Notes

HINDSIGHT IS 20/20: REVISITING THE REAPPORTIONMENT CASES TO GAIN PERSPECTIVE ON PARTISAN GERRYMANDERS

DOUGLASS CALIDAS†

ABSTRACT

In the first decade of the twentieth century, political party operatives have manipulated the boundaries of congressional districting maps to an unprecedented extent in the interest of gaining partisan advantage. The judiciary, led by a fractured Supreme Court, has refused to intervene, holding claims of unconstitutional partisan gerrymandering nonjusticiable for want of a workable judicial standard.

The epidemic of partisan gerrymandering has harmed the electoral process in ways that mirror the harm caused by legislative malapportionment prior to the 1960s. In that decade, the Court assertively invoked the Equal Protection Clause to effect reapportionment and bring congressional districting maps in line with updated population patterns. This Note revisits the reapportionment cases, examines the political and jurisprudential context at the time they were decided, and posits that well-reasoned decisions by the Court that correct a breakdown in the democratic process will gain public acceptance over time and strengthen the legitimacy of the Court. This is the lesson of the reapportionment cases.

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INTRODUCTION

In June 2006, the Supreme Court decided the case of *League of United Latin American Citizens (LULAC) v. Perry*.[1] Commentators across the nation recognized the action underlying this legal challenge—the Texas Republicans' 2003 partisan gerrymander of the map used to elect their state's congressional delegation—as an egregious example of partisan politics run amuck.[2] Justice John Paul Stevens's dissenting opinion in *LULAC* quoted former Texas Lieutenant Governor Bill Ratliff, a Republican member of the state senate, as saying that "political gain for the Republicans was 110% of the motivation for the plan."[3] Both the Texas Republicans, who drafted the plan without any real input from their Democratic colleagues, and the Texas Democrats, who fled the state on two occasions in a failed attempt to prevent the plan's adoption, displayed their partisan political interests on their sleeves.[4]

A number of individuals and organizations immediately commenced litigation designed to challenge the Texas redistricting plan on several grounds.[5] In particular, they challenged the gerrymander's partisan nature by alleging an unconstitutional dilution

1. League of United Latin Am. Citizens (LULAC) v. Perry, 126 S. Ct. 2594 (2006).

2. *E.g.*, Editorial, *Drawing the Line on Redistricting*, WASH. POST, July 1, 2003, at A13 ("In Texas, things already have reached truly wacky dimensions . . . ."); Editorial, *DeLay Tactics*, ST. LOUIS POST-DISPATCH, Dec. 14, 2005, at C10 ("Given the gerrymander's deep roots and political pitfalls, courts have tried to stay out of all but the most extreme gerrymandering cases. The [Texas districting] plan is that extreme."); Stuart Taylor, Jr., *The Trouble With Texas*, NAT'L J., Mar. 4, 2006, at 13 (describing "the egregious gerrymander that Tom DeLay helped ram through the Texas Legislature in 2003").

3. *LULAC*, 126 S. Ct. at 2629 (Stevens, J., concurring in part and dissenting in part).

4. *See* David M. Halbfinger, *Across U.S., Redistricting as a Never-Ending Battle*, N.Y. TIMES, July 1, 2003, at A21 ("[T]he battle in Texas captured national attention last month, when 51 Democratic members of the state House fled in chartered buses to Ardmore, Okla., holing up in a Holiday Inn for four days until a crucial procedural deadline passed. By denying Republicans a quorum, they killed a redistricting bill for the moment, but the ploy came at a price in scorn from late-night comedians and seemed to alienate many Texans.").

5. *E.g.*, Plaintiffs, Congresswoman Sheila Jackson Lee and Congresswoman Eddie Bernice Johnson, Request for Declaratory Judgment Relief, Injunctive Relief and First Amended Complaint at 1–2, Session v. Perry, 457 F. Supp. 2d 716 (E.D. Tex. 2006) (No. 2:03CV354). Plaintiffs challenged the plan for being not only a partisan political gerrymander, but also an unconstitutional exercise in minority group vote dilution under the Voting Rights Act. *Id.* at 12–13. The plaintiffs' Voting Rights Act claims are beyond the scope of this Note.

of the voting strength of Texas Democrats under the Equal Protection Clause.[6]

When the case reached the Supreme Court, the Court dismissed the partisan gerrymandering claim as a nonjusticiable political question.[7] Agreeing with four of his fellow Justices that the lack of a workable judicial standard precluded courts from reaching the merits of partisan gerrymandering claims, Justice Anthony Kennedy refused to hold that all such claims are inherently nonjusticiable, reasoning that a workable judicial standard may emerge in future years.[8]

After probing the partisan gerrymandering crisis, this Note draws upon the lessons of the Court's landmark decisions in the reapportionment era to predict the American polity's likely response should a future court decide to assertively police partisan gerrymanders. Considered with the lessons of the reapportionment era in mind, the arguments against the justiciability of partisan gerrymanders and the criticisms of the flaws inherent in each of the prospective standards available to identify an unconstitutional partisan gerrymander seem to lose much of their strength.[9]

The Court's refusal to correct the breakdown in the democratic process brought on by the advent of egregious partisan gerrymanders has invited the continued use of districting processes with deeply troubling pathologies. This Note reaches the conclusion that the strength of the arguments lodged against judicial review of partisan gerrymandering is overstated. In time, the American public would view a future Court's decision to assertively police partisan gerrymanders as a courageous and necessary move that would fortify the legitimacy of the Court.

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6. *Id.* at 1–2 ("Plaintiffs . . . file this . . . Complaint asserting that the acts undertaken by Defendants are unconstitutional (redistricting undertaken by the state inconsistent with . . . the Fourteenth Amendment's Equal Protection Clause and acts of the Defendant[s] constitute unconstitutional partisan gerrymandering)."). *LULAC* received great media scrutiny in both the legal and mainstream press. *E.g.*, *The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 125, 243 (2006); Linda Greenhouse, *Justices Uphold Most Remapping in Texas by G.O.P.*, N.Y. TIMES, June 29, 2006, at A1.

7. *LULAC*, 126 S. Ct. at 2612.

8. Vieth v. Jubelirer, 541 U.S. 267, 311 (2004) (Kennedy, J., concurring in the judgment).

9. *See* John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 611 (1998) ("[The] standard criticisms of [available partisan gerrymandering standards] strike me as overblown, but they seem to represent the conventional wisdom in this country.").

I. BREAKDOWN OF THE DEMOCRATIC PROCESS IN THE ERA OF PARTISAN GERRYMANDERS

Early in the twenty-first century, partisan gerrymanders of congressional districting schemes have skewed the democratic process and polarized Congress to an unprecedented extent.[10] It is no longer uncommon for a statewide districting plan to transparently represent "a total legislative railroading" of the minority party's voters.[11] A confluence of forces has brought the electorate to this state of affairs. Rapid advances in information technology have made extreme partisan gerrymanders possible, and an increasingly rancorous political climate has driven partisan operatives to engineer wildly unbalanced districting schemes.

A. The Causes of the Breakdown

1. *Rapid Advances in Technology*. Partisan gerrymanders are not new to the American political experience. The term "gerrymander" dates to 1812; the word itself is a combination of the last name of Elbridge Gerry, then governor of Massachusetts, and the word "salamander," so chosen because the redistricting plan favored by Governor Gerry featured districts so stretched and contorted that they were said to resemble salamanders.[12] In the few hundred years since Governor Gerry's time in office, politicians at every level of government have routinely drawn district boundaries with political considerations in mind.[13] Indeed, those who criticize partisan

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10. *See* Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 46 (1999) ("Because the districts in Congress are more and more one-party dominated, the American Congress is more extreme." (quoting U.S. Rep. John Tanner)).

11. Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, "Fair Representation" and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 571 (2003) (referencing Ind. State Sen. Charles Bosma's statement in his deposition that "I don't make goals for the opposite team," *quoted in* Bandemer v. Davis, 603 F. Supp. 1479, 1484 (S.D. Ind. 1984) (Pell, J., dissenting), *rev'd*, 478 U.S. 109 (1986)).

12. American Treasures of the Library of Congress, The Gerrymander, http://www.loc.gov/exhibits/treasures/trr113.html (last visited Mar. 20, 2008) ("In 1812, Jeffersonian Republicans forced through the Massachusetts legislature a bill rearranging district lines to assure them an advantage in the upcoming senatorial elections. . . . [A] Federalist editor is said to have exclaimed upon seeing the new district lines, 'Salamander! Call it a Gerrymander.'").

13. According to the Court in *Vieth*,

> Political gerrymanders are not new to the American scene . . . There were allegations that Patrick Henry attempted (unsuccessfully) to gerrymander James Madison out of the First Congress . . . . By 1840 the gerrymander was a recognized force in party

gerrymandering generally concede that it is impossible to remove politics from the equation completely.[14]

What *has* changed, however, is the extent of the manipulation. Rapid advances in research and information technology have made it possible to redistrict state maps along partisan lines in a way that was not possible or even conceivable in the past.[15] The legislators who engineer modern partisan gerrymanders have purposefully kept pace with the rapid changes in technology that make it easier to manipulate voter information and thereby effectuate increasingly egregious gerrymanders when drawing district boundaries. "Recent cases now document in microscopic detail the astonishing precision with which redistricters can carve up individual precincts and distribute them between districts with confidence concerning the . . . partisan consequences."[16] The ever-accelerating rate of technological progress has produced not only a difference in degree but a *difference in kind* regarding the level of partisanship that feeds into the districting process.[17] As John Hart Ely put it, "Give a latter-day

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> politics and was generally attempted in all legislation enacted for the formation of election districts. It was generally conceded that each party would attempt to gain power which was not proportionate to its numerical strength.

Vieth, 541 U.S. at 274–75 (plurality opinion) (citation omitted).

14. *See* Fuentes-Rohwer, *supra* note 11, at 541 ("Redistricting is a zero-sum game, a condition that the utmost care may not overcome. Thus, even the most careful of redistricters will have to place individuals in some districts where the votes will be insignificant.").

15. *See Vieth*, 541 U.S. at 345 (Souter, J., dissenting) ("[T]he increasing efficiency of partisan redistricting has damaged the democratic process to a degree that our predecessors only began to imagine."); Tony Quinn, *Gerrymandering: Crazy-Quilt Districts Make Your Vote Pointless*, L.A. TIMES, Oct. 31, 2004, at M2 ("That was before computers, databases and Machiavellian map-drawers drained the competition out of House elections.").

16. Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2553–54 (1997); *see also Vieth*, 541 U.S. at 346 (Souter, J., dissenting) ("A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues." (citing Wells v. Rockefeller, 394 U.S. 542, 551 (1969) (Harlan, J., dissenting))).

17. Although "[g]errymanders are partisan by definition," the first decade of the twenty-first century has produced partisan gerrymanders—of which the Texas gerrymander is representative—that differ from past gerrymanders in that they skew the results of Congressional elections to the point at which the majority of seats are rendered uncontested. *DeLay Tactics*, *supra* note 2. *Congressional Quarterly* has statistically analyzed the way in which most Congressional seats are insulated from competition:

> According to the *Congressional Quarterly*, new gerrymander techniques will result . . . in only 29 of the 435 [2004] House races being competitive, and the number of competitive seats is falling with each election.
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> Only a decade ago, *CQ* was rating more than 100 House seats up for grabs in each election. That number fell to 50 in the 2000 and 2002 elections.

Elbridge Gerry or Boss Tweed a modern computer, and one person/one vote will seem a minor annoyance."[18]

2. *A Swell of Partisan Bias*. These advances in technology have coincided with an increasing sense of bitter partisanship among the members of both major parties, who encourage the use of technology to further partisan aims.[19] As Justice Kennedy observed in his *Vieth v. Jubelirer*[20] concurrence, inflamed partisan sentiment on both sides of the aisle has caused legislatures to abandon the "sense of decorum and restraint" that good government requires.[21] "[O]ur legislators have reached the point of declaring that, when it comes to apportionment: 'We are in the business of rigging elections.'"[22] Meanwhile, the two major political parties' dominance of both Congress and the state legislatures has made it highly unlikely that Congress will use its Elections Clause authority to intervene and stop the outrage.[23] Without any judicial involvement in the process, the corrosive effect of blatant partisan bias in crafting districting plans is likely to get worse before it gets any better.[24]

It will never be a simple task to identify how much partisan dominance is too much in the context of partisan gerrymanders.[25]

Editorial, *Democratic Cancer: Gerrymander Abuse Knows No Limits*, SAN DIEGO UNION-TRIB., Sept. 27, 2004, at B6 (italics added).

18. John Hart Ely, *Confounded by* Cromartie*: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U. MIAMI L. REV. 489, 505 (2002). See *infra* notes 71–79 and accompanying text for a definition of the "one-person, one-vote" standard and a discussion of its significance.

19. *See* Tim Storey, *Supreme Court Tackles Texas*, ST. LEGISLATURES, Apr. 1, 2006, at 22 (quoting Tex. State Sen. Rodney Ellis) (describing the Texas gerrymander as "a map adopted through a scheme marked by extreme partisanship driven by leaders in Washington").

20. Vieth v. Jubelirer, 541 U.S. 267 (2004).

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

22. *Id.* at 317 (quoting Joseph Hoeffel, *Six Incumbents Are a Week Away from Easy Election*, WINSTON-SALEM J., Jan. 27, 1998, at B1 (quoting former N.C. State Sen. Mark McDaniel)) (citation omitted).

23. *See* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 549 (2004) ("The Pennsylvania experience shows how the original constitutional design has been undermined by the emergence of national political parties. . . . [P]oliticians from other states contributed to the commotion in Pennsylvania because they were part of the same faction.").

24. *See* Quinn, *supra* note 15 ("The House of Representatives is the house of extremes—the least representative political body in the world's major democracies. There is no room for diversity of opinion. And it will stay that way.").

25. *See* Davis v. Bandemer, 478 U.S. 109, 155 (1986) (O'Connor, J., concurring in the judgment) (predicting that the majority's proposed standard for identifying an unconstitutional

That said, the nation's experience with partisan gerrymanders seems to have reached a tipping point; gerrymanders such as the Texas gerrymander at issue in *LULAC* have become so complete, and their execution so brazen, that the level of gerrymandering in the first decade of the twenty-first century has reduced most congressional elections to a "farce" and rendered individual voters' decisions on election day nearly meaningless.[26] A fair argument can thus be advanced that partisan gerrymandering has, with the assistance of modern districting technology, reached the point of a political "bloodfeud" that extracts democratic costs every bit as detrimental as those once associated with malapportionment.[27]

B. The LULAC *Case*

The facts underlying *LULAC* provide a jarring and well-documented example of the way in which partisan politics have come to overwhelm the districting process. In 2003, national media attention focused on the Republican-controlled Texas state legislature's extreme partisan gerrymander of the districting scheme used to elect Texas's congressional delegation.[28]

As a result of the increase in its population recorded by the 2000 census, the state of Texas gained two additional seats in Congress.[29] By 2003, the Republicans had come to control both chambers of the Texas state legislature and quickly set out to create a new statewide districting map.[30] Republican Party operatives ran sophisticated

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partisan gerrymander will "prove unmanageable and arbitrary"); *see also* LULAC v. Perry, 126 S. Ct. 2594, 2611 (2006) (commenting on the difficulty of finding "a standard for deciding how much partisan dominance is too much").

26. *See* Op-Ed, *The Gerrymandering Scandal*, BOSTON GLOBE, Aug. 5, 2004, at A17 ("Thanks to modern gerrymandering, most congressional districts have been turned into a [sic] Democratic or Republican monopolies—constituencies meticulously mapped to lock in one-party supermajorities and guarantee election results long before voters go to the polls."); Editorial, *Rescuing U.S. Democracy*, WASH. POST, Dec. 15, 2003, at A30 ("[E]lections for the House of Representatives have become something of a farce; results of almost all of them can be predicted the day the districts get drawn.").

27. *LULAC*, 126 S. Ct. at 2631 (Stevens, J., concurring in part and dissenting in part) (quoting Balderas v. Texas, Civ. Action No. 6:01CV158 (Nov. 14, 2001) (App. to Juris. Statement 209a-210a)).

28. *See, e.g.*, sources cited *supra* note 2.

29. *LULAC*, 126 S. Ct. at 2606.

30. *Id.* When the results of the 2000 census were announced, Republicans controlled the state senate and Democrats wielded a majority in the state house of representatives. *Id.* Thus divided, the state legislature was unable to come to a consensus and create a new statewide congressional districting plan that would incorporate the two new seats. *Id.* To fill the vacuum, a

computer models designed to maximize the number of Republicans in Texas's congressional delegation, and the Republican-controlled Texas legislature introduced a gerrymander named "Plan 1374C."[31]

"There is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage."[32] The Republicans' introduction of this plan triggered a "protracted partisan struggle, during which Democratic legislators left the State for a time to frustrate quorum requirements."[33] Ultimately, however, the Democrats' maneuvers could not stop the Republican-controlled state legislature from implementing Plan 1374C, and the legislature officially enacted the gerrymander in October 2003.[34]

Litigation challenging Plan 1374C commenced almost immediately. The *LULAC* plaintiffs challenged the districting plan on a number of grounds; in particular, the gerrymander's partisan nature was challenged as an unconstitutional vote dilution of the Democratic electorate's voting strength under the Equal Protection Clause.[35] After a tortured procedural history during which the district court twice entered judgment against the plaintiffs on the partisan gerrymandering claim,[36] the Supreme Court granted certiorari and upheld Plan 1374C against the claim of partisan gerrymandering.[37]

Writing for the Court, Justice Kennedy disposed of the Texas Democrats' partisan gerrymandering claim by citing an opinion he

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Texas federal district court was forced to step in and draw a map, which largely preserved the existing districting scheme, devised prior to the 2000 census. *See id.* ("Once the District Court applied [neutral redistricting standards]—such as placing the two new seats in high-growth areas, following county and voting precinct lines, and avoiding the pairing of incumbents—the drawing ceased, leaving the map free of further change except to conform it to one-person, one-vote." (internal quotation marks omitted)).

31. *Id.*

32. Session v. Perry, 298 F. Supp. 2d 451, 470 (E.D. Tex. 2004) (per curiam), *vacated sub nom.* Jackson v. Perry, 543 U.S. 941 (2004).

33. *LULAC*, 126 S. Ct. at 2606 (Kennedy, J., concurring in part and dissenting in part).

34. *Id.*

35. *Id.* at 2609.

36. *Id.* at 2607. Initially, the District Court entered judgment against the challengers on all their claims. *Id.* Soon thereafter, however, the Supreme Court decided *Vieth*. The Supreme Court then vacated the federal district court's opinion in favor of the state in *LULAC* and remanded back to the district court for reconsideration in light of *Vieth*. *Id.* The district court again found for the state on remand, reasoning that the Texas map was similar to the Pennsylvania map upheld by the Court in *Vieth*. *Id.* An appeal was then made to the Supreme Court, and the Court granted certiorari. *Id.*

37. *Id.* at 2626.

had written two years earlier in the case of *Vieth v. Jubelirer*.[38] In *Vieth*, the Court had held all claims of partisan gerrymandering nonjusticiable—for the time being.[39] Justice Kennedy provided the critical fifth vote necessary to strike down the *Vieth* petitioners' partisan gerrymandering claim, but he wrote a concurring opinion to rebuff the plurality's hard stance that would have closed the door on the federal courts' ability to hear partisan gerrymandering claims in the future.[40] Though he agreed with the plurality that the lack of a workable judicial standard at the time precluded courts from reaching the merits of partisan gerrymandering claims, Justice Kennedy cautioned, "That no such standard has emerged in this case should not be taken to prove that none will emerge in the future."[41]

In *LULAC*, Kennedy tersely preserved the uncertain state of the law he had previously sanctioned in *Vieth*, stating, "[The] disagreement persists. A plurality of the Court in *Vieth* would have held such challenges to be nonjusticiable political questions, but a majority declined to do so. *We do not revisit the justiciability holding . . . .*"[42]

The *LULAC* Court held that the one major difference between *LULAC* and *Vieth*—that the reapportionment in *Vieth* followed a decennial census whereas the *LULAC* reapportionment was an unnecessary measure that took place in the middle of the decade—did not distinguish the *LULAC* scheme from the one upheld in *Vieth*.[43] After dismissing the petitioners' claims of partisan gerrymandering, the Court considered the petitioners' claims of racial

38. Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in the judgment).

39. *Id.* at 311 ("That no such standard has emerged in this case should not be taken to prove that none will emerge in the future."). Although not a single other member of the Court joined his opinion in *Vieth*, *id.* at 306, Justice Kennedy voiced the narrowest grounds for the case disposition reached by five Justices. His opinion thus stands as the Court's controlling opinion. *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976))).

40. *Vieth*, 541 U.S. at 311 (Kennedy, J., concurring in the judgment).

41. *Id.*

42. *LULAC*, 126 S. Ct. at 2607 (emphasis added) (citations omitted). The splintered *Vieth* Court divided 4–1–4 in evaluating the justiciability of partisan gerrymandering claims, revealing the unsettled state of the law on this issue. Four Justices were prepared to consider the merits of a partisan gerrymandering claim, while an equal number of Justices were prepared to hold all such claims nonjusticiable "political questions." *Vieth*, 541 U.S. at 271, 277 (plurality opinion).

43. *LULAC*, 126 S. Ct. at 2609.

vote dilution under the Voting Rights Act[44] and found in part for the petitioners.[45]

Justice Kennedy's majority opinion in *LULAC* maintained the Court's jurisprudence in a true state of limbo. Going forward, the Court has reserved the right to either enmesh itself in or completely distance itself from the contentious partisan districting debate.

C. Partisan Politics Recast as Racial Politics

In both *Vieth* and *LULAC*, the Court refused to reach the merits of the petitioners' partisan gerrymandering claims. In both cases, however, the Court was prepared to entertain claims alleging the use of impermissible race-conscious districting methods. These decisions are unsurprising given the Court's tendency to "express far more solicitude toward the claims of groups defined in racial terms, such as blacks and Latinos, than toward groups defined in partisan terms."[46] This phenomenon comports with the traditional view that the Court will enforce the Equal Protection Clause most rigorously when the rights of "discrete and insular minorities" are involved.[47]

If the racial vote-dilution claim and the partisan gerrymandering claim had been entirely distinct, the Court's willingness to hear one and not the other would not be an independent basis for concern. Racial vote-dilution claims and other race-based Equal Protection claims brought in the context of elections, however, almost always represent but one dimension of the effects of a comprehensive partisan gerrymandering scheme.[48] "Bizarrely shaped districts" that sort out voters by race are "almost always a joint product" of race-conscious districting and partisan political machinations.[49] Moreover,

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44. Voting Rights Act, 42 U.S.C. § 1973 (2000).

45. *See LULAC*, 126 S. Ct. at 2613–23 ("Based on the foregoing, the totality of the circumstances demonstrates a § 2 violation."). A full discussion of the Voting Rights Act claims brought by the *LULAC* plaintiffs is beyond the scope of this Note.

46. Kathleen M. Sullivan & Pamela S. Karlan, *The Elysian Fields of the Law*, 57 STAN. L. REV. 695, 709 (2004).

47. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938). See *infra* Part IV.A for a discussion of the significance of this phenomenon.

48. Ely, *supra* note 18, at 500 ("[T]he legislature may have gone out of its way to include an unusually high percentage of black neighborhoods on the theory that an unusually high percentage of blacks are likely to vote Democratic.").

49. Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1349 (2005).

"racial identification is highly correlated with political affiliation."[50] Given this state of affairs, purely partisan gerrymanders may masquerade as racially conscious redistricting plans. Thus, "racial gerrymandering and political gerrymandering are frequently one and the same."[51]

Meanwhile, the groups most interested and best equipped to bring lawsuits alleging defects in the electoral process tend to be the political parties. "Even if the plaintiffs themselves are not political activists—and often they are—the lawsuits are nearly always financed and run by political parties."[52] The natural confluence of these two scenarios creates a perverse incentive for "disappointed players in the cruel game of partisan redistricting to recast themselves as aggrieved parties in equal protection dramas defined by race."[53]

Thus, whether a given body of litigation takes the form of a racial vote-dilution claim or a more direct allegation of partisan gerrymandering, the "true motivation behind [these lawsuits] is almost always to change the political complexion of the legislative body or delegation as a whole."[54] Given that the issue of race in the United States is "already explosive," the Court's willingness to encourage partisan election complaints to be recast in the divisive terms of racial identity is an unfortunate consequence of its jurisprudence.[55]

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50. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 633 (2002) (quoting Easley v. Cromartie, 532 U.S. 234, 243 (2001)); *see* Anthony Q. Fletcher, Note, *White Lines, Black Districts*—Shaw v. Reno *and the Dilution of the Anti-Dilution Principle*, 29 HARV. C.R.-C.L. L. REV. 231, 251 (1994) (observing that minority voters exhibit a "tendency to overwhelmingly support 'liberal' candidates and viewpoints"). The propensity for African-American voters to support the Democratic Party is but one example of this social pattern. *See id.* at 251 n.125 ("Both Democratic and Republican party analysts agree that the overwhelming majority of . . . registered black voters [in the United States] are Democrats.").

51. Fletcher, *supra* note 50, at 249.

52. Sullivan & Karlan, *supra* note 46, at 710.

53. *See* Issacharoff, *supra* note 50, at 632 ("[T]he courts provided a second forum for redistricting battles if, *and only if*, the redistricting losers could recast themselves as victims of excessive consideration of race."). The Court's refusal to hear partisan gerrymandering claims forces all such claims into the "suffocating category of race." *Id.* at 630–31. Issacharoff notes, "Indeed, this became the defining legal pattern in the 1990 round of redistricting . . . ." *Id.* at 632.

54. Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 736 (1998).

55. *See* Issacharoff, *supra* note 50, at 597 (discussing the "already explosive issues of race in the redistricting battles").

If a future Court is to change course and attempt to cure the breakdown in the democratic process brought on by partisan gerrymandering, it must be willing to face the short-term criticism that such a decision would invite. The Court could take comfort in the belief that the American public would recognize the wisdom of its decision in the long run, as the lessons of the reapportionment experience suggest.

II. LESSONS OF THE REAPPORTIONMENT EXPERIENCE

During the first half of the 1960s, the Supreme Court decided a number of cases that drastically changed the composition of state legislatures and congressional delegations from states across the nation. This period has since been dubbed "the reapportionment era" in recognition of the way in which the Court's decisions brought antiquated electoral systems in line with existing population demographics. In the face of a grave crisis in the democratic electoral process, these decisions "brought about massive, nationwide political reform where before prospects for change had been hopeless."[56]

More than forty years have passed since these venerated reapportionment cases were decided.[57] The wide public approval these decisions enjoy did not come easily; contemporaries caustically accused the reapportionment-era Court of gross overreaching in creating constitutional rules and standards "out of whole cloth."[58] Over time, however, public opinion and judges of all political stripes have come to universally hail these decisions as courageous steps taken by the Court to restore the health and functioning of a democratic electoral system that suffered from serious structural flaws.[59]

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56. Abner J. Mikva, *Justice Brennan and the Political Process: Assessing the Legacy of* Baker v. Carr, 1995 U. ILL. L. REV. 683, 685 (1995).

57. The Court decided *Baker v. Carr* in 1962. Baker v. Carr, 369 U.S 186 (1962). Two years later, in 1964, the Court decided *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Wesberry v. Sanders*, 376 U.S. 1 (1964).

58. *See* Nathaniel Persily, *Suing the Government in Hopes of Controlling It: The Evolving Justifications for Judicial Involvement in Politics*, 5 U. PA. J. CONST. L. 607, 608–09 (2003) (discussing the extended reach of the Court post-*Baker*).

59. *E.g.*, Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of* Baker v. Carr, 80 N.C. L. REV. 1103, 1104 (2002) ("If *Baker v. Carr* was ever controversial, it is no longer so. The decision has not only enjoyed near-universal acceptance, it is also recognized as one of the Court's finest moments.").

A. *Breakdown of the Democratic Process in the Reapportionment Era*

The breakdown of the democratic process caused by the explosion in partisan gerrymandering is not without precedent in the modern era. The nation's experience with malapportionment and the "reverse gerrymander" provides a rich example of a democratic crisis that cried out for the Supreme Court to provide a solution.

When *Baker v. Carr*[60] reached the Supreme Court in 1962, members of the political branches of government were being elected to office with districting schemes that were wildly out of line with demographic realities.[61] "When the original complaint in *Baker* was filed in 1959, the Tennessee Legislature had been refusing for nearly fifty years to reapportion the state legislative districts."[62] This refusal to reapportion flew in the face of an express provision of the Tennessee state constitution that required that "each legislative district have the same number of qualified voters."[63] The districting scheme at issue in *Baker* was almost indefensible as a democratic system of representation. "Districts with 40 percent of the state's voters could elect sixty-three of the ninety-nine members of the house, and districts with 37 percent of the voters could elect twenty of the thirty-three members of the senate."[64]

Tennessee was by no means unique in this way. Prior to *Baker*, "[m]any 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."[65] By refusing to reapportion (and thereby effecting a "reverse gerrymander"), the members of the Tennessee legislature entrenched their hold on

60. Baker v. Carr, 369 U.S. 186 (1962).

61. *See id.* at 192–93 (citing the complaint's assertion that the federal statute "arbitrarily and capriciously apportioned representatives").

62. Stephen Ansolabehere & Samuel Issacharoff, *The Story of* Baker v. Carr, *in* CONSTITUTIONAL LAW STORIES 297, 298 (Michael C. Dorf ed., 2004).

63. *See id.* ("As a result, there existed an enormous disparity in the voting strength of individual voters. For example, south-central Moore County, with 2,340 voters, had one seat in each house of the state legislature, while Shelby County, covering the city of Memphis, had only seven seats for its 312,345 voters.").

64. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 200 (2000).

65. Issacharoff & Karlan, *supra* note 23, at 544.

political power and artificially bolstered the representation of old, rural communities at the expense of newly populous urban areas.[66]

When the members of the Court granted certiorari to hear *Baker*, they were keenly aware of the structural flaws in Tennessee's electoral politics, which epitomized the systemic flaws found in the electoral systems of states across the nation.[67] In deciding *Baker*, the Court considered the claim that Tennessee's antiquated districting scheme violated its voters' fundamental right to have their votes counted without dilution.[68] Holding that no political question precluded the district court from disposing of the vote dilution claim on its merits, the Court sanctioned an unprecedented application of the Fourteenth Amendment's Equal Protection Clause.[69] "Given the significance of the issues at stake, it is unsurprising that talismanic and formalistic incantations of justiciability ultimately gave way to substantial questions of democratic legitimacy."[70] The Court felt compelled to intervene, and did so forcefully.

Two years later, *Reynolds v. Sims*[71] armed the Court with a simple standard that forever changed the course of judicial involvement in politics. Voicing the oft-repeated maxim that "[l]egislators represent people, not trees or acres," the Court read into the Fourteenth Amendment's Equal Protection Clause a guarantee of equal footing among a state's citizens in selecting political representatives.[72] In the eyes of the *Reynolds* Court, "equal footing" meant just that—one citizen's vote must count the same as each other citizen's vote.[73] In practical terms, this meant that each

66. *Baker*, 369 U.S. at 248 n.4 ("'As a consequence, [each] municipality . . . is forced to function in a horse and buggy environment where there is little political recognition of the heavy demands of an urban population.'" (quoting Brief Amici Curiae of the National Institute of Municipal Law Officers at 2, *Baker*, 369 U.S. 186 (No. 103)).

67. *See* Mikva, *supra* note 56, at 685.

68. *Baker*, 369 U.S. at 237.

69. *Id.* at 226 (holding that claims of unconstitutional vote dilution are justiciable because the Equal Protection Clause of the Fourteenth Amendment provides workable judicial standards proper for evaluating these claims). "Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action." *Id.*

70. Charles, *supra* note 59, at 1132.

71. Reynolds v. Sims, 377 U.S. 533 (1964).

72. *Id.* at 562.

73. *Id.* at 563 ("Weighting the votes of citizens differently, by any method or means . . . hardly seems justifiable.").

district in any given state must contain roughly the same number of voters as each other district. Quickly termed "one person, one vote," this standard of equipopulation proved to be extraordinarily effective in equipping the judicial branch with a clear-cut method of enforcing the value of representational equality in the democratic process.[74]

Given the stakes at hand, the *Reynolds* Court was convinced that the proper enforcement of the Fourteenth Amendment not only authorized, but required, this judicial undertaking. "Full and effective participation by all citizens in . . . government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less."[75]

The same year the Court decided *Reynolds*, it also decided the case of *Wesberry v. Sanders*,[76] in which it held that Congressional districting plans must also provide for proportional representation.[77] The Court vigorously defended its use of the Equal Protection Clause to uphold the individual voting rights of citizens of all races—despite precedent that treated the clause as an instrument to be employed primarily for the protection of disenfranchised minorities.[78] In his *Reynolds* opinion, Chief Justice Earl Warren declared, "[T]he Equal Protection Clause guarantees the opportunity for equal participation by all voters . . . . 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 . . . ."[79]

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74. *See* Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1645 (1993) ("Three decades after the Court's initial forays into the 'political thicket,' the commands of one-person, one-vote reign supreme . . . .").

75. *Reynolds*, 377 U.S. at 565. As was the case in *Baker*, in *Reynolds* the Court addressed the constitutionality of a districting scheme used to elect state legislative representatives, this time in Alabama. *Id.* at 537.

76. Wesberry v. Sanders, 376 U.S. 1 (1964).

77. *See id.* at 18 ("[There] is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives.").

78. *See, e.g.*, The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 37 (1873) ("An examination of the history of the causes which led to the adoption of [the post-Civil War] amendments and of the amendments themselves, demonstrates that the main purpose . . . was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the white men who had formerly held them in slavery."). For a discussion of the Court's willingness to "entertain claims alleging the use of impermissible race-conscious districting methods," see *supra* note 46 and accompanying text.

79. *Reynolds*, 377 U.S. at 566.

B. Criticism—in the Short Run

In a single celebrated sentence, the *Baker* Court disposed of the argument that workable judicial standards for ensuring fair representation do not exist. "Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action."[80] Turning its back on fairly recent precedent,[81] the Court found no political question that precluded reaching the merits of the case.[82]

Justice John Marshall Harlan was stunned by the Court's cursory rejection in *Baker* of the separation of powers principles that had thus far kept the Court out of the districting process.[83] Harlan criticized one person, one vote for being overly *simplistic*, and thereby constituting an illegitimate constitutional standard.[84]

> Stripped of aphorisms, the Court's argument boils down to the assertion that appellees' right to vote has been invidiously "debased" or "diluted" by systems of apportionment which entitle them to vote for fewer legislators than other voters, an assertion which is tied to the Equal Protection Clause *only by the constitutionally frail tautology that "equal" means "equal."*[85]

Justice Harlan was far from alone in characterizing one person, one vote as a rule whose very simplicity drew attention to its status as a construct sprung from the minds of the individual members of the Warren Court.[86] What many contemporary observers found

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80. Baker v. Carr, 369 U.S. 186, 226 (1962) (emphasis omitted).

81. *E.g.*, Colegrove v. Green, 328 U.S. 549, 552 (1946) (refusing to reach the merits of a districting case because the issue had a "peculiarly political nature").

82. *Baker*, 369 U.S. at 237.

83. *Reynolds*, 377 U.S. at 592 (Harlan, J., dissenting). Considering the Court's opinion in *Baker* in his *Reynolds v. Sims* dissent, Justice Harlan remarked: "It is fair to say that, beyond discussion of a large number of cases having no relevance to this question, the Court's views on this subject were fully stated *in the compass of a single sentence* . . . ." *Id.* at 592 n.5 (emphasis added).

84. Contrast this criticism of one person, one vote with the contemporary view of the prospective standards available to judge partisan gerrymandering, which are often criticized for being overly complicated. *See infra* Part IV.B.

85. *Reynolds*, 377 U.S. at 590 (Harlan, J., dissenting) (emphasis added).

86. Like many contemporaries, Justice Felix Frankfurter, writing in dissent, was incredulous that the *Baker* majority was willing to suddenly entangle the judiciary in the districting process under the supposed authority of the Equal Protection Clause. *Baker*, 369 U.S.

remarkable about *Reynolds* was the fact that the Court was able to craft and implement successfully a concrete measure to gauge the constitutionality of the electoral process when the source of that measure was found nowhere in the constitutional text.[87]

Justice Harlan predicted that the Court's decision to involve itself in the districting process would come at the cost of grave damage to the Court's legitimacy in the eyes of the American polity.[88] Justice Harlan found it hard to believe "that cost was not too high or was inevitable."[89] He opined, "It is difficult to imagine a more intolerable and inappropriate interference by the judiciary with the independent legislatures of the States."[90]

C. Praise—in the Long Run

The Warren Court is probably most celebrated[91] for its then-controversial antidiscrimination decisions, such as *Brown v. Board of Education*,[92] that finally put the Equal Protection Clause to work in striking down rampant racial segregation previously sanctioned by law.[93] Nevertheless, though he had penned *Brown* and many other celebrated cases, Chief Justice Warren was particularly proud of his Court's reapportionment decisions, and is said to have considered these decisions as being his Court's most important.[94] According to

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at 270 (Frankfurter, J., dissenting). Invoking the political question doctrine, Justice Frankfurter declared, "[T]here is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here." *Id.* Justice Frankfurter was especially concerned with the way in which the Court's intrusion into the political process might politicize the judiciary. *See id.* at 268 (observing that the majority opinion "conveys no intimation what relief, if any, a District Court is capable of affording that would not invite legislatures to play ducks and drakes with the judiciary").

87. Persily, *supra* note 58, at 608–09 ("Indeed, the Court created the right to vote out of whole cloth—reading into the Equal Protection Clause a protection against discrimination in voting that made the Fifteenth, Nineteenth, and Twenty-Fourth Amendments superfluous.").

88. *Reynolds*, 377 U.S. at 624 (Harlan, J., dissenting) ("[N]o thinking person can fail to recognize that the aftermath of these cases, however desirable it may be thought in itself, will have been achieved at the cost of a radical alteration in the relationship between the States and the Federal Government, more particularly the Federal Judiciary.").

89. *Id.*

90. *Id.* at 615.

91. EARL WARREN, THE MEMOIRS OF EARL WARREN 306 (1977).

92. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

93. *Id.* at 493–95.

94. WARREN, *supra* note 91, at 306 ("The *Brown* case and the changes that it brought about caused many people to believe that it was the most important case of my tenure on the

John Hart Ely, Justice Warren "used to say that if *Reynolds v. Sims* had been decided before 1954, *Brown v. Board of Education* would have been unnecessary" because of the changes in the southern state legislatures that the one-person, one-vote rule would have engendered.[95]

Warren was particularly proud of the Court's opinion in *Baker*:

> The reason I am of the opinion that *Baker v. Carr* is so important is because I believe so devoutly that, to paraphrase Abraham Lincoln's famous epigram, ours is a government of *all* the people, by *all* the people, and for *all* the people. It is a representative form of government through which the rights and responsibilities of every one of us are defined and enforced. If these rights and responsibilities are to be fairly realized, it must be done by representatives who are responsible to all the people . . . ."[96]

The Senate confirmation hearings that sanctioned Justice Samuel Alito's elevation from the Third Circuit to the Supreme Court in January of 2006 demonstrate the American polity's overwhelming support for the reapportionment decisions. Shortly before the confirmation process, then-Judge Alito came under fire for having criticized the reapportionment decisions, first as an undergraduate at Princeton and later as a young attorney at the Justice Department.[97] During his confirmation hearings, Alito went to great lengths to distance himself from his earlier statements and communicate his full support for the reapportionment decisions:

> On the issue of reapportionment, as I sit here today in 2006 . . . I think that the principle of one person/one vote is a fundamental part of our constitutional law. . . . I don't see any reason why it should be reexamined, and I don't know that anybody is asking for that to be done.[98]

Court. That appraisal may be correct, but I have never thought so. It seemed to me that accolade should go to the case of *Baker v. Carr* . . . .").

95. JOHN HART ELY, ON CONSTITUTIONAL GROUND 4 (1996).

96. WARREN, *supra* note 91, at 308.

97. Adam Cohen, Editorial, *Question for Judge Alito: What About One Person One Vote?*, N.Y. TIMES, Jan. 3, 2006, at A16 ("As a Princeton undergraduate, Samuel Alito sided with Tennessee and Alabama in the reapportionment cases . . . . He cited his opposition to the reapportionment cases, apparently as a point of pride, in his application for the Reagan Justice Department job in 1985 . . . .").

98. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 380 (2006) (statement of Samuel A. Alito).

Senator John Cornyn, a Texas Republican, reinforced Alito's support for the reapportionment decisions: "[H]e has testified here and in other areas that he considers one person, one vote a bedrock of our democracy. . . . *[E]very American believes that today*, although it was fairly controversial not that many decades ago . . . ."[99]

The major lesson of the reapportionment era, then, is that well-considered decisions that reinvigorate the democratic process will gain acceptance from the American public over time and will only bolster the Court's legitimacy. Should members of a future Court decide to apply the Equal Protection Clause to assertively police partisan gerrymandering, the lessons of the reapportionment era indicate that such a decision would gain acceptance over the long run.

III. ARGUMENTS AGAINST THE JUSTICIABILITY OF PARTISAN GERRYMANDERS

The major arguments advanced to demonstrate the nonjusticiable nature of partisan gerrymandering claims focus on a perceived need for the Court to preserve its legitimacy in the eyes of the public by adhering to the traditional judicial role and eschewing the temptation to fix problems better left to the legislature.[100]

These arguments may largely be reduced to two distinct propositions. The first proposition is a variation of the "classic" political question doctrine[101] and asserts that the text of the Constitution places the districting power squarely outside of the domain of the judiciary.[102] The second proposition posits that there

99. *Id.* at 701–02 (statement of Sen. John Cornyn, Member, S. Comm. on the Judiciary); *see also* Cohen, *supra* note 97 ("*Baker* and *Reynolds* seem so self-evidently correct today that it is hard to imagine that Judge Alito could still really oppose them.").

100. *See* Fuentes-Rohwer, *supra* note 11, at 545 ("To ask our courts to step in and influence political controversies of the highest order under their idiosyncratic impressions of fairness should bother many. It is precisely for this reason that this Article calls for a lessened judicial role.").

101. Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (plurality opinion) ("Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights. . . . Such questions are said to be 'nonjusticiable,' or 'political questions.'"); *accord* Nixon v. United States, 506 U.S. 224, 234–35 (1993) (considering a challenge to procedures used in Senate impeachment proceedings as a nonjusticiable political question).

102. Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 239 (2002) ("The political question doctrine reflects a constitutional design that does not require the judiciary to supply the substantive content of all the Constitution's provisions.").

are no judicially discoverable and manageable *standards* available to identify the existence of an unconstitutional partisan gerrymander.[103] In the context of the partisan gerrymandering debate, this second proposition controls the Court's decision to stay out of the political thicket.[104]

A. The Districting Power under the Constitution

The first—and most compelling—sign of a nonjusticiable political question is the presence of a textual commitment of power in the Constitution to one of the political branches of the federal government.[105] The political question doctrine is derived from the fundamental constitutional doctrine of the separation of powers,[106] which maintains that although the judiciary is empowered to review some actions of Congress and the executive branch, there remain certain spheres of power that the Constitution has fully committed to the political branches of government.[107] Within these spheres, the actions and decisions of Congress and the executive branch must remain the final word, undisturbed by judicial review.[108]

The Elections Clause is a provision of Article I that commits to Congress the power to oversee the methods employed by each state legislature to elect its state's congressional delegation.[109] The Elections Clause provides:

> 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.[110]

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103. *Vieth*, 541 U.S. at 279 (plurality opinion).

104. *Id.* at 278.

105. Baker v. Carr, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department . . . .").

106. Barkow, *supra* note 102, at 264.

107. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803) ("[Certain] [s]ubjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. . . . The acts . . . can never be examinable by the courts.").

108. *Id.*

109. U.S. CONST. art. I, § 4.

110. *Id.* (emphasis added).

Referencing this section of the Constitution, Justice Frankfurter stated that the "short of it is that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States" in Congress.[111]

Justice Frankfurter's comments notwithstanding, the Court's modern jurisprudence does not treat the Elections Clause as a bar to judicial involvement in the districting process, at least when viewed through the lens of the Fourteenth Amendment's Equal Protection Clause. In *Baker*, the Court considered the relationship between the Fourteenth Amendment and the districting power as described in the text of Article I's Elections Clause.[112] In so doing, it approached the classical political question doctrine head-on. The Court held that the Fourteenth Amendment's guarantee of *equal protection* controls the issue of fair representation in Congress and supersedes the Elections Clause in cases of vote dilution.[113]

Nevertheless, the classic formulation of the political question doctrine and the Elections Clause itself continue to hold sway in the modern districting debate and acquire their most sustained force when the Court is asked to protect voting rights of groups whose composition strays from the heart of the Fourteenth Amendment's protections. Because a large segment of the judiciary believes that groups as politically potent as the major political parties fall outside the scope of the Fourteenth Amendment's protections, the Elections Clause continues to enjoy focused application in the Court's treatment of partisan gerrymanders.[114]

More specifically, the Elections Clause continues to prevent courts from taking the districting process *entirely* out of the hands of the state legislatures, at least for the time being.[115] If the courts may

111. Colegrove v. Green, 328 U.S. 549, 554 (1946).

112. Baker v. Carr, 369 U.S. 186, 232 (1962).

113. *Id.* ("*Smiley*, *Koenig* and *Carroll* settled the issue in favor of justiciability of questions of congressional redistricting."). In *Baker*, the Court considered the constitutionality of elections to state legislative office as opposed to the national Congress, and *Wesberry v. Sanders* squarely extended *Baker*'s holding to congressional districting. *See* Wesberry v. Sanders, 376 U.S. 1, 4, 18 (1964) (finding justiciable claims regarding vote dilution in congressional elections).

114. *See* Vieth v. Jubelirer, 541 U.S. 267, 288 (2004) (plurality opinion) ("[T]he Constitution contains no such principle. It guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups.").

115. In *LULAC*, the Court emphasized the continued viability of the Elections Clause by starting its discussion of the partisan gerrymandering issue with a verbatim quotation of the full LULAC v. Perry, 126 S. Ct. 2594, 2607 (2006) (Kennedy, J., concurring in part and dissenting in part) ("[I]t is appropriate to note some basic principles on the roles the States, Congress, and

not entirely remove the state legislatures from the districting process, the only constitutional methods available for courts to rein in partisan excesses in the districting process are to *monitor* state districting actions for improper reliance on partisan considerations or to *create prophylactic rules* that inform the legislatures as to what types of redistricting activity will be permitted. The pertinent question thus quickly becomes which metrics of post hoc review or prophylactic measures, if any, are "judicially discoverable and manageable."[116]

B. The Absence of a Workable Judicial Standard

The presence or absence of a workable judicial standard is the second factor used to gauge the presence of a nonjusticiable political question.[117] As demonstrated by the Court's opinion in *LULAC*, the lack of a workable standard stands as the primary reason that the Court will not recognize claims of partisan gerrymandering as justiciable.[118]

Like the first political question factor, which asks if the Constitution's text entrusts responsibility to a political branch of government, this second factor is derived in large part from the doctrine of separation of powers. When judicially discoverable and manageable standards do not exist, an issue may not be a true "case or controversy" requiring a judicial solution under Article III of the Constitution and thus the responsibility for its resolution lies in the

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the courts play in determining how congressional districts are to be drawn. Article I of the Constitution provides . . . . 'The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof . . . .'").

116. *Vieth*, 541 U.S. at 277 (plurality opinion); *id.* at 278 ("[J]udicial action must be governed by *standard*, by *rule*.").

117. In *Vieth*, Justice Scalia's plurality opinion cited Justice Brennan's opinion for the Court in *Baker*, which listed six independent tests to determine if 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 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*, 369 U.S. at 217). "These tests are probably listed in descending order of both importance and certainty. The second is at issue here, and there is no doubt of its validity." *Id.* at 278.

118. *See LULAC*, 126 S. Ct. at 2609–10 (finding that the "sole intent" standard fails to be a workable test).

domain of the politically accountable branches of government.[119] The courts' insistence on proper standards is also a prudential measure: by declining to make pronouncements on issues in which they do not have the benefit of clear rules of decision, the courts preserve their legitimacy.[120]

A lack of judicially manageable standards signifies more than the Court's inability to find a convenient measuring device. Rather, the Court's decision to refrain from determining cases in the absence of clear standards stems from an acute recognition of the limitations of the judicial role.[121] "The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction."[122]

No standard for identifying an unconstitutional partisan gerrymander has emerged that is robust, accurate, and precise enough to gain the sanction of the judiciary.[123] Although several prospective standards have been proposed to identify unconstitutional partisan gerrymanders, aimed at measuring either partisan intent or partisan effect, all suffer from weaknesses that critics of judicial involvement in politics are quick to identify.

1. *Measures of Partisan Intent.* In both *LULAC* and *Vieth*, Justice Stevens drafted dissenting opinions disputing the holding in each case that no workable standards exist for the Court to fairly and effectively identify partisan gerrymanders.[124] In both dissents, Justice Stevens pointed to the Court's jurisprudence in the racial

119. U.S. CONST. art. III, § 2 (describing the types of cases and controversies the courts can hear).

120. *Vieth*, 541 U.S. at 278 (plurality opinion) ("[J]udicial action must be governed by *standard*, by *rule*. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.").

121. *See id.* at 277 ("Sometimes . . . the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches . . . .").

122. *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting).

123. *See Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (arguing that no substantive definition of fairness in districting, or rules to limit judicial intervention, have been established).

124. LULAC v. Perry, 126 S. Ct. 2594, 2626 (2006) (Stevens, J., concurring in part and dissenting in part); *Vieth*, 541 U.S. at 317 (Stevens, J., dissenting).

gerrymandering cases[125] as a source of a judicially manageable standard that focuses on improper legislative intent.[126] Under this "predominant intent" test, partisan interests, like racial considerations, would be allowed to factor into redistricting decisions, as long as they did not "predominate" over all other considerations made in drawing district boundaries.[127]

Justice Stevens' predominant intent test boasts a jurisprudential advantage that not even one person, one vote enjoyed. It is fairly well-grounded in Court precedent, not only with respect to its use in the *Shaw v. Reno*[128] line of cases,[129] but in its close relation to the easily proven intent prong of the *Davis v. Bandemer*[130] test as well. Moreover, in *LULAC*, Justice Stevens cited the Court's opinion in *Fortson v. Dorsey*[131] as valuable precedent that precludes state legislatures from acting entirely on the basis of partisan intent[132]: "'A purely partisan desire to cancel out the voting strength of racial *or political* elements of the voting population' is not a legitimate government purpose."[133]

Justice Antonin Scalia's plurality opinion in *Vieth* attempted to demonstrate that identifying "predominant intent" would seldom be as facile as Justice Stevens contended.[134] Justice Scalia first noted that

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125. For example, in *Shaw v. Reno*, 509 U.S. 630 (1993), the Court declared for the first time that majority-minority districts—drawn with an eye toward increasing minority representation in Congress—may violate the Equal Protection Clause by diluting the votes of individual voters on account of their race. *Id.* at 657–58. In *Shaw*, the Court stated, "[W]e believe that reapportionment is one area in which appearances do matter." *Id.* at 647.

126. *LULAC*, 126 S. Ct at 2642 (Stevens, J., concurring in part and dissenting in part) ("With respect to the 'purpose' portion of the inquiry, I would apply the standard fashioned by the Court in its racial gerrymander cases.").

127. *Id.* ("[J]udges must analyze whether plaintiffs have proved that [an impermissible factor] was the predominant factor motivating a districting decision such that other, race-neutral districting principles were subordinated to . . . considerations [of the impermissible factor].").

128. *Shaw*, 509 U.S. at 630.

129. After *Shaw*, the Court applied this principle in a number of cases (commonly known as "the *Shaw* cases") to strike down a number of districting plans that were drawn to create majority-minority districts. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 905, 927–28 (1995) (applying the *Shaw* holding to strike down a bizarrely shaped Georgia congressional district drawn to contain almost exclusively African-American voters).

130. Davis v. Bandemer, 478 U.S. 109 (1986).

131. Fortson v. Dorsey, 379 U.S. 433 (1965).

132. *LULAC*, 126 S. Ct. at 2627 (Stevens, J., concurring in part and dissenting in part) (citing *Fortson*, 379 U.S. at 439).

133. *Id.* (emphasis added) (quoting *Fortson*, 379 U.S. at 439).

134. Vieth v. Jubelirer, 541 U.S. 267, 284–90 (2004) (plurality opinion). In *Vieth*, the plaintiffs advancing the claim alleging unconstitutional partisan gerrymandering on the part of

political identification is *not* an immutable characteristic, in contrast to race.[135] Thus, the predominant intent test, a metric originally used to identify racial gerrymanders, is problematic in a political gerrymandering context. Moreover, claims of improper use of race in redistricting have traditionally been brought as challenges to the composition of individual voting districts.[136] Partisan gerrymandering claims tend to implicate statewide redistricting plans as a whole and thus would require a would-be plaintiff to provide evidence of the intent of the full legislature with regard to the entire statewide plan. "Vague as the 'predominant motivation' test might be when used to evaluate single districts, it all but evaporates when applied statewide."[137]

2. *Measures of Partisan Effect*. When the focus in detecting the presence of an impermissible partisan gerrymander shifts from legislative *intent* to analysis of *effects* on voting patterns, the same criteria for identifying effects emerge time and again.[138] These criteria center on the geometric distribution of the voting districts and on the extent to which partisan manipulation undermines traditional districting principles—such as respect for district contiguity, compactness, and the preservation of neighborhood voting blocs.[139]

These tests are similar to the *Shaw* Court's "bizarre shape" test: when certain districts have been skewed beyond recognition, it becomes fairly easy to statistically detect the overwhelming attention paid to one or more dimensions of personal identification, be they

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the Republican-controlled Pennsylvania legislature requested the Court to adopt and apply a "predominant intent" standard similar to that championed by Justice Stevens. *Id.* at 284.

135. *Id.*

136. *Vieth*, 541 U.S. at 285 (plurality opinion).

137. *Id.*

138. The Supreme Court has refused to make use of any prospective standard for identifying an unconstitutional partisan gerrymander. *See supra* Part I.B. The same prospective criteria for identifying an unconstitutional partisan gerrymander based on partisan effects, however, have appeared in the Court's dissenting opinions and leading academic commentary. *See, e.g.*, *Vieth*, 541 U.S. at 321–22 ("The judicial standards applicable to gerrymandering claims are deeply rooted in [well-established Court] decisions . . . . '[T]he 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.'" (quoting Davis v. Bandemer, 478 U.S. 109, 165 (1986) (Powell, J., concurring in part and dissenting in part))); Ely, *supra* note 9, at 607, 614–16 (describing and criticizing "*Shaw v. Reno*'s 'Bizarre Shape' Test").

139. Bernard Grofman, *Criteria For Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 84–88 (1985).

racial or political. As John Hart Ely observed, "[A] bizarre shape test can be given determinate content."[140]

The use of these geometric criteria in identifying impermissible partisan gerrymanders can extend far beyond the "bizarre shape" test. All else being equal, democratic districting schemes tend to favor compact, contiguous districts. When districting maps depart from this neutral and expected pattern, "warning flags" should be, and generally are, raised in the minds of observers, whether they are members of the judiciary or of the public at large.[141]

Somewhat ironically, the success of the one-person, one-vote rule has complicated the attempt to use effects-based metrics to identify partisan gerrymanders. When the Warren Court ruled that the requirement of equal population among districts must take priority over all other factors—even traditionally neutral districting principles—it instantly became more difficult for state legislatures to preserve compact districts with simply drawn boundaries while maintaining compliance with one person, one vote.

Moreover, the criterion of "respect for neighborhood boundaries," a districting objective that enjoys a long history of respect as a "neutral" districting factor, itself becomes a complicating force in the context of testing for impermissible political gerrymanders. Voters in a given geographic area often share similar political preferences, in large part as a result of their common demographics.[142] In these situations, respect for neighborhood integrity could "direct[ly] conflict with criteria based on political competitiveness or electoral responsiveness."[143]

More sophisticated metrics look beyond traditional districting criteria; they draw upon social science research and statistical deviation tests as applied to district demographic data.[144] Prominent among these statistical tests is the "symmetry standard" advocated by amici curiae in *LULAC*.[145] The symmetry standard is used by social

140. Ely, *supra* note 9, at 614.

141. Grofman, *supra* note 139, at 118.

142. *Id.* at 90.

143. *Id.*

144. *See id.* at 103–84 (describing several prominent social science tests that may be applied to measure the extent of partisan gerrymandering).

145. *See generally* Brief of Amici Curiae Professors Gary King et al. in Support of Neither Party, LULAC v. Perry, 126 S. Ct. 2594 (2006) (No. 05-204) (arguing that the symmetry standard allows courts to decide by politically neutral principles whether a plan is overly partisan).

scientists to measure partisan bias and "requires that the electoral system treat similarly-situated political parties equally, so that each receives the same fraction of legislative seats for a particular vote percentage as the other party would receive if it had received the same percentage."[146]

This and other statistical metrics have received only a lukewarm response from the judiciary. Although Justice Stevens is prepared to join the highly respected social scientists and statisticians who believe in the efficacy of the symmetry standard and other like tests,[147] many of his colleagues on the Court are not so inclined. For example, Justice Kennedy wrote in *LULAC* that "we are wary of adopting a constitutional standard that invalidates a map that would occur in a hypothetical state of affairs. . . . Without altogether discounting its utility in redistricting planning and litigation, we conclude that asymmetry alone is not a reliable measure of unconstitutional partisanship."[148] In a similar vein, the *Davis v. Bandemer* Court voiced its approval of the federal district court's decision to reject the introduction of statistical evidence offered in support of the claim of partisan gerrymandering.[149]

The use of sophisticated statistical techniques suffers from the criticism that although such standards may be effective, they are not properly "judicially discernible."[150] Unlike the intuitively pleasing one-person, one-vote standard, there is no easy way to formulate a version of a statistical test that best articulates the constitutional command that each person's vote be counted equally. The proposed statistical tests thus flounder on the rocks of what has become the bane of partisan gerrymandering jurisprudence: where to draw the line. As Justice Kennedy put it, "courts must be cautious about adopting a standard that turns on whether the partisan interests in the

146. *Id.* at 4–5. "This standard is widely accepted by scholars as providing a measure of partisan fairness in electoral systems." *LULAC*, 126 S. Ct. at 2637 (Stevens, J., concurring in part and dissenting in part).

147. *LULAC*, 126 S. Ct. at 2637.

148. *Id.*

149. Davis v. Bandemer, 478 U.S. 109, 117 n.3 (1986). "A multitude of conflicting statistical evidence was also introduced at the trial. The District Court, however, specifically declined to credit any of this evidence, noting that it did not 'wish to choose which statistician is more credible or less credible.'" *Id.* (quoting Bandemer v. Davis, 603 F. Supp. 1479, 1485 (S.D. Ind. 1984), *rev'd*, 478 U.S. 109 (1986)).

150. Vieth v. Jubelirer, 541 U.S. 267, 281 (2004) (plurality opinion).

redistricting process were excessive. Excessiveness is not easily determined."[151]

Although statistical tests will no doubt become more robust and sophisticated, the Court's disinclination to apply a statistical metric as the fundamental test in this context renders it unlikely that the Court will implement any powerful new statistical test as a standard.[152]

The weaknesses of the prospective standards, as this Section has illustrated, are well-known, as are the costs of the breakdown in the democratic process brought on by egregious partisan gerrymandering.[153] This raises the question of whether the weaknesses of the prospective standards preclude the Court from following the reapportionment-era Court and protecting citizens' rights to have their votes counted in a meaningful way.

IV. THE CASE FOR CORRECTING THE BREAKDOWN

A. The Time Has Come for Meaningful Anti-Entrenchment Judicial Review

That the Court is willing to strike down improper racial gerrymanders but refuses to hear claims of improper partisan gerrymandering—as showcased by its decision in *LULAC*[154]—underscores a fundamental pattern of the Court's jurisprudence. Although the Court has vigorously protected minority groups from

151. *Id*. at 316 (Kennedy, J., concurring in the judgment).

152. On the Roberts Court, Justice Kennedy retains his decisive power on this issue: With Justices Breyer, Ginsburg, Souter, and Stevens prepared to grant relief for claims of partisan gerrymandering, a vote in favor of justiciability given by Justice Kennedy would supply the critical fifth vote needed for a majority opinion. *See id.* at 306 (Kennedy, J., concurring in the judgment) ("While agreeing with the plurality that the complaint the appellants filed in the District Court must be dismissed, and while understanding that great caution is necessary when approaching this subject, I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases."). The replacement of Chief Justice Rehnquist and Justice O'Connor with Chief Justice Roberts and Justice Alito has not produced a majority of justices willing to reach the merits of partisan gerrymandering claims. *See LULAC*, 126 S. Ct. at 2594, 2652 (Roberts, C.J., joined by Alito, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("I agree with the determination that appellants have not provided 'a reliable standard for identifying unconstitutional political gerrymanders.' The question whether any such standard exists . . . has not been argued in these cases. I therefore take no opinion on that question, which has divided the Court . . . ." (citation omitted)).

153. *See supra* Part I.A.

154. *LULAC*, 126 S. Ct. at 2612, 2616.

political abuse, it has largely refused to safeguard the operation of the majoritarian democratic system as a whole.

This course of action was not preordained. In the famous footnote four to *United States v. Carolene Products Company*,[155] Justice Harlan Fiske Stone laid out three categories of cases in which "exacting judicial scrutiny" may be appropriate.[156] The second of these three categories was those cases involving legislative activity that "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[157] When political actors seek to entrench their power by restricting the ability of the electorate to make changes to the political status quo, this justification for heightened judicial scrutiny is squarely invoked.[158]

John Hart Ely was a champion of this basis for judicial review, and he expressed his view of footnote four's second category as follows: "[I]t is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open."[159] Professor Ely understood well the implications of the Court's willingness to police the use of race in redistricting schemes while turning a blind eye to partisan entrenchment schemes. He found it ridiculous that the Court allowed legislators to claim an intent to entrench their political party as a defense against allegations that they improperly used race in redistricting.[160]

On a more fundamental doctrinal level, Justice Scalia and other opponents of judicial oversight of political redistricting take issue

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155. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

156. *Id.* at 152 n.4.

157. *Id.* The first category, instances where a specific textual tenet of the Constitution has been violated, has always been a focal point of the Court's review. The third category invokes the antidiscrimination approach to judicial review: judicial intervention is appropriate to safeguard the rights of "discrete and insular minorities" whose rights the majoritarian political process cannot be relied upon to safeguard. *Id.*

158. *Id.*

159. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 76 (1980).

160. Ely, *supra* note 9, at 620 (stating that such arguments made Ely feel "as if I've entered Mondo Bizarro"). Ely was reacting to opinions in cases such as *Miller v. Johnson*, 515 U.S. 900, 942 (1995) (Ginsburg, J., dissenting), in which certain Justices argued that evidence of overtly partisan motives in redistricting may be presented as a valid defense against claims of minority vote dilution brought under § 2 of the Voting Rights Act. In *Easley v. Cromartie*, 532 U.S. 234, 257 (2001), the Court majority expressly adopted this argument. "The basic question is whether the legislature drew District 12's boundaries because of race *rather than* because of political behavior (coupled with traditional, nonracial districting considerations)." *Id.*

with the notion that political groups have any right at all to fair representation. In *Vieth*, Justice Scalia lambasted the plaintiffs for bringing a claim founded upon their "right to proportional representation."[161] Stating that "the Constitution contains no such principle," he pointed out that the Constitutional text "nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers."[162]

Justice Scalia's argument is well considered, but it is subject to criticism on the ground that it is overly formalistic. The Constitution is agnostic about the existence of organized political parties; because many of the Framers hoped to spare the nation the problems associated with entrenched political parties, the Constitution itself makes no mention of them in its text.[163] To deny, however, the practical power that political parties exert on the electoral process is an exercise in self-deception.

The famous "white primary" cases—which predate the reapportionment era—demonstrate the Court's past willingness to recognize how the machinations of political parties dominate the electoral process. In *Smith v. Allwright*,[164] the Court struck down a whites-only primary system after rejecting the contention that state political parties are purely private groups whose behavior the Constitution does not regulate.[165] The Court stated, "Constitutional rights would be of little value if they could be thus indirectly denied."[166] Similarly, in *Terry v. Adams*,[167] the Court rejected the "formalistic argument[]" that political parties are "mere private groups" that do not fall within the scope of constitutional restraints.[168] When confronted with a wave of egregious partisan gerrymanders

161. Vieth v. Jubelirer, 541 U.S. 267, 288 (2004) (plurality opinion).

162. *Id.*

163. The U.S. Constitution Online, Things That Are Not in the U.S. Constitution, http://www.usconstitution.net/constnot.html#pparty (last visited Mar. 20, 2008) ("Political parties are such a basic part of our political system today, that many people might assume the Constitution must at least mention parties in one way or another . . . but there is absolutely no mention of political parties anywhere in the Constitution." (omission in original)).

164. Smith v. Allwright, 321 U.S. 649 (1944).

165. *Id.* at 663–65.

166. *Id.* at 664; *see also* Reynolds v. Sims, 377 U.S. 533, 563 (1964) ("One must be ever aware that the Constitution forbids 'sophisticated as well as simpleminded modes of discrimination.'" (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939))).

167. Terry v. Adams, 345 U.S. 461 (1953).

168. *Id.* at 466.

engineered by political party operatives, the Court should not blind itself to the fact that political parties control the very core of the electoral process in a way that farmers and urban dwellers do not.

The Court's refusal to tackle the issue of partisan gerrymandering invites the continued use of districting processes "with pathologies every bit as troubling as the one the Warren Court dismantled."[169] "As one member of Congress put it, '[b]ecause the districts in Congress are more and more one-party dominated, the American Congress is more extreme.' The result is not only less electoral accountability but also more fractiousness in government . . . ."[170]

In his controlling *Vieth* opinion, Justice Kennedy refused to slam the door on future claims of unconstitutional partisan gerrymandering.[171] In preserving the opportunity for a future Court to hold partisan gerrymandering claims justiciable, Justice Kennedy pointed out that partisan gerrymandering antics trigger a number of traditional justifications for judicial review. He cited footnote four of *Carolene Products* directly and cautioned:

> Where important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution. Allegations of unconstitutional bias in apportionment are most serious claims, for we have long believed that "the right to vote" is one of "those political processes ordinarily to be relied upon to protect minorities."[172]

The landmark reapportionment-era decisions of *Baker* and *Reynolds* stand as triumphant examples of anti-entrenchment jurisprudence.[173] As discussed at length in Part II.C,[174] these decisions are universally praised as bold and well-considered steps taken by the Court to clear the dust out of the political process. Invoking the Equal Protection Clause to dispose of partisan gerrymandering claims

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169. Sullivan & Karlan, *supra* note 46, at 713.

170. Issacharoff, *supra* note 50, at 629 (quoting U.S. Rep. John Tanner) (alteration in original) (footnote omitted)).

171. Vieth v. Jubelirer, 541 U.S. 267, 311–12 (2004) (Kennedy, J., concurring in the judgment).

172. *Id*. (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)).

173. Sullivan & Karlan, *supra* note 46, at 708; *see also* Karlan, *supra* note 49, at 1334 ("Both the Warren Court and Ely recognized that one person, one vote . . . is really a majoritarian principle dressed in individual rights rhetoric . . . .").

174. *See supra* Part II.C.

seems the next logical step if the Court is ever to pursue the course of anti-entrenchment jurisprudence beyond the initial successful forays of the reapportionment cases. In his controlling opinion in *Vieth*, Justice Kennedy aptly observed, "Our willingness to enter the political thicket of the apportionment process with respect to one-person, one-vote claims makes it particularly difficult to justify a categorical refusal to entertain claims against this other type of gerrymandering."[175]

The reapportionment-era decisions, and *Reynolds* in particular, paved the way for Justice Stevens' dissenting opinion in *Vieth* and all other major judicial efforts to rein in blatant partisan gerrymanders. Nevertheless, the formidable legacy of one person, one vote has been a mixed blessing. Although the success of this standard suggests that the courts can successfully engage what had previously been considered the purely political realm of districting, its simplicity and ease of execution are so universally praised that each of the metrics available to police partisan gerrymanders seems cumbersome in comparison.

B. A Defense of the Prospective Standards

In declining to consider the partisan gerrymandering claim in *Vieth*, the Court found it dispositive that no standard existed that was as "solid," as "judicially manageable,"[176] and as likely as one person, one vote "to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking."[177]

This concern seems overstated. If the reapportionment decisions are any guide, there is every reason to believe that the Court's legitimacy will not be undermined should it choose to correct so grave a structural flaw in the electoral process—namely, the partisan gerrymandering that has reduced many if not most congressional elections to a "farce" and has thrust legislators and political party operatives into "the business of rigging elections."[178]

There are several reasons to believe that a future Court's decision to invoke the Equal Protection Clause to strike down gerrymandered districting plans would not result in any loss of

175. *Vieth*, 541 U.S. at 310 (Kennedy, J., concurring in the judgment).
176. *Id.* at 268 (plurality opinion).
177. *Id.* at 291.
178. *See supra* notes 22, 26 and accompanying text.

legitimacy. First, a future Court need *not* overrule established precedent to do so. In *Davis v. Bandemer*, the Court first held claims of partisan gerrymandering justiciable under the Equal Protection Clause.[179] Justice Kennedy's controlling opinions in both *Vieth* and *LULAC* refused to explicitly overrule *Bandemer* and left the door wide open for a future Court to consider claims of partisan gerrymandering under the Equal Protection Clause.[180] The flexible state of the Court's jurisprudence on this issue stands in stark contrast to the uniformly unfavorable precedent that existed at the time the Court decided the reapportionment cases.[181]

Second, the American public, like the Court, recognizes the highly visible elements[182] that have converged to create the crisis in partisan gerrymandering. The American public's recognition of the grave danger that partisan gerrymandering presents for democratic governance will lead it to appreciate a future Court's willingness to fashion new doctrine and more assertively police the districting process to root out partisan gerrymandering. In deciding a well-known case that raised deep questions about the value of precedent and the virtue of judicial restraint, three sitting Justices observed: "[T]he Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[183] Although the process of making legally principled decisions typically requires close

179. Davis v. Bandemer, 478 U.S. 109, 119 (1986). *Davis v. Bandemer* is weak precedent. *See* Issacharoff, *supra* note 74, at 1671 ("Whereas *Baker* was followed within two years by *Reynolds* and *Wesberry* and their clear articulation of the one-person, one-vote standard, *Bandemer* begot only confusion."). In this Section, it is important to note only that a future Court decision to reach the merits of a partisan gerrymandering claim would not conflict with *Bandemer* in any way.

180. *See supra* notes 6–8 and accompanying text. Justice Kennedy appreciated the beneficial flexibility that his opinion allowed going forward: "A determination by the Court to deny all hopes of intervention could erode confidence in the courts as much as would a premature decision to intervene." *Vieth*, 541 U.S. at 310 (Kennedy, J., concurring in the judgment).

181. *See* Baker v. Carr, 369 U.S. 186, 266–67 (1962) (Frankfurter, J., dissenting) ("The Court today reverses a uniform course of decision established by a dozen cases, including one by which the very claim now sustained was unanimously rejected only five years ago . . . . Such a massive repudiation of the experience of our whole past in asserting destructively novel judicial power demands a detailed analysis of the role of this Court in our constitutional scheme . . . . It may well impair the Court's position as the ultimate organ of 'the supreme Law of the Land' in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce.").

182. These elements are the "rapid advances in information technology" and "an increasingly rancorous partisan political climate." *See supra* Part I.A.

183. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 866 (1992).

adherence to past jurisprudence to ensure that the Court's claimed "justification" for its action is "beyond dispute," this theory of legitimacy leaves room for the Court to fashion new doctrine when necessary.[184]

Finally, it would be shortsighted to overemphasize the apparent unattractiveness of the standards available to judge overly partisan gerrymanders as compared to the "elegance" of the one-person, one-vote standard. As discussed in Section A,[185] the one-person, one-vote standard may seem elegant in retrospect, but it was not considered elegant at the time it was created. Rather, the one-person, one-vote standard was harshly criticized for being an overly simplistic example of improper judicial rulemaking.[186] The prospective standards' relative complexity may present a challenge to their effective communication throughout the polity—but this complexity may also ward off some of the "judicial rulemaking" criticism that a simpler metric might invite.

CONCLUSION

In responding to the arguments against the justiciability of partisan gerrymandering claims, Justice Stevens has declared that "several standards for identifying impermissible partisan influence are available to judges."[187] The only missing element, in his opinion, is the "will to enforce them."[188]

Considered in light of the nation's experience with reapportionment, the arguments against the justiciability of partisan gerrymanders do seem overblown. This Note has drawn a parallel between the epidemic of partisan gerrymandering and the breakdown in the democratic process that precipitated the reapportionment decisions. Given the manner in which the reapportionment decisions are viewed in retrospect—as courageous and necessary steps taken by the Court to correct a grave breakdown in the democratic process—it seems likely that should a future Court decide to reach the merits of

184. *Id.* ("People understand that some of the Constitution's language is hard to fathom and that the Court's Justices are sometimes able to perceive significant facts or to understand principles of law that eluded their predecessors and that justify departures from existing decisions . . . . [T]he country can accept some correction of error without necessarily questioning the legitimacy of the Court.").

185. *See supra* Part IV.A.

186. *See supra* notes 84–85 and accompanying text.

187. Vieth v. Jubelirer, 541 U.S. 267, 341 (Stevens, J., dissenting).

188. *Id.*

partisan gerrymandering claims, such action would similarly bolster the legitimacy of the Court in the long run.