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IN RE 2012 LEGISLATIVE DISTRICTING: MARYLAND HIGH COURT DECISION EXEMPLIFIES LACKLUSTER FEDERAL GUIDANCE ON REDISTRICTING

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Days after the beginning of his administration in January 2009, President Barack Obama shut down an argument with then-House Republican Whip Eric Cantor by informing Congressman Cantor that "[e]lections have consequences."[1] What has become increasingly clear in recent years is that state elections—particularly state elections conducted immediately prior to a national census and subsequent redistricting—may have profound consequences on future elections.[2] Since the Supreme Court decided that partisan gerrymandering claims are justiciable in *Davis v. Bandemer*[3] nearly thirty years ago, state and federal judiciaries have wrestled with applying the Court's holding to claims of state partisan gerrymandering.[4] In *In re 2012 Legislative Districting*,[5] the Maryland Court of Appeals upheld the legislative apportionment plan ("the Redistricting Plan") passed by the Maryland State Legislature in 2012 following the 2010 United States Census.[6] This Note will argue that the Court of Appeals erred when it distinguished the Maryland Redistricting Plan from the Georgia apportionment plan reviewed in *Larios v. Cox*,[7] and should instead have struck down the Redistricting Plan as partisan discrimination in violation of the "one person, one vote" principle of the Equal Protection Clause of the Fourteenth Amendment.[8] More fundamentally, this Note argues that the standard ap-

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1. New Business, *How the Political Gridlock in Washington Might End*, BLOOMBERG BUSINESSWEEK (Feb. 24, 2010), http://www.businessweek.com/magazine/content/10_10/b4169000096164.htm.

2. *See infra* Part IV; *see also* Sam Wang, *The Great Gerrymander of 2012*, N.Y. TIMES (Feb. 2, 2013), http://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html ("The $30 million strategy consists of two steps for tilting the playing field: take over state legislatures before the decennial Census, then redraw state and Congressional districts to lock in partisan advantages. The plan was highly successful.").

3. 478 U.S. 109 (1986).

4. *See infra* Part II.B.1. For a definition of gerrymandering, see *infra* notes 33, 36.

5. 436 Md. 121, 80 A.3d 1073 (2013).

6. *Id.* at 130, 80 A.3d at 1077; *see infra* Part III.

7. 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004). The *Larios* court reviewed the constitutionality of a state legislative redistricting plan similar to the one put in place in Maryland. *See infra* Part IV.

8. U.S. CONST. amend. XIV; *see also* Reynolds v. Sims, 377 U.S. 533, 568 (1964).

plied by the Court of Appeals in reaching its decision was internally incoherent and stands as an unfortunate descendant of the Supreme Court's ambiguous and impracticable opinion in *Davis*.[9] The Court of Appeals' decision, including its failure to articulate a practicable standard by which to judge future redistricting efforts, marks another step in the continuing erosion of the public's faith in the integrity of the electoral system.[10]

I. THE CASE

The 2010 Census found that Maryland had an adjusted population of 5,772,231 residents.[11] The Maryland Legislature consists of forty-seven Legislative Districts containing forty-seven Senators and 141 Delegates.[12] Pursuant to the "one person, one vote" principle of the Equal Protection Clause of the United States Constitution,[13] this translates to 122,813 residents in an ideal Legislative District, and 40,938 residents in an ideal single-member Delegate Subdistrict.[14] According to the standard for "substantial equality across legislative districts," requiring a population variance no greater than ten percent between the most populous and least populous districts,[15] the largest district in Maryland should contain no more than 128,953 people, and the smallest no fewer than 116,673 people.[16]

Article III, Section five of the Maryland Constitution requires that within two years of each United States Census, the State's forty-seven legislative districts be reapportioned.[17] Following the 2010 Census, Maryland's Governor Martin O'Malley convened the Governor's Redistricting Advisory Committee ("GRAC").[18] The GRAC was formed to hold public

9. *See infra* Part IV.A.

10. *See infra* Part IV.C.

11. *In re 2012 Legislative Districting*, 436 Md. at 131, 80 A.3d at 1078. Pursuant to Maryland's No Representation Without Population Act of 2010, Maryland census data "must be adjusted to reassign Maryland residents in correctional institutions to their last known address and to exclude out-of-state residents in correctional institutions from redistricting." *No Representation Without Population Act*, MARYLAND DEP'T OF PLANNING, http://www.planning.maryland.gov/Redistricting/2010/newLaw.shtml (last visited Dec. 16, 2014).

12. *In re 2012 Legislative Districting*, 436 Md. at 127 & n.2, 80 A.3d at 1076 & n.2.

13. *See infra* Part II.A.

14. *In re 2012 Legislative Districting*, 436 Md. at 131, 80 A.3d at 1078.

15. *See infra* Part II.C.

16. *In re 2012 Legislative Districting*, 436 Md. at 156–57, 80 A.3d at 1093 (citing Voinovich v. Quilter, 507 U.S. 146, 161 (1993); Brown v. Thomson, 462 U.S. 835, 842–43 (1983)).

17. MD. CONST. art. III, § 5.

18. *In re 2012 Legislative Districting*, 436 Md. at 128, 80 A.3d at 1076. Members of the GRAC included:

> Jeanne D. Hitchcock, Esq., the Governor's Appointments Secretary, as Chair; Thomas V. Mike Miller, Jr., President of the Maryland Senate; Michael E. Busch, Speaker of the Maryland House of Delegates; James King, a former member of the House of Delegates from Anne Arundel County; and Richard Stewart, Chief Executive Officer of Montgomery Mechanical Services.

hearings, accept public comment, and draft a plan for the legislative reapportionment.[19] Of the active politicians involved in the redistricting effort, Governor Martin O'Malley (represented by Ms. Hitchcock) was a Democrat;[20] Speaker Michael Busch was a Democrat;[21] and Senate President Thomas Mike Miller was a Democrat.[22] Mr. Richard Stewart also was a Democrat.[23] The lone Republican on the GRAC was former Delegate James King.[24]

In December 2011, the GRAC published the Redistricting Plan, which the Governor then presented to the Maryland General Assembly.[25] In addition to the statistical evidence of partisan gerrymandering described in the next paragraph, the Redistricting Plan contained districts that are conspicuously not compact.[26] For instance, Maryland's 3rd District winds a twisting path along and away from the Chesapeake Bay, including suburbs to the north of Washington, D.C., as well as the western shore of the Chesapeake Bay, Annapolis, a small part of East Baltimore, another Baltimore City neighborhood near Clifton Park, and parts of suburbs to the northeast and the northwest of Baltimore.[27] No alternative redistricting plan was introduced by the General Assembly, and the Plan became law on February 24, 2012.[28] At the time the Plan became law, the Maryland Senate contained

Id. at 128 n.5, 80 A.3d at 1076 n.5.

19. *Id.* at 128, 80 A.3d at 1076.

20. *Biography of Martin J. O'Malley*, MARYLAND MANUAL ON-LINE, http://msa.maryland.gov/msa/mdmanual/08conoff/gov/former/html/msa13090.html (last visited Mar. 9, 2015).

21. *Biography of Michael E. Busch*, MARYLAND MANUAL ON-LINE, http://msa.maryland.gov/msa/mdmanual/06hse/html/msa12196.html (last visited Nov. 21, 2014).

22. *Biography of Thomas V. Mike Miller, Jr.*, MARYLAND MANUAL ON-LINE, http://msa.maryland.gov/msa/mdmanual/05sen/html/msa01619.html (last visited Nov. 21, 2014).

23. Report of the Special Master at 2 n.1 (Sept. 2012), [hereinafter Special Master Report], *available at* http://www.courts.state.md.us/coappeals/highlightedcases/2012districting/specialmastersreport.pdf.

24. *Biography of James J. King*, MARYLAND MANUAL ON-LINE, http://msa.maryland.gov/msa/mdmanual/06hse/former/html/msa14622.html (last visited Nov. 21, 2014).

25. *In re* 2012 Legislative Districting, 436 Md. 121, 128, 80 A.3d 1073, 1076 (2013).

26. Most courts determine whether a district is "compact" by an intuitive "eyeball" test—a district is considered to be compact if it looks compact and is similar in shape to other districts in the state. Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially Manageable Standard and Other Reform Options for Partisan Gerrymandering*, 46 HARV. J. ON LEGIS. 243, 262 (2009).

27. AZAVEA, REDRAWING THE MAP ON REDISTRICTING 2012 ADDENDUM 5 (2012), *available at* http://cdn.azavea.com/com.redistrictingthenation/pdfs/Redistricting_The_Nation_Addendum.pdf.

28. *In re 2012 Legislative Districting*, 436 Md. at 127–28, 80 A.3d at 1076.

thirty-five Democrats and twelve Republicans;[29] the Maryland House contained ninety-eight Democrats and forty-three Republicans;[30] and the Governor was a Democrat.[31]

Petitioner Cynthia Houser was the named party in a group of twenty-two voters from twelve legislative districts.[32] Houser filed a petition alleging that, inter alia, the Redistricting Plan violated the Equal Protection Clause because it contained impermissible partisan discrimination.[33] Specifically, Houser alleged that while the Redistricting Plan did not violate the ten percent rule,[34] the Redistricting Plan's maximum deviation nearly violated the rule at 9.41%.[35] Moreover, thirty-nine of the forty-two districts that voted for the Republican candidates for President and Governor were overpopulated in the Redistricting Plan,[36] twenty-five by more than four percent.[37] On the other hand, sixteen of twenty-one of the comparatively urban areas of Montgomery County, Prince George's County, and Baltimore City—all Democratic strongholds—were underpopulated.[38] Of the thirty-seven majority African-American delegate districts—also strongly aligned with the Democratic Party—thirty were underpopulated, twenty-

29. 2012 STATE AND LEGISLATIVE PARTISAN COMPOSITION, NAT'L CONFERENCE OF STATE LEGISLATURES (June 6, 2012), *available at* http://www.ncsl.org/documents/statevote/2012_legis_and_state.pdf.

30. *Id.*

31. *See Biography of Martin J. O'Malley*, *supra* note 20.

32. *In re 2012 Legislative Districting*, 436 Md. at 159, 80 A.3d at 1094–95. Other petitioners filed claims arguing the unconstitutionality of the redistricting plan on separate grounds; however, Houser's are the only claims alleging impermissible partisan discrimination, and therefore, her petition is the only relevant one for the purposes of this Note.

33. *Id.*, 80 A.3d at 1095. Impermissible political discrimination, also known as "gerrymandering," has been described by the Supreme Court as "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes." Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969). While many commentators attempt to distinguish between "one person, one vote" violations and "gerrymandering," the Court of Appeals correctly recognized such violations as simply a means of gerrymandering (or of other types of discrimination). *In re 2012 Legislative Districting*, 436 Md. at 182, 80 A.3d at 1108.

34. *See id.* at 156–57, 80 A.3d at 1093 (describing the standard for "substantial equality across legislative districts" as requiring a population variance no greater than ten percent between the most populous and least populous districts); *see also infra* Part II.C.

35. *In re 2012 Legislative Districting*, 436 Md. at 161, 80 A.3d at 1096.

36. Strategically "overpopulating" and "underpopulating" certain districts is a classic method of gerrymandering. A gerrymandered plan will pack as many people as possible into districts likely to vote for the opposing political party, while putting as few people as possible in districts likely to vote for incumbents, thus blunting the ability of the opposing party to gain a numeric advantage in the legislature. *See* Kristina Betts, *Redistricting: Who Should Draw the Lines? The Arizona Independent Redistricting Commission as a Model for Change*, 48 ARIZ. L. REV. 171, 184–85 (2006).

37. *In re 2012 Legislative Districting*, 436 Md. at 161, 80 A.3d at 1096.

38. *Id.*

eight by more than four percent, and twenty-five of those by 4.49% or more.[39]

In response to a motion filed by the Maryland Attorney General requesting that the Court of Appeals issue procedures for filing challenges to the Redistricting Plan, the Court of Appeals named Alan M. Wilner, a retired judge of the Court of Appeals, as the Court's Special Master, and empowered him to conduct any required hearings.[40] Judge Wilner conducted hearings on September 5, 2012, and parties were permitted to submit expert reports and other evidence without objection.[41] The Special Master issued a recommendation that challenges to the Redistricting Plan be denied.[42] The parties filed exceptions, and the Court of Appeals heard oral arguments regarding whether the Redistricting Plan violated the Voting Rights Act of 1965 or the Constitutions of the United States or the State of Maryland.[43]

II. LEGAL BACKGROUND

Beginning with *Reynolds v. Sims*[44] roughly fifty years ago, the Supreme Court has interpreted the Equal Protection Clause to require that states "construct districts, in both houses of its legislature, as nearly of equal population as is practicable."[45] In a related decision, *Davis v. Bandemer*,[46] the Supreme Court found in 1986 that partisan gerrymandering claims were justiciable, although that was the sole issue to which a majority of the Court could agree—only a plurality of the Court was able to converge on a standard.[47] In 2004, in *Vieth v. Jubelirer*,[48] the Supreme Court attempted once again to create a standard for adjudicating claims of partisan gerrymandering but ultimately arrived at the same result it did in *Davis*: while five justices concluded that such claims were properly justiciable, no majority was able to agree upon a standard.[49] In place of a comprehensive standard, the Supreme Court has only set certain parameters around the periphery of the issue, including holding that "de minimis" population deviations of less than ten percent are insufficient by themselves to establish a prima facie case of impermissible partisan discrimination.[50]

39. *Id.* at 161 n.27, 80 A.3d at 1096 n.27.

40. *Id.* at 128–29, 80 A.3d at 1077.

41. *Id.* at 129, 80 A.3d at 1077.

42. *Id.* at 129–30, 80 A.3d at 1077; Special Master Report at 19, 34, 74.

43. *In re 2012 Legislative Districting*, 436 Md. at 130, 138, 144, 159–60, 80 A.3d at 1077, 1082, 1086, 1095.

44. 377 U.S. 533 (1964).

45. *Id.* at 577; *see infra* Part II.A.

46. 478 U.S. 109 (1986).

47. *Id.* at 113; *see infra* Part II.B.1.

48. 541 U.S. 267 (2004).

49. *See infra* Part II. B.2.

50. *See infra* Part II.C.

A. The Supreme Court Has Interpreted the Equal Protection Clause to Require States to Construct Districts as Close in Population as Practicable

The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[51] Beginning approximately fifty years ago in *Reynolds v. Sims*,[52] the Supreme Court interpreted the Equal Protection Clause as requiring that States make a good-faith effort to construct legislative districts that are "as nearly of equal population as is practicable."[53] This has come to be known as the "one person, one vote" doctrine.[54] The doctrine derives from the Court's reasoning that "[l]egislators represent people, not trees or acres."[55] The Court explained that if the populations of voting districts are manipulated, the discriminatory effect on the voters living in overpopulated areas would be mathematically demonstrable.[56] Stated differently, "[o]verweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there."[57]

In the same term as *Reynolds*, the Supreme Court decided *Roman v. Sincock*,[58] which found that courts should not attempt to establish "rigid mathematical standards" for reviewing state legislative redistricting plans for constitutional validity under the Equal Protection Clause.[59] Instead, the Court required that state governments could only deviate from population-based representation based on factors free from "any taint of arbitrariness or discrimination."[60] Both *Reynolds* and *Roman* involved allegations of legislative districts that had become outdated over time, resulting in the effective devaluation of the votes of those living in districts that had become overpopulated.[61] Thus, neither case involved claims of political gerrymandering.

51. U.S. CONST. amend. XIV, § 1.
52. 377 U.S. 533 (1964).
53. *Id.* at 577.
54. Davis v. Bandemer, 478 U.S. 109, 118 (1986).
55. *Reynolds*, 377 U.S. at 562.
56. *Id.* at 563.
57. *Id.*
58. 377 U.S. 695 (1964).
59. *Id.* at 710.
60. *Id.*
61. *Reynolds*, 377 U.S. at 540; *Roman*, 377 U.S. at 704–05.

B. Although It Has Declined to Find Partisan Gerrymandering Claims Non-Justiciable, the Court Has Yet to Identify a Controlling Standard

On multiple occasions, the Court has addressed a two-part question: (1) are partisan gerrymandering claims justiciable; and (2) if so, by what standard should such claims be adjudicated?[62] Each time, the Court has held that partisan gerrymandering claims were justiciable but was unable to form a majority to agree upon a standard by which to evaluate such claims.[63]

1. Davis v. Bandemer *Represented the Supreme Court's Original Attempt at Producing a Standard for Reviewing Partisan Gerrymandering Claims but Failed to Produce a Majority on That Issue*

The Court confronted the issue of whether partisan gerrymandering claims were justiciable in the 1986 case of *Davis v. Bandemer*.[64] In *Davis*, the Court held that a claim alleging unconstitutional political gerrymandering was indistinguishable from racial gerrymandering claims for the purposes of justiciability.[65] The Court further held that in order for a complainant to demonstrate unconstitutional partisan discrimination, the comcomplainant would need to demonstrate intentional discrimination that had an actual discriminatory effect on an identifiable political group.[66] The Court stated that a certain level of discriminatory intent and outcome from redistricting was unavoidable,[67] and that a successful complainant would need to demonstrate that the electoral system had been "arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[68]

Davis involved a challenge brought against the 1981 Indiana State legislative reapportionment on the basis that it discriminated against Democrats.[69] The posture of this case was notable in that the trial court was able to examine the "results" of the redistricting because the State held an election between the reapportionment and the trial.[70] In that election, Democrats received 51.9% of the votes in the House races statewide, but garnered

62. *See* Davis v. Bandemer, 478 U.S. 109 (1986); Vieth v. Jubelirer, 541 U.S. 267 (2004).
63. *See infra* Parts II.B.1–2.
64. 478 U.S. 109 (1986).
65. *Id.* at 125.
66. *Id.* at 127.
67. *Id.* at 128–29 (quoting Gaffney v. Cummings, 412 U.S. 735, 753 (1973)).
68. *Id.* at 132.
69. *Id.* at 113.
70. *Id.* at 115.

just forty-three of the 100 available House seats.[71] In two counties that the Democrats alleged were particularly heavily gerrymandered, Democratic candidates won 46.6% of the vote and secured just three of the twenty-one available House seats in the county.[72]

The Supreme Court first turned to the question of whether political gerrymandering claims of this nature were justiciable.[73] It addressed the argument that such claims ought not be justiciable pursuant to the "political question" doctrine, which, under the test articulated by the Supreme Court in *Baker v. Carr*,[74] provides that the courts may not address questions which have been constitutionally committed to other branches of government or for which judicially manageable standards for resolving the claim are not available.[75] The Court explained that the "political question" doctrine analysis it undertook in *Baker*, in which it resolved an equal protection claim based on what was effectively a "one person, one vote" violation,[76] applied equally to equal protection claims alleging political gerrymandering.[77] In her concurrence in judgment, Justice O'Connor stated that there existed "intractable difficulties in deriving a judicially manageable standard from the Equal Protection Clause for adjudicating political gerrymandering claims."[78] The Part II majority rejected this argument, finding that Justice O' Connor failed to articulate how the plurality's standard was any less manageable than the standard the courts had long used to adjudicate racial

71. *Id.*

72. *Id.*

73. *Id.* at 118.

74. 369 U.S. 186 (1962).

75. *Id.* at 210, 217.

76. *Baker* was decided prior to the articulation of the "one person, one vote" doctrine in *Reynolds. Davis*, 478 U.S. at 123.

77. The *Davis* Court explained:

> In holding that claim to be justiciable, the Court concluded that none of the identifying characteristics of a political question were present: "The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. 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."
>
> This analysis applies equally to the question now before us.

478 U.S. at 122–23 (quoting *Baker*, 369 U.S. at 226).

78. *Id.* at 155 (O'Connor, J., concurring).

gerrymandering claims.[79] Accordingly, the Court found that political gerrymandering claims were justiciable.[80]

The Court next turned to its equal protection analysis.[81] The *Davis* plurality found that for the plaintiffs to succeed, they must demonstrate "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."[82] This so-called "intent plus effects" requirement is a well-established part of equal protection jurisprudence. The requirement has featured prominently in equal protection cases in which plaintiffs allege that a defendant's actions had a racially disparate impact. For instance, in *Washington v. Davis*,[83] the Court held that official action will not be held unconstitutional solely because it results in a racially disproportionate impact, and that racially discriminatory intent or purpose also is required to show a violation of the Equal Protection Clause.[84] The following year, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[85] the Supreme Court upheld but weakened this standard, holding, inter alia, that the impact of a law can be so clearly discriminatory as to allow no other explanation than that it was adopted for impermissible purposes.[86] While the language is slightly different in the racially disparate impact cases, the relationship is clear: the "intent plus effects" required by the *Davis* plurality is equal to and derived from the "purpose plus impact" requirements in *Washington* and its predecessors.[87]

The plurality opinion in *Davis*, however, stressed that political outcomes from redistricting, and thus political considerations while redistricting, were unavoidable.[88] Consequently, according to the *Davis* plurality, a certain baseline level of intent plus effects was inextricable from the redistricting process.[89] To demonstrate unconstitutional partisan discrimination,

79. *Id.* at 125 (majority opinion). While Justice White's opinion in *Davis* is a plurality opinion, a majority of the Justices joined in Part II of the opinion, which held that political gerrymandering claims are justiciable.

80. *Id.* at 125, 127.

81. While the plurality's equal protection analysis was not binding on future Supreme Court decisions, it formed the basis for the equal protection analysis that has occurred in the lower courts after *Davis*. *See* Vieth v. Jubelirer, 541 U.S. 267, 279 (2004) ("Nor can it be said that the lower courts have, over 18 years, succeeded in shaping the standard that this Court was initially unable to enunciate. They have simply applied the standard set forth in *Bandemer*'s four-Justice plurality opinion.").

82. *Davis*, 478 U.S. at 127.

83. 426 U.S. 229 (1976).

84. *Id.* at 239.

85. 429 U.S. 252 (1977).

86. *Id.* at 266 ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.").

87. *See Davis*, 478 U.S. at 127.

88. *Id.* at 128–29.

89. *Id.*

therefore, the Court required that a complainant demonstrate that the electoral system had been "arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[90] The Court further clarified that even with evidence showing that the state legislature intentionally set out to disadvantage a political party's electoral chances, such intentional discrimination would not be unconstitutional without a subsequent effect—that is, evidence that the disadvantaged party had, in fact, been adversely affected in subsequent elections.[91] Even this rigorous burden, however, was not enough.[92] The Court provided that disproportionate results in one election would not be sufficient to indicate a constitutional violation and held that it would only find an equal protection violation "where a history of disproportionate results appeared in conjunction with strong indicia of lack of political power and the denial of fair representation."[93] Applying this lofty standard to the facts presented, the plurality found that the *Davis* plaintiffs had not established a prima facie case of unconstitutional partisan discrimination.[94]

2. *Eighteen Years After* Davis, *the Supreme Court Revisited the Question and Yet Again Emerged Without a Majority Standard*

The *Davis* holding that political gerrymandering claims were justiciable would later be harshly criticized by the plurality opinion in *Vieth v. Jubelirer*.[95] Although *Vieth* did not overturn *Davis*,[96] the *Vieth* plurality, led by Justice Scalia, condemned the *Davis* plurality's reasoning, finding that the *Davis* Court had only found that political gerrymandering claims were justiciable because it had *not* been persuaded that *no* "judicially discernible and manageable standards" for managing such claims existed.[97] The *Vieth* plurality described this "shifting of the burden" as "clumsy" and noted that no majority existed as to what such judicially discernable standards might be.[98] The *Vieth* plurality stated that in the eighteen years since *Davis*, no legislative or majority standard had been created to fill that void,[99] and further noted that lower courts had similarly been unable to craft a standard of

90. *Id.* at 132.

91. *Id.* at 139.

92. While equal protection scholars may question the notion that "intent plus effects" is a particularly rigorous burden, see *infra* Part IV.B. for a discussion regarding why this requirement is impracticable in this context.

93. *Davis*, 478 U.S. at 139.

94. *Id.* at 134.

95. 541 U.S. 267, 278–79 (2004).

96. A majority of the Justices held in concurring and dissenting opinions that political gerrymandering claims remained justiciable. *Id.* at 317 (Stevens, J., dissenting).

97. *Id.* at 278 (plurality opinion) (quoting *Davis*, 478 U.S. at 123) (internal quotation marks omitted).

98. *Id.* at 278–79.

99. *Id.* at 279.

their own with which to resolve the question left open by the Supreme Court.[100] The *Vieth* plurality cited this ongoing failure to develop a standard for adjudicating claims of unconstitutional partisan gerrymandering as the basis for its argument that no manageable standards for adjudicating such claims exists.[101] The plurality concluded that "[l]acking [such standards], we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided."[102]

In his concurrence in the judgment, Justice Kennedy joined with the four dissenting Justices[103] in rejecting the plurality's reasoning and opinion on the question of justiciability.[104] This left undisturbed the *Davis v. Bandemer* holding that unconstitutional partisan gerrymandering claims were justiciable. Justice Kennedy explained that the mere fact that the courts had not yet been able to articulate a standard for adjudicating partisan gerrymandering claims did not preclude such a standard from being developed.[105] Moreover, Justice Kennedy wrote that "[w]here important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution."[106] The sentiment expressed by Justice Kennedy here echoes that of the Supreme Court in 1964 in *Reynolds v. Sims*, which stated:

> We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.[107]

Notably, as Justice Kennedy states in his opinion concurring in the judgment,[108] even the *Vieth* plurality does not disagree with the judgment that "severe partisan gerrymander[ing]" is "incompatib[le] . . . with democratic principles."[109] The *Vieth* plurality further agreed with Justice Stevens

100. *Id.*
101. *Id.* at 281.
102. *Id.*
103. *Id.* at 317 (Stevens, J., dissenting); *id.* at 346 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting).
104. *Id.* at 306 (Kennedy, J., concurring).
105. *Id.* at 311.
106. *Id.*
107. Reynolds v. Sims, 377 U.S. 533, 566 (1964).
108. *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring).
109. *Id.* at 292 (plurality opinion).

in opining "that an *excessive* injection of politics [into redistricting] is *un*-lawful."[110] All of the dissenting and concurring Justices agree with these principles. What the Justices were still unable to agree on in *Vieth*, as in *Davis*, was what standard ought to be applied to partisan gerrymandering claims.[111] As a result, the lower courts remain in the same quandary they have been in for almost thirty years: political gerrymandering claims are justiciable, but the Court has yet to offer more than an impracticable plurality standard for how such cases should be reviewed.[112]

C. De Minimis Population Deviations of Under Ten Percent Are Insufficient to Establish a Prima Facie Case of Impermissible Discrimination

One guideline courts have looked to regarding whether a particular legislative redistricting was constitutionally permissible was determining if the deviations from population equality crossed a so-called de minimis threshold. In *Brown v. Thomson*,[113] the Supreme Court held that "minor deviations from mathematical equality among state legislative districts [were] insufficient," without further evidence, "to make out a prima facie case of" unconstitutional partisan "discrimination under the Fourteenth Amendment."[114] The *Brown* Court further provided that apportionment plans with maximum population deviations of under ten percent fell within this category of "minor deviations."[115] However, the Court did not state that apportionment plans with less than ten percent population deviations *may not* be found discriminatory; rather, it said that such a small deviation would not constitute sufficient evidence in and of itself.[116] This careful language may have been in response to the Court's opinion in *Roman*, which stated "it is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause."[117] This permissive reading of the de minimis standard was adopted by the U.S. Court of Appeals for the Fourth Circuit in *Daly v. Hunt*,[118] in which the court held that the *Brown* ten percent threshold does not "completely insulate" a state districting plan from attack, but instead only served as a marker

110. *Id.* at 293.

111. *Id.* at 292 ("[T]hese four dissenters come up with three different standards—all of them different from the two proposed in *Bandemer* and the one proposed here by appellants . . . .").

112. *See infra* Part IV.A.

113. 462 U.S. 835 (1983).

114. *Id.* at 842 (quoting Gaffney v. Cummings, 412 U.S. 735, 745 (1973) (citations and internal quotation marks omitted).

115. *Id.*

116. *Id.*

117. Roman v. Sincock, 377 U.S. 695, 710 (1964).

118. 93 F.3d 1212 (4th Cir. 1996).

which allowed a plaintiff to establish a prima facie case of invidious discrimination from statistical evidence alone.[119] The Fourth Circuit stated in *Daly* that petitioners addressing plans with smaller population disparities may still succeed if they are able to produce additional evidence demonstrating "that the apportionment process had a 'taint of arbitrariness or discrimination.'"[120]

In 2004, the Supreme Court suggested that the ten percent deviation was not a safe harbor by summarily affirming, without decision, a U.S. District Court decision finding that a Georgia state legislative redistricting plan with population deviations under ten percent was nevertheless constitutionally infirm.[121] Moreover, the Court so held despite the fact that just one election had been held between the enactment of the redistricting plan and the judicial review of the plan's constitutionality.[122] This result stood in contravention of the plurality view in *Davis*, which stated that the Court had found "equal protection violations only where a history of disproportionate results appeared in conjunction with strong indicia of lack of political power and the denial of fair representation."[123]

III. THE COURT'S REASONING

In *In re 2012 Legislative Districting*,[124] the Maryland Court of Appeals upheld the legislative apportionment plan put in place by Maryland following the 2010 United States Census, finding that it did not constitute impermissible partisan discrimination under the Fourteenth Amendment Equal Protection Clause.[125] The Court of Appeals' analysis focused primarily on two questions: (1) whether partisan discrimination is a permissible aim of the Maryland legislature in legislative reapportionment, and if so, what limits should be placed on such discrimination; and (2) whether such partisan discrimination took place in the Redistricting Plan.

The Houser petitioners argued, inter alia, that the intent of the Redistricting Plan was to "punish Republicans and reward Democrats."[126] As a threshold matter, the Court of Appeals reiterated its 2002 holding in *In re*

119. *Id.* at 1220.

120. *Id.* (quoting *Roman*, 377 U.S. at 710).

121. Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004).

122. *Id.* at 1327.

123. Davis v. Bandemer, 478 U.S. 109, 139 (1986).

124. 436 Md. 121, 80 A.3d 1073 (2013).

125. *Id.* at 179, 80 A.3d at 1106–07. *N.b.*, the Redistricting Plan was challenged by multiple groups of petitioners, who brought claims on multiple grounds. *Id.* at 130, 138, 144, 159–60, 80 A.3d at 1077, 1082, 1086, 1094–95. For the purposes of this Note, however, the discussion will be focused on the Court's Equal Protection Clause analysis and how it fits into the greater discussion regarding political gerrymandering.

126. *Id.* at 161, 80 A.3d at 1095 (quoting Petition of Cynthia Houser, et al., May 1, 2012) (internal quotation marks omitted).

Legislative Districting of the State[127] that "so long as the [Redistricting Plan] does not contravene the constitutional criteria, that it may have been formulated in an attempt to preserve communities of interest, to promote regionalism, to help or injure incumbents or political parties, or to achieve other social or political objectives, will not affect its validity."[128] Without citing *Daly*, the Court of Appeals then proceeded to essentially apply the burden-shifting framework described by the Fourth Circuit in that decision.[129] The Court of Appeals noted that the ten percent rule serves as one way for a petitioner to establish a prima facie case of invalidity of the Redistricting Plan.[130] To the extent the ten percent rule has not been violated, as was the case in the 2012 Maryland redistricting,[131] a challenger may still create a prima facie showing by demonstrating that "the deviation was deliberately created in furtherance of intentional impermissible racial, political, or regional discrimination."[132] The conspicuously partisan groups formed to create redistricting plans[133] are thus empowered to create plans designed to "help or injure incumbents or political parties," while being chastened to not create plans in furtherance of "intentional impermissible political discrimination," and are offered no guidance regarding where that line is drawn.

The Court of Appeals affirmed the finding of the Special Master that nothing in the record indicated the drafter's intent to discriminate or supported an inference of deliberate partisan discrimination.[134] The Court of Appeals distinguished the Maryland Redistricting Plan from the Georgia state legislative redistricting plan analyzed and ultimately overturned by the U.S. District Court for the Northern District of Georgia in *Larios v. Cox*[135] ("the Georgia Plan").[136] The *Larios* decision was affirmed without opinion by the U.S. Supreme Court.[137] After providing an exhaustive account of the evidence presented in *Larios*, the Court of Appeals emphasized the absence of similar evidence supporting intent to discriminate,[138] including the sta-

127. 370 Md. 312, 805 A.2d 292 (2002).

128. *In re 2012 Legislative Districting*, 436 Md. at 133, 80 A.3d at 1079–80 (quoting *In re Legislative Districting of the State*, 370 Md. at 321–22, 805 A.2d at 297).

129. *See supra* Part II.C.

130. *In re 2012 Legislative Districting*, 436 Md. at 164, 80 A.3d at 1097 (citing the Special Master Report, which the Court of Appeals adopts in relevant part).

131. The Redistricting Plan's maximum deviation is 9.41%. *See supra* Part I.

132. *In re 2012 Legislative Districting*, 436 Md. at 164, 80 A.3d at 1097–98 (quoting Special Master Report at 53) (internal quotation marks omitted).

133. *See supra* Part I.

134. *In re 2012 Legislative Districting*, 436 Md. at 179, 80 A.3d at 1098, 1106–07.

135. 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004).

136. *In re 2012 Legislative Districting*, 436 Md. at 170–76, 80 A.3d at 1101–04.

137. 542 U.S. 947 (2004).

138. The Court of Appeals explained that:

tistical support for an inference of partisan discrimination, in the case under review.[139] The Court of Appeals concluded that "the quality of the evidence in this case," both direct and circumstantial, did not measure up to the evidence provided in *Larios*.[140] Accordingly, the Court of Appeals found that the petitioners had failed to rebut the presumption of validity attaching to the Redistricting Plan by demonstrating impermissible political discrimination.[141]

The Court of Appeals did not provide any bright line rule;[142] nor did it clarify whether statistical evidence could, on its own, create an inference of partisan discrimination sufficient to invalidate a legislative reapportionment plan.[143] Instead, the stronger statistical evidence and the existence of evidence suggesting intent to discriminate present in *Larios* were sufficient for the Court to differentiate the Redistricting Plan from the Georgia Plan and uphold the Special Master's finding that the Maryland petitioners had failed to advance evidence of the "quality" presented in *Larios*.[144] Accordingly,

> The creators of the state plans did not consider such traditional redistricting criteria as district compactness, contiguity, protecting communities of interest, and keeping counties intact. . . . Rather, they had two expressly enumerated objectives: the protection of rural Georgia and inner-city Atlanta against a relative decline in their populations compared with that of the rest of the state and the protection of Democratic incumbents.

In re 2012 Legislative Districting, 436 Md. at 170, 80 A.3d at 1101 (quoting *Larios*, 300 F. Supp. 2d at 1325).

139. The Georgia legislative reapportionment plan,

> ha[d] a total population deviation range of 9.98% and an average deviation of 3.47%. The House districts deviate from ideal equal population by a range of +4.99% to −4.99%, with the largest district having 176,939 persons (in a four-member district) and the smallest district having 43,209 persons. Notably, ninety of the 180 House seats (50.00%) are in districts with population deviations greater than ± 4%. Sixty seats (33.33%) are in districts with deviations greater than ± 4.5%, and twenty seats (11.11%) are in districts with deviations greater than ± 4.9%. The most underpopulated districts are primarily Democratic-leaning, and the most overpopulated districts are primarily Republican-leaning. Moreover, most of the districts with negative deviations of 4% or greater are located either in south Georgia or within inner-city Atlanta.

Id. at 171, 80 A.3d at 1102 (quoting *Larios*, 300 F. Supp. 2d at 1326) (internal quotation marks omitted).

140. *Id.* at 179, 80 A.3d at 1106.

141. *Id.* at 164–65, 80 A.3d at 1106–07.

142. In fact, the Court of Appeals explicitly refused to address whether the ten percent rule established a safe haven, or whether other evidence of an intent to discriminate could succeed despite a State failing to cross the ten percent threshold in population difference between districts. *Id.* at 169, 80 A.3d at 1100.

143. *Id.* at 179, 80 A.3d at 1106.

144. The Court of Appeals stated:

> As we see it, [the Special Master] was comparing the quality of the evidence, both direct and circumstantial, supporting the unconstitutional determination in *Larios*, all of which went to the proof of discriminatory or arbitrary intent, with that offered in this case, and, after that comparison, he found the evidence in this case lacking. And because the evidence in *Larios* consisted of both direct and circumstantial evidence, all of which tended to prove the intent of the plan's drafters, and collectively, directly so, the reference to "the kind of evidence presented in *Larios* that might directly show" the

the Court rejected the petitioners' argument that it should rely on *Larios* in finding that the Redistricting Plan constituted unconstitutional partisan discrimination.[145]

IV. ANALYSIS

In the decades since *Davis v. Bandemer*,[146] the Supreme Court has consistently upheld the justiciability of political gerrymandering claims and the impermissibility of severe partisan discrimination, but has failed to provide an administrable standard for what rises to the level of severe partisan discrimination.[147] The actual standard articulated by the plurality in *Davis* would, in practice, render insufficient virtually every claim of unconstitutional partisan discrimination.[148] The confusion produced by this lack of a practicable standard has led directly to decisions like that of the Court of Appeals in *In re 2012 Legislative Districting*.[149] The Court of Appeals should have followed the lead of the *Larios* court and struck down the 2012 Legislative Redistricting Plan as unconstitutional partisan gerrymandering.[150] Moreover, the ten percent rule, developed by the courts as a way to shift the burden onto the state in cases of conspicuously uneven districts, is now a relic of a time before legislators had access to advanced modeling software to use in redistricting.[151] The judiciary's ongoing failure to craft an effective solution to the important issue of partisan gerrymandering will continue to have a deleterious effect on the American public's faith in the electoral process, which over time has inflicted and will continue to inflict profound harm on our democracy.[152]

A. The Supreme Court Has Consistently Upheld the Justiciability of Political Gerrymandering Claims and the Impermissibility of Severe Partisan Discrimination but Has Failed to Provide a Practicable Standard

Decades of Supreme Court precedent stand for the premises that (a) political gerrymandering claims are justiciable;[153] and (b) severe partisan

> drafters' intent, is no more than a recognition that the quality of the evidence in this case did not measure up to that in *Larios.*

Id.

145. *Id.*, 80 A.3d 1106–07.

146. 478 U.S. 109 (1986).

147. *See infra* Part IV.A.

148. *See infra* Part IV.A.

149. 436 Md. 121, 80 A.3d 1073 (2013).

150. *See infra* Part IV.A.

151. *See infra* Part IV.B.

152. *See infra* Part IV.C.

153. Vieth v. Jubelirer, 541 U.S. 267, 317 (2004) (Stevens, J., dissenting); Davis v. Bandemer, 478 U.S. 109, 125 (1986).

discrimination in state legislative redistricting is impermissible.[154] What is far less clear, despite three national censuses since *Davis v. Bandemer* and all of the concomitant judicial challenges to subsequent state redistricting plans, is what exactly elevates discrimination to the required level of impermissibility.[155] The *Davis* plurality stated that a successful plaintiff must show both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.[156] The *Davis* plurality clarified that one election would not be sufficient to demonstrate a discriminatory effect;[157] rather, a petitioner must show that a group of voters had their influence on the political process "consistently degrade[d],"[158] which required a showing of "a history of disproportionate results . . . in conjunction with strong indicia of lack of political power and the denial of fair representation."[159]

The problem with this standard, as lower courts have come to find, is that it is practically impossible to meet, a fact that Justice Scalia happily pointed out writing for the *Vieth* plurality.[160] This is true not just because of the *Davis* plurality's assurance that *some* partisan discrimination was unavoidable,[161] but also because when states have a census every ten years, meeting the burden of showing a "history of disproportionate results" is simply not possible. The *Vieth* plurality provided a laundry list of cases alleging unconstitutional partisan discrimination under the *Davis* standard

154. *Vieth*, 541 U.S. at 292–93; *Davis*, 478 U.S. at 132–34; Abate v. Mundt, 403 U.S. 182, 185, 187 (1971); Roman v. Sincock, 377 U.S. 695, 710 (1964); Larios v. Cox, 300 F. Supp. 2d 1320, 1351 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004).

155. *Vieth*, 541 U.S. at 279 ("[T]he six-Justice [*Davis*] majority could not discern what the judicially discernable standards might be . . . lower courts have lived with that assurance of a standard . . . coupled with that inability to specify a standard, for the past 18 years."); *id.* at 292 ("[In this case,] four dissenters come up with three different standards—all of them different from the two proposed in *Bandemer* and the one proposed here by appellants . . . .").

156. *Davis*, 478 U.S. at 127.

157. *Id.* at 135.

158. *Id.* at 132.

159. *Id.* at 139.

160. The plurality in *Vieth* wrote that application of the *Davis* standard, such as it is,

> has almost invariably produced the same result (except for the incurring of attorney's fees) as would have obtained if the question were nonjusticiable: Judicial intervention has been refused. As one commentary has put it, "[t]hroughout its subsequent history, *Bandemer* has served almost exclusively as an invitation to litigation without much prospect of redress." The one case in which relief was provided (and merely preliminary relief, at that) did *not* involve the drawing of district lines; in *all* of the cases we are aware of involving that most common form of political gerrymandering, relief was denied.

541 U.S. at 279–80 (footnote call number omitted) (citation omitted)(quoting SAMUEL ISSACHAROFF, PAMELA KARLAN & RICHARD PILDES, THE LAW OF DEMOCRACY 886 (rev. 2d ed. 2002)).

161. *Davis*, 478 U.S. at 128–29.

where relief was denied[162] and found none where relief was granted.[163] As a result, lower courts invalidating state redistricting plans have ignored the burden of proof from *Davis* by characterizing partisan discrimination claims as "one person, one vote" claims rather than "gerrymandering" claims.[164] As the Court of Appeals explained, however, this is often a distinction without a difference—as occurred in the Maryland case, petitioners will often aver that partisan gerrymandering is occurring by way of a deviation from "one person, one vote" requirements.[165]

The failure of the Supreme Court to provide clear and meaningful guidance on this issue has led to decisions like that of the Court of Appeals in *In re 2012 Legislative Districting*. In its decision, the Court of Appeals held on the one hand that "help[ing] or injur[ing] incumbents or political parties" is a permissible goal of the State legislature in redistricting,[166] while on the other hand, the Court of Appeals cited an absence of sufficient evidence of an intent to discriminate on the basis of politics as one of the primary ways that *In re 2012 Legislative Districting* was distinguishable from *Larios*.[167] Thus, according to the Court of Appeals, the Governor's Redistricting Advisory Committee's intent to discriminate was simultaneously unavoidable and absent.

To further demonstrate this confusion, the Court of Appeals provided that when the ten percent rule had not been violated, a challenger may still create a prima facie showing by demonstrating that "the deviation was deliberately created in furtherance of intentional impermissible racial, political, or regional discrimination."[168] However, the crucial word "impermissible" is not defined anywhere in the Court of Appeals' opinion. Given the court's explicit holding that "help[ing] or injur[ing] incumbents or political parties" is a *permissible* aim of legislatures in creating redistricting plans,[169] this lack of clarity is particularly noteworthy.

162. *Vieth*, 541 U.S. at 280 n.6 (collecting cases).

163. *Id.* at 279–80.

164. *See, e.g.*, Larios v. Cox, 300 F. Supp. 2d 1320, 1327 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004) (finding State legislative redistricting plan unconstitutional despite just one election occurring between enactment and judicial review); *id.* at 1351 (finding *Davis* inapposite because *Larios* dealt not with a political gerrymandering claim, but with a "one person, one vote" violation rooted in partisan discrimination).

165. *In re* 2012 Legislative Districting, 436 Md. 121, 182, 80 A.3d 1073, 1108 (2013).

166. *Id.* at 133, 80 A.3d at 1079–80 (quoting *In re* Legislative Districting of the State, 370 Md. 312, 321–22, 805 A.2d 292, 297 (2002)).

167. *Id.* at 179, 80 A.3d at 1106.

168. *Id.* at 164, 80 A.3d at 1097–98 (quoting Special Master Report at 53) (internal quotation marks omitted).

169. *Id.* at 133, 80 A.3d at 1079–80 (quoting *In re Legislative Districting of the State*, 370 Md. at 321–22, 805 A.2d at 297).

B. The Operative Standard for What Constitutes Permissible Partisan Discrimination Is Unreasonably Accommodating

The Court of Appeals cited no support for its position that political aims were a permissible goal in the redistricting process;[170] thus, to evaluate this assertion, the Supreme Court cases providing reasoning for this same assertion must be evaluated. The *Davis* Court provided two main reasons for this ruling: (1) that political considerations of this sort were inherently unavoidable;[171] and (2) that "[p]olitics and political considerations are inseparable from districting and apportionment," and a "politically mindless" approach may nevertheless produce gerrymandered results.[172] Neither of these justifications withstand scrutiny. First, political considerations may be separated from redistricting by separating politicians from redistricting. Several states have created non-partisan redistricting commissions to conduct redistricting. Moreover, sophisticated mapping software allows groups creating redistricting plans to create such plans with extreme precision.

Six states have separated politics from redistricting by creating non-partisan redistricting commissions to conduct redistricting.[173] For example, California created a Citizens Redistricting Commission for the State of California, which in turn created a non-partisan panel to sift through over 36,000 applicants to create a group of sixty of the most qualified applicants, consisting of twenty from each political subgroup (Democrats, Republicans, and Independents).[174] Republican and Democratic leaders were then allowed discretionary strikes to remove twenty-four applicants from the pool, and the panel then chose the first eight members of the Redistricting Commission from the remaining thirty-six applicants.[175] Those eight members then chose the remaining six members of the Redistricting Commission.[176] The non-partisan fourteen-member Redistricting Commission proceeded to create a new legislative reapportionment scheme following the 2010 census

170. With the exception of citing its own 2002 decision, which itself did not cite any other decision in support of the proposition.

171. Davis v. Bandemer, 478 U.S. 109, 128 (1986) (quoting Gaffney v. Cummings, 412 U.S. 735, 753 (1973)).

172. *Id.* at 128–29 (quoting *Gaffney*, 412 U.S. at 753) (internal quotation marks omitted).

173. *See* Justin Levitt, *Who Draws the Lines?*, ALL ABOUT REDISTRICTING, http://redistricting.lls.edu/who.php#independent (last visited Nov. 2, 2014) (listing Alaska, Arizona, California, Idaho, Montana, and Washington as states that have established independent commissions that take the redistricting process out of the hands of interested politicians and which are responsible for devising politically neutral legislative districts).

174. STATE OF CAL. CITIZENS REDISTRICTING COMM'N, FINAL REPORT ON 2011 REDISTRICTING 1–2 (2011), *available at* http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_2final_report.pdf.

175. *Id.* at 2–3.

176. *Id.* at 3.

using an open, transparent, and non-political process.[177] While this process may be onerous, it nevertheless gives lie to the assertion that "political considerations are inseparable from districting."[178] Moreover, software developers are regularly coming out with new and increasingly effective models for neutral redistricting methods that create districts that are compact and equal in population.[179] The status quo is not intractable.

Second, the Supreme Court described gerrymandering in *Kirkpatrick v. Preisler*[180] as "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes."[181] Thus, when the *Davis* Court states that a "politically mindless approach may produce . . . the most grossly gerrymandered results,"[182] this does not stand to reason. A politically mindless approach is, by definition, not doing anything deliberately. As a result, this argument in favor of a permissive attitude toward partisan discrimination in redistricting, which has survived largely unquestioned from *Davis* to *In re 2012 Legislative Districting*,[183] is without merit.

The *Davis* plurality's defeatist attitude toward addressing partisan discrimination in redistricting was later adopted by the Court of Appeals. Without citation, the Court of Appeals stated in a 2002 decision[184] that because the redistricting process was "a political one," the fact that the plan had been formulated "to help or injure incumbents or political parties" would not affect its validity.[185] In other words, because intent to discriminate is unavoidable, such intent is therefore insufficient to establish constitutionally impermissible partisan discrimination. While the majority opin-

177. *Id.* at 5.

178. Davis v. Bandemer, 478 U.S. 109, 128 (1986) (quoting Gaffney v. Cummings, 412 U.S. 735, 753 (1973)) (internal quotation marks omitted).

179. *See, e.g.*, Christopher Ingraham, *This Computer Programmer Solved Gerrymandering in His Spare Time*, WASH. POST WONKBLOG (June 3, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/06/03/this-computer-programmer-solved-gerrymandering-in-his-spare-time/.

180. Kirkpatrick v. Preisler, 394 U.S. 526 (1969).

181. *Id.* at. 538.

182. *Davis*, 478 U.S. at 129 (quoting *Gaffney*, 412 U.S. at 753).

183. *In re* 2012 Legislative Districting, 436 Md. 121, 133, 80 A.3d 1073, 1079 (2013) ("On the contrary, because, in their hands, the process is in part a political one, they may consider countless other factors, including broad political and narrow partisan ones . . . ." (quoting *In re* Legislative Districting of the State, 370 Md. 312, 321–22, 805 A.2d 292, 297 (2002))).

184. *In re Legislative Districting of the State*, 370 Md. at 312, 805 A.2d at 292.

185. *Id.* at 321–22, 805 A.2d at 297.

ion did not cite *Davis*,[186] this represents one of the main findings provided by the *Davis* plurality.[187]

Some equal protection scholars may scoff at the notion that intent to discriminate may, by itself, represent a constitutional violation—after all, it is well-established in equal protection law that a constitutional violation requires intent plus effects.[188] However, applying structurally analogous equal protection law from the disparate impact field, it is clear that in certain circumstances, intent may be inferred from effects.[189] While the *Larios* court had the luxury of direct evidence of discriminatory intent,[190] that decision likewise suggested a willingness to accept circumstantial evidence, even evidence falling short of the ten percent threshold, as proof of discriminatory intent.[191] Particularly in light of the precision with which legislators are able to create district maps using today's advanced redistricting software, continuing to require both intent and effects in this area ignores the realities of the technical capabilities of current legislators.

Finally, even if the argument that *some* partisan discrimination is unavoidable is accepted at face value, sophisticated mapping technology exists to make the redistricting process *more* neutral. As the *Larios* court stated, "the Supreme Court has never sanctioned partisan advantage as a legitimate justification for population deviations."[192] Courts should apply the Equal Protection Clause to partisan gerrymandering cases in such a way as to limit, to the extent possible, that inherently illegitimate end. In that light, the current de minimis standard of ten percent is unjustifiably large given the technology that exists today.[193] The most popular such application in existence today, *Maptitude*, advertises that "[i]t is used by a super-majority of

186. The *Davis* opinion is cited in the dissenting opinion in support of the premise that the redistricting plan cannot be found unconstitutional as the petitioners failed to demonstrate an actual discriminatory effect. *In re Legislative Districting of the State*, 370 Md. at 384, 805 A.2d at 334 (Raker, J., dissenting).

187. *See* Vieth v. Jubelirer, 541 U.S. 267, 281 (2004) ("The plurality concluded that a political gerrymandering claim could succeed only where plaintiffs showed 'both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.'" (quoting *Davis*, 478 U.S. at 127)).

188. *See supra* Part II.

189. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.").

190. Larios v. Cox, 300 F. Supp. 2d 1320, 1325 (N.D. Ga. 2004) ("The creators of the state plans . . . had two expressly enumerated objectives: the protection of rural Georgia and inner-city Atlanta against a relative decline in their populations compared with that of the rest of the state and the protection of Democratic incumbents."), *aff'd*, 542 U.S. 947 (2004).

191. *Id.* at 1352 ("[W]hile a 9.98% total deviation is not presumptively unconstitutional, the plans' drafters pushed the deviation as close to the 10% line as they thought they could get away with, conceding the absence of an 'honest and good faith effort' to construct equal districts.").

192. *Id.* at 1351.

193. *See* Wang, *supra* note 2 ("Professionals use proprietary software to draw districts, but free software like Dave's Redistricting App lets you do it from your couch.").

the state legislatures, political parties, and public interest groups."[194] *Maptitude* allows a user to control for virtually every possible factor or outcome affecting or resulting from redistricting, including past election results, compactness, population deviation, race, communities of interest, and past legislative apportionment plans.[195]

Indeed, it is no coincidence that the majority of state legislative districts have been drawn so that the maximum population deviation falls "between 9 and 10% in at least one, and usually both, houses of their state legislatures."[196] The fact that state legislators who know the line is drawn at ten percent systematically place their maximum population deviation between nine and ten percent suggests that if the line were drawn at five percent, the majority of states could place their maximum population deviation between four and five percent. The capabilities of the technology available today—in fact, the technology available a decade ago—is well-illustrated by *Larios*, in which the State produced a maximum population deviation of 9.98% and drew a full third of its districts with a population deviation of greater than 4.5%.[197] Given how well-documented the control that state legislatures exercise over their legislative redistricting process has become, redistricting plans containing maximum population polarization deviations between nine and ten percent can no longer be said to have constituted a "good faith" effort to create a plan "free from any taint of arbitrariness or discrimination" as required by *Roman*.[198]

C. The Stronger Public Policy Arguments Favor a More Stringent Standard for Evaluating the Constitutionality of State Legislative Redistricting

Having established the strong likelihood that states *can* be held closer to "one person, one vote," it remains to explain why they *should* be so constrained. The easy answer, of course, is because, according to *Reynolds v. Sims*, the Equal Protection Clause says as much.[199] There are, however, practical reasons that support limiting gerrymandering as well. The two

194. CALIPER, MAPTITUDE SOFTWARE, DATA, AND SERVICES FOR REDISTRICTING 1, *available at* http://www.caliper.com/PDFs/Maptitude%20for%20Redistricting%20Brochure.pdf.

195. *Id.* at 2–6.

196. James R. Dalton, Note, *Making Politics* De Minimis *in the Political Process: The Unworkable Implications of* Cox v. Larios *in State Legislative Redistricting and Reapportionment*, BYU L. REV. 1999, 2000 & n.12 (2004) ("Of forty-seven states surveyed after the 2000 U.S. Census, twenty-nine had district deviations in excess of 9%.).

197. *In re* 2012 Legislative Districting, 436 Md. 121, 171, 80 A.3d 1073, 1102 (2013) (quoting *Larios*, 300 F. Supp. 2d, at 1326).

198. Roman v. Sincock, 377 U.S. 695, 710 (1964).

199. 377 U.S. 533, 577 (1964) ("[T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.").

largest reasons in support of fighting to end partisan discrimination in redistricting are (1) maintaining (or restoring) the public's faith in the electoral process, and (2) preventing (or reversing) harmful political polarization. Both of these issues are profoundly important to the strength of the American democracy and are important public interests for courts and legislatures to bear in mind when addressing these issues.

The one unassailable negative effect gerrymandering has on the political process is negatively affecting voter turnout. In a June 2008 report written by the Democratic Leadership Council, the organization reported that "[o]n average, 214,000 voters cast ballots in each of the 60 most competitive House races run in 2006. In 60 of the least competitive elections (where members won by between 50 and 90 percentage points), only 153,000 voters came out to have their choices counted—28 percent fewer."[200] According to Nolan McCarty, the Susan Dod Brown Professor of Politics and Public Affairs at Princeton University, a more general problem is one of perception: "A key to any successful democracy is a widespread belief in the fairness and impartiality of elections. Having incumbents participate in designing districts promoting their job security does little to enhance the legitimacy of American democracy."[201]

Gerrymandering may also be a cause of political polarization, not just in Maryland but across the nation. Political columnist David Broder observed that "[g]errymandered, one-party districts tend to send highly partisan representatives to the House or the legislature, contributing to the gridlock in government that is so distasteful to voters."[202] While there is scholarly writing contradicting the intuitive notion that gerrymandering would lead to polarization,[203] the issue is far from settled. The intuitive line of thought is reasonable and supported by the evidence: Republicans have controlled the majority of the state legislatures during the last two census cycles and have used those advantages to more firmly entrench their state and federal legislative majorities.[204] The number of "swing districts" in the

200. MARC DUNKELMAN, DEMOCRATIC LEADERSHIP COUNCIL GERRYMANDERING THE VOTE 2 (2008), *available at* http://www.dlc.org/specials/Gerrymandering_the_Vote.pdf.

201. Nolan McCarty, *Hate Our Polarized Politics? Why You Can't Blame Gerrymandering.*, WASH. POST (Oct. 26, 2012), http://www.washingtonpost.com/opinions/hate-our-polarized-politics-why-you-cant-blame-gerrymandering/2012/10/26/c2794552-1d80-11e2-9cd5-b55c38388962_story.html.

202. David S. Broder, *Voting's Neglected Scandal*, WASH. POST (June 26, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/06/25/AR2008062501944.html.

203. *See* McCarty, *supra* note 201 ("[T]here is little systematic evidence to support the claim that gerrymandering has had a substantial effect on polarization. In fact, there is considerable evidence that it has played at most a tiny role.").

204. Nate Silver, *As Swing Districts Dwindle, Can a Divided House Stand?*, N.Y. TIMES FIVETHIRTYEIGHT BLOG (Dec. 27, 2012), http://fivethirtyeight.blogs.nytimes.com/2012/12/27/as-swing-districts-dwindle-can-a-divided-house-stand/ ("Republicans were in charge of the redistricting process in many states, and they made efforts to shore up their incumbents, while packing Democrats into a few overwhelmingly Democratic districts.").

U.S. House of Representatives has dropped from 103 districts in 1992 to approximately 35 in 2012.[205] When legislators run in districts wherein they do not face serious challenges from the opposing party, their larger concern becomes an intraparty (primary) challenge, causing the incumbent legislator to move to the political poles.[206]

Finally, it is important to note that this partisan discrimination has significantly helped the electoral outcomes for Maryland Democrats. In 2014, Maryland held its first state election since the 2012 redistricting plan was adopted.[207] In that election, GOP candidates for State Senate received approximately forty-one percent of the vote.[208] Despite that, those candidates won just 14 of 47, or 29.8%, of the total Maryland State Senate seats.[209] Similar effects of redistricting have affected the federal legislature. In 2012, Democratic candidates for the U.S. House of Representatives received 54,301,095 total votes as compared to 53,822,442 received by Republican candidates.[210] Despite that seeming victory in total votes, the Republicans won control of the House by a 234 to 201 margin.[211] Thus, like the Maryland Democrats, the congressional Republicans have been significantly and unfairly advantaged by similarly gerrymandered districts in Republican-controlled states.

IV. CONCLUSION

If *Davis*, *Vieth*, and *In re 2012 Legislative Districting* are indicative of anything, it is that some of the concerns expressed by the *Reynolds* Court about the risks of "entering into political thickets and mathematical quag-

205. *Id.*

206. Ezra Klein, *The 13 Reasons Washington Is Failing*, WASH. POST WONKBLOG (Oct. 7, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/10/07/the-13-reasons-washington-is-failing/ ("[I]n recent decades the parties have polarized. According to the respected DW-Nominate system, which measures party polarization, the two parties have never been further apart in Congress.").

207. All seats in the Maryland General Assembly—the Maryland Senate and Maryland House of Delegates—are up for election every four years. *See General Assembly*, MARYLAND MANUAL ON-LINE, http://msa.maryland.gov/msa/mdmanual/07leg/html/gaf.html (last visited Nov. 21, 2014).

208. *See Official 2014 Gubernatorial General Election Results for State Senator*, MARYLAND STATE BOARD OF ELECTIONS, http://elections.state.md.us/elections/2014/results/General/gen_results_2014_2_015X.html (last visited Mar. 24, 2014). Included as Appendix A is an Excel spreadsheet in which the 2014 Maryland State Senator election results are summed.

209. *Maryland State Senate Elections, 2014*, BALLOTPEDIA, http://ballotpedia.org/Maryland_State_Senate_elections,_2014 (last visited Nov. 21, 2014).

210. Ezra Klein, *House Democrats Got More Votes Than House Republicans. Yet Boehner Says He's Got a Mandate?*, WASH. POST WONKBLOG (Nov. 9, 2012), http://www.washingtonpost.com/blogs/wonkblog/wp/2012/11/09/house-democrats-got-more-votes-than-house-republicans-yet-boehner-says-hes-got-a-mandate/.

211. *See* Wang, *supra* note 2.

mires"[212] are reasonable ones. The *Reynolds* Court, however, stated, the fact that such claims are difficult to resolve does not mean the courts should shrink from their important responsibility in this area. It is well established that political gerrymandering claims are justiciable under the Equal Protection Clause. Moreover, dominant political parties within many states and from both parties have proven incapable of self-restraint in this area and have frequently discriminated against minority parties to the greatest extent permitted.[213] Courts must serve as a bulwark against this harm. The Court of Appeals' failure to do so here is a discouraging sign of things to come.

APPENDIX A.

	VOTES	REPRESENTATION
DEM:	947,240	33/47
REP:	655,037	14/47
TOTAL:	1,614,526	
REP. PERCENT:	0.405714742	0.29787234

Name	Legis. District	Party	Early Voting	Election Day	Absentee / Provision-als	Total Votes	%
Edwards, G.	1	REP	2,694	26,434	1,246	30,374	99.2
Other	1		24	203	13	240	0.8
Shank, C.	2	REP	2,184	22,836	1,003	26,023	98.1
Other	2		88	392	24	504	1.9
Young, R.	3	DEM	3,363	14,089	855	18,307	50.8
Stottlemyer, C.	3	REP	2,352	14,573	768	17,693	49.1
Other	3		8	49	2	57	0.2
Rupli, D.	4	DEM	2,102	12,247	524	14,873	32.1
Hough, M.	4	REP	2,871	27,588	955	31,414	67.7
Other	4		16	92	9	117	0.3
Riley, A.	5	DEM	1,772	8,037	394	10,203	21.4
Getty, J.	5	REP	4,938	31,426	1,042	37,406	78.5
Other	5		6	48	4	58	0.1
Olszewski, J.	6	DEM	2,744	10,868	453	14,065	44.9

212. Reynolds v. Sims, 377 U.S. 533, 566 (1964).

213. *See* Levitt, *supra* note 173 (noting that only a small number of states—namely, Alaska, Arizona, California, Idaho, Montana, and Washington—have thus far established independent commissions that take the redistricting process out of the hands of interested politicians and which are responsible for devising politically neutral legislative districts); Dalton, *supra* note 196 ("Of forty-seven states surveyed after the 2000 U.S. Census, twenty-nine had district deviations in excess of 9%." (citation omitted)).

Name	Legis. District	Party	Early Voting	Election Day	Absentee / Provision-als	Total Votes	%
Salling, J.	6	REP	3,038	11,549	329	14,916	47.7
Collier, S.	6	UNA	429	1,787	69	2,285	7.3
Other	6		5	17	4	26	0.1
Letke, K.	7	DEM	2,396	9,751	355	12,502	25.3
Jennings, J.	7	REP	6,559	29,432	922	36,913	74.6
Other	7		7	37	2	46	0.1
Klausmeier, K.	8	DEM	4,267	18,674	697	23,638	61.2
Lofstad, E.	8	REP	2,543	11,953	442	14,938	38.7
Other	8		8	26	3	37	0.1
Frederic, R.	9	DEM	3,791	12,745	596	17,132	34.1
Bates, G.	9	REP	5,815	26,200	1,094	33,109	65.8
Other	9		9	43	4	56	0.1
Kelley, D.	10	DEM	9,542	19,910	996	30,448	98
Other	10		100	327	12	439	2
Zirkin, B.	11	DEM	5,746	22,983	1,472	30,201	97.5
Other	11		132	604	29	765	2.5
Kasemeyer, E.	12	DEM	5,195	15,865	926	21,986	58.6
Pippy, J.	12	REP	2,431	12,453	597	15,481	41.3
Other	12		8	39	0	47	0.1
Guzzone, G.	13	DEM	4,802	19,303	921	25,026	62.3
Venkatesan, J.	13	REP	1,999	12,663	464	15,126	37.6
Other	13		1	25	0	26	0.1
Montgomery, K.	14	DEM	4,221	16,929	1,075	22,225	57.5
Howard, F.	14	REP	2,180	13,447	772	16,399	42.4
Other	14		8	31	2	41	0.1
Feldman, B.	15	DEM	2,425	16,113	1,387	19,925	60.4
Ficker, R.	15	REP	1,140	10,601	1,287	13,028	39.5
Other	15		3	39	2	44	0.1
Lee, S.	16	DEM	2,447	23,572	2,584	28,603	70
Marks, M.	16	REP	770	10,455	983	12,208	29.9
Other	16		4	45	4	53	0.1
Kagan, C.	17	DEM	2,687	14,438	1,401	18,526	68.1
Zellers, S.	17	REP	950	6,930	616	8,496	31.2
Other	17		17	141	11	169	0.6
Madaleno, R.	18	DEM	3,415	20,402	1,723	25,540	97.6
Other	18		81	509	42	632	2.4
Manno, R.	19	DEM	3,748	16,818	1,464	22,030	67.7
Gonzales, F.	19	REP	1,190	8,608	648	10,446	32.1
Other	19		3	50	2	55	0.2
Raskin, J.	20	DEM	4,939	19,857	1,674	26,470	98.7
Other	20		55	278	26	359	1.3
Rosapepe, J.	21	DEM	4,599	16,501	1,141	22,241	97.6
Other	21		116	422	16	554	2.4
Pinsky, P.	22	DEM	3,173	17,315	983	21,471	86.7
Denise, J.	22	REP	318	2,744	183	3,245	13.1
Other	22		1	34	0	35	0.1
Peters, D.	23	DEM	9,723	24,762	1,519	36,004	98.8
Other	23		76	351	19	446	1.2
Benson, J.	24	DEM	6,825	21,578	1,289	29,692	99.2
Other	24		78	149	11	238	0.8
Currie, U.	25	DEM	7,082	20,843	1,172	29,097	91.9
Boone, K.	25	REP	361	1,405	136	1,902	6

Name	Legis. District	Party	Early Voting	Election Day	Absentee / Provision-als	Total Votes	%
Other	25		68	575	14	657	2.1
Muse, C.	26	DEM	6,942	21,793	1,018	29,753	89.6
Howells, K.	26	REP	488	2,670	212	3,370	10.1
Other	26		39	50	4	93	0.3
Miller, T.	27	DEM	5,322	22,326	1,019	28,667	62.5
Peed, J.	27	REP	2,484	14,081	603	17,168	37.4
Other	27		8	50	4	62	0.1
Middleton, M.	28	DEM	4,401	21,845	1,054	27,300	66.8
Donnelly, A.	28	REP	1,624	11,373	496	13,493	33
Other	28		7	52	2	61	0.1
Dyson, R.	29	DEM	2,402	13,825	838	17,065	43.4
Waugh, S.	29	REP	2,661	18,677	845	22,183	56.5
Other	29		3	21	4	28	0.1
Astle, J.	30	DEM	6,232	14,871	1,358	22,461	51.3
Quinn, D.	30	REP	4,806	15,366	1,112	21,284	48.6
Other	30		8	36	7	51	0.1
Harman, A.	31	DEM	2,240	8,106	583	10,929	27.8
Simonaire, B.	31	REP	4,648	22,728	962	28,338	72.1
Other	31		5	27	2	34	0.1
DeGrange, J.	32	DEM	4,054	14,007	1,041	19,102	59
Barber, L.	32	REP	2,374	10,359	537	13,270	41
Other	32		12	11	5	28	0.1
Reilly, E.	33	REP	8,759	31,253	1,733	41,745	98
Other	33		191	595	59	845	2
James, M.	34	DEM	3,785	12,069	605	16,459	42.7
Cassilly, B.	34	REP	4,186	17,088	768	22,042	57.2
Other	34		20	40	2	62	0.2
Kelly, B.	35	DEM	1,997	8,633	314	10,944	26
Norman, W.	35	REP	4,820	25,444	801	31,065	73.9
Other	35		1	31	1	33	0.1
Tilghman, B.	36	DEM	3,683	9,450	479	13,612	32.8
Hershey, S.	36	REP	6,184	20,849	843	27,876	67.1
Other	36		7	19	4	30	0.1
Robinson, C.	37	DEM	3,000	9,636	892	13,528	33.8
Eckardt, A.	37	REP	5,742	19,495	1,160	26,397	65.9
Other	37		17	92	12	121	0.3
Mathias, J.	38	DEM	3,846	15,287	1,088	20,221	51.7
McDermott, M.	38	REP	3,426	14,479	963	18,868	48.2
Other	38		4	19	0	23	0.1
King, N.	39	DEM	2,725	15,099	984	18,808	97.2
Other	39		64	421	51	536	2.8
Pugh, C.	40	DEM	2,789	15,916	1,081	19,786	98
Other	40		25	358	12	395	2
Gladden, L.	41	DEM	7,015	19,002	1,375	27,392	98.7
Other	41		65	293	7	365	1.3
Brochin, J.	42	DEM	3,525	19,290	1,161	23,976	51.6
Robinson, T.	42	REP	2,798	18,527	1,084	22,409	48.3
Other	42		7	38	3	48	0.1
Conway, J.	43	DEM	5,909	18,594	1,163	25,666	98.2
Other	43		90	369	24	483	1.8
Pulliam, S.	44	DEM	6,551	18,805	905	26,261	80.2
Reiter, B.	44	REP	1,409	4,735	268	6,412	19.6

Name	Legis. District	Party	Early Voting	Election Day	Absentee / Provision-als	Total Votes	%
Other	44		11	40	0	51	0.2
McFadden, N.	45	DEM	3,834	17,530	839	22,203	98.8
Other	45		45	215	10	270	1.2
Ferguson, B.	46	DEM	2,114	14,438	768	17,320	97.3
Other	46		67	382	35	484	2.7
Ramirez, V.	47	DEM	2,073	12,722	787	15,582	99
Other	47		23	129	8	160	1