which had the effect of “depriv[ing] the Negro petitioners discriminatorily of the benefits of residence . . . including . . . the right to vote in municipal elections.”<sup>35</sup> Thus, focusing on the measurable effects of the redistricting plan in question, the Court approved federal court involvement in the narrow circumstances of racial malapportionment under the Fifteenth Amendment.<sup>36</sup>

Soon afterwards in *Baker v. Carr*,<sup>37</sup> the Supreme Court held for the first time that malapportionment cases were justiciable under the Equal Protection Clause.<sup>38</sup> The district court, relying on *Colegrove*, dismissed the plaintiff’s complaint alleging unconstitutional vote dilution as a result of district malapportionment.<sup>39</sup> In an opinion by Justice Brennan, the Supreme Court reversed the dismissal and held that such claims were justiciable, not as Guarantee Clause claims, but as claims under the Equal Protection Clause of the Fourteenth Amendment.<sup>40</sup> *Baker* thus overturned *Colegrove* and opened the door for federal court involvement in malapportionment and redistricting.<sup>41</sup>

B. *An Objective Measurement of a Constitutional Violation: The “One-Person, One-Vote” Standard*

*Baker v. Carr*, however, did not address an important issue: the proper standard under the Equal Protection Clause to determine whether districts are properly apportioned. This question was answered in a series of cases, beginning with *Gray v. Sanders*.<sup>42</sup> At issue in *Sanders* was the Georgia state system of electing representatives by

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 345.

<sup>37</sup> 369 U.S. 186 (1962).

<sup>38</sup> *Id.* at 237.

<sup>39</sup> *Id.* at 209.

<sup>40</sup> *Id.* at 237.

<sup>41</sup> Interestingly, Justice Brennan’s majority opinion omitted any reference to Justice Frankfurter’s opinion in *Colegrove*, decided sixteen years earlier. Justice Brennan cited the Court’s Guarantee Clause jurisprudence and stated that, while Guarantee Clause claims were nonjusticiable, the Equal Protection Clause presented no barrier. *Id.* at 223–24. Justice Brennan failed to mention that *Colegrove* spoke directly to the equal protection issue and had held that malapportionment claims were nonjusticiable under the Equal Protection Clause. See Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1717–18 (1999).

<sup>42</sup> 372 U.S. 368 (1963).

county.<sup>43</sup> In particular, similar to the federal Electoral College, candidates for election had to receive a majority of “county votes,” where each county was given a certain number of votes based on population size.<sup>44</sup> The Court held that the inequality in population size between counties was unconstitutional because it diluted the voting strength of individuals living in more populous counties.<sup>45</sup> Writing for the Court, Justice Douglas asked: “How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?”<sup>46</sup> The disparity of voting power between counties influenced the Court’s decision, as Justice Douglas noted that a single county vote for a candidate in one county represented 938 citizens, while in another county a single vote represented 92,721 citizens.<sup>47</sup> The Court then articulated the standard that governs such claims: Once the electoral district in question is identified, every election participant located inside the district must have an equal vote.<sup>48</sup> In other words, electoral districts must be drawn in such a way that each district is equal in population size.

The next year, in *Wesberry v. Sanders*,<sup>49</sup> the Court applied the “one-person, one-vote” principle to invalidate a state statute providing electoral districts for the House of Representatives.<sup>50</sup> Justice Black, writing for the Court, noted that one electoral district contained 823,680 citizens, while another contained only 272,154 citizens.<sup>51</sup> Because there was one congressman for each district, the Court reasoned that the votes of the citizens living in the more populous districts were worth less than those living in the less populous districts.<sup>52</sup> The Court held that Article I, Section 2, of the Constitution,<sup>53</sup> which provides that “Representatives shall be chosen ‘by the People of the several States’ and shall be ‘apportioned among the several States . . . according to their respective Numbers,’”<sup>54</sup> means “one-person, one-

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<sup>43</sup> *Id.* at 370–71.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 379.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 371.

<sup>48</sup> *Sanders*, 372 U.S. at 379.

<sup>49</sup> 376 U.S. 1 (1964).

<sup>50</sup> *Id.* at 7–8.

<sup>51</sup> *Id.* at 2.

<sup>52</sup> *Id.* at 8.

<sup>53</sup> U.S. CONST. art. I, § 2.

<sup>54</sup> *Wesberry*, 376 U.S. at 17.

vote.”<sup>55</sup> “To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected ‘by the People’ . . . .”<sup>56</sup> Thus, the Court invalidated the electoral scheme because it failed to comply with the “one-person, one-vote” principle in electing members of the House of Representatives.<sup>57</sup>

Finally, in *Reynolds v. Sims*,<sup>58</sup> the Court refined its “one-person, one-vote” standard in the context of state legislative districts.<sup>59</sup> At issue in *Reynolds* was the apportionment of state legislative electoral districts, where Alabama’s thirty-five Senate districts varied in population size from 15,417 citizens to more than 600,000 citizens.<sup>60</sup> In addition, Alabama’s House of Representatives consisted of 100 elected officials from districts varying in size from 13,462 citizens to 634,864 citizens.<sup>61</sup> Chief Justice Warren, writing for the Court, broadly held that population size was the only permissible criterion for drawing electoral districts.<sup>62</sup> “Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.”<sup>63</sup> Furthermore, Chief Justice Warren noted that “[t]he resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the state.”<sup>64</sup> Thus, the Court solidified the “one-person, one-vote” principle as the objective measure of equal protection for voting rights between state electoral districts.<sup>65</sup>

Since *Reynolds*, the Court has consistently reaffirmed the “one-person, one-vote” principle in a variety of settings.<sup>66</sup> Seldom has the

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<sup>55</sup> *Id.* at 18.

<sup>56</sup> *Id.* at 8.

<sup>57</sup> *Id.* at 18.

<sup>58</sup> 377 U.S. 533 (1964).

<sup>59</sup> *Id.* at 568.

<sup>60</sup> *Id.* at 545–46.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 562.

<sup>63</sup> *Id.*

<sup>64</sup> *Reynolds*, 377 U.S. at 563.

<sup>65</sup> *Id.* at 568 (“Simply stated, an individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.”).

<sup>66</sup> See generally *Hadley v. Junior Coll. Dist.*, 397 U.S. 50 (1970) (applying the principle to elected junior college governing body); *Avery v. Midland County*, 390 U.S. 474 (1968) (applying the principle to elected county commissioners).

Court wavered from requiring population equality between electoral districts.<sup>67</sup> The principle itself addressed a fundamental problem facing the courts: population shifts created an extreme imbalance that led to malapportionment of electoral districts, but incumbents were unlikely to change the districts and essentially vote for their own removal.<sup>68</sup> After *Baker v. Carr*,<sup>69</sup> the Supreme Court mandated that electoral districts be drawn to reflect population equality so that each individual's vote is weighted the same as every other individual within the state.<sup>70</sup> The Court objectively assessed whether the Equal Protection Clause had been violated simply by comparing the effects of a given redistricting plan: the population sizes between state electoral districts.<sup>71</sup> Even prior to *Baker*, the Court used an objective "effects" analysis to invalidate a redistricting plan in *Gomillion*.<sup>72</sup> Districts became equal according to population, but they also became necessarily more unnatural in appearance. Soon, legislatures began to exploit this to their advantage.

## II. THE HISTORY OF GERRYMANDERING

*"[T]he majority has wholly failed to reckon with what the future may hold in store . . . ."*<sup>73</sup>

The Supreme Court has stated that partisan gerrymandering may violate the Equal Protection Clause where a particular group is

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<sup>67</sup> Generally speaking, precise mathematical equality is not required, although there must be "a good-faith effort to achieve" such equality. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969). In *Kirkpatrick*, the Court invalidated a redistricting plan whereby the greatest deviations from mathematical equality were 3.13% above and 2.83% below. *Id.* at 528–29. In *Karcher v. Dagggett*, the Court invalidated a redistricting plan whereby the greatest deviation between districts was 0.7%. 462 U.S. 725, 732 (1983). However, the Court has allowed deviations under limited circumstances. *See, e.g.*, *Ball v. James*, 451 U.S. 355 (1981) (allowing system for electing water reclamation district directors to apportion voting power among certain landowners according to the amount of land owned).

<sup>68</sup> *See* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 852–53 (2d ed. 2002).

<sup>69</sup> 369 U.S. 186 (1962).

<sup>70</sup> *See supra* Part I.B.

<sup>71</sup> *See id.* This solution was a fundamental shift in the nature of apportionment, as districts had previously been drawn using natural boundaries: "In order to bring legislative districts as close to [one-person, one-vote] as possible, states must disregard preexisting political boundaries such as cities, townships, and counties. Adherence to these traditional boundaries was, historically, the principal constraint on creative districting . . . ." Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 103 (2000).

<sup>72</sup> *See supra* notes 30–36 and accompanying text.

<sup>73</sup> *Baker*, 369 U.S. at 339 (Harlan, J., dissenting).

“denied its chance to effectively influence the political process.”<sup>74</sup> The Court’s justification for involvement in this area thus rests on similar principles as the Court’s justification for adjudicating claims of malapportionment: the Equal Protection Clause requires that an individual’s right to vote be given meaning in the sense that the fundamental right to vote cannot be abridged through the districting process if the result is that participation in elections nears a mere formality.<sup>75</sup> As discussed above, malapportionment denies voters in more populous districts a chance to influence the political process as effectively as those in other districts.<sup>76</sup> The Court remedied this concern by requiring population equality between districts.<sup>77</sup> Unlike malapportionment, the effects of partisan gerrymandering are not easily measurable for purposes of determining whether an equal protection violation exists. The measurable effects of partisan gerrymandering are the opportunistic inclusion and exclusion in various electoral districts of certain voters based on their political affiliation. However, the very nature of elections assumes that one political party will prevail over the other in any individual election because the amount of voters associated with each party will vary among various districts. “Difficult as the issues engendered by *Baker v. Carr* may have been, nothing comparable to the mathematical yardstick used in apportionment cases is available to identify the difference between permissible and impermissible adverse impacts on the voting strength of political groups.”<sup>78</sup> Thus, the Court cannot measure the effects of partisan gerrymandering simply by examining the amounts of Republican and Democrat voters as it could with the population differences between each district. The following section will, in light of this difficulty, discuss the Court’s approach to measuring the effects of partisan gerrymandering on election districts in order to determine when the Equal Protection Clause has been violated.

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<sup>74</sup> *Davis v. Bandemer*, 478 U.S. 109, 132–33 (1986). “[A]n equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively.” *Id.* at 133.

<sup>75</sup> *See id.* at 119 (stating “districting that would ‘operate to minimize or cancel out the voting strength of . . . political elements of the voting population’ . . . raise[s] a constitutional question”) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) (emphasis omitted)).

<sup>76</sup> *See supra* Part I.

<sup>77</sup> *Id.*

<sup>78</sup> *City of Mobile v. Bolden*, 446 U.S. 55, 90 (1980) (Stevens, J., concurring).

A. *Searching for a Measurable Standard of Gerrymandering*

Initially, the Court stressed its reluctance to invalidate districts drawn on the basis of political affiliation: in *Gaffney v. Cummings*,<sup>79</sup> ten years after *Gray v. Sanders*,<sup>80</sup> the Court reversed a lower court's invalidation of districts drawn to reflect Connecticut's statewide political strength.<sup>81</sup> That is, each district was drawn to reflect the proportion of Democrat and Republican voters across the state.<sup>82</sup> The Court expressly recognized the right of the legislature to take political factors into consideration when reapportioning districts according to the "one-person, one-vote" principle.<sup>83</sup> Although the Court attempted to draw a distinction between legitimately recognizing the respective political strengths of a state's party system and eliminating one party's political strengths,<sup>84</sup> the Court ultimately took a passive approach to political redistricting:

District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.

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... [J]udicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so. . . . [The courts do not] have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.<sup>85</sup>

The Court again took up the gerrymandering issue thirteen years later in *Davis v. Bandemer*.<sup>86</sup> In *Davis*, the Court considered an

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<sup>79</sup> 412 U.S. 735 (1973).

<sup>80</sup> 372 U.S. 368, 381 (1963) (holding that the Equal Protection Clause of the Fourteenth Amendment embodies the "one-person, one-vote" standard with respect to state legislative electoral districts).

<sup>81</sup> *Gaffney*, 412 U.S. at 754.

<sup>82</sup> *Id.* at 753.

<sup>83</sup> *See id.* at 754.

<sup>84</sup> *See id.*

<sup>85</sup> *Id.* at 753–54.

<sup>86</sup> 478 U.S. 109 (1986).

issue distinct from *Gaffney*, namely, the redistricting of the legislature on political grounds by the incumbents for the purpose of retaining control.<sup>87</sup> The Republican majority of the Indiana state legislature reapportioned the electoral districts in order to keep a republican majority in office.<sup>88</sup> The Democrats sued, and the district court held the plan unconstitutional under the Equal Protection Clause.<sup>89</sup> On appeal, a majority of the Supreme Court found such gerrymandering claims justiciable:

The issue here is of course different from that adjudicated in *Reynolds*. It does not concern districts of unequal size. Not only does everyone have the right to vote and have his vote counted, but each elector may vote for and be represented by the same number of lawmakers. Rather, the claim is that each political group in a State should have the same chance to elect representatives of its choice as any other political group. Nevertheless, the issue is one of representation, and we decline to hold that such claims are never justiciable.<sup>90</sup>

Despite this finding of justiciability, the Court ultimately dismissed the action without a majority opinion on any other issue. Justice White, joined by Justices Brennan, Marshall, and Blackmun, opined for reversal on the grounds that the district court's test was insufficient.<sup>91</sup> The district court had held that the plaintiffs "need only show that their proportionate voting influence has been adversely affected."<sup>92</sup> The plurality stated that such a test was not required by the Constitution.<sup>93</sup> Instead, the plurality would have required the plaintiffs "to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."<sup>94</sup> However, mere disproportionate influence was an insufficient standard to determine discrimination.<sup>95</sup> Instead, there must be a "substantially greater showing of adverse effects than a mere lack of proportional representation to support a finding of unconstitutional vote dilution."<sup>96</sup>

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<sup>87</sup> *Id.* at 114.

<sup>88</sup> *Id.* at 115.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 124.

<sup>91</sup> *Id.* at 143 (plurality opinion).

<sup>92</sup> *Davis*, 478 U.S. at 130.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 127.

<sup>95</sup> *Id.* at 130.

<sup>96</sup> *Id.* at 131.

Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, affirmed the dismissal on the grounds that partisan gerrymandering claims are nonjusticiable and such issues should be left "to the legislative branch as the Framers of the Constitution unquestionably intended."<sup>97</sup> Justice O'Connor would have held all such claims as nonjusticiable political questions because to hold otherwise would eventually lead to a requirement of "simple proportionality as the standard for measuring the normal representational entitlements of a political party."<sup>98</sup> Justice O'Connor recognized:

[T]he individual's right to vote does not imply that political groups have a right to be free from discriminatory impairment of their group voting strength. Treating the vote dilution claims of political groups as cognizable would effectively collapse the "fundamental distinction between state action that inhibits an individual's right to vote and state action that affects the political strength of various groups that compete for leadership in a democratically governed community."<sup>99</sup>

Justices Powell and Stevens agreed with Justice White's plurality as to the appropriate standard with which to adjudicate such claims, but disagreed with the finding that there was no equal protection violation.<sup>100</sup> Justice Powell articulated the view that "the merits of a gerrymandering claim must be determined by reference to the configurations of the districts, the observance of political subdivision lines, and other criteria that have independent relevance to the fairness of redistricting."<sup>101</sup> In Justice Powell's opinion, the most important consideration with respect to gerrymandering claims is the "shape[] of voting districts and adherence to established political subdivision boundaries."<sup>102</sup>

In *Vieth v. Jubelirer*,<sup>103</sup> the Supreme Court was again faced with a partisan gerrymandering claim, this time from Pennsylvania where the Republican majority adopted a redistricting plan protecting its majority.<sup>104</sup> Democratic voters sued, claiming that the reapportion-

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<sup>97</sup> *Id.* at 144 (O'Connor, J., concurring).

<sup>98</sup> *Davis*, 478 U.S. at 157.

<sup>99</sup> *Id.* at 150–51 (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 83 (1980) (Stevens, J., concurring)).

<sup>100</sup> *Id.* at 161–62 (Powell, J., concurring in part and dissenting in part).

<sup>101</sup> *Id.* at 165.

<sup>102</sup> *Id.* at 173.

<sup>103</sup> 541 U.S. 267 (2004).

<sup>104</sup> *Id.* at 272.

ment plan violated the Equal Protection Clause.<sup>105</sup> The Court in *Vieth* remained fractured with respect to the justiciability question as well as the applicable standard with which to adjudicate such claims.<sup>106</sup> Justice Scalia, writing for the plurality, concluded that *Davis* should be overturned, as the Court had wholly failed to discover any “judicially discernable and manageable standards by which political gerrymander cases are to be decided,”<sup>107</sup> as required under the six-part test of *Baker*.<sup>108</sup> Justice Scalia noted that, since *Davis*, “[t]he lower courts have lived with [the] assurance [that a] standard [exists] (or more precisely, lack of assurance that there is no standard), coupled with that inability to specify a standard, for the past 18 years.”<sup>109</sup>

Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Bandemer* exists. . . . [N]o judicially discernable and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.<sup>110</sup>

Justice Scalia reviewed a number of lower court decisions and concluded that the plurality’s two-part test in *Bandemer* requiring proof of both discriminatory intent and discriminatory effect on an identifiable political group had been wholly unworkable against

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<sup>105</sup> *Id.*

<sup>106</sup> *Vieth*, 541 U.S. at 267–368.

<sup>107</sup> *Id.* at 278 (plurality opinion) (quoting *Davis*, 478 U.S. at 123).

<sup>108</sup> *See id.* at 277–78. *Baker v. Carr* set out six independent tests for determining whether a political question exists:

“[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”

*Id.* at 277–78 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Although Justice Scalia’s plurality opinion focused on the second test, he noted in his opinion that the Framers of the Constitution had explicitly provided a remedy for claims such as gerrymandering in Article I, Section 4, of the Constitution. *Id.* at 275. This provision, “while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to ‘make or alter’ those districts if it wished.” *Id.*

<sup>109</sup> *Id.* at 279.

<sup>110</sup> *Vieth*, 541 U.S. at 281 (plurality opinion).

claims of gerrymandering.<sup>111</sup> Addressing the appellants' proposed standards, Justice Scalia highlighted the analytical differences between the "one-person, one-vote" rule and the issue of political gerrymandering:

Our one-person, one-vote cases . . . have no bearing upon this question, neither in principle nor in practicality. Not in principle, because to say that each individual must have an equal say in the selection of representatives, and hence that a majority of individuals must have a majority say, is not at all to say that each discernible group, whether farmers or urban dwellers or political parties, must have representation equivalent to its numbers. And not in practicality, because the easily administrable standard of population equality adopted by *Wesberry* and *Reynolds* enables judges to decide whether a violation has occurred (and to remedy it) essentially on the basis of three readily determined factors—where the plaintiff lives, how many voters are in his district, and how many voters in other districts; whereas requiring judges to decide whether a districting system will produce a statewide majority for a majority party casts them forth upon a sea of imponderables, and asks them to make determinations that not even election experts can agree upon.<sup>112</sup>

Thus, Justice Scalia and the plurality recognized not only that malapportionment and gerrymandering are distinct constitutional harms, but also that the standard of measuring malapportionment is inapplicable to determining whether an unconstitutional gerrymander exists.

Justice Stevens, writing in dissent, would have held that gerrymandering claims are justiciable and believed that the standards governing racial gerrymandering should similarly apply to claims against partisan gerrymandering.<sup>113</sup> Justice Stevens's standard would focus

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<sup>111</sup> See *id.* Justice Scalia also rejected the appellant's similar proposed standard of proving discriminatory intent and effect by showing that "the mapmakers acted with a *predominant intent* to achieve partisan advantage . . . shown by direct evidence or by circumstantial evidence that other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage." *Id.* at 284.

<sup>112</sup> *Id.* at 290 (internal citations omitted).

<sup>113</sup> See *id.* at 329 (Stevens, J., dissenting). In *Shaw v. Reno*, 509 U.S. 630, 649 (1993), the Supreme Court held that

a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race . . .

on the effects of redistricting as well as the “predominant intent” behind the legislative districting plan:

The racial gerrymandering cases therefore supply a judicially manageable standard for determining when partisanship, like race, has played too great of a role in the districting process. . . . If . . . the predominant motive of the legislators who designed [a district], and the sole justification for its bizarre shape, was a purpose to discriminate against a political minority, that invidious purpose should invalidate the district.<sup>114</sup>

Justice Souter, joined by Justice Ginsberg in dissent, would also have held that such claims are justiciable and would invalidate politically drawn districts if the plaintiffs met the burden of proving a five-element test.<sup>115</sup> Justice Souter’s test requires the plaintiff to show (1) that he or she belonged to a “cohesive political group . . . which would normally be a major party”; (2) that the legislature ignored other, permissible factors in drawing the district in question; (3) a “correlation[] between the district’s deviations from traditional districting principles and the distribution of the population of his group”; (4) a hypothetical district less egregious than the district in question that includes the plaintiff’s residence and “deviate[s] less from traditional districting principles than the actual district”; and (5) “that the defendants acted intentionally to manipulate the shape of the district.”<sup>116</sup> Once the plaintiff has proved these elements, Justice Souter would shift the burden to the defendants to rebut the evidence by showing some permissible justification for the districting plan in question.<sup>117</sup>

The Supreme Court most recently addressed the limits on gerrymandering in *League of United Latin American Citizens v. Perry*.<sup>118</sup> Following the 2000 census, Texas implemented a redistricting plan for its congressional electoral districts.<sup>119</sup> Then in 2003, the newly elected Republican majority implemented a mid-decade redistricting

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*Vieth*, 541 U.S. at 329 (Stevens, J., dissenting). In *Miller v. Johnson*, 515 U.S. 900, 913 (1995), the Supreme Court clarified its holding in *Shaw* and held that a district’s irrational or bizarre shape was “persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature’s dominant and controlling rationale in drawing its district lines.” *Id.*

<sup>114</sup> *Vieth*, 541 U.S. at 336 (Stevens, J., dissenting).

<sup>115</sup> *See id.* at 347 (Souter, J., dissenting).

<sup>116</sup> *Id.* at 347–50.

<sup>117</sup> *Id.* at 351.

<sup>118</sup> 126 S. Ct. 2594 (2006).

<sup>119</sup> *Id.* at 2605–06 (plurality opinion).

plan.<sup>120</sup> The plaintiffs argued, among other things, that the mid-decade redistricting plan was an unconstitutional partisan gerrymander under the Equal Protection Clause.<sup>121</sup>

In *Perry*, a majority of the Court affirmed that gerrymandering claims are justiciable under *Davis*, notwithstanding the plurality opinion in *Vieth*.<sup>122</sup> The Court issued no other majority opinion with respect to political gerrymandering.<sup>123</sup> Justice Kennedy's plurality opinion rejected the notion that mid-decade redistricting is unconstitutional, even when it is done for purely partisan motivations immediately after a new political majority is elected.<sup>124</sup> Joined by Justices Souter and Ginsberg, Justice Kennedy concluded:

[W]e disagree with appellants' view that a legislature's decision to override a valid, court-drawn plan mid-decade is sufficiently suspect to give shape to a reliable standard for identifying unconstitutional political gerrymanders. We conclude that appellants have established no legally impermissible use of political classifications. For this reason, they state no claim on which relief may be granted . . . .<sup>125</sup>

In dissent, Justice Stevens, joined by Justice Breyer, would have held that mid-decade redistricting for solely partisan purposes states a justiciable claim.<sup>126</sup> In opposition to Justice Kennedy, Justice Stevens stated his belief that "courts can easily identify the motive for redistricting when the legislature is under no legal obligation to act."<sup>127</sup> Justice Stevens would require an individual with standing<sup>128</sup> "to prove both improper purpose and effect."<sup>129</sup> Justice Scalia, joined by Justice Thomas, would have held gerrymandering claims nonjusticiable consistent with Justice Scalia's plurality opinion in *Vieth*.<sup>130</sup>

<sup>120</sup> *Id.* For an explanation of mid-decade redistricting, *see supra* note 14.

<sup>121</sup> *See id.*, at 2607 (plurality opinion).

<sup>122</sup> *Id.*

<sup>123</sup> The Court did, however, conclude by a five-to-four margin that one of the districts was violative of section two of the Voting Rights Act of 1965, 42 U.S.C. § 1973(b), which prohibits, among other things, racial gerrymandering. *Id.* at 2612–24.

<sup>124</sup> *Perry*, 126 S. Ct. at 2609 (plurality opinion).

<sup>125</sup> *Id.* at 2612.

<sup>126</sup> *See id.* at 2626 (Stevens, J., dissenting).

<sup>127</sup> *Id.* at 2632.

<sup>128</sup> For purposes of standing, Justice Stevens would require a plaintiff "to prove that he is either a candidate or a voter who resided in a district that was changed by a new districting plan." *Id.* at 2642 (Stevens, J., concurring in part and dissenting in part).

<sup>129</sup> *Perry*, 126 S. Ct. at 2642.

<sup>130</sup> *Id.* at 2663 (Scalia, J., concurring in part and dissenting in part).

Thus, although the Court repudiated the plurality's opinion in *Vieth*, it broke no new ground with respect to manageable standards for gerrymandering claims. In addition, the Court's fracture concerning mid-decade redistricting is indicative of the Court's larger problem of discerning factors to determine when a reapportionment plan crosses the line into an unconstitutional gerrymander.

### III. ANALYSIS

#### A. *The Incompatibility of the Intent/Effects Test with Respect to Partisan Gerrymandering Claims*

The Supreme Court's difficulty in finding manageable standards with which to judge claims of gerrymandering stems from the relationship between gerrymandering and malapportionment and the fact that the Court is constrained by the "one-person, one-vote" requirement. Although gerrymandering has been around for centuries, it was considered until recently to be beyond the scope of federal court jurisdiction.<sup>131</sup> After the Supreme Court held that the Equal Protection Clause requires electoral districts comply with the "one-person, one-vote" requirement, the courts began judicial oversight of regularly occurring legislative redistricting in order to assure compliance with this standard.<sup>132</sup> This invariably meant drawing districts somewhat artificially, without regard to natural boundaries that had, to a certain extent, previously defined districts.<sup>133</sup> The Court's willingness to tolerate artificial districts and regularly occurring redistricting by legislatures, in order to fulfill the "one-person, one-vote" requirement, allowed the legislatures to define their districts along partisan lines by elevating population equality above all other considerations.<sup>134</sup>

The Court recognized as much when it stated the possibility that an "apportionment scheme, under the circumstances of a particular case, [could] operate to minimize or cancel out the voting strength

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<sup>131</sup> See Whitney M. Eaton, *Where Do We Draw the Line? Partisan Gerrymandering and the State of Texas*, 40 U. RICH. L. REV. 1193, 1193-94 (2006).

<sup>132</sup> See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>133</sup> See McConnell, *supra* note 71, at 103.

<sup>134</sup> Issacharoff & Karlan, *supra* note 11, at 546 ("Precisely because it elevates equality of population over all other criteria, one person, one vote can serve as a smoke-screen for politically driven deviations from other districting principles. When it comes to district-level entrenchment, the necessity of tinkering with the lines every ten years can turn into an opportunity to redraw districts to shore up incumbents who otherwise might face defeat.").

of racial or political elements of the voting population.”<sup>135</sup> Thus, Chief Justice Warren’s holding in *Reynolds* that population size is the only permissible criterion for drawing election districts paved the way for incumbents to protect their seats, themselves protected by the shield of “one-person, one-vote.”<sup>136</sup>

The Supreme Court’s requirement of “one-person, one-vote” in *Reynolds* was a graceful solution to a particularly egregious problem.<sup>137</sup> The requirement is an objectively measurable standard by which to judge whether a constitutional violation has occurred. Specifically, a districting plan is unconstitutional if it deviates from that requirement to an impermissible extent.<sup>138</sup> Ironically, while judicial involvement was arguably necessary for malapportionment, as incumbents would naturally be reluctant to vote themselves out of office, incumbents now protect themselves through the same legislative redistricting that *Reynolds* requires, albeit with ulterior motives: “If new

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<sup>135</sup> Fortson v. Dorsey, 379 U.S. 433, 439 (1965); see also Kristina Betts, *Redistricting: Who Should Draw the Lines? The Arizona Independent Redistricting Commission as a Model for Change*, 48 ARIZ. L. REV. 171, 177 (2006), noting that:

Under the theory of separation of powers, redistricting falls within the power of the legislature, which creates yet another political issue. Although many state statutes bar legislators from drawing maps to protect incumbents, the U.S. Constitution does not prohibit this practice. The problem with allowing legislators or legislative committees to draw their own maps to protect incumbents is that legislators have an inherent vested interest in the redistricting process because they want to retain their seats. Under certain circumstances, it is inevitable that the majority party will strive to protect its advantage.

*Id.* (footnotes omitted).

<sup>136</sup> See McConnell, *supra* note 71, at 103 (stating that once the Court decided *Reynolds*, “legislative line-drawers were able to draw maps to produce the results they desired, rendering elections less a reflection of popular opinion than of legislative craftsmanship”); see also *City of Mobile v. Bolden*, 446 U.S. 55, 90 (1980) (Stevens, J., concurring) (noting that “nothing comparable to the mathematical yardstick used in apportionment cases is available to identify the difference between permissible and impermissible adverse impacts on the voting strength of political groups”).

<sup>137</sup> See Michael Weaver, *Uncertainty Maintained: The Split Decision over Partisan Gerrymanders in Vieth v. Jubelirer*, 36 LOY. U. CHI. L.J. 1273, 1292 (2005) (noting that “[t]he one person, one vote principle dramatically corrected the [population] deviations in congressional districts, and nullified a majority of states’ electoral district maps”); see also Issacharoff & Karlan, *supra* note 11, at 544, stating:

The central vice presented by [the malapportionment cases] was minority entrenchment. Many states had last redrawn state legislative boundaries at the turn of the twentieth century, and their legislatures had become backwater relics of past political deals, controlled by lawmakers from rural hamlets in decline whose reactionary politics stymied the interests of voters in the burgeoning cities and suburbs.

*Id.*

<sup>138</sup> See *supra* notes 3–5 and accompanying text.

*districts must be drawn,”* the majority party thinks, “*what is there to stop us from drawing them so as to create a majority of our political party in a majority of those districts, all the while keeping with one-person, one-vote?*”<sup>139</sup> The Supreme Court’s attempt to discern between such invidious motivation and legitimate majority victories is the crux of the problem with the Court’s current gerrymandering jurisprudence.<sup>140</sup> The only agreement between all nine Justices in *Vieth* was that eventually extreme partisan redistricting is unconstitutional.<sup>141</sup> The disagreement concerns the standards for measuring when redistricting crosses the line from constitutional to unconstitutional.<sup>142</sup>

As evident from the discussion in Parts II and III, those Justices that would hold gerrymandering claims justiciable take their cue from the malapportionment cases and inquire as to the *effects* of redistricting.<sup>143</sup> However, the effects of gerrymandering cannot be objectively measured and distinguished from politically neutral redistricting.<sup>144</sup> In the malapportionment cases, the measure of the effect of redistricting was also the measure of the equal protection violation: interdistrict population inequality.<sup>145</sup> In contrast, gerrymandering

<sup>139</sup> See, e.g., Adam Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. PA. J. CONST. L. 1001, 1046 (2005) (arguing that “[t]he easiest feasible standard to use for partisan one person, one vote deviations is the standard set for partisan gerrymandering . . . . Constitutionally speaking, gerrymandering is the closest cousin to one person, one vote violations, as they both involve the manipulation of voting districts toward a political end, and come under equal protection scrutiny as a result.”).

<sup>140</sup> See Erika Lewis, *Trailblaze or Retreat? Political Gerrymandering After Vieth v. Jubelirer*, 27 HAW. L. REV. 269, 293 (2004) (noting that “the search for judicially manageable and discernible standards for political gerrymandering is elusive”); see also Issacharoff & Karlan, *supra* note 11, at 574, stating:

The normal distribution of populations across 435 congressional districts will yield a range of districts, from those that are highly competitive and will likely elect centrist candidates or swing from election to election between the two major parties, to those that are more politically homogeneous and will gravitate toward the poles of the political spectrum.

<sup>141</sup> See Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 809–10 (2005).

<sup>142</sup> See *id.*

<sup>143</sup> See *supra* Parts II, III.

<sup>144</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 290 (2004) (stating that under “a legislature that draws district lines with no objectives in mind except compactness and respect for the lines of political subdivisions . . . [,] political groups that tend to cluster . . . would be systematically affected by what might be called a ‘natural’ packing effect”).

<sup>145</sup> See *supra* Part I. In addition to population inequality, the malapportionment cases also examined the shapes of various districts. *Id.* This measure is flawed in the gerrymandering context for the simple fact that “one-person, one-vote” requires that

has no corresponding objective measure, as inequality in the party strength is simply a function of individual politics and is necessary for the majority-rule principle contained in the Constitution's guarantee of a republican form of government.<sup>146</sup> Thus, unlike malapportionment, an effects-based test is not sufficient for purposes of gerrymandering, because, regardless of whether a gerrymander has occurred, one political party will always lose. In other words, the effects of a partisan gerrymander may be similar in many respects to a validly drawn redistricting plan that simply happens to contain a majority of one political party.<sup>147</sup> The Court therefore finds itself taking a "how far is too far" approach, which assumes that particularly egregious effects may be unconstitutional.<sup>148</sup>

The legislature that takes into account partisan considerations wants the party in power to remain in power. Simply measuring electoral losses is ineffective at getting to the root of the apparent equal protection problem of gerrymandering: taking into account partisan considerations. This is because it is difficult to determine objectively whether a political party lost with or without the help of a "political cartographer."<sup>149</sup>

Perhaps recognizing this dilemma, some of those members of the Court that would hold such claims justiciable also attempt to discern the *intent* of the legislative body behind the redistricting plan in question, in order to punish impermissible partisan effects.<sup>150</sup> "[A] straightforward application of settled constitutional law leads to the inescapable conclusion that the State may not decide to redistrict if its sole motivation is 'to minimize or cancel out the voting strength of racial or political elements of the voting population.'"<sup>151</sup> However, discerning a predominant intent of the redistricting body necessarily involves inquiry into the effects of redistricting. For example, the

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districts be drawn unnaturally, in order to contain an equal number of individuals. Thus, the shape of a district may simply be the result of completely legitimate redistricting. *Cf. Davis v. Bandemer*, 478 U.S. 109, 165 (Powell, J., dissenting) (arguing that "the merits of a gerrymandering claim must be determined by reference to the configurations of the districts").

<sup>146</sup> See McConnell, *supra* note 71, at 114–15.

<sup>147</sup> See Issacharoff & Karlan, *supra* note 11, at 574.

<sup>148</sup> See Berman, *supra* note 141, at 809–10 (noting that, in *Vieth*, "[f]or the first time, all the Justices agreed that the pursuit of partisan advantage in redistricting is sometimes unconstitutional") (citations omitted).

<sup>149</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 331 (Stevens, J., dissenting).

<sup>150</sup> See, e.g., *id.* at 350 (Souter, J., dissenting).

<sup>151</sup> *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2634 (2006) (Stevens, J., dissenting) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)).

plurality opinion in *Davis* advocated that the plaintiffs prove “both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.”<sup>152</sup> Such intentional discrimination would be measured by criteria such as the shapes of various districts.<sup>153</sup> Similarly, Justice Stevens argued in his dissent in *Vieth* that the “predominant intent” behind the legislative redistricting plan was a manageable measure of partisan redistricting.<sup>154</sup> This would require a court to find such intent “if no neutral criterion can be identified to justify the lines drawn.”<sup>155</sup> Likewise, Justice Souter would require that the plaintiffs prove, among other things, “that the defendants acted intentionally to manipulate the shape of the district.”<sup>156</sup> But Justice Souter’s argument that “proving intent should not be hard” exposes the fact that the proof of intent requirement is simply the inference drawn from the effects of the redistricting plan in question.<sup>157</sup> Justice Souter notes that proof of intent would not be difficult once the plaintiff has shown: (1) that a correlation exists between the redistricting plan’s deviations and a negative impact on the plaintiffs’ political party and (2) that a redistricting plan with fewer partisan deviations exists.<sup>158</sup> Because the measure of effects is not appropriate in the gerrymandering context, this conceptualization of intent is likewise flawed.<sup>159</sup> Unlike malapportionment, the effects of partisan gerrymandering are not objectively measurable with any degree of ease or certainty. Additionally, inquiring as to the intent of the legislature in hopes of discovering a partisan motivation is just as difficult because there is not likely to be any direct evidence of a legislative body’s “state of mind.” This has led several members of the Court to argue that such claims are not properly justiciable for want of “judicially discoverable and manageable standards for resolving it.”<sup>160</sup> Indeed, the plurality opinion in *Vieth* felt compelled to over-

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<sup>152</sup> *Davis v. Bandemer*, 478 U.S. 109, 127 (1986).

<sup>153</sup> *See id.* at 116.

<sup>154</sup> *Vieth*, 541 U.S. at 341 (Stevens, J., dissenting).

<sup>155</sup> *Id.* at 339.

<sup>156</sup> *Id.* at 350 (Souter, J., dissenting).

<sup>157</sup> *Id.*

<sup>158</sup> *See id.*

<sup>159</sup> *See supra* note 78 and accompanying text.

<sup>160</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962); *see also* Lewis, *supra* note 140, at 288 (observing that the claim that “Bandemer’s intent-effect standard for partisan gerrymandering claims was a failure is a near-universal consensus”).

turn *Bandemer* in light of “[e]ighteen years of essentially pointless litigation.”<sup>161</sup>

*B. Overview of Alternative Proposals*

In addition to the various standards proposed by the justices in the foregoing opinions, there has been a multitude of proposed solutions by scholars attempting to correct the Court’s failure to adequately adjudicate claims of gerrymandering.<sup>162</sup> Perhaps the most radical of these is the argument that neither malapportionment nor gerrymandering claims should be brought under the Equal Protection Clause.<sup>163</sup> However, this is a minority position, as most scholars recognize the reality that *Baker* and *Reynolds* will likely never be overturned.<sup>164</sup> Indeed, the requirement of “one-person, one-vote” is “[o]ne of the most firmly established principles of constitutional law.”<sup>165</sup> Thus, although some proposals put forth arguments outside of the Court’s current Equal Protection Clause framework, a realistic solution to the problem of gerrymandering must take into account the constraints posed by the requirement of “one-person, one-vote,” namely, the ability of legislatures to create artificial districts for the sake of equality.

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<sup>161</sup> *Vieth*, 541 U.S. at 306 (plurality opinion).

<sup>162</sup> See, e.g., Ryan P. Bates, *Congressional Authority to Require State Adoption of Independent Redistricting Commissions*, 55 DUKE L.J. 333 (2005) (arguing that Congress has the constitutional power to require individual states to adopt bipartisan redistricting commissions, and that Congress should do so); JoAnn D. Kamuf, “Should I Stay or Should I Go?”: *The Current State of Partisan Gerrymandering Adjudication and a Proposal for the Future*, 74 FORDHAM L. REV. 163, 209–10 (2005) (arguing that the Supreme Court should adjudicate partisan gerrymandering claims within a “freedom of association” framework); McConnell, *supra* note 71 (arguing that malapportionment and gerrymandering claims should be brought under the Guarantee Clause); Amy M. Pugh, *Unresolved: Whether a Claim for Political Gerrymandering May Be Brought Under the First Amendment?*, 32 N. KY. L. REV. 373, 395–96 (2005) (concluding that political gerrymandering claims would be justiciable under the First Amendment: “[A]ny showing of governmental discrimination based on political affiliation towards political participation in the electoral process, in association with a political party and in the expression of political views, will be subject to . . . strict scrutiny.”); Robert Redwine, *Racial and Political Gerrymandering—Different Problems Require Different Solutions*, 51 OKLA. L. REV. 373, 401 (1998) (arguing that, in order to protect the minority political party, approval of a redistricting plan should require a super-majority in the state legislature).

<sup>163</sup> See, e.g., McConnell, *supra* note 71 (arguing that malapportionment and gerrymandering claims would be better served if brought under the Guarantee Clause).

<sup>164</sup> See *id.* at 103 (noting that “[t]here are no dissenters from that proposition on the Supreme Court, and there have been none for decades. Legislatures, litigants, judges, and academics all accept the proposition”).

<sup>165</sup> *Id.*

These alternative proposals, however, will likely fail at the judicial level for the same reasons the Court's own proposed standards have failed: they presume that gerrymandering can be objectively measured.<sup>166</sup> In addition, the sheer number of proposed solutions may in fact belie the Court's acceptance of any one of them. As the plurality stated in *Vieth*, "the mere fact that these four dissenters come up with three different standards—all of them different than the two proposed in *Bandemer* and the one proposed here by appellants—goes a long way to establishing that there is no constitutionally discernible standard."<sup>167</sup>

In addition to these proposals, Congress has recently sought to regulate gerrymandering in congressional redistricting, with no success.<sup>168</sup> For example, in 2003 Rep. Maxine Waters (D-CA) proposed a bill to preclude mid-decade redistricting by limiting states, in districting for the House of Representatives, to redistricting once every decennial census "unless the State is ordered by a Federal court to conduct such subsequent redistricting in order to comply with the Constitution of the United States or to enforce the Voting Rights Act of 1965 or otherwise enforce the voting rights of the people of that State."<sup>169</sup> In 1990, Congress proposed a bill that would regulate the redistricting process for the House of Representatives by providing, among other things, that "[d]istricts may not be established with the intent or effect of diluting the voting strength of any person, or group, *including any political party*."<sup>170</sup> The previous year, a similar bill was proposed that provided "[t]he boundaries of each district may not be drawn for the purpose of minimizing the voting strength of any racial, ethnic, or economic group, *or for the purpose of favoring any political party*."<sup>171</sup>

A number of states have undertaken attempts to correct gerrymandering by requiring that redistricting be accomplished, not by a majority of the legislature, but by a neutral, bipartisan redistricting body.<sup>172</sup> These states, through constitutional amendment, have

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<sup>166</sup> See *supra* note 161 and accompanying text.

<sup>167</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion).

<sup>168</sup> *Id.* at 276–77 ("Since 1980, no fewer than five bills have been introduced to regulate gerrymandering in congressional districting.")

<sup>169</sup> H.R. 2090, 108th Cong. § 1 (2003) (citation omitted).

<sup>170</sup> H.R. 5037, 101st Cong. § 1(b)(4) (1990) (emphasis added).

<sup>171</sup> H.R. 1711, 101st Cong. § 2(c)(2)(A) (1989) (emphasis added).

<sup>172</sup> See Redistricting Commissions: Legislative Plans, <http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/apecomsn.htm> (last visited Jan. 11, 2007). The following states currently employ some form of a bipartisan redistricting com-

sought to take the partisan legislature out of the redistricting process in order to ensure impartiality.<sup>173</sup> Under this type of process, the legislature generally chooses an even number of Democrats and Republicans, and those individuals then choose a final member meeting the approval of both parties.<sup>174</sup> States that require redistricting by a politically neutral body have the advantage of ensuring a fair and balanced method of redistricting without having to inquire into the effects or intent of the redistricting body, because a politically neutral plan is, in effect, a bipartisan compromise that does not simply have the best interests of one political party in mind at the expense of the other party.

This type of plan also avoids the problems mentioned earlier concerning the Court's failed inquiries as to the "effect" and "intent" of redistricting bodies because these inquiries are unnecessary when the *process* itself is immune from partisan influence. "[T]he drafters of a bipartisan plan most likely lack discriminatory intent and are unlikely to draw a plan with severely discriminatory effects."<sup>175</sup> By preventing partisan considerations from entering the process of redistricting at the outset, therefore, these states are assured that the redistricting plan itself is not an unconstitutional partisan gerrymander with respect to the intent of the bipartisan committee and the effects of the plan. The "intent" and "effects" tests described throughout the previous sections all attempt to discern whether the redistricting plan was influenced by partisan motivations. By eliminating partisan motivations at the outset, the state is assured of a legitimate redistricting plan without the need for a post hoc analysis.

An additional benefit of a bipartisan compromise is that it avoids excessive judicial oversight. "When properly designed, such commissions can moderate excessive partisanship without completely excising the political character of the process."<sup>176</sup> The concern of the

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mission: Alaska, Arizona, Arkansas, Colorado, Hawaii, Idaho, Iowa, Missouri, Montana, New Jersey, Ohio, Pennsylvania, and Washington. *Id.* Maine and Vermont make such bipartisan commissions advisory only. *Id.* Connecticut, Illinois, Mississippi, Oklahoma, and Texas use bipartisan commissions as a backup system in case the legislature fails to meet its deadline for submitting its reapportionment plan. *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> See Christopher C. Confer, *To Be About the People's Business: An Examination of the Utility of Nonpolitical/Bipartisan Legislative Redistricting Commissions*, 13 KAN. J.L. & PUB. POL'Y 115, 118-21 (2004) (reviewing the common methods of achieving a bipartisan or nonpartisan redistricting commission).

<sup>175</sup> Michael E. Lewyn, *How to Limit Gerrymandering*, 45 FLA. L. REV. 403, 444 (1993).

<sup>176</sup> Bates, *supra* note 162, at 352 (arguing that Congress has the constitutional power to require all States to adopt independent redistricting commissions).

Court in *Gaffney v. Cummings*, as well as in the more recent cases where members of the Court have argued against justiciability (i.e., Justice O'Connor's dissent in *Davis v. Bandemer* and Justice Scalia's plurality opinion in *Vieth v. Jubelirer*), should be relieved to a certain extent. By creating a bipartisan committee tied to the legislature, the Court leaves the redistricting process to the legislative branch while being assured that judicial oversight need only be minimal, as there is little chance for a partisan influence over the process of redistricting such that the Court must take the redistricting process out of the hands of the political parties. While remaining political, therefore, redistricting becomes less partisan-influenced.

#### IV. A WORKABLE SOLUTION

A workable equal protection solution must respect the "one-person, one-vote" jurisprudence that has become essential to modern day political districting. In addition, such a solution must also recognize the problems associated with gerrymandering and avoid the difficulty facing the Supreme Court as to discerning when such partisan districting has "gone too far" by examining the intent of the redistricting body and the effects of such redistricting. Finally, such a solution should entail minimal judicial intervention, as redistricting is a political issue that does not lend itself naturally to judicial oversight.<sup>177</sup> Taking these factors into account, it is clear that the Court should protect the *process* of redistricting in order to ensure that the intent of the redistricting body is nonpartisan and the effects of redistricting do not simply protect the incumbents at the expense of the party not in power. Courts could best accomplish this by creating an irrebuttable presumption of validity for any redistricting done by a bipartisan committee.<sup>178</sup> "[I]t is obvious that any districting plan

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<sup>177</sup> See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring), stating:

The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level. Thus, the legislative business of apportionment is fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out—by the very parties that are responsible for this process—present a political question in the truest sense of the term.

<sup>178</sup> Such a bipartisan compromise was seen in *Gaffney v. Cummings*, 412 U.S. 735 (1973), where the Court upheld a plan designed by both parties in order to give proportional representation of party strength across districts. See *supra* Part I. Thus,

based on a bipartisan compromise should be upheld . . . .”<sup>179</sup> Such a solution would work to practically eliminate gerrymandering; because an independent committee will not be motivated by partisan concerns, the effect of any redistricting will not favor partisan preferences.

For these same reasons the Supreme Court’s concern of intent and effect is relieved. The creation of an irrebuttable presumption of validity will induce states to adopt independent committees to reduce litigation, avoid court-ordered redistricting, and assure voters that their right to vote remains protected. An irrebuttable presumption for independent committees will also give those current members of the Court who favor nonjusticiability a workable and manageable standard for assuring Equal Protection in redistricting. Furthermore:

In addition to reducing political bias in redistricting outcomes, independent redistricting commissions may have significant corollary benefits. For instance, redistricting plans drawn by nonpartisan commissions may increase the competitiveness of individual districts . . . . Theoretically, increased district competitiveness brings a corresponding increase in the responsiveness of district representation and may also marginally reduce voter apathy by removing one basis for the perception that individual electoral participation is irrelevant because electoral outcomes are a foregone conclusion.<sup>180</sup>

Along with an irrebuttable presumption of validity for independent committees, it is equally important to protect the process of redistricting by invalidating other processes as well. Mid-decade redistricting, such as was involved in *Perry*, should be held presumptively unconstitutional. Only if the state can prove that the mid-decade redistricting was done to reflect population changes more accurately (and thus in compliance with “one-person, one-vote”) should that particular process be upheld. The Equal Protection Clause “requires actions taken by the sovereign to be supported by some legitimate interest, and further establishes that a bare desire to harm a politically disfavored group is not a legitimate interest.”<sup>181</sup> Especially in the case of *Perry*, where the mid-decade redistricting was done shortly after a new political majority took office, mid-decade redistricting

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if the Court were to adopt this Comment’s proposal, it could cite *Gaffney* for precedent.

<sup>179</sup> Lewyn, *supra* note 175, at 445.

<sup>180</sup> Bates, *supra* note 162, at 353.

<sup>181</sup> *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2634 (2006) (Stevens, J., dissenting).

carries an air of invalidity.<sup>182</sup> Indeed, “the presence of midcycle redistricting, for any reason, raises a fair inference that partisan machinations played a major role in the map-drawing process.”<sup>183</sup>

Thus, the process of mid-decade redistricting should only be allowed when it is related to a legitimate state interest, namely, redistricting to correct for population changes in order to comply with the applicable law, including the “one-person, one-vote” requirement and the Voting Rights Act. Although Justice Kennedy rejected this proposal in *Perry*,<sup>184</sup> he was joined only by Justices Souter and Ginsberg in that opinion. Justices Stevens and Breyer held that mid-decade redistricting is unconstitutional.<sup>185</sup> Justices Scalia and Thomas would hold that such claims are not justiciable,<sup>186</sup> and Justice Alito and Chief Justice Roberts have issued no opinion on the matter. Therefore, the option is by no means foreclosed. Furthermore, the Justices in *Perry* dealt with the intent of the legislature and the effects of mid-decade redistricting. Perhaps by refocusing the issue purely on protecting the process, the Court may gain at least five members who would hold mid-decade redistricting presumptively unconstitutional.

One issue that would require serious attention if this proposal is adopted is the Court’s role concerning states that fail to adopt an independent committee despite the practical benefits of doing so. In order for the alternative proposal suggested here to have meaning, the Court must make it a more attractive alternative than doing nothing. At a minimum, the Court must continue to hold that gerrymandering claims are justiciable. On this level, judicial involvement would most likely involve a case-by-case inquiry as to the processes used by a legislature in the course of redistricting. Beyond that, it is presently unclear how the Court would treat gerrymandering claims concerning a redistricting done by a partisan legislature notwithstanding the independent committee presumption.<sup>187</sup> However, it is likely that the risk of a substantial majority of states failing to adopt such independent committees would be low, in light of the benefits associated with it and the public pressure that may come from voters

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<sup>182</sup> See *id.* at 2632.

<sup>183</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 367 (2004) (Breyer, J., dissenting).

<sup>184</sup> *Perry*, 126 S. Ct. at 2611–12 (plurality opinion).

<sup>185</sup> *Id.* at 2632–33 (Stevens, J., dissenting).

<sup>186</sup> *Id.* at 2663 (Scalia, J., dissenting).

<sup>187</sup> For an interesting argument that Congress may have the ability to require states to adopt such independent committees, see Bates, *supra* note 162.

to approve independent committees to eliminate gerrymandering when the Supreme Court has made elimination an attractive alternative.

Another potential issue is the selection of these bipartisan committees. Currently, the states that employ such redistricting bodies have different processes to select committee members.<sup>188</sup> It is vital that the selection of the committee members also be free from partisan motivations and that the committee accurately reflects independent bipartisanship. Thus, the Court might be forced to set some criteria for committee selection, such as the number of members, defining who selects the various committee members, and defining the population from which members are selected. Because the Court would, in implementing an irrebuttable presumption, have no power to overturn a districting plan drawn by a bipartisan committee, the Court must make sure that the procedure by which the bipartisan committee is selected is not susceptible to partisan control. One potential solution would be to allow the Court to review and, if necessary, amend the initial committee selection process, whereby challengers may assert claims that the selection procedure itself is faulty. This would ensure that the committee is truly bipartisan and thereby ensure that any resulting districting plan is not an unconstitutional gerrymander.

#### V. CONCLUSION

In conclusion, the Supreme Court's difficulty articulating workable standards for adjudicating gerrymandering claims stems from the fact that the Court has attempted to measure such an Equal Protection violation by the effects of partisan redistricting, similar to the Court's measure of violations with respect to malapportionment.<sup>189</sup> Unfortunately, there has been no sufficiently objective standard, so the Court has been fractured as to the justiciability of gerrymandering claims, as well as the considerations involved in finding constitutional violations. Additionally, the constraint of "one-person, one-vote" provides cover for redistricting bodies that have partisan motives in mind because that standard requires artificial and frequent redistricting. Several states have attempted to solve this problem by requiring that redistricting be done by independent commit-

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<sup>188</sup> See Confer, *supra* note 174, at 119–23.

<sup>189</sup> See *supra* Parts I, II.

tees.<sup>190</sup> This ensures that partisan intent remains excluded from the process, and that the effects of redistricting will be politically neutral.

This Comment proposes that the Supreme Court take its cue from the states that have implemented a bipartisan redistricting commission and declare that redistricting by an independent committee is irrebuttably presumed to be constitutional under the Equal Protection Clause. This safe harbor will entice voters and legislatures alike. Protecting the process of redistricting has the additional advantage of alleviating the concerns of the various justices who argue for nonjusticiability as well as ensuring that, for those justices who would require it, the intent/effect requirement is satisfied. Protecting the process of redistricting would be further accomplished if the Court were to hold that mid-decade redistricting is presumptively invalid and that only a showing of a legitimate state interest of preserving “one-person, one-vote” would suffice to rebut that presumption. It does, however, remain to be seen how the Court would treat those States that would continue to engage in partisan redistricting.

Thus, by protecting the process, the Court ensures that Equal Protection is sustained by an objectively measurable standard, a standard that is judicially manageable and complies with the requirement of “one-person, one-vote.”

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<sup>190</sup> See *supra* Part III.B.