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Note

DRAWING THE LINE: A FIRST AMENDMENT FRAMEWORK FOR PARTISAN GERRYMANDERING IN THE WAKE OF *RUCHO V. COMMON CAUSE*

KYLE KERAGA*

Gerrymandering is extremely effective. In 2011, Maryland Democrats drew a district map restricting Republicans to only one of eight congressional seats, despite the Republican Party’s consistent thirty-five percent share of the statewide popular vote.¹ In 2016, North Carolina Republicans consolidated their advantage with a map confining Democrats to three of ten seats, despite the Democratic Party’s forty-five percent share of the vote.² In each subsequent election, these plans have worked precisely as intended, entrenching the mapmakers’ control of their state legislatures despite spirited challenges from their state’s minority party.³ This problem is not unique to Maryland or North Carolina: Since the 2010 redistricting cycle, as many as fifty-nine seats in the House of Representatives have been predetermined, election-to-election, by partisan gerrymanders—twenty in favor of Democrats, and thirty-nine in favor of Republicans.⁴

Democracy is not supposed to work this way—and the voting public broadly agrees: Gerrymandering, “the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power,” is the subject of widespread, bipartisan opposition.⁵ Contempt for

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1. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2511 (2019) (Kagan, J., dissenting).

2. *Id.* at 2510.

3. *Id.* at 2493, 2510–11.

4. Alex Tausanovitch, *The Impact of Partisan Gerrymandering*, CTR. FOR AM. PROGRESS (Oct. 1, 2019, 9:01 AM), <https://www.americanprogress.org/issues/democracy/news/2019/10/01/475166/impact-partisan-gerrymandering/>.

5. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015). As recently as 2017, as many as seventy-three percent of Americans expressed support for removing

this practice has been a prominent feature of our political culture since the earliest days of our Republic⁶—expressed through political cartoons, art galleries, and computer fonts.⁷ This disdain is well-founded, as partisan gerrymanders have substantial suppressive effects on public participation: They chill turnout among minority parties, distort accountability between voters and their representatives, contribute to ideological segregation among the electorate, raise the costs of challenging incumbents, and reinforce a pervasive sentiment that participation in our democracy is an exercise in futility.⁸ Seventeen states have addressed this issue by establishing an independent redistricting commission through ballot initiatives or legislative enactments⁹; in the remaining thirty-three, disaffected voters are often left to seek redress through the judiciary.

In *Rucho v. Common Cause*,¹⁰ the United States Supreme Court declared that partisan gerrymandering is a nonjusticiable political question

partisanship from the districting process entirely, even if it would cost their party an election. *Supermajority of Americans Want Supreme Court to Limit Partisan Gerrymandering*, CAMPAIGN LEGAL CTR. (Sept. 11, 2017), <https://campaignlegal.org/press-releases/supermajority-americans-want-supreme-court-limit-partisan-gerrymandering/>.

6. Anna Khomina, *Elbridge Gerry and the Original Gerrymander*, GILDER LEHRMAN INST. AM. HIST. (Oct. 2, 2017), <https://www.gilderlehrman.org/blog/elbridge-gerry-and-original-gerrymander/> (describing contemporary disdain for Elbridge Gerry's original gerrymander).

7. *E.g.*, Harlow G. Unger, *Elbridge Gerry's Monster Salamander that Swallows Votes*, HIST. NEWS NETWORK (Nov. 3 2019), <https://historynewsnetwork.org/article/173464> (showcasing classic *Boston Centinal* political cartoon that coined the term “gerrymander”); “*Redistricting*” – *City Hall's New Art Exhibit*, LANCASTER PUB. ART (Oct. 30, 2019), <https://www.lancasterpublicart.com/news/2019/10/30/redistricting-city-halls-new-art-exhibit/> (encouraging viewers to treat congressional districts as Rorschach ink blot tests); Grace Panetta, *There's a New Downloadable Font Inspired by Gerrymandered Congressional Districts*, BUS. INSIDER (Aug. 1, 2019, 1:25 PM), <https://www.businessinsider.com/you-can-download-font-gerrymandered-congressional-districts-2019-8/> (providing a moderately legible typeface constructed entirely of congressional districts).

8. *See* Danny Hayes & Seth C. McKee, *The Participatory Effects of Redistricting*, 53 AM. J. POL. SCI. 1006, 1008–09 (2009) (reviewing effects on turnout and incumbency costs); Fred Dews, *A Primer on Gerrymandering and Political Polarization*, BROOKINGS INST. (July 6, 2017), <https://www.brookings.edu/blog/brookings-now/2017/07/06/a-primer-on-gerrymandering-and-political-polarization/> (discussing polarization and ideological segregation); Sam Fleming, *Battle Lines: The Fight for a Fair Vote in America*, FT MAG (Aug. 2, 2018), <https://www.ft.com/gerrymandering> (highlighting widespread voter frustration and electoral futility); Thomas E. Mann, *We Must Address Gerrymandering*, TIME (Oct. 13, 2016), <https://time.com/4527291/2016-election-gerrymandering/> (observing “hyper-partisanship that paralyzes our politics and governance”).

9. *Redistricting Commissions: Congressional Plans*, NAT'L CONF. ST. LEGISLATURES (Apr. 18, 2019), <http://www.ncsl.org/research/redistricting/redistricting-commissions-congressional-plans.aspx>. Eight states have delegated redistricting authority to an independent commission, while eight others have a commission that works alongside the legislature. *Id.* Iowa follows a unique system that leaves the task up to nonpartisan legislative staff, with a final legislative vote of approval. *Id.*

10. 139 S. Ct. 2484 (2019).

beyond the authority of the federal courts.¹¹ The Court reached this conclusion despite a longstanding acknowledgement that extreme gerrymandering is “incompatible with [our] democratic principles”¹²—over the years, assorted Justices from both parties have criticized gerrymandering as everything from “cherry-pick[ing] voters,”¹³ to “rigging elections,”¹⁴ to a subversion of “the core principle of republican government . . . that the voters should choose their representatives, not the other way around.”¹⁵ With the doors of the federal courts closed, voters seeking to challenge their political disempowerment will be left to seek relief from the state courts, or from the gerrymanderers themselves.¹⁶

This result may have been predictable, but it was also avoidable. From the outset, the development of gerrymandering doctrine was hindered by the Court’s decision to accept partisan dominance as a permissible motive, and to frame its analysis around the impact of a map on future elections.¹⁷ Instead, the Court should have drawn the line at intent. This Note challenges the Court’s insistence on an effects-based jurisprudence by arguing that a map drawn with the predominant purpose of securing partisan advantage is a form of viewpoint discrimination and a violation of the political participatory rights guaranteed by the First Amendment.¹⁸ Properly adjudicated under a manageable standard grounded in intent, extreme partisan gerrymanders like those in Maryland and North Carolina are a clear constitutional violation, and cannot be a political question.¹⁹

11. See *infra* Part III.

12. *Rucho*, 139 S. Ct. at 2506 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015)).

13. *Id.* at 2512 (Kagan, J., dissenting).

14. *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring).

15. *Ariz. State Legislature*, 135 S. Ct. at 2677 (quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 *Tex. L. Rev.* 781, 781 (2005)).

16. See Gretchen Frazee & Laura Santhanam, *What the Supreme Court’s Gerrymandering Decision Means for 2020*, PBS (June 28, 2019, 5:51 PM), <https://www.pbs.org/newshour/nation/what-the-supreme-courts-gerrymandering-decision-means-for-2020> (discussing how redistricting has become a focal point in “state-level fights for political power” following the 2010 election); Michael Wines, *State Court Bars Using North Carolina House Map in 2020 Elections*, N.Y. TIMES (Oct. 28, 2019), <https://www.nytimes.com/2019/10/28/us/north-carolina-gerrymander-maps.html> (revealing how a North Carolina Superior Court struck down the map at issue in *Rucho* under a state constitutional provision).

17. See *infra* Part II.B.

18. See *infra* Part IV.

19. See *infra* Part IV.D.

I. THE CASE

Rucho v. Common Cause featured parallel challenges to congressional district maps drawn by the Maryland and North Carolina legislatures.²⁰ Each map was designed to consolidate the congressional advantage of each state's majority party: In Maryland, the map favored Democrats, while in North Carolina, the map favored Republicans.²¹ Each map performed exactly as intended, reinforcing each party's control over its state's congressional delegation in subsequent elections.²² In response, voters and public interest organizations challenged each map under the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, section 2 of the U.S. Constitution.²³ In both cases, the plaintiffs prevailed, the maps were enjoined, and the defendants appealed.²⁴

*Common Cause v. Rucho*²⁵ featured a challenge to North Carolina's 2016 Congressional Redistricting Plan (the "2016 Plan").²⁶ After two elections in which Republicans secured at least seventy-five percent of the state's Congressional seats despite earning at most fifty-five percent of the popular vote,²⁷ North Carolina Representative David Lewis and Senator Robert Rucho, co-chairs of the Assembly's redistricting committee, hired a Republican specialist to draw a map that would maintain the Republican Party's 10-3 advantage in the state's Congressional delegation.²⁸ This process was openly partisan: The redistricting committee listed "Partisan Advantage" as a guiding criterion in the map-drawing process.²⁹ Representative Lewis "acknowledge[d] freely that this would be a political gerrymander," and optimized the map for a 10-3 Republican advantage only "because he did not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats."³⁰ Adopted on party lines, the map solidified

20. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019).

21. *Id.* at 2491, 2493.

22. *Id.*

23. *Id.* at 2491. Article I Section 2 provides that representatives "shall be apportioned among the several States . . . according to their respective Numbers" U.S. CONST. art. I, § 2.

24. *Id.*

25. 318 F. Supp. 3d 777 (M.D.N.C. 2018), *vacated*, 139 S. Ct. 2484 (2019).

26. *Id.* at 799.

27. *Id.* at 804.

28. *Rucho*, 139 S. Ct. at 2510 (Kagan, J., dissenting). The specialist, Dr. Thomas Hofeller, employed "sophisticated technological tools and precinct-level election results . . . to predict voting behavior." *Id.*

29. *Id.*

30. *Common Cause*, 318 F. Supp. 3d at 808 (alterations in original). Representative Lewis further proclaimed, "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." *Id.* at 809.

the Republican Party's advantage in 2016 and 2018, despite a dwindling popular vote lead.³¹

*Benisek v. Lamone*³² presented the same issue along inverted party lines.³³ In 2011, Maryland Democrats aggressively pursued a redistricting plan that would create a 7-1 advantage in Congress, despite the party's election share peaking at sixty-five percent.³⁴ Maryland Senate President Thomas V. Mike Miller, Jr., characterized this gerrymander as a "serious obligation" to counteract the Republican Party's nationwide redistricting efforts.³⁵ According to former Governor Martin O'Malley, the map was calibrated to flip the Sixth Congressional District into Democratic control.³⁶ The Democrat-led redistricting committee hired Eric Hawkins, an analyst at a Democratic consulting firm, "to ensure that the new map produced 7 reliable Democratic seats, and to protect all Democratic incumbents."³⁷ To achieve this goal, Hawkins moved approximately 360,000 voters out of the district, and moved 350,000 new voters in—reducing the population of registered Republicans by over 66,000 while increasing the number of Democrats by 24,000.³⁸ Following this map's adoption—also on party lines—the Sixth District has remained firmly Democratic.³⁹

The United States District Courts for the District of Maryland and the Middle District of North Carolina primarily adjudicated these claims under the First Amendment.⁴⁰ Each court synthesized the Supreme Court's viewpoint discrimination precedent⁴¹ to distill roughly equivalent three-prong tests, requiring: (1) an invidious intent to discriminate against the disfavored party, (2) a discriminatory impact on that party, and (3) a causal

31. *Rucho*, 139 S. Ct. at 2510 (Kagan, J., dissenting).

32. 348 F. Supp. 3d 493 (D. Md. 2018), *vacated*, 139 S. Ct. 2484 (2019).

33. *Id.* at 497.

34. *Rucho*, 139 S. Ct. at 2511 (Kagan, J., dissenting).

35. *Benisek*, 348 F. Supp. 3d at 506.

36. *Id.* at 502.

37. *Rucho*, 139 S. Ct. at 2511 (Kagan, J., dissenting).

38. *Id.* at 2493 (majority opinion).

39. *Id.*

40. *Id.* at 2492–93. The *Common Cause* Court also ruled on Equal Protection grounds. *Id.* at 2492. Under the *Common Cause* Equal Protection test, plaintiffs must demonstrate (1) "that a legislative mapdrawer's predominant purpose . . . was to 'subordinate adherents of one political party and entrench a rival party in power'"; and (2) "that the dilution of the votes of supporters of a disfavored party . . . is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party." *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 864, 867 (M.D.N.C. 2018) (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015)), *vacated*, 139 S. Ct. 2484 (2019).

41. *See infra* Section II.A.3.

connection between intent and effect.⁴² Through this analysis, a map's discriminatory impact could be expressed either as an injury to the plaintiff's representational rights on a theory of vote dilution, or an associational injury by virtue of a chilling effect on the political activities of the disfavored party.⁴³

Applying this test to an extensive array of direct⁴⁴ and circumstantial⁴⁵ evidence, both courts ruled for the plaintiffs and enjoined the challenged district maps.⁴⁶ The courts found that the plaintiffs had successfully stated a representational injury by demonstrating that their natural political strength was diluted through the "widespread cracking and packing"⁴⁷ of their party's votes.⁴⁸ The *Benisek* court held that the Maryland plaintiffs had also suffered an associational injury, as residents of the Sixth District "were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting in an atmosphere of general confusion and apathy."⁴⁹ Both sets of defendants appealed directly to the Supreme Court under Title 28, section 1253 of the United States Code.⁵⁰

42. *Benisek v. Lamone*, 348 F. Supp. 3d 493, 515 (D. Md. 2018), *vacated*, 139 S. Ct. 2484 (2019); *Common Cause*, 318 F. Supp. 3d at 929.

43. *Rucho*, 139 S. Ct. at 2502–03; *Benisek*, 348 F. Supp. 3d at 517, 522; *Common Cause*, 318 F. Supp. 3d at 840, 858.

44. Among other evidence, the plaintiffs in *Common Cause* and *Benisek* demonstrated legislative intent by pointing to clear statements by legislators and party officials involved with the redistricting process. *Common Cause*, 318 F. Supp. 3d at 803; *Benisek*, 348 F. Supp. 3d at 502, 506. Each party made efforts to limit the minority's involvement in the mapmaking process and engaged in private talks with partisan consultants.; *Common Cause*, 318 F. Supp. 3d at 803; *Benisek*, 348 F. Supp. 3d at 502, 504–05. Testimony demonstrated that these consultants relied heavily on voter data and were instructed to draw a partisan map. *Common Cause*, 318 F. Supp. 3d at 803; *Benisek*, 348 F. Supp. 3d at 502–03.

45. Each case relied on different forms of circumstantial evidence to demonstrate the challenged maps' extreme partisan lean. *See Benisek*, 348 F. Supp. 3d at 500–01, 507 (noting historic swing in the Sixth District's "Partisan Voter Index" and reshuffling of voters); *Common Cause*, 318 F. Supp. 3d at 896–97 (comparing North Carolina map to thousands of hypothetical alternatives generated by plaintiffs' expert, nonprofit organizations, and a bipartisan panel of judges).

46. *Rucho*, 139 S. Ct. at 2491.

47. *Common Cause*, 318 F. Supp. 3d at 884. Cracking involves spreading members of a disfavored group across multiple districts to dilute their voting strength; packing entails concentrating members of that group into a limited number of districts to minimize the effect of individual votes. *Id.* at 811.

48. *Id.* at 884.

49. *Benisek*, 348 F. Supp. 3d at 524.

50. *Rucho*, 139 S. Ct. at 2491. Under Title 28, section 2284(a) of the United States Code, "[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a) (2012). A losing party may appeal the grant of an injunction issued by a three-judge panel directly to the Supreme Court. *Id.* § 1253.

II. LEGAL BACKGROUND

The Supreme Court's holding in *Rucho v. Common Cause* was the culmination of a decades-long struggle to adjudicate partisan gerrymandering claims.⁵¹ Understanding the heart of that quagmire and the basis of the *Rucho* opinion requires a broad look at the Court's interpretation of its power of review. Section II.A explores the way separation of powers limits the scope of judicial authority.⁵² Section II.B discusses how these principles have been applied to shape the Court's redistricting jurisprudence.⁵³

A. *Justiciability and the Scope of Judicial Review*

Article III, Section 2 of the United States Constitution limits the jurisdiction of the federal courts to cases or controversies arising under the laws of the United States.⁵⁴ Cognizant of the counter-majoritarian concerns associated with overreach by an unelected judiciary, the Supreme Court has construed this language to constrain the realm of disputes within the scope of judicial review.⁵⁵ Justiciability doctrines such as ripeness, standing, and mootness function as procedural and temporal limitations on the judicial role.⁵⁶ Comparatively, nonjusticiable political questions are substantive matters entirely beyond the authority of the federal courts, often by virtue of their commitment to a coordinate branch of government.⁵⁷

These doctrines—political question among them—are characterized by a continuing tension between judicial respect for the political process and the judicial role as a check on democratic decisionmaking.⁵⁸ Section II.A.1 discusses how the political question doctrine has been used to balance these competing concepts as an implementation of the separation of powers.⁵⁹ Section II.A.2 reviews how these same conceptual foundations undergird a rubric for heightened scrutiny of laws that harm the majoritarian democratic process.⁶⁰ Section II.A.3 provides a proof of concept for this framework by

51. *See infra* Section II.B.2.

52. *See infra* Section II.A.

53. *See infra* Section II.B.

54. U.S. CONST. art. III, § 2.

55. *See* *Flast v. Cohen*, 392 U.S. 83, 94–95 (1968) (finding the words “case” and “controversy” “limit the business of federal courts to questions . . . capable of resolution through the judicial process” and “define the role assigned to the judiciary in a tripartite allocation of power”).

56. *Id.* at 95.

57. *Coleman v. Miller*, 307 U.S. 433, 454–55 (1939) (referencing “the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination” as “dominant considerations” in the justiciability of a substantive legal issue).

58. *See id.*

59. *See infra* Section II.A.1

60. *See infra* Section II.A.2.

illustrating the Court's history of intervention to restrain legislative and executive decisions with a deleterious impact on state elections.⁶¹

1. The Separation of Powers: Origin and Application of the Political Question Doctrine

The political question doctrine constrains the power of judicial review by protecting the policymaking prerogative of the democratically elected branches.⁶² The notion that some policy decisions are not suitable for judicial redress can be traced back to the earliest decisions of the Supreme Court.⁶³ In *Marbury v. Madison*,⁶⁴ Justice Marshall recognized that the discretionary exercise of executive power is not subject to judicial oversight.⁶⁵ Comparatively, a President's ministerial duty to comply with a statutory or constitutional mandate may be subject to review.⁶⁶ Additionally, the Court has traditionally held that the Constitution's guaranty of "a Republican Form of Government"⁶⁷ is the exclusive province of the political branches.⁶⁸ Any judicial evaluation of the legitimacy of a state government would necessarily require subjective policy determinations by unelected judges, with sweeping implications for the allocation of a state's political power.⁶⁹

The modern formulation of this doctrine emerged in *Baker v. Carr*,⁷⁰ when the Supreme Court evaluated the justiciability of an Equal Protection

61. See *infra* Section II.A.3.

62. See *Japan Whaling Ass'n v. Am. Cetacean Soc'y.*, 478 U.S. 221, 230 (1986) (characterizing the political question doctrine as excluding from review "policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch").

63. E.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803); *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 173–75 (1796).

64. 5 U.S. 137 (1803).

65. *Id.* at 165–66 ("By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . [W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.").

66. *Id.* at 166. ("[W]hen the legislature proceeds to impose on that officer other duties . . . he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.").

67. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government.").

68. *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849).

69. *Id.* at 41–42 (finding "it rests with Congress to decide what government is the established one in a State"; noting "[I]ts decision is binding on every other department of the government, and could not be questioned in a judicial tribunal"; and questioning the standard by which a court could evaluate this decision).

70. 369 U.S. 186 (1962).

challenge to Tennessee's legislative district plan.⁷¹ The *Baker* Court first evaluated traditionally nonreviewable powers, including foreign relations,⁷² recognition of foreign and tribal governments,⁷³ the duration of wartime hostilities,⁷⁴ and the validity of constitutional amendments.⁷⁵ Synthesizing these concepts, and finding the case justiciable, the Court reasoned that "[t]he nonjusticiability of a political question is primarily a function of the separation of powers."⁷⁶ Prominent among political questions are several features, including "a textually demonstrable constitutional commitment of the issue to a coordinate political department," and "a lack of judicially discoverable and manageable standards for resolving it."⁷⁷ When a case is characterized by one or more of these patterns, judicial intervention would likely implicate separation of powers, and the Court should decline to exercise its power of review.⁷⁸

Nevertheless, the presence of a political question turns on the unique circumstances of each case.⁷⁹ As "deference rests on reason, not habit," the Court will intervene if the facts clearly demonstrate that a government actor has exceeded the scope of its authority.⁸⁰ The Court has declined to review matters of impeachment, a power granted exclusively to the Senate,⁸¹ and prudentially refrained from interfering with the organization of the National

71. *Id.* at 187, 196, 197–98. The *Baker* plaintiffs alleged that Tennessee's continued use of an apportionment plan adopted in 1901 was "unconstitutional and obsolete," as the state's population had grown and shifted dramatically in the half century since that plan was enacted. *Id.* at 192–94.

72. *Id.* at 211.

73. *Id.* at 212, 215.

74. *Id.* at 213.

75. *Id.* at 214.

76. *Id.* at 210.

77. *Id.* at 217. The full list of political question formulations provided in *Baker* also includes: the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

78. *Cf. id.* at 217 ("Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence.").

79. *Id.* at 210–11 (noting that "the 'political question' label" tends to incorrectly suggest a categorical analysis and "obscure the need for case-by-case inquiry").

80. *Id.* at 213–14; *accord* *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547 (1924) ("[A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared.").

81. *Nixon v. United States*, 506 U.S. 224, 229 (1993) (holding that where Article I, section 3, grants the Senate "the sole Power to try all Impeachments," the word "sole" suggests the Senate's authority is exclusive).

Guard, a responsibility vested in Congress.⁸² In each case, the lack of manageable standards suggested that the constitutional commitment in question was intended to be exclusive, as the issue was not suitable for judicial resolution.⁸³ By contrast, in *Powell v. McCormack*,⁸⁴ the Supreme Court determined that the House of Representatives cannot exclude lawfully elected members, notwithstanding its constitutional authority to determine their qualifications under Article I, Section 5.⁸⁵ In light “of the basic principles of our Democratic system,” the Court reasoned that the “textually demonstrable commitment” of authority embodied by that provision does not include “a discretionary power to deny membership by a majority vote.”⁸⁶

2. *The Famous Footnote Four: A Rubric for Heightened Review of Legislative Actions*

The same principles of judicial restraint that animate the political question doctrine also demand that decisions of the legislature are given substantial deference by the courts.⁸⁷ Even before *Marbury*, the Court has frequently attached a presumption of constitutionality to legislative acts.⁸⁸ When invoking this presumption, the Court construes every possible inference in favor of a law’s validity and will only intervene where an alleged constitutional violation is readily apparent.⁸⁹ In modern jurisprudence, this concept has been formalized as the rational basis standard of review—a

82. *Gilligan v. Morgan*, 413 U.S. 1, 6–7 (1973) (noting that where Article I, section 8, grants Congress and the States the power to organize and discipline the militia, judicial review “would therefore embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government”).

83. *Nixon*, 506 U.S. at 228–29 (finding the two concepts are not distinct, as “the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch”); *Gilligan*, 413 U.S. at 8 (doubting the “technical competence” of a judge to engage in the technical evaluation required to review regulations of the armed forces).

84. 395 U.S. 486 (1969).

85. *Id.* at 548.

86. *Id.*

87. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) (“When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution.”).

88. *E.g., Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 18 (1800) (“The presumption, indeed, must always be in favor of the validity of laws, if the contrary is not clearly demonstrated.”); *Hylton v. United States*, 3 U.S. (3 Dall.) 175 (1796) (declining to overturn tax on carriages absent clear evidence; holding that acts of Congress should only be overturned as unconstitutional “in a very clear case”).

89. *United States v. Morrison*, 529 U.S. 598, 607 (2000) (“Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.”); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat) 518, 625 (1819) (“[T]his court has expressed the cautious circumspection with which it approaches the consideration of such questions; . . . in no doubtful case, would it pronounce a legislative act to be contrary to the constitution.”).

highly deferential analysis characterized by respect for the policymaking prerogative of the elected legislature.⁹⁰ Rational basis scrutiny operates as a judicial default, and is applied unless challenged legislation implicates a fundamental right or a suspect classification.⁹¹

This deference—and its underlying principles of restraint—is set aside whenever legislative decisions implicate constitutional guaranties.⁹² The most famous statement of this principle comes from *United States v. Carolene Products, Co.*,⁹³ a commerce clause case featuring a congressional prohibition on the interstate shipment of filled milk.⁹⁴ In a well-cited footnote of that decision (“Footnote Four”), the Court articulated a framework for a more exacting standard of judicial review.⁹⁵ Although not exhaustive, the Court provided three predicate circumstances for heightened scrutiny: (1) laws that appear to violate specific constitutional provisions, such as Bill of Rights guaranties; (2) restrictions on the majoritarian political process, such as limitations on the right to vote, the dissemination of information, or the operation of political organizations; and (3) discrimination “against discrete and insular minorities”—groups lacking the ability to defend their interests through the organic operations of the political process.⁹⁶

The principles set forth by Footnote Four have evolved into a framework for the judicial role, defining when intervention should prevail over restraint and prudential considerations. In the decades following *Carolene Products*, the Court has applied strict scrutiny to strike down laws that discriminate against suspect classes or interfere with fundamental rights.⁹⁷ Similarly, the Court has gradually articulated various degrees of heightened scrutiny to safeguard the liberties enumerated in the Bill of Rights.⁹⁸ Nevertheless, the

90. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (“[L]egislation . . . is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”); accord *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955) (“[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

91. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966); *McLaughlin v. Florida*, 379 U.S. 184, 191–92 (1964).

92. *Carolene Prods. Co.*, 304 U.S. at 152 n.4.

93. 304 U.S. 144 (1938).

94. *Id.* at 145–46.

95. *Id.* at 152 n.4.

96. *Id.*

97. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and *Korematsu v. United States*, 323 U.S. 214, 216 (1944), for the earliest articulations of strict scrutiny to evaluate laws that interfere with fundamental rights or engage in suspect classifications.

98. See, for example, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638–39 (1943), for an early description of the principles of heightened scrutiny for those Bill of Rights

theory of heightened scrutiny to protect the political process has not been entirely ignored:⁹⁹ Echoes of the Footnote’s majoritarian concerns are visible in the emergence of the fundamental right to vote, and the Court’s embrace of an active judicial role in moderating election law issues.¹⁰⁰

3. Election Law Jurisprudence: Protecting the Rights of Suffrage and Political Participation

Article 1, Section 4 of the United States Constitution (the “Elections Clause”) grants state legislatures authority over the time, place, and manner of congressional elections, subject to congressional oversight.¹⁰¹ Nevertheless, the Supreme Court has recognized that the right to vote and to participate in the political process is a fundamental tenant of representative government.¹⁰² This principle has been increasingly expressed in terms of the First Amendment freedoms of association, representation, and expression—political participatory rights inseparable from the freedom of speech,¹⁰³ and fundamental to the foundations of our democracy.¹⁰⁴ Accordingly, the Supreme Court has applied varying degrees of heightened scrutiny when a state uses this power to restrict or hinder individual participation in the political process.¹⁰⁵

The Court’s ballot access doctrine is a keen example of this category of judicial review. The Court first recognized a fundamental right to vote under

provisions incorporated as fundamental, rejecting application of the rational basis test for laws that address freedom of the press or religion.

99. *See* *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628 (1969) (finding the presumption of constitutionality inoperative where state governments have deviated from their majoritarian mandate).

100. *See infra* Section II.A.3.

101. U.S. CONST. art. I, § 4.

102. *See, e.g.*, *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (finding representative democracy “unimaginable without the ability of citizens to band together [to support] . . . candidates who espouse their political views”); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (emphasizing that “voting is of the most fundamental significance under our constitutional structure”).

103. *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (“[P]olitical belief and association constitute the core of those activities protected by the First Amendment.”); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (“[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of . . . freedom of speech.”).

104. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010) (“Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (affirming that the First Amendment, as a fundamental tenant of American government, reflects a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”).

105. *E.g.*, *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 632 (1969) (overturning restriction on participation in school board elections); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (applying strict scrutiny to strike down poll tax as unconstitutional).

the Equal Protection Clause in *Harper v. Virginia Board of Elections*,¹⁰⁶ characterizing the franchise as “preservative of other basic civil and political rights.”¹⁰⁷ Since *Harper*, the Court has consistently applied strict scrutiny to overturn ballot access restrictions¹⁰⁸ or laws that limit participation in party primary elections.¹⁰⁹ Comparatively, evenhanded election regulations are measured through a balancing test articulated in *Anderson v. Celebrezze*,¹¹⁰ considering: (1) “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments,” (2) “the precise interests put forward by the State,” and (3) “the extent to which those interests make it necessary to burden the plaintiff’s rights.”¹¹¹ These laws are often upheld if the burden imposed is justified by the state’s compelling interest in preserving the integrity of the election process—and overturned where they effect an exclusion of candidates or voters from public participation.¹¹²

The same First Amendment principles that preclude ballot access restrictions also dictate heightened scrutiny of laws that discriminate on the basis of political belief.¹¹³ Government acts that “disfavor certain subjects or viewpoints” or “identif[y] certain preferred speakers” are heavily

106. 383 U.S. 663 (1966).

107. *Id.* at 667 (quoting *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964)); *see also* *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (declaring the franchise “a fundamental political right, because preservative of all rights”).

108. *E.g.*, *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186–87 (1979) (applying strict scrutiny to overturn requirement that candidates obtain 25,000 signatures); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (applying heightened scrutiny to strike down poll tax law).

109. Political primaries have come to be recognized as “an integral part of the election machinery,” and are afforded similar protections to general elections. *See* *United States v. Classic*, 313 U.S. 299, 318 (1941). For example, in the now-infamous “White Primary” cases, the Court used the Fourteenth and Fifteenth Amendments to strike down laws creating race-based restrictions on Texas Democratic Party primaries. *See generally* *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

110. 460 U.S. 780 (1983).

111. *Id.* at 789; *see also* *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968) (finding the First Amendment protects “the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively”).

112. *Anderson*, 460 U.S. at 788 n. 9. *Compare* *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191, 204 (2008) (upholding Indiana voter ID requirement based on state’s interest in preventing voter fraud), *with* *Williams*, 393 U.S. at 25 (overturning election law that made it “virtually impossible” for a new political party to be placed on the ballot).

113. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010) (“[T]he First Amendment stands against attempts to disfavor certain subjects or viewpoints”); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”); *Elrod v. Burns*, 427 U.S. 347, 355 (1976) (“The cost of the practice of patronage is the restraint it places on freedoms of belief and association.”).

disfavored,¹¹⁴ as political speech “is an essential mechanism of democracy” and “a precondition to enlightened self-government.”¹¹⁵ These concerns are manifest in the political arena, where First Amendment freedoms are “at their zenith.”¹¹⁶ Accordingly, the Supreme Court has overturned regulations that limit individual campaign contributions,¹¹⁷ constrain a party’s freedom over its organizational structure,¹¹⁸ or frustrate the effectiveness of political speech.¹¹⁹ Similarly, the Court has held that any invidious consideration of partisan loyalty in government patronage decisions amounts to “coerced belief,” and a violation of the freedom of association.¹²⁰ These rulings have been justified by a need to preserve “[t]he free functioning of the electoral process,” and to avoid conflating the priorities of a political party with the interests of the government itself.¹²¹

B. The Supreme Court’s Redistricting Jurisprudence

The Elections Clause grants state legislatures the authority to regulate federal elections, and commits oversight of this process to Congress.¹²² Throughout the early twentieth century, the Supreme Court interpreted this language to hold that redistricting challenges are nonjusticiable, reasoning that the States have exclusive discretion over the distribution of electoral power between their political subdivisions.¹²³ Justice Frankfurter, writing for the majority in *Colegrove v. Green*,¹²⁴ famously described the apportionment

114. *Citizens United*, 558 U.S. at 340.

115. *Id.* at 339.

116. *Meyer v. Grant*, 486 U.S. 414, 425 (1988); *accord* *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (noting that the First Amendment “‘has its fullest and most urgent application’ to speech uttered during a campaign for political office” (internal citation omitted)).

117. *Citizens United*, 558 U.S. at 319 (overturning corporate campaign finance limits).

118. *E.g.*, *Eu*, 489 U.S. at 222, 229 (finding restrictions on party organization and internal processes “directly implicate the associational rights of political parties and their members”).

119. *E.g.*, *McCullen v. Coakley*, 573 U.S. 464, 489–90 (2014) (finding it “no answer to say that [anti-abortion protesters] can still be seen and heard” when government-imposed buffer zones “have effectively stifled [their] message”); *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 736, 738 (2008) (holding that an election law supporting underfunded opponents of well-financed candidates “impermissibly burdens [a well-financed candidate’s] First Amendment right to spend his own money for campaign speech”).

120. *Elrod v. Burns*, 427 U.S. 347, 355–56 (1976).

121. *Id.* at 355–56, 362.

122. *See supra* note 101 and accompanying text.

123. *See* *South v. Peters*, 339 U.S. 276, 277 (1950) (declining to involve the judiciary in “political issues arising from a state’s geographical distribution of electoral strength”); *MacDougall v. Green*, 335 U.S. 281, 284 (1948) (finding states have the prerogative to “assure a proper diffusion of political initiative” among their political subdivisions); *Colegrove v. Green*, 328 U.S. 549, 554 (1946) (finding “the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States” and therefore “precludes judicial correction”).

124. 328 U.S. 549 (1946).

process as a “political thicket” beyond the jurisdiction of the federal courts.¹²⁵ This attitude changed following *Baker*, when the Court held that none of the formulations of a political question are present in a redistricting suit.¹²⁶ In the subsequent decades, the Court began to develop principles under the Equal Protection Clause to evaluate the fairness of district maps.¹²⁷ Section II.B.1 explores the evolution of judicially manageable standards for cases involving malapportionment and racial gerrymandering.¹²⁸ Section II.B.2 reviews the Court’s struggle to develop a corresponding framework for partisan gerrymandering claims.¹²⁹

1. *Equal Protection Standards: Equal Population and Racial Gerrymandering*

Following *Baker*, the Supreme Court has developed two clear standards for evaluating Congressional districts under the Fourteenth Amendment.¹³⁰ First, as a constitutional minimum, equal population—or “one person, one vote”—must be the legislature’s controlling consideration in the redistricting process.¹³¹ Although mathematical precision is neither expected nor required, departures from equal population must be justified by “legitimate considerations incident to . . . a rational state policy”—such as respect for established municipal boundaries, the preservation of existing districts, or principles of compactness and contiguity.¹³² Even minimal deviations, unless unavoidable, require justification,¹³³ and substantial differences in population may raise a presumption that a map was drawn with unconstitutional motives.¹³⁴

125. *Id.* at 556.

126. *Baker v. Carr*, 369 U.S. 186, 226 (1962); *see also* supra Section II.A.3.

127. *Reynolds v. Sims*, 377 U.S. 533, 557 (1964) (“[T]he Equal Protection Clause provides discoverable and manageable standards for use by lower courts in determining the constitutionality of a state legislative apportionment scheme . . .”).

128. *See infra* Section II.B.1.

129. *See infra* Section II.B.2.

130. *See Shaw v. Reno*, 509 U.S. 630, 641 (1993) (“[Redistricting] schemes violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength.”); *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (“[A]s nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.”).

131. *Reynolds*, 377 U.S. at 558, 581; *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270–71 (2015) (emphasizing the constitutional nature of this requirement; calling equal population “a background rule against which redistricting takes place”).

132. *Reynolds*, 377 U.S. at 577, 578–81.

133. *White v. Weiser*, 412 U.S. 783, 790 (1973); *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) (finding “the command of Art. I, § 2 . . . permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown”).

134. *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973) (noting “population deviations among districts may be sufficiently large to require justification”).

This requirement, now a bedrock principle of the redistricting process, is grounded in the right to vote.¹³⁵ In *Wesberry v. Sanders*¹³⁶ and *Reynolds v. Sims*,¹³⁷ the Court held Article I, Section 2,¹³⁸ construed in light of the structural design of the bicameral legislature, demands “equal representation in the House for equal numbers of people.”¹³⁹ Districts drawn without equal population violate this guarantee by distorting the proportionate influence of each voter.¹⁴⁰ This differential weighing of votes based on geographical location amounts to a form of discrimination that offends the basic mandate of Equal Protection.¹⁴¹ Notably, Justice Harlan dissented from each of these decisions on political question grounds, arguing that the Elections Clause grants Congress exclusive oversight of the apportionment process.¹⁴² Rejecting Justice Harlan’s proposition, the Court held that Congress cannot insulate a constitutional injury from review.¹⁴³

Second, the Court has categorically precluded the invidious consideration of race in the redistricting process.¹⁴⁴ Although a legislature engaged in redistricting will inevitably be aware of racial demographics,¹⁴⁵ a congressional map will be subject to strict scrutiny if racial considerations were the “overriding, predominant force”—the “dominant and controlling rationale”—in the apportionment process.¹⁴⁶ Although compliance with the Voting Rights Act and remedial classifications to correct past racial

135. *Reynolds*, 377 U.S. at 561–62 (“[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”); see also *supra* notes 106–109 and accompanying text.

136. 376 U.S. 1 (1964).

137. 377 U.S. 533 (1964).

138. U.S. CONST. art. I, § 2 (mandating representatives be chosen “by the People of the several States . . . according to their respective Numbers”).

139. *Wesberry*, 376 U.S. at 14.

140. *Reynolds*, 377 U.S. at 563.

141. *Id.*

142. *Reynolds*, 377 U.S. at 589 (Harlan, J., dissenting) (arguing “[t]hese decisions . . . have the effect of placing basic aspects of state political systems under the pervasive overlordship of the federal judiciary”); *Wesberry*, 376 U.S. at 23 (Harlan, J., dissenting); cf. *supra* note 101 and accompanying text.

143. *Reynolds*, 377 U.S. at 582, 585 (“[O]nce a State’s legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action . . .”).

144. *Miller v. Johnson*, 515 U.S. 900, 911, 915 (1995).

145. *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (“[R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines. . . . That sort of race consciousness does not lead inevitably to impermissible race discrimination.”).

146. *Miller*, 515 U.S. at 909, 913, 916 (citation omitted) (finding racial gerrymander where “the legislature subordinated traditional race-neutral districting principles . . . to racial considerations”).

gerrymanders may allow a race-conscious map to survive strict scrutiny,¹⁴⁷ courts repeatedly strike down districts designed to dilute the representation of a racial group.¹⁴⁸ Consistent with standard equal protection jurisprudence, facially neutral districts that are “unexplainable on grounds other than race”—such as those with extraordinarily bizarre shapes—raise a presumption of improper motive.¹⁴⁹

The difficulty of ascertaining predominant intent has been a consistent barrier to redress, especially when the mapmakers indicate a mixed or alternative motive.¹⁵⁰ This problem is best illustrated by the line of cases addressing North Carolina’s Twelfth Congressional District.¹⁵¹ In *Shaw v. Reno* (“Shaw I”)¹⁵² and *Shaw v. Hunt* (“Shaw II”),¹⁵³ the first two decisions addressing this issue, the Court struck down the district as an unconstitutional racial gerrymander.¹⁵⁴ The Court found that the district’s irregular shape, juxtaposed against its history and demographics, supported a conclusion that the map was deliberately drawn to create “two majority-black districts.”¹⁵⁵ When the map was redrawn and subsequently challenged, the plaintiffs were unable to establish predominant intent, as the new map corresponded evenly with racial and partisan considerations.¹⁵⁶ Nevertheless, the Court has been careful to avoid conflating race and party: Although the predominant intent to obtain partisan advantage provides a shield against racial gerrymandering

147. See *North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018) (upholding adoption of special master’s “expressly race-conscious” redistricting plan that was “limited to ensuring that the plaintiffs were relieved of the burden of voting in racially gerrymandered legislative districts”); *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) (finding majority-minority districts must be maintained under the Voting Rights Act if (1) the minority group is “sufficiently large and geographically compact to constitute a majority;” (2) the minority group is “politically cohesive;” and (3) the majority “votes sufficiently as a bloc . . . to defeat the minority’s preferred candidate”).

148. *Shaw*, 509 U.S. at 642.

149. *Id.* at 643, 649; e.g., *Goumillion v. Lightfoot*, 364 U.S. 339, 340 (1960) (enjoining a redistricting law converting square-shaped district into “an uncouth twenty-eight-sided figure”).

150. See *Easley v. Cromartie*, 532 U.S. 234, 257–58 (2001) (discussing the burden placed on plaintiffs to demonstrate predominant intent).

151. See generally *Easley*, 532 U.S. 234 (involving a decade of continuous litigation over whether the Twelfth District is a racial gerrymander in violation of the Fourteenth Amendment); *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Shaw*, 509 U.S. 630.

152. 509 U.S. 630 (1993).

153. 517 U.S. 899 (1996).

154. *Id.* at 906 (reaching this conclusion under *Miller*).

155. *Id.* at 905–906.

156. *Easley*, 532 U.S. at 258 (finding plaintiffs failed to show “that the legislature could have achieved its legitimate political objectives in alternate ways that are comparably consistent with traditional districting principles”); *Hunt*, 526 U.S. at 549–51 (reviewing expert’s testimony “that the data as a whole supported a political explanation at least as well as, and somewhat better than, a racial explanation”).

claims, use of racial demographics as a proxy for partisan alignment remains impermissible.¹⁵⁷

2. *Partisan Gerrymandering in the Supreme Court: Struggle to Develop a Standard*

Despite the emergence of coherent standards for race and population, the Supreme Court has struggled to articulate a consistent approach to partisan gerrymandering.¹⁵⁸ In *Gaffney v. Cummings*,¹⁵⁹ decided eleven years after *Baker*, the Court rejected a challenge to a redistricting plan drafted to promote proportional representation for the two major parties.¹⁶⁰ Reasoning that “districting inevitably has and is intended to have substantial political consequences,” the Court concluded that the legislature’s consideration of partisan interests is a necessary incident of the apportionment process.¹⁶¹ Moreover, the Court found no authority to overturn a plan that “undertakes, not to minimize or eliminate the political strength of any group or party, but to . . . provide a rough sort of proportional representation in the legislative halls of the State.”¹⁶²

Although the *Gaffney* Court was arguably advancing a benign classification theory for redistricting,¹⁶³ subsequent decisions citing *Gaffney* have embellished on this principle, culminating in the proposition that “a jurisdiction may engage in constitutional political gerrymandering.”¹⁶⁴ Accordingly, the challenge lies in determining how much partisan impact may be tolerated—and defining the boundary between permissible partisan advantage and unconstitutional partisan entrenchment.¹⁶⁵

157. *Bush v. Vera*, 517 U.S. 952, 968 (1996).

158. *See Vieth v. Jubelirer*, 541 U.S. 267, 282, 306 (2004) (describing “[e]ighteen years of essentially pointless litigation” and the “long record of puzzlement and consternation” faced by federal courts resolving these claims).

159. 412 U.S. 735 (1973).

160. *Id.* at 738 (“[State] Senate and House districts were structured so that the composition of both Houses would reflect ‘as closely as possible . . . the actual [statewide] plurality . . . in a given election.’” (second and third alterations in original)).

161. *Id.* at 752–53.

162. *Id.* at 754.

163. *See id.* (“[J]udicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength . . .”); *accord Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (“A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective.”).

164. *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999).

165. *Davis v. Bandemer*, 478 U.S. 109, 133 (1986) (“[A]n equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively.”); *see also Vieth*, 541 U.S. at 306–07 (2004) (Kennedy,

The Court's first crack at this problem came in *Davis v. Bandemer*,¹⁶⁶ featuring a challenge to the district map adopted by Indiana following the 1980 census.¹⁶⁷ The plan, developed with negligible input from Democrats, granted Republicans fifty-seven percent of legislative seats with only forty-eight percent of the popular vote.¹⁶⁸ Addressing these disparities, the Court affirmed the justiciability of partisan gerrymandering claims, finding the underlying constitutional question comparable to racial gerrymandering as a dilution of the voting strength of a target demographic.¹⁶⁹ Nevertheless, harkening to *Gaffney*'s recognition that political considerations are an inevitable feature of the districting process,¹⁷⁰ the Court held that an electoral disadvantage does not necessarily invalidate a constitutional map.¹⁷¹ Rather, "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."¹⁷²

This "consistent degradation" test proved exceedingly difficult to satisfy, and in *Vieth v. Jubelirer*,¹⁷³ the Justices repudiated *Bandemer* and fractured over the proper standard to apply.¹⁷⁴ *Vieth* involved a Pennsylvania map enacted as "a punitive measure" in response to Democratic redistricting efforts in other states—and calibrated to ensure Republicans received thirteen of nineteen congressional seats, with only 49.9% of the popular vote.¹⁷⁵ Justice Scalia's plurality opinion drew a stark contrast between race, "a rare and constitutionally suspect motive," and partisan advantage, "an ordinary and lawful motive," to distinguish the two claims.¹⁷⁶ Echoing Justice Harlan's dissents in *Reynolds* and *Wesberry*, Justice Scalia emphasized that

J., concurring) (identifying as core obstacles "the lack of comprehensive and neutral principles for drawing electoral boundaries" and "the absence of rules to limit and confine judicial intervention").

166. 478 U.S. 109 (1986).

167. *Id.* at 113.

168. *Id.* at 115; *see* *Bandemer v. Davis*, 603 F. Supp. 1479, 1495 (S.D. Ind. 1984) (noting "[t]he minority party was wholly excluded from the mapmaking process"), *rev'd*, 478 U.S. 109 (1986).

169. *Bandemer*, 478 U.S. at 124–25 (observing that either claim involves an "identifiable racial or ethnic group [claiming] an insufficient chance to elect a representative of its choice;" reasoning "that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability").

170. *See supra* notes 161–164 and accompanying text.

171. *Bandemer*, 478 U.S. at 128–29, 131–32.

172. *Id.* at 132. The *Bandemer* Court reasoned such discrimination may occur either as a result of "continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." *Id.* at 133.

173. 541 U.S. 267 (2004).

174. *Id.* at 282–84.

175. *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 535–36 (M.D. Pa. 2002), *aff'd*, 541 U.S. 267 (2004). This plan did not live up to its partisan expectations—in subsequent elections, the map produced only a narrow 11–10 advantage for Republicans. *Vieth*, 541 U.S. at 289.

176. *Vieth*, 541 U.S. at 286.

political gerrymandering was a common practice during colonial times, and construed the Elections Clause as precluding judicial intervention in the redistricting process.¹⁷⁷ Accordingly, the plurality held that partisan gerrymandering claims are nonjusticiable political questions.¹⁷⁸

Five Justices—in separate opinions—agreed that partisan gerrymandering is justiciable but could not settle on an acceptable standard to apply.¹⁷⁹ Although Justice Kennedy was not prepared to find the claim justiciable under the facts of this case, he was hesitant to categorically foreclose review of partisan gerrymandering, and expressed hope that a standard might emerge in the future, possibly under the First Amendment.¹⁸⁰ Dissenting, Justices Breyer and Souter proposed tests intended to delineate the boundaries of acceptable partisan influence.¹⁸¹ Justice Stevens went further, challenging the plurality's acceptance of political advantage as a permissible redistricting motive.¹⁸² He analogized partisan gerrymandering to racial gerrymandering as the deliberate electoral suppression of a target demographic,¹⁸³ and a burden on freedom of association.¹⁸⁴ Justice Stevens asserted that equating the two claims would obviate the difficulty of defining a threshold of unconstitutionality, and mitigate the plurality's concerns about judicial overreach.¹⁸⁵

Justice Kennedy may have been overly optimistic: Following *Vieth*, even as the Court continued to recognize that partisan gerrymandering subverts basic democratic principles, the Justices were unable to settle on a manageable standard to resolve these claims.¹⁸⁶ In *League of United Latin*

177. *Id.* at 274–75; *cf. Wesberry v. Sanders*, 376 U.S. 1, 23 (1964) (Harlan, J., dissenting) (arguing the Elections Clause provides the States with plenary over elections, “subject only to the [exclusive] supervisory power of Congress”).

178. *Vieth*, 541 U.S. at 306.

179. *Id.* at 317 (Stevens, J., dissenting).

180. *Id.* at 314 (Kennedy, J., concurring) (“First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters’ representational rights.”).

181. *Id.* at 347–50 (Souter, J., dissenting) (proposing a five-element test requiring the plaintiff to show an injury to their party through a departure from traditional redistricting principles); *id.* at 360 (Breyer, J., dissenting) (suggesting a test based on “the unjustified use of political factors to entrench a minority in power,” measured by a lack of adherence to traditional districting criteria and by a minority party’s efforts to hold political power (emphasis omitted)).

182. *Id.* at 324 (Stevens, J., dissenting).

183. *Id.* at 326 (“[I]f the State goes ‘too far’—if it engages in ‘political gerrymandering for politics’ sake’—it violates the Constitution in the same way as if it undertakes ‘racial gerrymandering for race’s sake.’”).

184. *Id.* at 324–25 (citing *Elrod v. Burns*, 427 U.S. 347, 356 (1976)).

185. *Id.* at 339.

186. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015).

American Citizens v. Perry,¹⁸⁷ the Court rejected a “sole motivation” approach, emphasizing the need for plaintiffs to demonstrate unconstitutional partisan effects.¹⁸⁸ In *Gill v. Whitford*,¹⁸⁹ the Court passed over a mathematical “efficiency gap” algorithm designed to calculate each party’s wasted votes.¹⁹⁰ Concurring Justices in each case highlighted the associational harms caused by partisan discrimination and argued that partisan entrenchment should not be a permissible motive for redistricting.¹⁹¹ These decisions heightened the judiciary’s confusion over the proper framework to adjudicate partisan gerrymandering, and left the justiciability of these claims on increasingly unstable grounds.¹⁹²

III. THE COURT’S REASONING

In an opinion written by Chief Justice Roberts, the Supreme Court in *Rucho v. Common Cause* held that partisan gerrymandering is a nonjusticiable political question.¹⁹³ At the outset, the Chief Justice highlighted the lack of “clear, manageable, and politically neutral”¹⁹⁴ standards for adjudicating these claims without undermining the legitimacy or neutrality of the federal judiciary.¹⁹⁵ Although partisan gerrymandering is “incompatible with democratic principles,”¹⁹⁶ any partisan gerrymandering doctrine would require the courts to distinguish unconstitutional partisan

187. 548 U.S. 399 (2006).

188. *Id.* at 417, 418 (Kennedy, J., concurring) (“[A] successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do what appellants’ sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants’ representational rights.”).

189. 138 S. Ct. 1916 (2018).

190. *Id.* at 1932. Notably, the *Gill* plaintiffs presented extensive evidence of the process the Republican mapmakers used to develop, test, and select a map designed to maximize partisan advantage. See *Whitford v. Gill*, 218 F. Supp. 3d 837, 847–53 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018). Nevertheless, this claim was dismissed for a lack of standing. *Gill*, 138 S. Ct. at 1932.

191. *Perry*, 548 U.S. at 448 (Stevens, J., concurring) (arguing a partisan desire to dilute a group’s voting strength is not a legitimate government purpose for redistricting); *Whitford*, 138 S. Ct. at 1938 (Kagan, J., concurring) (arguing “partisan gerrymanders inflict other kinds of constitutional harm . . . [and] may infringe the First Amendment rights of association held by parties, other political organizations, and their members”).

192. See *supra* notes 158, 177–179 (describing the courts’ trend towards nonjusticiability).

193. 139 S. Ct. 2484, 2506–07 (2019).

194. *Id.* at 2498 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 306–08 (2004) (Kennedy, J., concurring)).

195. *Id.* The Court drew heavily on Justice Kennedy’s concurring opinion in *Vieth* to reason that “[w]ith uncertain limits, intervening courts . . . would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.” *Id.* (quoting *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring)).

196. *Id.* at 2506 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2677 (2015)); see also *supra* note 15 and accompanying text.

entrenchment from permissible partisan advantage.¹⁹⁷ Any attempt at such a delineation would invariably rest on competing notions of fairness that are highly subjective and incompatible with judicial neutrality.¹⁹⁸

The Chief Justice reached this conclusion on two primary grounds. First, the Court held that “federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were [constitutionally] authorized to do so.”¹⁹⁹ Although partisan gerrymandering was common prior to Independence, the Framers granted Congress exclusive supervision over the redistricting process through the Elections Clause.²⁰⁰ “At no point was there a suggestion that the federal courts had a role to play.”²⁰¹ Second, the Court reasoned that where established principles of Equal Protection prohibit racial discrimination in redistricting,²⁰² partisan gerrymandering is an amorphous concept subject to competing definitions, with no clear threshold of unconstitutionality.²⁰³ “Any judicial decision on what is ‘fair’ in this context would be an ‘unmoored determination’ of the sort characteristic of a political question beyond the competence of the federal courts.”²⁰⁴

Evaluating the standards proposed by the dissent and the lower courts, the Chief Justice concluded that none provided an acceptable or neutral boundary for adjudication.²⁰⁵ The First Amendment test embraced by the lower courts²⁰⁶ would preclude any consideration of partisan alignment in the redistricting process—an approach in conflict with the Court’s longstanding position that such considerations are tolerable and inevitable.²⁰⁷ The Equal Protection test invoked by Middle District of North Carolina raised serious administrability concerns by requiring judges to predict the outcomes of future elections and determine whether a disproportionate partisan advantage is likely to persist.²⁰⁸ Equally unavailing was Justice Kagan’s approach of using each state’s individual redistricting criteria as a neutral baseline, as

197. *Rucho*, 139 S. Ct. at 2498–99.

198. *See id.* at 2500 (“The initial difficulty in settling on a ‘clear, manageable and politically neutral’ test for fairness is that it is not even clear what fairness looks like in this context.”).

199. *Id.* at 2499.

200. *Id.* at 2494–96.

201. *Id.* at 2496.

202. *Id.* at 2502.

203. *Id.* at 2500.

204. *Id.* (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)).

205. *Id.* at 2502.

206. *See supra* notes 41–43 and accompanying text (discussing a three-prong test requiring (1) discriminatory intent, (2) burden on associational or representational rights, and (3) causation).

207. *Rucho*, 139 S. Ct. at 2504 (citing *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973)); *see supra* notes 160–164 and accompanying text.

208. *Rucho*, 139 S. Ct. at 2503; *see also supra* note 40.

“[t]he degree of partisan advantage that the Constitution tolerates should not turn on criteria offered by the gerrymanderers themselves.”²⁰⁹

In an extended dissent, Justice Kagan charged partisan mapmakers with denying citizens “the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives.”²¹⁰ The dissent argued that partisan gerrymandering violates both the First and Fourteenth Amendments.²¹¹ Where the First Amendment protects freedoms of political belief, association, and representation, partisan gerrymandering “subject[s] certain voters to ‘disfavored treatment’ . . . precisely because of ‘their voting history [and] their expression of political views.’”²¹² Where the Fourteenth guarantees every citizen an equal opportunity to participate in elections, “that opportunity ‘can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.’”²¹³

Justice Kagan challenged the majority with abdicating its most fundamental duty “just when courts across the country . . . have coalesced around manageable judicial standards to resolve partisan gerrymandering claims.”²¹⁴ Per Justice Kagan, the three-part First Amendment test enunciated by the courts below would establish clear and manageable standards for oversight of the apportionment process while avoiding each of the majority’s principal concerns.²¹⁵ The use of a state’s “own political geography and districting criteria” as a baseline consideration would limit judicial subjectivity,²¹⁶ and advanced computing technology would enable courts and litigants to accurately quantify a district map’s dilutive effect.²¹⁷ Moreover, “the combined inquiry [of predominance and substantiality] used in these cases set[s] the bar high, so that courts could intervene in the worst partisan gerrymanders, but no others.”²¹⁸

209. *Rucho*, 139 S. Ct. at 2505.

210. *Id.* at 2509 (Kagan, J., dissenting).

211. *Id.* at 2514.

212. *Id.* (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring)).

213. *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 566 (1964)).

214. *Id.* at 2509.

215. *Id.* at 2516.

216. *Id.* at 2521 (emphasis omitted).

217. *Id.* at 2517–18 (discussing one example technique that uses a computer algorithm to compare the challenged map to thousands of simulated district configurations based on a state’s neutral districting criteria). “[T]he same technologies and data that today facilitate extreme partisan gerrymanders also enable courts to discover them, by exposing just how much they dilute votes.” *Id.*

218. *Id.* at 2522.

IV. ANALYSIS

The holding in *Rucho v. Common Cause* was the result of the Court's decision to frame the gerrymandering problem as a question of impact, rather than an impermissible legislative motive. This Note proposes that a district map drawn with the predominant intent to secure partisan advantage violates the First Amendment as a form of viewpoint discrimination and an injury to political participatory rights. Section IV.A provides the foundation of this analysis by highlighting the Court's duty to protect the democratic process against obstruction and distortion.²¹⁹ Section IV.B challenges the Court's longstanding acceptance of partisan advantage as the predominant objective of the redistricting process.²²⁰ Section IV.C proposes an intent-based First Amendment standard to adjudicate partisan gerrymandering claims on a theory of viewpoint discrimination.²²¹ Finally, Section IV.D highlights the inapplicability of the political question doctrine in light of this framework.²²²

A. *The Duty to Act: The Court's Responsibility to Preserve the Framework of Democracy*

The regime of heightened scrutiny established in *United States v. Carolene Products* demonstrates that the Court has "a role to play" in moderating extreme partisan gerrymanders.²²³ Professor John Hart Ely described Footnote Four as articulating a "representation-reinforcing" model of judicial review,²²⁴ characterized by protections for the process of selecting decisionmakers, rather than specific substantive outcomes.²²⁵ Under this approach, the Court has a longstanding duty to "clear[] the channels of political change"²²⁶ by (1) striking down laws that obstruct the representation of the majority will and (2) regulating the use of power by political insiders

219. *See supra* Section IV.A.

220. *See supra* Section IV.B.

221. *See supra* Section IV.C.

222. *See supra* Section IV.D.

223. *See Vieth v. Jubelirer*, 541 U.S. 267, 311–12 (2004) (Kennedy, J., concurring) ("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.'" (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938))); *cf. Rucho v. Common Cause*, 139 S. Ct. 2484, 2496 (2019).

224. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 102, 117 (1980). Professor Ely further notes that courts, as neutral decisionmakers removed from the political process, are uniquely suited to this task. *Id.* at 88, 102.

225. *Id.* at 101–02 (emphasizing that this theory of review recognizes "the unacceptability of the claim that appointed and life-tenured judges are better reflectors of conventional values than elected representatives, devoting itself instead to policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent").

226. *Id.* at 105.

to prevent the suppression of political outsiders.²²⁷ The rights of speech and suffrage are closely guarded to guarantee unfettered access to the political process.²²⁸ Likewise, laws that target minorities are constitutionally suspect not only by virtue of their stigmatic effect, but also their propensity to insulate those groups from political influence.²²⁹

Decades of election law jurisprudence highlight the importance of the Court's responsibility to the framework of democracy.²³⁰ The right to vote is protected due to its centrality to the democratic process—in *Harper v. Virginia Board of Elections* and *Yick Wo v. Hopkins*,²³¹ the Court described the franchise as “preservative of all other rights.”²³² Accordingly, Professor Ely's “channels of political change” are the focal point of the Court's ballot access and redistricting doctrines.²³³ *Anderson* balancing turns on the value of election regulations to a functioning democracy: Challenged regulations are upheld when their contribution to the effectiveness or the integrity of the election process outweighs the burdens they place on the franchise.²³⁴ Likewise, each of the established redistricting doctrines is designed to protect political outsiders against electoral disempowerment²³⁵: Malapportionment is strictly scrutinized as a form of vote dilution and a “debasement” of the

227. *Id.* at 101, 103.

228. *Id.* at 105, 117 (arguing “the courts should be heavily involved in reviewing impediments to free speech, publication, and political association . . . because they are critical to the functioning of an open and effective democratic process” and that “unblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage”).

229. *Id.* at 86–87 (“[W]hat are sometimes characterized as two conflicting American ideals—the protection of popular government on the one hand, and the protection of minorities from denials of equal concern and respect on the other—in fact can be understood as arising from a common duty of representation.”).

230. *See supra* Section II.A.3.

231. 118 U.S. 356 (1886).

232. *See supra* note 107 and accompanying text.

233. ELY, *supra* note 224, at 105, 117; *accord Anderson v. Celebrezze*, 460 U.S. 780, 793–94 (1983) (“The inquiry is whether the challenged restriction unfairly or unnecessarily burdens “the availability of political opportunity.” . . . [S]uch restrictions threaten to reduce diversity and competition in the marketplace of ideas.”) (citation omitted) (quoting *Clements v. Fashing*, 457 U.S. 957, 964 (1982)); *Reynolds v. Sims*, 377 U.S. 557, 555 (1964) (“The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”); *see also supra* note 223.

234. *Anderson*, 460 U.S. at 789; *see supra* notes 111–112 and accompanying text.

235. Ely, *supra* note 224, at 117 (emphasizing that the right to vote is “essential to the democratic process” and “cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo”).

franchise,²³⁶ while racial gerrymandering is categorically proscribed as the political suppression of a discrete and insular minority.²³⁷

Partisan gerrymandering is no less “incompatible with democratic principles,” and no less deleterious to “the channels of political change.”²³⁸ As Justice Kagan noted in *Rucho*, the maps drawn in Maryland and North Carolina “promote[] partisanship above respect for the popular will.”²³⁹ These gerrymanders undermine the majoritarian process by entrenching insiders in power, and frustrating the ability of outsiders to translate votes into representation.²⁴⁰ They render elections noncompetitive and deter public participation in the democratic process.²⁴¹ They generate “a politics of polarization and dysfunction,” reinforcing a pervasive belief that officials owe their allegiance to the members of their party—rather than the voting public.²⁴² These trends have not escaped judicial notice: The Supreme Court has consistently denounced gerrymandering as destructive to the foundations of our democracy.²⁴³ It necessarily follows that the Court has a duty to act.

Instead, the *Rucho* majority deferred this responsibility by construing the Elections Clause as an exclusive grant of authority to Congress and the States.²⁴⁴ This reasoning, an echo of the “political thicket” criticized by

236. *Reynolds*, 377 U.S. at 555 (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”).

237. *Shaw v. Reno*, 509 U.S. 630, 648 (1993) (“When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.”).

238. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015)); ELY, *supra* note 224, at 105; *see supra* note 15 and accompanying text.

239. *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting).

240. *See supra* notes 4, 8 and accompanying text.

241. *See Hayes & McKee, supra* note 8, at 1009; *e.g.*, *Benisek v. Lamone*, 348 F. Supp. 3d 493, 508, 524 (D. Md. 2018) (noting voter turnout among Republicans decreased by as much as sixteen percent in counties affected by the Democratic gerrymander in Maryland and concluding that “[m]embers of the Republican Party in the Sixth District . . . were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting in an atmosphere of general confusion and apathy”), *vacated*, 139 S. Ct. 2484 (2019).

242. *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting); *Vieth v. Jubelirer*, 541 U.S. 267, 331 (2004) (Stevens, J., dissenting) (“The parallel danger of a partisan gerrymander is that the representative will perceive that the people who put her in power are those who drew the map rather than those who cast ballots . . .”).

243. *See supra* notes 13–15 and accompanying text.

244. *Rucho*, 139 S. Ct. at 2496 (“The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress.”). Notably, the majority argues that review of the redistricting process was committed to Congress in the context of partisan gerrymandering—but not in the context of racial gerrymandering or malapportionment. *Id.* at 2495–96. This is a meaningless distinction. There is nothing in the Constitution that suggests

Justices Frankfurter and Harlan,²⁴⁵ was soundly repudiated by the Supreme Court in *Baker v. Carr*, *Wesberry v. Sanders*, and *Reynolds v. Sims*.²⁴⁶ Moreover, decades of judicial intervention to prevent abuse of the elections process demonstrate that the Elections Clause is not an absolute barrier to judicial review.²⁴⁷ Although elected officials have authority over the time, place, and manner of elections,²⁴⁸ the presumption of constitutionality attendant to their discretion is narrowed when their actions restrict the unfettered operations of the democratic process.²⁴⁹ And while “judges have no license to reallocate political power between the two major political parties,”²⁵⁰ courts have an established duty to prevent those parties from commandeering the machinery of the state.²⁵¹

B. The Gaffney Gaffe: Rejecting Partisan Gain as the Dominant Redistricting Motive

Racial and partisan gerrymandering share a common core in their damaging effects on the majoritarian democratic process.²⁵² As Justice Stevens noted in *Vieth v. Jubelirer*, “the essence of a gerrymander is the same regardless of whether the group is identified as racial or political.”²⁵³ Each practice involves the electoral suppression of a specific demographic by reducing its ability to preserve its interests through the political process.²⁵⁴

the judiciary may override the mandate of the Elections Clause to review some Equal Protection violations, but not others. See *Davis v. Bandemer*, 478 U.S. 109, 125 (1985) (“That the characteristics of the complaining group are not immutable or that the group has not been subject to the same historical stigma may be relevant to the manner in which the case is adjudicated, but these differences do not justify a refusal to entertain such a case.”).

245. *Colegrove v. Green*, 328 U.S. 549, 556 (1946); see *supra* notes 124–138 and accompanying text.

246. See *supra* notes 142–143 and accompanying text.

247. See *supra* notes 101–112 and accompanying text (discussing the Court’s evaluation of election regulations under the First and Fourteenth Amendments).

248. U.S. CONST. art. 1., § 4.

249. *ELY*, *supra* note 224, at 117 (quoting *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628 (1969)); see *supra* note 92, 101–105 and accompanying text.

250. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). But see *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) (holding that a State’s allocation of political power is “not wholly exempt” from judicial scrutiny).

251. See *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (emphasizing that “care must be taken not to confuse the interest of partisan organizations with governmental interests”).

252. See *supra* notes 169, 229.

253. *Vieth v. Jubelirer*, 541 U.S. 267, 335 (2004) (Stevens, J., dissenting).

254. *Shaw v. Reno*, 509 U.S. 630, 648 (1993) (noting the distortion of political representation created by racial gerrymandering); *Davis v. Bandemer*, 478 U.S. 109, 132–33 (1986) (“In both contexts, the question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process.”); *Gaffney*, 412 U.S. at 754 (finding districts vulnerable where “racial or political groups have been fenced out of the political process and their voting strength invidiously minimized”).

Each practice undermines legislative neutrality and accountability by reducing the incentives for elected officials to represent political outsiders.²⁵⁵ And while many of the most pervasive harms caused by racial discrimination are not present in the partisan context, racial gerrymandering cases have consistently been decided on political egalitarian grounds.²⁵⁶ Whether the target group is defined by its race or its political identity, its representation is no less diluted by the cracking and packing of votes than by a distortion in its district's population or a restriction on its access to the ballot.²⁵⁷ It follows that partisan advantage, like racial discrimination, should not be considered "an ordinary and lawful motive" in the redistricting process.²⁵⁸

Despite these commonalities, the Court has embraced the misguided notion that "a jurisdiction may engage in constitutional political gerrymandering."²⁵⁹ This distinction can be traced to *Gaffney v. Cummings*, where the Court held that a benign consideration of partisan interests during apportionment is constitutionally permissible.²⁶⁰ Due to the increasingly broad construction of this holding,²⁶¹ redistricting doctrine has splintered: Partisan gerrymanders are adjudicated based on their *effects* on subsequent elections, while racial gerrymanders are strictly scrutinized based on *intent* alone.²⁶² This bifurcation has left the Court to grapple with the "unmoored determination" of "how much" partisan entrenchment it is willing to tolerate.²⁶³ In turn, this framing of the issue as a matter of degree led to decades of confusion over the proper method to adjudicate partisan

255. Compare *Shaw*, 509 U.S. at 642, 648, with *Vieth*, 541 U.S. at 331 (Stevens, J., dissenting) (recognizing the distortion of incentives caused by each form of gerrymandering).

256. See, e.g., the White Primaries, *supra* note 109; see also *Shaw*, 509 U.S. at 648 (finding racial gerrymandering "altogether antithetical to our system of representative democracy"); *Thornburg v. Gingles*, 478 U.S. 30, 43, 98 (1986) (striking down a redistricting plan under the Voting Rights Act where "the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class]" (alterations in original)).

257. See *supra* text accompanying notes 169, 213.

258. *Vieth*, 541 U.S. at 324–26 (Stevens, J., dissenting) ("[I]f the State goes 'too far'—if it engages in 'political gerrymandering for politics' sake—it violates the Constitution in the same way as if it undertakes 'racial gerrymandering for race's sake.'").

259. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2497 (2019) (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) and citing *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) for this principle).

260. See *supra* notes 160–161.

261. See *supra* notes 163–164 and accompanying text. Equally striking, the doctrinal evolution from *Gaffney*'s benign classification approach to *Cromartie*'s acceptance of "constitutional political gerrymandering" arguably emerged in dicta. *Constitutional Validity of Congressional Redistricting*, 82 A.L.R. Fed. 2d 1 (2014). The *Rucho* Court, like the *Cromartie* Court before it, exclusively cited racial gerrymandering cases for the broader proposition. *Rucho*, 139 S. Ct. at 2497 (citing *Cromartie*, 526 U.S. at 551; *Shaw v. Hunt*, 517 U.S. 899, 905 (1996); *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *Shaw*, 509 U.S. at 646).

262. *Rucho*, 139 S. Ct. at 2496–97 (highlighting the difference between the two claims).

263. *Id.* at 2500–01; see *supra* note 204.

gerrymandering claims,²⁶⁴ and culminated in the political question holding in *Rucho*.²⁶⁵

The divergence of these standards was—and continues to be—grounded in structural logic incongruous with our constitutional system.²⁶⁶ In *Gaffney*, the Court reasoned that “districting inevitably has and is intended to have substantial political consequences” as “politics and political considerations are inseparable from districting and apportionment.”²⁶⁷ Stated more plainly in *Rucho*: “To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers’ decision to entrust districting to political entities.”²⁶⁸ This “boys-will-be-boys” line of reasoning undermines the system of checks and balances that is central to the structure of our government.²⁶⁹ It contradicts the majority’s stated hesitation to allow politically-motivated actors to moderate their self-interest.²⁷⁰ And it misrepresents the intent of the Framers, many of whom detested partisan gerrymandering,²⁷¹ and considered factionalism an existential threat to the system they designed.²⁷²

The majority’s administrability concerns fare no better. As the Court has already acknowledged, every legislature will inevitably be aware of race

264. See *supra* Section II.B.2.

265. *Rucho*, 139 S. Ct. at 2497 (“Partisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, ‘a jurisdiction may engage in constitutional political gerrymandering.’” (quoting *Cromartie*, 526 U.S. at 551, and citing *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)); *Davis v. Bandemer*, 478 U.S. 109, 128, 132 (1986) (drawing from *Gaffney*’s benign classification approach and its holding on the inevitability of partisan effects to reason that “the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination” and hold that proving such discrimination requires a showing of consistent degradation).

266. See *supra* note 161 and accompanying text.

267. 412 U.S. at 753.

268. *Rucho*, 139 S. Ct. at 2497.

269. See THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison) (“Ambition must be made to counteract ambition . . . In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”).

270. See *supra* text accompanying note 209; *accord* Ely, *supra* note 224 at 117 (emphasizing that the duty to preserve the democratic process “cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo”).

271. *Rucho*, 139 S. Ct. at 2512 (Kagan, J., dissenting) (“[P]artisan gerrymandering goes back to the Republic’s earliest days. (As does vociferous opposition to it.)”); *accord* *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 844–45 (M.D.N.C. 2018) (reviewing commentary on founding era authority to confirm public distaste for gerrymandering), *vacated*, 139 S. Ct. 2484 (2019); Khomina, *supra* note 6.

272. See THE FEDERALIST NO. 9 (Alexander Hamilton) (characterizing the Union as “a barrier against domestic faction and insurrection”); THE FEDERALIST NO. 10 (James Madison) (“When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.”).

during the apportionment process, just as it will be aware of the state's political composition.²⁷³ Moreover, redistricting will inevitably affect racial demographics as readily as political parties.²⁷⁴ These inevitabilities have not rendered racial gerrymandering unmanageable: The Court simply chose a better path for these claims by identifying predominant intent as the threshold of unconstitutionality.²⁷⁵ The same approach would be well-suited to address partisan gerrymandering.²⁷⁶ Some partisan considerations and political effects are an inevitable consequence of the redistricting process and must be tolerated.²⁷⁷ Once the intent to obtain partisan advantage predominates—once all neutral considerations have been subordinated to partisan ends—a constitutional line has been crossed, and the Court must intervene.²⁷⁸

C. This Much Is Too Much: Partisan Gerrymandering as a Form of Viewpoint Discrimination

The First Amendment would provide a stronger foundation for partisan gerrymandering claims.²⁷⁹ The freedoms of association and representation

273. Compare *supra* note 145 (discussing inevitable awareness of race), with *supra* notes 161, 207 and accompanying text (discussing inevitable awareness of political effects).

274. E.g., Olga Pierce & Kate Rabinowitz, “Partisan” Gerrymandering Is Still About Race, PROPUBLICA (Oct. 9, 2017, 6:48 PM), <https://www.propublica.org/article/partisan-gerrymandering-is-still-about-race> (“Manipulating a map to move around Wisconsin Democrats also means manipulating a map to move around Wisconsin voters who are not white . . .”).

275. See *supra* notes 146–149 and accompanying text.

276. See *Vieth v. Jubelirer*, 541 U.S. 267, 339 (2004) (Stevens, J., dissenting) (“I would apply the standard set forth in the *Shaw* cases and ask whether the legislature allowed partisan considerations to dominate and control the lines drawn Such a narrow test would cover only a few meritorious claims, but it would preclude extreme abuses . . .”).

277. See *supra* text accompanying note 267.

278. See *supra* note 276. Compare *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (finding that to prove predominance “a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations”), with *Rucho v. Common Cause*, 139 S. Ct. 2484, 2520–21 (2019) (Kagan, J., dissenting) (finding “the quest for partisan gain made the State[s] override [their] own political geography and districting criteria” (emphasis omitted)).

279. See *Vieth*, 541 U.S. at 324 (Stevens, J., dissenting) (“[P]olitical belief and association constitute the core of those activities protected by the First Amendment,’ and discriminatory governmental decisions that burden fundamental First Amendment interests are subject to strict scrutiny.” (citation omitted) (quoting *Elrod v. Burns*, 427 U.S. 347, 356 (1976))); *supra* note 111 and accompanying text (discussing connection between voting and speech); see also Simon Brewer, *Back to Basics: Why Partisan Gerrymandering Violates the First Amendment*, YALE LAW SCH., MEDIA FREEDOM & INFO. ACCESS CLINIC (Mar. 12, 2019), <https://law.yale.edu/mfia/case-disclosed/back-basics-why-partisan-gerrymandering-violates-first-amendment> (“The First Amendment is the appropriate constitutional provision through which to evaluate partisan gerrymandering because, quite simply, voting is political speech and partisan gerrymanders attempt to burden that speech.”).

are vital to “the channels of political change”²⁸⁰—already these protections have been extended to encompass the right to vote and its ancillary political activities.²⁸¹ These political participatory rights are directly undermined by partisan gerrymandering, which may be characterized as a form of viewpoint discrimination based on political belief.²⁸² Accordingly, the possibility of a First Amendment standard has been a persistent undercurrent in the Supreme Court’s partisan gerrymandering decisions.²⁸³ Recharacterizing partisan gerrymandering in this context would align with the Court’s responsibility to the democratic process,²⁸⁴ harmonize the racial and partisan gerrymandering doctrines,²⁸⁵ and draw a clear constitutional line to provide the foundation of a judicially manageable standard.²⁸⁶

The three-part test embraced in *Common Cause v. Rucho* and *Lamone v. Benisek* fails to address the underlying issue.²⁸⁷ By continuing to measure the constitutionality of partisan gerrymanders based on their effects, this test retains the *Gaffney* bifurcation and all of its attendant line-drawing problems.²⁸⁸ The threshold determination that vote dilution must occur “to such a degree that it result[s] in a tangible and concrete adverse effect”²⁸⁹ is no less subjective than the unmanageable “persistent degradation” standard adopted in *Davis v. Bandemer* and rejected in *Vieth v. Jubelirer*.²⁹⁰ While modern technology can facilitate an objective comparison to a state’s traditional redistricting criteria,²⁹¹ judges would nonetheless be required to

280. ELY, *supra* note 224, at 105–06 (highlighting the centrality of First Amendment political participatory rights to a functioning democratic process); *see supra* notes 103–104 and accompanying text.

281. *See supra* notes 111–112 and accompanying text.

282. *See* Brewer, *supra* note 279 (“The Constitution forbids viewpoint discrimination because it distorts the relationship between citizens and their elected officials.”); *accord* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2514 (2019) (Kagan, J., dissenting) (“By diluting the votes of certain citizens, the State frustrates their efforts to translate those affiliations into political effectiveness.”); *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring) (“[T]hese allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.”).

283. *See supra* notes 180, 191.

284. *See supra* note 228 and accompanying text.

285. *See supra* notes 258, 276 and accompanying text.

286. *See Rucho*, 139 S. Ct. at 2521–22 (Kagan, J., dissenting) (offering “a first-cut answer: This much is too much”).

287. *See supra* text accompanying notes 40–43.

288. *See supra* Section IV.B.

289. *Benisek v. Lamone*, 348 F. Supp. 3d 493, 515 (D. Md. 2018), *vacated*, 139 S. Ct. 2484 (2019).

290. *Cf. supra* notes 173–178 and accompanying text (discussing *Bandemer*).

291. *See supra* notes 190, 217 and accompanying text; *accord Rucho*, 139 S. Ct. at 2517 (Kagan, J., dissenting) (observing that the evidence presented by the North Carolina and Maryland plaintiffs demonstrates “how the same technologies and data that today facilitate extreme partisan

make an “unmoored determination” about the impact a map will have on future elections.²⁹² More fundamentally, allowing partisan interests to dominate the redistricting process absent extreme adverse effects would do little to mitigate the harmful impact of these gerrymanders on “the channels of political change”—from the distortion, ossification, and polarization of legislative politics to the breakdown of incentives for lawmakers to represent their voters.²⁹³

Given the harms produced by these gerrymanders, *Carolene Products* demands more.²⁹⁴ Our democracy demands more.²⁹⁵ Justice Stevens, dissenting in *Vieth*, had the right approach: equalizing the racial and partisan gerrymandering doctrines by applying strict scrutiny whenever either impermissible motive predominates.²⁹⁶ The First Amendment already prohibits viewpoint discrimination in many official contexts, from campaign finance, to political patronage, to party organization and advocacy.²⁹⁷ There is no reason why this essential protection for the rights of political belief and association should be blind to this fundamentally political arena.²⁹⁸ Partisan gerrymanders frustrate and hinder the effectiveness of individual votes—the most important form of political expression²⁹⁹—and chill essential political activities at the heart of these freedoms.³⁰⁰ Moreover, the policy concerns that prohibit consideration of partisanship in patronage terminations are particularly resonant here, as partisan gerrymandering directly subordinates the interests of the state to partisan gain.³⁰¹

Therefore, the Court should hold that a district map drawn with the predominant intent to maximize partisan advantage is a violation of the First

gerrymanders also enable courts to discover them, by exposing just how much they dilute votes” (citing *Vieth v. Jubelirer*, 541 U.S. 267, 312–13 (2004) (Kennedy, J., concurring))).

292. *Rucho*, 139 S. Ct. at 2500; see *supra* text accompanying note 204.

293. ELY, *supra* note 224, at 105; see *supra* notes 239–242 and accompanying text.

294. See *supra* note 223 and accompanying text.

295. See *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting) (“By substantially diluting the votes of citizens favoring their rivals, the politicians of one party had succeeded in entrenching themselves in office. They had beat democracy.”).

296. *Vieth*, 541 U.S. at 326–27 (Stevens, J., dissenting).

297. See *supra* notes 119–127.

298. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 928 (M.D.N.C. 2018) (noting that “[i]t defies reason that the First Amendment—which ‘has its fullest and most urgent application’ to political speech” would provide greater protections to “associations of individuals organized principally for economic gain” than to “associations of individuals principally organized to advance political beliefs”), *vacated*, 139 S. Ct. 2484 (2019).

299. See *supra* note 111.

300. See *supra* notes 239–242 and accompanying text.

301. Compare text accompanying note 121 (observing the Court’s invocation of this policy in political patronage cases) with text accompanying note 242 (discussing how gerrymandering encourages elected officials to value party loyalty over loyalty to their electorate).

Amendment.³⁰² This ruling would confer several benefits and mitigate the *Rucho* Court’s concerns. First, a standard grounded in intent alone would ameliorate partisan gerrymandering doctrine’s persistent line-drawing problems.³⁰³ Although any evaluation of legislative intent entails some subjectivity, judges would no longer be expected to predict the effects of a map on future elections—the courts would be freed of the impossible quantification of fairness that comes with the question: “How much is too much?”³⁰⁴ Second, this ruling would reciprocally strengthen racial gerrymandering doctrine, as rampant partisan interests have provided lawmakers with a consistent shield against racial gerrymandering claims.³⁰⁵ Finally, the inherent difficulty of demonstrating predominant intent would alleviate the majority’s concerns about overreach.³⁰⁶ Plaintiffs will bear the burden of proving that all neutral criteria were subordinated to partisan ends:³⁰⁷ the extensive evidentiary records compiled in *Benisek* and *Common Cause* demonstrate that this is not an easy task.³⁰⁸

With predominant intent as the core constitutional inquiry, the canonical gerrymandering cases can be readily synthesized into a standard to adjudicate these claims.³⁰⁹ As in *Benisek* and *Common Cause*, courts may have access to unambiguous statements by the lawmakers responsible for redistricting, or hard data demonstrating that partisan interests were at the forefront of the redistricting process.³¹⁰ Evidence that the majority party distorted the

302. See *supra* note 276.

303. See *supra* Section IV.C.

304. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019); *accord supra* notes 165, 265 and accompanying text (discussing the bifurcation’s effect in muddying the doctrine and contributing to the *Rucho* holding).

305. See *supra* notes 150–157 (discussing difficulty of adjudicating racial gerrymandering claims when lawmakers demonstrate mixed motives); *accord* Igor Derysh, *Gerrymander Guru’s Secret Files: He Used Racial Data to Disenfranchise Black Voters*, SALON (Sept. 11, 2019, 10:00 AM), <https://www.salon.com/2019/09/11/gerrymander-gurus-secret-files-he-used-racial-data-to-disenfranchise-black-voters/> (describing how a Republican mapmaker in North Carolina secretly used racial demographics to develop the maps at issue in *Rucho*).

306. *Rucho*, 139 S. Ct. at 2522 (Kagan, J., dissenting) (“[T]he combined inquiry used in these cases set the bar high, so that courts could intervene in the worst partisan gerrymanders, but no others.”); *Vieth v. Jubelirer*, 541 U.S. 267, 284–85 (2004) (Scalia, J.) (noting the difficulties associated with determining partisan motive).

307. See *supra* note 278 and accompanying text (discussing standard for predominance).

308. *Rucho*, 139 S. Ct. at 2517–19 (Kagan, J., dissenting) (recounting the “overwhelming” direct evidence of predominant purpose established by the lower courts); see *supra* notes 44–45 (summarizing this evidence).

309. See *Vieth*, 541 U.S. at 321–22 (Stevens, J., dissenting) (“With purpose as the ultimate inquiry, other considerations have supplied ready standards for testing the lawfulness of a gerrymander.”).

310. *E.g.*, *Whitford v. Gill*, 218 F. Supp. 3d 837, 847–53 (W.D. Wis. 2016) (noting heavy use of voter data and overriding prioritization of partisan gain in spreadsheets used during the map drafting process; observing mapmaker’s testimony that “[w]e have an opportunity and an obligation to draw these maps that Republicans haven’t had in decades”), *vacated*, 138 S. Ct. 1916 (2018);

apportionment process by redistricting behind closed doors, privately hiring and consulting with a partisan firm, or excluding the minority party from redistricting deliberations is remarkably common, and highly persuasive.³¹¹ Alternatively, the circumstantial evidence standards embraced in racial gerrymandering cases are readily applicable to partisan claims—such as bizarre shapes that mark substantial departures from a state’s traditional redistricting criteria.³¹² Likewise, while disproportionate representation is insufficient in isolation, extreme disparities and flipped results may lend weight to this analysis.³¹³

D. Ducking the Question: Refuting the Supreme Court’s Application of the Political Question Doctrine

Properly characterized as a violation of First Amendment political participatory rights,³¹⁴ partisan gerrymandering is necessarily justiciable.³¹⁵ Although political question has been read as a largely prudential mechanism of abstention,³¹⁶ the doctrine is best construed as an exercise of constitutional

Davis v. Bandemer, 478 U.S. 109, 116 n.5 (1986) (noting mapmakers intended “to save as many incumbent Republicans as possible”); see *supra* notes 29–30, 36, 44 and accompanying text (reviewing legislative testimony and data used in *Benisek and Common Cause*).

311. *E.g.*, *Whitford*, 218 F. Supp. 3d at 847–53 (describing in great detail the process used by expert consultants to calculate partisan performance of potential maps and strategically select the strongest alternative); *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 535 (M.D. Penn. 2002) (noting Republicans developed a map under pressure from national party officials as a “punitive measure against Democrats . . . effectively ignor[ing] all Democratic members of the General Assembly”), *aff’d*, 541 U.S. 267 (2004); *Bandemer v. Davis*, 603 F. Supp. 1479, 1495 (S.D. Ind. 1984) (observing that Republicans hired a private firm to develop the challenged map, excluded Democrats from mapmaking process, and revealed the proposed map to Democrats in the final hours of the legislative session), *rev’d*, 478 U.S. 109 (1986); see *supra* notes 28, 37 and accompanying text (describing similar incidents in *Benisek and Common Cause*).

312. *Compare Goumillion v. Lightfoot*, 364 U.S. 339, 340 (1960) (finding “uncouth twenty-eight-sided figure” demonstrative of racial discrimination), *with Bandemer*, 603 F. Supp. at 1493 (observing that challenged plan “is replete with ‘uncouth’ and ‘bizarre’ configurations” that suggest partisan motive). See also *Vieth v. Jubelirer*, 541 U.S. 267, 340 (2004) (Stevens, J., dissenting) (noting one district “looms like a dragon descending on Philadelphia from the west”); Fleming, *supra* note 8 (comparing Maryland district to a “praying mantis”); Ella Nilsen, *North Carolina’s Extreme Gerrymandering Could Save the House Republican Majority*, VOX (May 8, 2018, 11:00 AM), <https://www.vox.com/policy-and-politics/2018/5/8/17271766/north-carolina-gerrymandering-2018-midterms-partisan-redistricting/> (comparing North Carolina districts to “an octopus” and a “mutant crab”).

313. *E.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 411 (2006) (observing that Republicans carried 59% of the popular vote but won only 43% of corresponding seats under a prior map); *Whitford*, 218 F. Supp. 3d 837, 853 (noting that Republicans won 48.6% of the popular vote and received 60% of the available seats).

314. See *supra* Section IV.C.

315. See *supra* notes 80, 143, and accompanying text.

316. See *supra* notes 76–78 and accompanying text; see also Ron Parker, *Is The Political Question Doctrine Jurisdictional or Prudential?*, 6 U.C. IRVINE L. REV. 255, 255, 272–74 (2016)

interpretation, aimed at defining the limits of textually committed political discretion.³¹⁷ This approach reflects the doctrine's origins as an implementation of the separation of powers.³¹⁸ From this perspective, the prudential *Baker* factors chiefly inform the core question of whether a constitutional commitment is exclusive—they are not intended to be raised on a standalone basis to defer judicial review.³¹⁹ Moreover, these prudential considerations share a common nucleus with the presumption of legislative constitutionality: Both doctrines are a manifestation of judicial respect for the majoritarian process.³²⁰ Where “the channels of political change” have been distorted or undermined, that deference has no applicability, and the balance shifts in favor of intervention.³²¹

As a function of the separation of powers, the political question doctrine has no force when the Constitution has been violated.³²² Any determination that a case presents a nonjusticiable political question rests on deference to the policymaking authority of a coordinate branch of government.³²³ The scope of this authority is constrained by the Constitution: Any political actor that violates a constitutional provision has abused its discretion.³²⁴ From *Marbury v. Madison* to *Baker v. Carr*, this distinction—between a valid exercise of policymaking authority and the invalid contravention of

(arguing, largely on surplusage grounds, that only the first *Baker* factor is constitutional, while the remaining six are independent prudential considerations).

317. Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L. J. 597, 601–06 (1976); accord *Elrod v. Burns*, 427 U.S. 347, 352–53 (1976) (declining to find a political question and holding “our determination of the limits on state executive power contained in the Constitution is in proper keeping with our primary responsibility of interpreting that document”); *Baker v. Carr*, 369 U.S. 186, 211 (1962) (“Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court . . .”).

318. See *supra* text accompanying note 76.

319. See *supra* notes 81–83 and accompanying text (demonstrating this pattern).

320. Compare *supra* note 62 and accompanying text (regarding political question), with *supra* note 87 and accompanying text (regarding presumption of constitutionality).

321. ELY, *supra* note 224, at 105; see also *supra* Section IV.A.

322. See *Baker*, 369 U.S. at 217, 226 (holding “[t]he courts cannot reject as ‘no law suit’ a bona fide controversy as to whether some action denominated ‘political’ exceeds constitutional authority” and finding no political question where “[t]he question . . . is the consistency of state action with the Federal Constitution”).

323. See *supra* note 62 and accompanying text (highlighting core principle of majoritarian deference); see also Henkin, *supra* note 317 at 597–98 (recognizing that this deference is “axiomatic in a system of constitutional government built on the separation of powers” and arguing that “as long as the political branches act within their constitutional powers, whether they have done wisely or well is a ‘political question’ which is not for the courts to consider”).

324. See *Elrod v. Burns*, 427 U.S. 347, 352 (1976) (finding “there can be no impairment of executive power . . . where actions pursuant to that power are impermissible under the Constitution); accord Henkin, *supra* note 317, at 598 (recognizing that the courts’ concern to be “whether the political branches of government . . . have exceeded constitutional limitations”).

constitutional norms—has consistently been determinative.³²⁵ Therefore, the political question analysis inherently requires an exercise of constitutional interpretation, not judicial abstention.³²⁶ If no violation has occurred, or the boundary is impossible to discern, the case presents a political question and judicial restraint will prevail.³²⁷ If the line has been crossed and a violation is clear, there can be no political question.³²⁸

This inquiry does not carve entire issues out of the scope of judicial review simply because they are difficult to adjudicate with precision.³²⁹ In *Baker*, the Court recognized that the political question doctrine is not amenable to “semantic cataloguing,” as constitutional violations will only be apparent under the unique circumstances of each case.³³⁰ Therefore, while the legal issues presented in two cases may be similar, the presence of a political question will vary on the facts.³³¹ This piecemeal approach advances the underlying principles of judicial restraint by encouraging the Court to draw lines gradually and avoid implicating the separation of powers.³³² Nowhere is its efficacy more apparent than in the evolution of redistricting doctrine following *Baker*.³³³ Although the touchstone rules for malapportionment and racial gerrymandering were declared in decisive cases,³³⁴ these standards have taken shape over time, their contours fleshed

325. This distinction emerged as early as *Marbury*, where the Court distinguished the valid exercise of executive discretion with the President’s defiance of a ministerial duty imposed by statute or constitutional provision. See *supra* notes 65–66 and accompanying text. In a modern context, the distinction is demonstrated by the Court’s deference to the Senate on matters of impeachment—and its corresponding intervention into the House of Representatives’ attempt to disqualify duly elected members. Compare *supra* note 81 and accompanying text (discussing *Nixon v. United States*, 506 U.S. 224, 229 (1993)), with *supra* notes 84–86 and accompanying text (discussing *Powell v. McCormack*, 395 U.S. 486 (1969)).

326. See Henkin, *supra* note 317, at 598, 601, 602 n.17 (“[T]he result is an interpretation of the Constitution, not abstention by the courts on their own initiative from their own institutional considerations of wisdom and policy or from ad hoc prudential concerns . . .”).

327. See *supra* text accompanying notes 81–86.

328. See *supra* notes 80, 85–86, and accompanying text.

329. But see *supra* notes 67–69 and accompanying text. Regardless, even in the context of the Guaranty Clause, the Court has typically considered the substance of each case before reaching its political question determination. See *Baker v. Carr*, 369 U.S. 186, 223–24 (1962), for an overview of these decisions.

330. *Baker*, 369 U.S. at 217.

331. *Id.* at 217–18.

332. *Reynolds v. Sims*, 377 U.S. 533, 578 (1964) (“Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment.”); see *supra* note 89 (discussing this approach in the context of the presumption of constitutionality).

333. See *supra* Section II.B.2.

334. See *supra* notes 131, 144, 142, and accompanying text.

out through the resolution of individual disputes and the confluence of resultant standards.³³⁵

Therefore, the Court's determination that partisan gerrymandering claims are categorically nonjusticiable is fundamentally incompatible with its concession that partisan gerrymandering is undemocratic³³⁶ and its recognition that extreme partisan gerrymanders are unconstitutional.³³⁷ This holding is flatly inconsistent with the doctrine's origins in *Baker*, and deleterious to the balance of restraint and modulation at the core of the separation of powers.³³⁸

Of course, gerrymandering involves challenging and convoluted issues: as disputes arise and the standard is tested, courts would find some cases difficult to decide.³³⁹ But no good doctrine is built in a day—judicial restraint and stare decisis demand that constitutional rules are developed over time.³⁴⁰ Accordingly, the possibility of difficult cases should not preclude redress of clear violations.³⁴¹ *Rucho* would have been a great place to start: In Maryland and North Carolina, the dominant party's efforts to curtail “the channels of political change” were predominant, shameless, and entirely obvious.³⁴² Instead of skirting around the specter of future disputes, and attempting to articulate a broad definition of fairness in a single case,³⁴³ the Court should have done what it has always done: apply a narrow rule to these unambiguous facts, and let *Rucho* serve as a clear starting point for the organic evolution of a workable doctrine.

335. See, e.g., the malapportionment cases, *supra* notes 130–143.

336. See *supra* note 15 and accompanying text.

337. E.g., *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring) (finding unconstitutionality predicated “on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective”); *Davis v. Bandemer*, 478 U.S. 109, 133 (1986) (White, J.) (finding unconstitutionality “where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively”); *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) (finding unconstitutionality where “racial or political groups have been fenced out of the political process and their voting strength invidiously minimized”).

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

339. See Derysh, *supra* note 305 (illustrating how Republican redistricting specialists carefully masked racial discrimination in the North Carolina gerrymanders at issue in *Rucho*).

340. See, for example, the malapportionment cases, *supra* notes 131–134 and accompanying text.

341. See *supra* notes 80, 143, and accompanying text.

342. ELY, *supra* note 224, at 105; see *Rucho v. Common Cause*, 139 S. Ct. 2484, 2517 (2019) (Kagan, J., dissenting) (observing the “overwhelming direct evidence” of intent in these cases); see also *supra* text accompanying notes 25–39.

343. *Rucho*, 139 S. Ct. at 2499–500 (majority opinion) (arguing “it is not even clear what fairness looks like in this context.”).

V. CONCLUSION

The Supreme Court's political question holding in *Rucho v. Common Cause*³⁴⁴ was the predictable endpoint of decades of confusion over the justiciability of partisan gerrymandering claims.³⁴⁵ But it was also the foreseeable consequence of the Court's decision to allow partisan interests to dominate the redistricting process, and to evaluate gerrymanders based on their effects, rather than the underlying legislative motive.³⁴⁶ Instead of perpetuating this framing, the Court should have drawn the line at predominant intent, and held that a map drawn to "subordinate adherents of one political party and entrench a rival party in power"³⁴⁷ is unconstitutional viewpoint discrimination in its purest form.³⁴⁸ A First Amendment standard grounded in intent would ameliorate the confusion that has hindered the evolution of gerrymandering doctrine, and reclaim the Court's role as a steward of "the channels of political change."³⁴⁹ Such a standard would be entirely justiciable, amenable to the wealth of circumstantial evidence techniques that have been used to evaluate legislative intent for decades.³⁵⁰ It would be balanced by a predominance threshold well-calibrated to constrain judicial intervention and preserve the separation of powers.³⁵¹ And it would provide an answer to the Court's lingering, impossible question: When asked "how much" partisan entrenchment it is willing to tolerate, the Court could simply declare: "None at all."³⁵²

344. *See supra* Part III.

345. *See supra* Part II.B.

346. *See supra* Part IV.B.

347. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015).

348. *See supra* Part IV.C.

349. ELY, *supra* note 224, at 105; *see supra* Part IV.A.

350. *See supra* notes 308–313 and accompanying text.

351. *See supra* Part IV.C.; *see also* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2523 (2019) (Kagan, J., dissenting).