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Partisan Gerrymandering and the Elusive Standard

Ethan Weiss

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PARTISAN GERRYMANDERING AND THE ELUSIVE STANDARD

Ethan Weiss*

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INTRODUCTION

With the completion of every census comes a redistricting.¹ Because redistricting will always have its winners and losers,² allegations of bias are common. One

* J.D. Candidate, Santa Clara University School of Law, 2013. I would like to thank Angelo Ancheta. He made researching and writing this paper possible. Further, I would like to thank the Editors and Associates of the Santa Clara Law Review for all of their hours of assistance.

1. *Strength in Numbers*, CENSUS.GOV, <http://www.census.gov/rdo/pdf/StrengthInNumbers2010.pdf> (last visited Mar. 29, 2013); U.S. CONST. art. I, § 2 cl. 3; see *Reynolds v. Sims*, 377 U.S. 533, 568–69 (1964).

2. See DANIEL HAYS LOWENSTEIN ET AL., *ELECTION LAW: CASES AND MATERIALS* 129 (4th ed. 2008).

common allegation, if a political branch is in control of redistricting,³ is that the dominant party engaged in partisan gerrymandering. In fact, there are allegations that Minnesota has fallen victim to partisan gerrymandering following the 2010 Census.⁴ The judiciary has proven incapable of agreeing on a standard for adjudicating this issue.⁵ In recent years, the Court has never been able to garner more than a plurality when faced with the issue of partisan gerrymandering, and several justices have written concurrences suggesting their own standards.⁶ Courts therefore currently lack a clearly defined standard dictating how to adjudicate partisan gerrymandering claims.

Partisan gerrymandering claims raise several different issues that the Supreme Court has struggled with each time it has addressed the question. First, does partisan gerrymandering actually violate the Constitution of the United States?⁷ Second, are partisan gerrymandering claims even justiciable?⁸ There are six issues that may prevent courts from having the power to address redistricting: (1) if it is found to be constitutionally dedicated to a nonjudicial branch of government, (2) if the Court can find no judicially discoverable or manageable standard to address the issue, (3) if there is no avenue for the Court to decide the case without making a policy determination within the purview of nonjudicial discretion, (4) if there is no way for the Court to make a decision without expressing a lack of respect to a coordinate branch of government, (5) if there is an unusual need for adherence to a political decision, or (6) if there is a

3. Some states have elected to place the job of redistricting in the hands of a group not related to the political process. California is one of these states. See generally STATE OF CAL. CITIZENS REDISTRICTING COMM'N, FINAL REPORT ON 2011 REDISTRICTING (2011), available at http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_2final_report.pdf [hereinafter REDISTRICTING COMM'N].

4. Report shows heavy partisan gerrymander in proposed Minnesota Maps, MIDWESTDEMOCRACYNETWORK.org (May 13, 2011), http://www.midwestdemocracynetwork.org/index.php/reports/article/MN_partisan_gerrymander_report/.

5. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Cox v. Larios*, 542 U.S. 947 (2004); *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

6. *League of United Latin Am. Citizens*, 548 U.S. at 399; *Cox*, 542 U.S. at 947; *Veith*, 541 U.S. at 267.

7. See *Vieth*, 541 U.S. at 313–14 (Kennedy, J., concurring).

8. See *id.* at 271–306 (plurality opinion).

potential for embarrassment from different declarations by various branches of government.⁹ Moreover, even if partisan gerrymandering claims are both justiciable and present a constitutional violation, the Court must address the issue of the proper standard for such suits.¹⁰

The first part of this Comment will discuss the background of the partisan gerrymander.¹¹ This section will discuss the historical backdrop of the issue, how the Supreme Court previously handled partisan gerrymandering, and the more recent holdings of partisan gerrymandering cases.¹² The Comment will then state the legal problem, and then analyze the different proposed standards.¹³ Unfortunately, the paper will demonstrate that none of these proposed standards are workable; however, the Comment will conclude that partisan gerrymandering is indeed justiciable. Finally, this Comment will propose a new standard for adjudicating partisan gerrymandering claims and will explain why this standard is appropriate for cases involving discrimination on the basis of political affiliation.¹⁴ For the purposes of this Comment, the first question the court must answer—whether a partisan gerrymander actually violates the Fourteenth Amendment—will largely be bracketed. In their analysis, most of the justices seem to assume that if partisan gerrymandering is a justiciable issue, and if a redistricting scheme could satisfy the hypothetical partisan gerrymandering test, then an act of partisan gerrymandering would in fact violate the Equal Protection Clause of the Fourteenth Amendment.¹⁵ Thus, this Comment will only delve into the two issues in contention: justiciability and the appropriate standard.

9. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (finding these categories will deem an issue a nonjusticiable political question).

10. *See Vieth*, 541 U.S. at 324–25 (Stevens, J., dissenting).

11. *See infra* Part I.

12. *See infra* Part I.

13. *See infra* Part II–III.

14. *See infra* Part IV.

15. *See generally* *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Cox v. Larios*, 542 U.S. 947 (2004); *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

I. BACKGROUND

As long as legislatures have been in charge of redistricting, partisan gerrymandering has been a problem. Parties and individuals use it to make their election prospects brighter. In the process, however, the ability of voters to effectively exercise their respective voices is suppressed.

A. *Defining Partisan Gerrymandering*

So what exactly is partisan gerrymandering? In the United States, we base our representation system on geographic regions, where an individual represents a set area in a legislative body.¹⁶ Elections of representatives from these geographic regions are typically conducted on a winner-take-all basis.¹⁷ Whoever receives the most votes wins the right to represent the region.¹⁸ “Since a separate winner-take-all election occurs in each district, when the elections are run along party lines there is no assurance that the statewide vote for a given party will be proportionate to the number of legislative seats it wins.”¹⁹ In other words, a party receiving forty percent of the vote may very well win only thirty percent of the seats.²⁰ Winner-take-all elections provide an opportunity to draw districts to favor a particular party. For example, if there is a state with one hundred and fifty Democrats and one hundred and forty Republicans and three districts are to be drawn, it is theoretically possible to draw the districts so each one contains fifty Democrats, but two of them contain sixty Republicans and one contains only twenty.²¹ In this hypothetical, despite Democrats being the majority of the populace, Republicans would always have a majority in the legislature. The redrawing of those districts, or redistricting, can have a major outcome on elections.

16. LOWENSTEIN ET AL., *supra* note 2, at 247.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 129. Of course a legislature must comply with the one-person, one-vote requirement set out in *Reynolds v. Sims*, but this does not preclude legislatures from gaming redistricting to their advantage. See *Reynolds v. Sims*, 377 U.S. 533, 539 (1964).

Of course, not every type of redistricting is an improper redistricting.²² Sometimes, legislatures adhere to traditional redistricting criteria.²³ These requirements can include, but are not limited to: geographic contiguity, geographic compactness, preserving communities of interest, and nesting.²⁴ The only redistricting requirement legislatures must adhere to under the Constitution is the “one person, one vote” requirement,²⁵ though compliance with the above factors is considered normal and preferable. Occasionally, however, legislatures use impermissible characteristics when redistricting, such as the race of the populace.²⁶ “The term [partisan] gerrymandering is defined as ‘[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.’”²⁷ This is problematic because “[a] group that is denied by partisan gerrymandering the effective exercise of its vote is necessarily deprived of the ability to protect its rights. Because elected officials are free to disregard its needs and concerns, that group is denied an effective voice in policy making decisions.”²⁸

B. *A History of the Practice and the Role of the Law*

The term gerrymandering arises from a redistricting scheme in 1812.²⁹ Throughout American history, gerrymanders have been a common part of politics. For instance, post-Reconstruction South Carolina Democrats

22. See *Reynolds*, 377 U.S. at 586–87.

23. LOWENSTEIN ET AL., *supra* note 2, at 244.

24. REDISTRICTING COMM’N, *supra* note 3, at 6–7.

25. *Id.* at 7.

26. See *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960).

27. Whitney M. Eaton, *Where Do We Draw the Line? Partisan Gerrymandering and the State of Texas*, 40 U. RICH. L. REV. 1193, 1193 (2006).

28. Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially Manageable Standard and Other Reform Options for Partisan Gerrymandering*, 46 HARV. J. ON LEGIS. 243, 244 (2009).

29. *Id.* That year, the governor of Massachusetts, Elbridge Gerry, approved a redistricting plan which included a district shaped like a salamander. *Id.* The purpose of this district was to advance Gerry’s political party. *Id.* *The Federalist Press* mocked the district as a “Gerrymander,” an obvious hybrid of the word salamander and the name Gerry. *Elbridge Gerry, 5th Vice President (1813–1814)*, UNITED STATES SENATE, http://www.senate.gov/artandhistory/history/common/generic/VP_Elbridge_Gerry.htm (last visited Mar. 3, 2013).

drew districts to ensure there was only one majority Republican, and thus majority black, district.³⁰

Originally, claims regarding unfair redistricting were deemed nonjusticiable political questions.³¹ The Supreme Court regularly affirmed lower court decisions dismissing partisan gerrymandering claims as nonjusticiable.³² This changed after *Baker v. Carr*, when gerrymandering claims were first accepted into the judicial purview.³³

The big shift in partisan gerrymandering came in 1986, when a majority of the Supreme Court announced in *Davis v. Bandemer* that partisan gerrymandering claims are in fact justiciable under the Equal Protection Clause of the Fourteenth Amendment.³⁴ A district court found that Indiana's state apportionment plan favored Republicans, and ruled in favor of the plaintiffs.³⁵ Though finding the partisan gerrymandering claim to be ultimately justiciable, the Supreme Court reversed the lower court's holding.³⁶ In the process, the Court announced that to be successful, a plaintiff in a partisan gerrymandering case must show: (1) the defendants intentionally discriminated against their identifiable political group, and (2) a discriminatory effect on their group.³⁷

30. McDonald, *supra* note 28, at 246.

31. *Id.*

32. See, e.g., *Jimenez v. Hidalgo Cnty. Water Improvement Dist. No. 2*, 424 U.S. 950 (1976), *aff'g* 68 F.R.D. 668 (S.D. Tex. 1975); *Ferrell v. Hall*, 406 U.S. 939 (1972), *aff'g* 339 F.Supp. 73 (W.D. Okla. 1972); *Wells v. Rockefeller*, 398 U.S. 901 (1970), *aff'g* 311 F.Supp. 48 (S.D.N.Y. 1970); *WMCA, Inc. v. Lomenzo*, 382 U.S. 4 (1965), *aff'g* 238 F. Supp. 916 (S.D.N.Y. 1965). These cases were abrogated by *Davis v. Bandemer*, 478 U.S. 109 (1986). See discussion *infra* Part I.B.

33. See *Baker v. Carr*, 369 U.S. 186 (1962).

34. *Bandemer*, 478 U.S. at 125.

35. McDonald, *supra* note 28, at 247 (holding the districts deprived Democrats of their representational rights, as evidenced by the irregular shapes of districts, the mix of single-member and multi-member districts, and the creation of new district lines that failed to adhere to political subdivision boundaries).

36. *Bandemer*, 478 U.S. at 125, 143.

37. *Id.* at 127; see also *id.* at 161 (Powell, J., concurring in part and dissenting in part). Though a majority of the justices did not sign on to the part of Justice White's opinion where he announced the standard courts should abide by when adjudicating partisan gerrymandering claims, Justice Powell specifically stated in his dissent that he agreed with the plurality that a plaintiff must show both intent and effect. *Id.*

A plurality of the Court attempted to expand on the effect prong, stating that discriminatory effect can be shown via an electoral process that will consistently degrade the plaintiff's influence on the political process, but these members were not able to garner a majority of the Court.³⁸ The dissenting justices articulated their own standard, suggesting factors such as fairness, shape of the voting district, adherence to established political subdivisions, nature of the legislative procedures, and the legislative history should determine if an impermissible partisan gerrymander has occurred.³⁹ The only standard the majority of the Court could agree on was the vague intent-effect standard, which became the law.⁴⁰ Finally, a concurrence held partisan gerrymandering claims should be nonjusticiable.⁴¹

Unfortunately, *Bandemer* proved difficult, if not impossible, to apply. One observer even noted that the standard essentially became "dead letter law."⁴² In fact, there was only one instance where a court actually found a

38. See *id.* at 132 (plurality opinion). The plurality expanded upon this definition, stating it would require the plaintiff to show he has been denied a chance to effectively influence the political process. *Id.* at 132–33. The plurality further opined that a history of lack of proportional representation *alone* would not be sufficient. *Id.*

39. *Id.* at 173 (Powell, J., concurring in part and dissenting in part). However, none of these factors would be dispositive. *Id.*

40. See *id.* at 127 (plurality opinion); see also *id.* at 161 (Powell, J., concurring in part and dissenting in part); McDonald, *supra* note 28, at 247. Despite the fact that this was the only standard five Justices could agree on, many lower courts chose to adopt the plurality's definition of what constitutes discriminatory intent. See, e.g., *O'Lear v. Miller*, 222 F. Supp. 2d 850, 855 (E.D. Mich. 2002).

41. *Bandemer*, 478 U.S. at 144 (O'Connor, J., concurring).

42. McDonald, *supra* note 28, at 248. The cases applying *Bandemer* suggest McDonald is correct. See *O'Lear*, 222 F. Supp. 2d at 856 (adopting the *Bandemer* plurality's stringent effect test and finding no equal protection violation accordingly); *Holloway v. Hechler*, 817 F. Supp. 617, 627–28 (S.D.W.V. 1992) (finding the plaintiffs failed to demonstrate both the requisite levels of intent and effect necessary to find a violation of the Equal Protection Clause); *Pope v. Blue*, 809 F. Supp. 392, 397 (W.D.N.C. 1992) (finding plaintiffs had failed to prove they had been shut out of the political process, and thus had failed to demonstrate effect under *Bandemer*); McDonald, *supra* note 28, at 249–50 (citing *Terrazas v. Slagle*, 821 F. Supp. 1162, 1174–75 (W.D. Tex. 1993)) (noting the court rejected the partisan gerrymandering claim even though Republicans consistently garnered a majority of the vote yet always failed to attain a majority of the legislature).

cognizable unlawful partisan gerrymander under *Bandemer*.⁴³ Other than this one anomaly, *Bandemer* proved an inapplicable standard.

C. *The Modern State of the Law*

After the 2000 redistricting, partisan gerrymandering returned to the Supreme Court in three separate cases.⁴⁴ The first case followed a Pennsylvania redistricting plan passed in 2002.⁴⁵ Though Democrats were a majority in the state, the plan created Republican majorities in sixty-eight percent of the state congressional districts.⁴⁶ National Republican figures openly pushed the plan as a means to counter similar moves by Democrats elsewhere.⁴⁷

Eventually, the case reached the Supreme Court in *Vieth v. Jubelirer*.⁴⁸ Unfortunately, the Court was unable to reach a majority, and several justices wrote concurrences and dissents, leaving the law in a confusing place.⁴⁹ The plurality opinion, authored by Justice Scalia and joined by Chief Justice Rehnquist and Justices O'Connor and Thomas, found partisan gerrymandering claims to be nonjusticiable political questions.⁵⁰ Justice Scalia seemingly based his decision on the "lack of a judicially discoverable and manageable standard[]" test for a political question, as constructed in *Baker v. Carr*.⁵¹ First, Justice Scalia noted that since the *Bandemer* decision, no lower court had been able to shape a

43. McDonald, *supra* note 28, at 251–52. In *Republican Party of N.C. v. Martin*, a court found a possible partisan gerrymandering claim where a Republican had not been elected to the Superior Court in over a hundred years. *See id.* (citing *Republican Party of N.C. v. Martin*, 980 F.2d 943, 948, 961 (4th Cir. 1992)).

44. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006); *Cox v. Larios*, 542 U.S. 947 (2004); *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

45. *See* McDonald, *supra* note 28, at 254.

46. *Id.*

47. *Id.* Despite this evidence, the district court dismissed the claim because although it was the intent of the plan to discriminate against Democrats, the plaintiffs failed to allege the requisite discriminatory effect as the Democrats had not been entirely shut out from the political process. *Id.* (citing *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 547 (M.D. Pa. 2002)).

48. *Vieth*, 541 U.S. 267 (2004).

49. *See generally id.*

50. *See id.* at 267, 306.

51. *Baker v. Carr*, 369 U.S. 186, 217 (1962); *see generally Vieth*, 541 U.S. 267.

cognizable partisan gerrymandering scheme out of the intent-effect framework set up by the Supreme Court.⁵² Second, he rejected every other proposed standard.⁵³ He dismissed the litigant's standard, which would have merely required plaintiffs to show that mapmakers acted with the predominant intent to achieve partisan advantage,⁵⁴ because he said the term predominant was too hard to decipher and too ambiguous.⁵⁵ He further dismissed the litigant's effect test, which would have found partisan gerrymandering if plaintiffs showed that the districts systematically "packed and cracked" rival party's voters.⁵⁶ Justice Scalia claimed this would prove impossible, as a person's politics was not nearly as discernible as a person's race,⁵⁷ and he further noted that proportional representation is not a requirement of the Constitution.⁵⁸

Justice Kennedy agreed with the plurality that the litigants had failed to establish a claim,⁵⁹ but not that partisan gerrymandering was a nonjusticiable political question out of fear that one day someone would be successful in articulating a workable standard.⁶⁰ He argued a category should only be deemed nonjusticiable if no standard *could* exist.⁶¹ He noted a claim could be made under the Fourteenth Amendment if a litigant could show how a permissible classification burdened his or her representational rights.⁶² He further noted that a claim might be brought under the First Amendment, because a plaintiff could have an interest in his representational rights not being burdened because of his or her political ideology.⁶³ Justice Scalia, however, was unconvinced, arguing that it is the Supreme Court's job to find a standard.⁶⁴

52. *See Vieth*, 541 U.S. at 303.

53. *See id.* at 292–306.

54. *Id.* at 284.

55. *Id.* at 285.

56. *Id.* at 286.

57. *Id.* at 287.

58. *Id.* at 288.

59. *Id.* at 306 (Kennedy, J., concurring).

60. *Id.*

61. *See id.* at 312.

62. *Id.* at 313–14.

63. *Id.* at 314–15.

64. *See id.* at 301 (plurality opinion).

Justice Stevens disagreed with the plurality, and felt there was enough evidence to find an unconstitutional partisan gerrymander.⁶⁵ He argued that since party affiliation has been found to be an impermissible criterion in employment decisions by public officials, it should also be an impermissible criterion for excluding voters from a congressional district.⁶⁶ He proposed a standard that said if partisan considerations dominate, and no neutral justification can justify the districts, then the Equal Protection Clause would invalidate the districts.⁶⁷

Justices Souter and Ginsburg also dissented;⁶⁸ they too felt it was time to articulate a new standard.⁶⁹ To accomplish this task, they formulated a rebuttable five-part *prima facie* test that a plaintiff would need to establish.⁷⁰ First, the plaintiff would need to prove he or she is a member of a cohesive political group.⁷¹ Second, he or she would have to show the district of his residence was not drawn with any heed to traditional districting criteria.⁷² Third, the plaintiff would need to show a specific correlation between the district's deviations from the traditional redistricting criteria and the population distribution of his or her political group.⁷³ Fourth, the plaintiff would have to create an alternative district, which adheres closer to traditional districting criteria.⁷⁴ Finally, the plaintiff would have to show that the defendant acted with the intent to harm the plaintiff's group.⁷⁵ Justice Scalia, however, rejected this test for failing to identify what minimal representation one could have

65. *See id.* at 339–40 (Stevens, J., dissenting).

66. *Id.* at 324–25. Stevens backed up his claims by noting a number of cases where the Supreme Court did in fact hold party affiliation to be an impermissible criterion, including: *Bd. of Comm'rs v. Umbehr*, 518 U.S. 668, 674–75 (1996); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716–17 (1996); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64–65 (1990); *Branti v. Finkel*, 445 U.S. 507, 519–20 (1980). *Id.*

67. *Vieth*, 541 U.S. at 334–36 (Stevens, J., dissenting).

68. *Id.* at 342–43.

69. *See id.* at 345 (Souter, J., dissenting).

70. *Id.* at 347.

71. *Id.*

72. *Id.* at 347–48.

73. *Id.* at 349.

74. *Id.*

75. *Id.* at 350.

before a partisan gerrymandering case would fail.⁷⁶

In his dissent, Justice Breyer opined that a partisan gerrymander violates the Fourteenth Amendment when there is an “unjustified use of political factors to entrench a minority in power.”⁷⁷ He stated certain factors could include indicia of abuse such as middecennial redistricting, radical departures from traditional redistricting criteria, or a majority party twice failing to obtain a majority of seats without any neutral explanation.⁷⁸ Justice Scalia was still unconvinced, as there could always be some neutral explanation.⁷⁹

The second case came to the Supreme Court a few months later. In 2002, Democrats in Georgia redrew districts in order to stem the growing power of Republicans.⁸⁰ The maps intentionally lead to underpopulated Democratic districts and overpopulated Republican districts.⁸¹ The district court ultimately found a violation of the “one person, one vote” constitutional requirement,⁸² and the Supreme Court ultimately affirmed on those grounds in *Cox v. Larios*.⁸³ However, Justice Stevens stated this was also an unlawful partisan gerrymander, stating that “the District Court’s detailed factual findings regarding appellees’ equal protection claim confirm that an impermissible partisan gerrymander is visible to the judicial eye and subject to judicially manageable standard[].”⁸⁴

Despite the inability of the Supreme Court to reach a cognizant, single standard in *Vieth* or *Larios*, the issue reached the Court again in *League of United Latin American*

76. *Id.* at 296–97 (plurality opinion).

77. *Id.* at 360 (Breyer, J., dissenting).

78. *Id.* at 366.

79. *Id.* at 300 (plurality opinion).

80. McDonald, *supra* note 28, at 259. The maps intentionally caused underpopulated Democratic districts and overpopulated Republican districts. *Id.* The Court found that the districts were drawn to intentionally pair Republican incumbents against one another, forcing half the Republican caucus to run against a fellow republican incumbent. *See id.* at 259–60.

81. *Id.*

82. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1340, 1356 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004); McDonald, *supra* note 28, at 260.

83. *Cox v. Larios*, 542 U.S. 947 (2004).

84. *Id.* at 950 (Stevens, J., concurring).

Citizens (LULAC) v. Perry.⁸⁵ This case arose out of a middecennial redistricting plan from Texas.⁸⁶ Previously, Democrats had drawn districts in a manner that placed Republicans at a disadvantage.⁸⁷ However, as the 1990s pressed on, Republicans made significant gains in Texas.⁸⁸ When it came time to redistrict in 2000, the parties had split control over the Texas government, so no map could be agreed upon.⁸⁹ This resulted in a court drawing the districts.⁹⁰ Eventually, the Republicans took complete control of the government, and redistricted middecade.⁹¹ The middecennial redistricting plan ultimately turned the already Republican controlled legislature into a supermajority of sixty-nine percent.⁹²

Though the case was dismissed by the district court, the case eventually reached the Supreme Court.⁹³ Once again, the Supreme Court failed to reach a majority on the partisan gerrymandering claim.⁹⁴ Justice Kennedy refused to discuss justiciability again;⁹⁵ however, he dismissed the partisan gerrymandering claim because not every line was drawn with a partisan purpose.⁹⁶ Further, he expressly rejected the plaintiffs' suggested sole-intent standard, because he claimed it failed to require a plaintiff to show representational rights were actually burdened.⁹⁷ He further rejected a standard based on symmetry, whereby partisan gerrymandering is determined by comparing the results of the election if the parties' respective shares of the vote were reversed.⁹⁸ He noted this standard was unsatisfactory because it failed to account for how much partisan dominance would be too

85. See generally *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

86. McDonald, *supra* note 28, at 256–57.

87. *League of United Latin Am. Citizens*, 548 U.S. at 410–11.

88. *Id.* at 411.

89. *Id.*

90. *Id.*

91. McDonald, *supra* note 28, at 256.

92. *Id.* at 256–57.

93. *Id.* at 257.

94. See generally *League of United Latin Am. Citizens*, 548 U.S. 399.

95. *Id.* at 414.

96. *Id.* at 417–19.

97. *Id.*

98. *Id.* at 420.

much.⁹⁹

Justice Stevens decided to change course from *Vieth* and reformulate his proposed standard.¹⁰⁰ First, a plaintiff must show he or she is a resident within a redistricting map.¹⁰¹ Then, he or she must demonstrate the predominant purpose of the plan was to maximize one party's power.¹⁰² Finally, the plaintiff will need to demonstrate discriminatory effect.¹⁰³ If the plaintiff meets all of these elements, he has established a partisan gerrymandering claim.¹⁰⁴ The Justice expanded on the effect prong, stating effect could be shown if: the plaintiff's candidate would have originally won under the preexisting plan, the plaintiff's residence is now a safe district for the opposite party, and the new district is less compact than the old one.¹⁰⁵ Justice Stevens ultimately concluded that the plaintiffs met this burden.¹⁰⁶ Justice Breyer joined him, holding partisan gerrymandering claims to be justiciable, and reaffirming his previous holding that an unjustified use of purely partisan line drawing violates the Fourteenth Amendment.¹⁰⁷

Justices Souter and Ginsburg once again adhered to the idea that partisan gerrymandering claims are justiciable, but merely disagreed with Justice Kennedy's rejection of using the process followed in redistricting and his rejection of the use of symmetry as tools for adjudicating such claims.¹⁰⁸

Chief Justice Roberts and Justice Alito refused to rule on the justiciability of partisan gerrymandering claims, noting that this issue was not argued.¹⁰⁹ However, this fact did not stop Justices Scalia and Thomas from reiterating their belief that partisan gerrymandering claims are nonjusticiable political questions.¹¹⁰

99. *Id.*

100. *Id.* at 475–76 (Stevens, J., concurring in part and dissenting in part).

101. *Id.* at 475.

102. *Id.* at 475–76.

103. *Id.*

104. *Id.*

105. *Id.* at 476.

106. *Id.* at 482.

107. *See id.* at 491–92 (Breyer, J., concurring in part and dissenting in part).

108. *Id.* at 483 (Souter, J., concurring in part and dissenting in part).

109. *Id.* at 492–93 (Roberts, J., concurring in part and dissenting in part).

110. *Id.* at 511–12 (Scalia, J., concurring in part and dissenting in part).

II. IDENTIFICATION OF THE LEGAL PROBLEM

Due to the lack of a majority in the recent partisan gerrymandering cases,¹¹¹ lower courts have no single identifiable standard to use when adjudicating partisan gerrymandering claims. Lower courts may not even be sure if such partisan claims are justiciable. This could result in a partisan gerrymandering claim in one district court being dismissed as a political question, and another claim in a different court succeeding under one of the many articulated standards or even the previously stated *Bandemer* standard. In order for our judicial system to maintain consistency, there is a need for a uniform standard that all federal courts can rely upon.

III. ANALYSIS

This Comment will analyze the proposed standards one at a time, organized by the proponent of those standards.

A. *Justices Scalia and Thomas*

Close examination of the case law suggests Justices Scalia and Thomas are wrong, and partisan gerrymandering is justiciable. In *Baker v. Carr*, the Court noted an issue is a political question if any of the following six classifications applies:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or 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.¹¹²

111. See generally *League of United Latin Am. Citizens*, 548 U.S. 399; *Cox v. Larios*, 542 U.S. 947 (2004); *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

112. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

In *Vieth*, Justice Scalia argued partisan gerrymandering was a political question based on the second test.¹¹³ He focused mainly on the failure of courts to formulate a standard.¹¹⁴ This argument is flawed. First, Justice Scalia argued that in the eighteen years *Bandemer* had been on the books, the lower courts failed to articulate a workable standard.¹¹⁵ However, as Justice Kennedy noted in his concurrence, the lower courts were bound by *Bandemer*.¹¹⁶ Just because courts could not articulate a test using the *Bandemer* standard does not mean that one could never exist.¹¹⁷

Next, Justice Scalia argued that demonstrating discriminatory effect was overly difficult.¹¹⁸ While he does correctly note that a mere failure to achieve a proportional representation would not suffice to demonstrate effect, he incorrectly suggests that requiring a plaintiff to demonstrate that he or she was denied an effective opportunity to influence the political process is prohibitively difficult.¹¹⁹ As Justice Kennedy pointed out, new technologies such as computers can make it easier to determine the burden gerrymandering imposes.¹²⁰ Further, courts have proven themselves capable of employing experts to determine the effects of partisan gerrymandering.¹²¹ Finally, *Bandemer* bound all the cases Justice Scalia uses to back up his argument.¹²² Lower courts cannot determine what constitutes effect when the Supreme Court offered no guidance as to when a plaintiff might rightly believe that he or she was denied an ability to effectively influence the political process.

Justice Scalia further argued that even the litigant's suggested effects prong was unworkable.¹²³ The litigants suggested that effect can be shown if "the plaintiffs show that

113. See *Vieth*, 541 U.S. at 278.

114. *Id.* at 279.

115. *Id.*

116. *Id.* at 312 (Kennedy, J., concurring).

117. See *id.* at 281–84 (plurality opinion).

118. See *id.* at 286–87.

119. See *id.* at 281.

120. *Id.* at 312–13 (Kennedy, J., concurring).

121. See, e.g., *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 655–59 (N.D. Ill. 1991).

122. See *Vieth*, 541 U.S. at 282–83.

123. See *id.* at 286.

the districts systematically ‘pack’ and ‘crack’ the rival party’s voters, and . . . the court’s examination of the ‘totality of circumstances’ confirms that the map can thwart the plaintiffs’ ability to translate a majority of votes into a majority of seats.”¹²⁴ Justice Scalia argued that this would be an unfeasible standard, because political disposition is not as discernible as race, and is not immutable.¹²⁵ But the number of registered members of a party within a district is not difficult to discern.¹²⁶ Further, the mutability of political preferences should not preclude creating an effects prong, because voters’ ability to change location has never prevented the Court from announcing gerrymandering standards in other contexts.¹²⁷ It is true that people cannot step out of their race, nor can they stop existing; however, the Court had no problem mandating that the standard for United States congressional districts must be one person, one vote, even though populations will not stay the same over the course of the decade.¹²⁸

Justice Scalia also argued the intent standard was too hard to prove.¹²⁹ He did this by claiming the appellant’s proposed intent standard—which required a predominant intent to disadvantage the plaintiff’s group as opposed to the *Bandemer* standard of merely showing intent to disadvantage—would be too hard to show on a statewide basis.¹³⁰ Racial equal protection cases, however, demonstrate

124. *Id.* at 286–87 (emphasis omitted) (footnote omitted).

125. *Id.* at 286.

126. For example, the California Secretary of State keeps statistics on party registration by United States Congressional District, Assembly District, and State Senate Districts. See *February 10, 2011—Report of Registration*, CALIFORNIA SECRETARY OF STATE DEBRA BOWEN (2013) [hereinafter *Report of Registration*], <http://www.sos.ca.gov/elections/ror/ror-pages/ror-odd-year-11/>. In February 2011, State Senate District 10 was 50.85% Democrat, 19.23% Republican, 2.09% American Independent, and 0.51% Green. *Report of Registration as of February 10, 2011: Registration by State Senate District* (2011), <http://www.sos.ca.gov/elections/ror/ror-pages/ror-odd-year-11/senate.pdf>.

127. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 569 (1964); *Gomillion v. Lightfoot*, 364 U.S. 339, 347–48 (1960).

128. See *Reynolds*, 377 U.S. at 569.

129. *Vieth*, 541 U.S. at 284.

130. *Id.* at 285 (noting that there would be too many questions as to how much intent would constitute too much intent, as at least some districts would be drawn for neutral purposes).

that it is only difficult, not impossible.¹³¹ This fact will be discussed in greater detail in the proposal section of this Comment.¹³² Justice Scalia then continued his argument by noting that even on a district-by-district basis, an intent standard is not viable because while racial discrimination is constitutionally proscribed, the partisan consequences of redistricting are not.¹³³ His argument is that no consideration of racial factors is ever constitutionally permitted while some consideration of partisan factors is; and because redistricting is a political process, it would be impossible for courts to accurately ascertain when partisan considerations have become predominant.¹³⁴ While Justice Scalia is correct that the Supreme Court has long acknowledged that political groups will unquestionably be disadvantaged by the redistricting process, the Supreme Court has also held that pure animus is never a legitimate government interest for purposes of the Equal Protection Clause.¹³⁵ Even if one could fairly argue that predominant consideration of partisan factors is not *pure* animus, the courts have a long history of adjudicating political issues under the Equal Protection Clause. In *Reynolds v. Sims*, the Supreme Court announced the one person, one vote standard, requiring districts be apportioned evenly based on the population.¹³⁶ Admittedly, this case is not entirely on point, but it provides some integral clues as to whether it would be acceptable for a state to conduct a blatant partisan gerrymander. The Court stated it was particularly concerned with clever ways to debase the vote of an individual as well as blatant, less ingenious methods.¹³⁷ When a party engages in a successful partisan gerrymander, the party effectively rigs the process of elections to prevent certain political persuasions from

131. See generally *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

132. See *infra* Part IV.

133. *Vieth*, 541 U.S. at 285–86.

134. *Id.*

135. See, e.g., *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (stating that “a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest”) (emphasis omitted).

136. See *Reynolds v. Sims*, 377 U.S. 533, 563–64 (1964).

137. See *id.* at 562–65.

garnering their supporters to affect the results of elections.¹³⁸ Because voting is the quintessential method of protecting rights,¹³⁹ a partisan gerrymander is a form of preventing minority political persuasions from being able to actively protect their rights—it is a method of preventing people from being able to effectively exercise their vote, just like in *Reynolds*.¹⁴⁰ Further, permissible partisan considerations will only make it more difficult to recognize an impermissible partisan gerrymander; it will not make it impossible like Justice Scalia asserts.¹⁴¹ Thus, even though there is no constitutional amendment expressly prohibiting discrimination on the basis of political affiliation, and even if partisan considerations are occasionally constitutionally permissible, a redistricting scheme drawn with the main intent to disadvantage a political minority would not be invisible to the Constitution.¹⁴²

Though Justice Scalia may have been wrong regarding whether a judicially manageable standard existed, this does not rule out the possibility that partisan gerrymandering claims might be nonjusticiable. There is a plausible argument that the Constitution textually commits redistricting to another branch—the legislature.¹⁴³ Article I, Section 5 of the Constitution states that each congressional house shall be the judge of its election.¹⁴⁴ In *Powell v. McCormack*, however, the Court set forth the boundaries that

138. See McDonald, *supra* note 28, at 244.

139. See *id.*

140. See *Reynolds*, 377 U.S. at 568.

141. See *infra* Part IV.

142. The argument being that a partisan gerrymander would be tantamount to a legislature acting with the bare desire to harm the opposing political party in violation of the Constitution, or that once again, a clever way of rigging the election process to thwart various groups' voting ability would also be violative of the Constitution. After all, partisan gerrymandering cases are rife with examples of legislators not being so coy about their reasons for drawing districts in the fashion they did. See McDonald, *supra* note 28, at 254. But, once again, this Comment is not meant to address whether or not partisan gerrymanders in general violate the Constitution, as the Supreme Court has rarely touched on this question.

143. Joann D. Kamuf, Note, "Should I Stay or Should I Go?": *The Current State of Partisan Gerrymandering Adjudication and a Proposal for the Future*, 74 *FORDHAM L. REV.* 163, 198 (2005).

144. U.S. CONST. art. I, § 5.

Congress must abide by when judging their own elections.¹⁴⁵ If the Supreme Court can intervene when the legislature starts enforcing non-enumerated requirements on their members, surely they can intervene when a legislature redistricts to disadvantage a political party.

Next, one might argue that Article I, Section 4 leaves the time, place, and manner regulations of elections to the purview of state legislatures and only grants Congress power to intervene.¹⁴⁶ Case law, however, suggests the contrary. Per *Wesberry v. Sanders*, judicial intervention is appropriate if a state legislature redistricts for the purpose of debasing voting power.¹⁴⁷ Further, legislatures may make procedural, not outcome-determinative, regulations regarding elections,¹⁴⁸ and a partisan gerrymander would qualify as an outcome-determinative regulation.¹⁴⁹

Further, the Tenth Amendment has never barred judicial intervention. As *Reynolds* and *Baker* demonstrate, the Supreme Court has intervened whenever a state redistricts unconstitutionally.¹⁵⁰ Though partisan gerrymandering is not a race-based claim like the issues in contention in those three cases, judicial intervention would still be based on constitutional grounds.¹⁵¹

The other parts of the justiciability test seem to be less of a bar. There is no need for the Court to make a policy

145. See *Powell v. McCormack*, 395 U.S. 486, 548 (1969) (holding that Congress is only allowed to judge whether a member has met the requirement expressly stated in the Constitution, and that it is not allowed to have discretionary power to deny membership by a majority vote).

146. See U.S. CONST. art. I, § 4; Kamuf, *supra* note 143, at 198.

147. See *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964).

148. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832–33 (1995).

149. For instance, a legislature may mandate that all elections be mail-in elections, as this theoretically will not affect the outcome of the election; however, a legislature may not edit the ballot so one candidate's name bears a type of scarlet letter that may dissuade voters from voting for him. See *id.* A partisan gerrymander would be outcome-determinative because the legislature would be making a decision that would likely affect the ability of certain candidates to get elected.

150. See *Reynolds v. Sims*, 377 U.S. 533, 569 (1964); *Baker v. Carr*, 369 U.S. 186, 217 (1962).

151. Once again, whether or not partisan gerrymandering violates the Equal Protection Clause is not really an emphasis of this Comment. The argument, however, would be that drawing districts so as to dilute someone's vote on the basis of their political philosophy is denying them equal protection under the law.

determination when adjudicating a gerrymandering claim. Courts have previously invalidated districting schemes without doing so.¹⁵² Holding a districting scheme unconstitutional has never been found disrespectful towards a different branch of government.¹⁵³ Courts would not be required to adhere to a political decision when adjudicating partisan gerrymandering claims.¹⁵⁴ Finally, there is no great risk of embarrassment when adjudicating partisan gerrymandering claims.¹⁵⁵ Thus, partisan gerrymandering claims do not appear to be a nonjusticiable political question, and the holdings of Justices Scalia and Thomas appear to be more result oriented than logically supportable.

B. Justice Kennedy

In *Vieth*, Justice Kennedy felt the plaintiff's claim should be dismissed,¹⁵⁶ however, he did not want to deem partisan gerrymandering claims nonjusticiable.¹⁵⁷ Justice Kennedy predicted that a time would come when someone would successfully articulate a partisan gerrymandering standard.¹⁵⁸ He did not want to preclude future plaintiffs from using the judicial system as a means of remedying this real harm,¹⁵⁹ but as Justice Scalia noted, he believed the Supreme Court should be in charge of articulating a standard for lower courts to follow.¹⁶⁰

152. For instance, courts have invalidated redistricting schemes without making the policy determination of which constitutional redistricting criteria *should* have been relied upon. See generally *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

153. See generally *Reynolds*, 377 U.S. 533; *Baker*, 369 U.S. 186.

154. This would merely be interpreting the meaning of the Equal Protection Clause. Cf. *N.Y. Chinese TV Programs, Inc. v. U.E. Enters., Inc.*, 954 F.2d 847, 852 (2d Cir. 1992).

155. Cases are typically only thrown out on "embarrassment" grounds when a judicial ruling acts as second guessing decisions of other branches. See Harvard Law Review Association, *The Political Question Doctrine, Executive Deference, and Foreign Relations*, 122 HARV. L. REV. 1193, 1198-99; see also *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982, 984 (9th Cir. 2007) (holding that the judiciary could not rule in favor of plaintiffs suing Caterpillar Inc. for selling bulldozers to Israel in violation of international law, because doing so would implicitly question the policy of the United States to finance those sales).

156. *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring).

157. *Id.*

158. See *id.*

159. See *id.*

160. *Id.* at 301 (plurality opinion).

Justice Kennedy also suggested that partisan gerrymandering claims could be brought under the First Amendment; suggesting that a partisan gerrymander is tantamount to penalizing a citizen for voicing a political view by deflating the strength of that citizen's vote.¹⁶¹ The First Amendment, after all, has been used to prevent discrimination against political parties before.¹⁶² The idea that the First Amendment could be used to adjudicate partisan gerrymandering claims was not only consistent with this other First Amendment jurisprudence, but it was a theory shared by others.¹⁶³ As Justice Scalia correctly points out, however, finding a partisan gerrymander to be a violation of First Amendment would subject all political consideration in redistricting to judicial scrutiny.¹⁶⁴ "What cases such as *Elrod v. Burns* . . . require is not merely that Republicans be given a decent share of the jobs in a Democratic administration, but that political affiliation be disregarded."¹⁶⁵ And as the Supreme Court had previously noted, political considerations can be allowed in some circumstances,¹⁶⁶ so construing political gerrymandering as contrary to the First Amendment would conflict with established Supreme Court precedent.

Justice Kennedy's opinion in *LULAC* was no more illuminating. While making a strong argument that the plaintiff's sole intent standard was untenable,¹⁶⁷ Justice Kennedy's opinion again failed to articulate any standard for courts to follow.¹⁶⁸ As the post-*Bandemer* cases show us, the

161. *Id.* at 314–15 (Kennedy, J., concurring).

162. The First Amendment has been used by courts to limit the power of state legislators to prevent people from participating in an election because of their political disposition. See Kamuf, *supra* note 143, at 206–08. It has been used to curtail the power of legislatures to regulate the political parties' contributions to the election process. See *id.* at 204–05. Courts have used it to prevent legislatures from requiring one party's candidate to declare candidacy earlier than others. See *Anderson v. Celebrezze*, 460 U.S. 780, 787–88 (1983). And courts have used it to prevent officials from basing employment decisions on partisan affiliation. See *Elrod v. Burns*, 427 U.S. 347, 363 (1976).

163. See generally Kamuf, *supra* note 143, at 205–10.

164. *Vieth*, 541 U.S. at 294.

165. *Id.* (emphasis omitted).

166. See *Karcher v. Daggett*, 462 U.S. 725, 739–40 (1983).

167. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 417–20 (2006).

168. See *id.*

lower courts need clear guidance when adjudicating partisan gerrymandering claims.¹⁶⁹

C. *Justice Stevens*

Justice Stevens' *Vieth* opinion only focused on intent. Justice Stevens' test would not require a plaintiff to show he was actually harmed by the partisan gerrymander.¹⁷⁰ Though the scenario is unlikely, this could potentially lead to a case where a plaintiff could win a partisan gerrymandering claim without having to show the redistricting has a harmful effect.

There is a more serious problem with Justice Stevens' standard. By requiring the plaintiff to show that partisanship was the sole motivation,¹⁷¹ Justice Stevens makes partisan gerrymandering impossible to prove. A legislature will always be able to formulate some type of pretense for a redistricting scheme.¹⁷² The possibility that a legislature would redistrict with a partisan goal in mind and then fail to articulate any other reason for that goal is farfetched, even according to Stevens.¹⁷³

Justice Stevens' *LULAC* opinion seems to recognize this failure. In this opinion, Justice Stevens changed the intent standard to just a predominant motive.¹⁷⁴ This is the appropriate level of intent a plaintiff should be required to prove. As Justice Scalia noted, some consideration of partisan factors is inevitable,¹⁷⁵ so a standard that only required *any* intent would be too broad; but a sole intent standard would prove impossible to meet. However, where the Justice Stevens *LULAC* opinion fails is in its discussion of effect. While Justice Stevens does in fact add an effect aspect to the test,¹⁷⁶ he highlights effect in a manner that makes the

169. The fact that only one court was able to find a valid partisan gerrymandering claim suggests a cognizable standard is necessary. McDonald, *supra* note 28, at 251–52.

170. *See Vieth*, 541 U.S. at 334–36 (Stevens, J., dissenting).

171. *See id.*

172. *See* McDonald, *supra* note 28, at 255.

173. *Id.* (citing *Vieth*, 541 U.S. at 339 (Stevens, J., dissenting)).

174. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 474 (2006) (Stevens, J., concurring in part and dissenting in part).

175. In some cases it can even be incredibly blatant. *See Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

176. *League of United Latin Am. Citizens*, 548 U.S. at 474 (Stevens, J., concurring in part and dissenting in part).

standard irrelevant. Justice Stevens argued that to show effect, a plaintiff would need to show his or her candidate would have won under the preexisting plan, the new place of residence is now safe for the opposition, and the new district is less compact than the old district.¹⁷⁷ This does little more than suggest that once a redistricting scheme causes some harm to someone, the effect element is met.¹⁷⁸ The effect test needs to be more detailed as evidenced by the post-*Bandemer* lower court cases.¹⁷⁹ The part of the *Bandemer* standard that failed was the effect prong.¹⁸⁰ Thus, any feasible standard must adequately articulate effect.

D. Justices Souter and Ginsburg

Justice Souter, joined by Justice Ginsburg, came close to articulating a workable standard. The first four parts of the Souter-Ginsburg test list several factors which would show evidence of intent:¹⁸¹ showing a plaintiff is a member of a cohesive group, showing a lack of heed to traditional redistricting principles, showing correlation between departures from traditional principles and the population of the plaintiffs' group, and showing an alternative, traditional plan could be drawn.¹⁸² Though helpful, these four tests fail to articulate what type of harm must be shown.¹⁸³ While these factors go a long way towards showing intent, they do not really demonstrate that a plaintiff was actually harmed. For instance, in Louisiana less than twenty-seven percent of the electorate is Republican, yet there is a Republican governor, and a Republican controlled legislature,¹⁸⁴ which

177. *Id.* at 476 (Stevens, J., concurring in part and dissenting in part).

178. *See id.*

179. *See O'Lear v. Miller*, 222 F. Supp. 2d 850, 859 (E.D. Mich. 2002) (holding the plaintiffs failed to show effect because nothing was alleged beyond severely disproportionate results); *Pope v. Blue*, 809 F. Supp. 392, 397 (W.D.N.C. 1992); *see also Terrazas v. Slagle*, 821 F. Supp. 1162, 1174–75 (W.D. Texas 1993) (holding effect was not met because the burdened party still had an influence on legislative outcomes).

180. *See McDonald*, *supra* note 28, at 248–49.

181. *Vieth v. Jubelirer*, 541 U.S. 267, 346 (2004) (Souter, J., dissenting).

182. *Id.* at 347–50.

183. *See id.*

184. ASSOCIATED PRESS, *Democrats Now Make Up Less Than 50 Percent of Louisiana Voters*, NEW ORLEANS CITY BUSINESS, (Aug. 15, 2011, 8:47 AM) <http://neworleanscitybusiness.com/blog/2011/08/15/louisianas-democratic->

suggests many Democrats in the state are very willing to vote for Republican candidates. If Republicans in that state redistrict so that they win a few more seats, it would not really be fair to say Democrats were harmed just because Democrats who already voted Republican are now in a district with more registered Republicans.

As the fifth and final element of their partisan gerrymandering *prima facie*, Justices Souter and Ginsburg would require that the plaintiff prove the defendant acted intentionally to dilute the plaintiff political group's voting strength.¹⁸⁵ Unfortunately, here again the Souter-Ginsburg test does not sufficiently explain effect. There is no suggestion as to how much voting strength must be diluted, or in what way it must be diluted, before harm has been demonstrated.¹⁸⁶ Further, by making intent the focus of this element, it takes the focus off the harm aspect of the element. This element also seems to suggest that the plaintiffs need to show intent independent of the above variables, without articulating how.

Justices Souter and Ginsburg argued that they did not need to articulate a standard in *LULAC* because the plan was plainly lawful.¹⁸⁷ However, by stating they would not reject the *amici's* proposed standard of symmetry, they suggested a willingness to consider a test including a consideration of how the parties would fare should their respective shares of the vote be reversed.¹⁸⁸ As Justice Kennedy noted, however, this fails to take into account cross party voters and does not fully articulate how much partisan dominance is too much.¹⁸⁹ Therefore, without more, this element could prove again to be nonilluminating in a partisan gerrymandering case.

E. Justice Breyer

Justice Breyer's *Vieth* standard finds a violation of the Fourteenth Amendment if there were an "unjustified use of

resgistration-drops-below-50-percent/.

185. *Vieth*, 541 U.S. at 350 (Souter, J., dissenting).

186. *See id.* at 296 (plurality opinion).

187. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 483 (2006) (Souter, J., concurring in part and dissenting in part).

188. *See id.*

189. *Id.* at 420 (Kennedy, J., opinion).

political factors to entrench a minority in power,¹⁹⁰ but is too vague to really be a workable standard. Justice Breyer did attempt to curtail this problem by listing the neutral factors that a court could consider,¹⁹¹ but unfortunately, these factors provide little help. Redistricting taking place more than once in a decade may suggest there was an unjustified use of political power¹⁹²; but, as evidenced by the Supreme Court's near unanimous rejection of this as dispositive evidence in *LULAC*, this would not be enough to show a partisan gerrymander.¹⁹³ The minority party gaining a majority of the seats could be the result of crossover voting.¹⁹⁴ To be fair, Justice Breyer did note that if the failure of a majority party to obtain a majority of the seats could be explained by a neutral justification, it should not be considered as evidence of an unlawful partisan gerrymander.¹⁹⁵ However, sometimes a neutral explanation may not be so apparent, so an adequate test should look to raw data to ensure party members are truly voting along party lines before stating that a party has truly been harmed. Further, it is unlikely that any plan could not be justified or explained by anything other than an effort to secure partisan political advantage,¹⁹⁶ because just as was the problem with Justice Stevens' *Vieth* holding, it would not be difficult for a legislature to articulate some neutral explanation for its redistricting scheme.¹⁹⁷

IV. PROPOSAL

An ideal test would require a partisan gerrymandering plaintiff to show intent and effect, but it should set a standard for courts to follow when attempting to ascertain these criteria. To accomplish this, the ideal partisan gerrymandering test should use the *Arlington Heights* model for ascertaining intent, and it should modify the *Gingles* test

190. *Vieth*, 541 U.S. at 360 (Breyer, J., dissenting) (emphasis omitted).

191. *Id.* at 366.

192. *Id.*

193. See generally *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

194. An example of crossover voting can be seen in the Louisiana voting patterns mentioned earlier. See ASSOCIATED PRESS, *supra* note 184.

195. *Vieth*, 541 U.S. at 366 (Breyer, J., dissenting).

196. See McDonald, *supra* note 28, at 255.

197. See *id.*

for ascertaining effect.

A. Non-suspect Class and Why the Modified Gingles Test is Appropriate

Before discussing the applicable test, it is important to note that partisan affiliation will remain a non-suspect class, and thus this test will fall under rational basis scrutiny. Making political parties a suspect class and making all classifications based on political parties subject to strict or intermediate scrutiny could result in a myriad of lawsuits over issues within the permissible area of political jockeying.¹⁹⁸ Non-suspect classes are adjudicated under the rational basis test, which asks whether the legislation is rationally related to a legitimate state interest.¹⁹⁹ Animus, however, is never a legitimate state interest,²⁰⁰ and so a review of political gerrymandering on a rational basis platform should prove workable. This ideal partisan gerrymandering test will determine whether there could be a reason other than animus by first determining whether the legislature acted with the intent to dilute the opposing party's vote, and then determining whether the legislature actually did dilute the opposing party's vote. If there was no intent, then the motivation could not have been pure animus. Because this intent test will examine whether the legislature considered traditional redistricting criteria,²⁰¹ if a plaintiff demonstrates intent, he likely could have demonstrated that alternative motives for the redistricting scheme were not really factors. Also, if effect cannot be shown, it is equally unlikely animus was the purpose.

Naturally, *pure* animus will be impossible to prove to an absolute certainty, as once again, a pretextual motive could always be conjured up for a redistricting scheme.²⁰² The suggested test, however, will analyze whether the evidence of

198. See Benjamin D. Black, *Developments in the State Regulation of Major and Minor Political Parties*, 82 CORNELL L. REV. 109, 110 (1996) ("Despite the vaunted position of political parties in political theory, politicians in state legislatures often interfere in the parties' operation and constrain their political activities.").

199. See *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

200. See *id.* at 535.

201. See *infra* Part IV.B.

202. See McDonald, *supra* note 28, at 255.

animus is strong enough to warrant judicial intervention. That being said, it is still important to note why it is appropriate to use a test designed for rooting out racial discrimination in a claim of discrimination against a non-suspect class. After all, abridging the right to vote based on race is expressly prohibited²⁰³ and intentional racial discrimination is afforded suspect status under the Constitution.²⁰⁴ An individual generally cannot pretend to not be part of a race. Also, racial discrimination has historically been much more prevalent and intense than political discrimination, and very rarely are there legitimate reasons to discriminate based on race.²⁰⁵ Though these differences are not insubstantial and should be accounted for, the effects of partisan gerrymandering are harmful enough to warrant borrowing the test. When a party engages in a partisan gerrymander, as stated earlier, voters lose faith in the process, elected officials become free to disregard the concerns of a portion of the community they are supposed to represent, and the voters have no ability to protect their fundamental rights.²⁰⁶ In essence, partisan gerrymandering degrades the ability of elections to serve some of its most vital purposes. After all, the Supreme Court has even described the right to vote as “‘preservative of all rights.’”²⁰⁷ In his book, *Democracy and Distrust*, John Ely argues that the United States Constitution is concerned about the process under which government operates, as opposed to the substantive policies of the government.²⁰⁸ Thus, it is important for the courts to intervene when the process of voting is manipulated so that those in power will remain in power, and those out of power will stay out.²⁰⁹ If everyone’s interests are effectively voiced in the process of voting, then those running for office cannot completely disregard any

203. U.S. CONST. amend. XV.

204. *Miller v. Johnson*, 515 U.S. 900, 904 (1995).

205. Political affiliation, however, often does have a place in the political field. Once again, there are many permissible classifications based on political party. See Black, *supra* note 198, at 110.

206. McDonald, *supra* note 28, at 244.

207. *Id.* (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

208. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 101 (1980).

209. See *id.* at 103.

group; but if the system is manipulated by those in power, then those out of power lose any ability to effectively protect their rights.²¹⁰ Ely even noted that pre-Revolution, the colonialists were concerned about lack of representation in Parliament in that: “(1) their input into the process by which they were governed was insufficient, and that (partly as a consequence) (2) they were being denied what others were receiving.”²¹¹ Thus, manipulation of the voting process is serious enough to warrant the use of a racial discrimination test.

Further, voting has previously triggered stricter tests for discrimination, even when a non-suspect class is involved. Complete denial of the right to vote under the Equal Protection Clause triggers strict scrutiny for categories bearing no relation to voting qualifications,²¹² demonstrating the importance of this right. This is why poll taxes receive strict scrutiny,²¹³ even though the discrimination is based on wealth—a category that typically receives only rational basis scrutiny.²¹⁴ Even when the burden on voting is deemed insubstantial, the Court still considers voting important enough to at least entertain a balancing test—balancing the interest of the state versus the burden on voting—all while claiming to be in the realm of rational basis scrutiny.²¹⁵ Further, even though this test will not eliminate all possible alternative motives besides animus, the Court has seemingly relaxed the rational basis test when dealing with a non-suspect class that has been more often subjected to discrimination,²¹⁶ and here too, political majorities often attempt to subvert political minorities. Therefore, given the importance of fair voting procedures and the large temptation of major political parties to manipulate them, the Court will likely be willing to allow for a little more ambiguity than it typically does under the rational basis standard.

210. *See id.*

211. *Id.* at 89.

212. *See, e.g.,* Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).

213. *See id.* at 670.

214. Harris v. McRae, 448 U.S. 297, 323 (1980).

215. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 202–03 (2008).

216. *See generally* Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

All this being considered, however, the test still sufficiently accounts for the fact that racial discrimination should be easier to prove. When a plaintiff establishes intentional discrimination based on a racial classification, he or she will win so long as the government cannot establish a compelling interest, which the law is narrowly tailored to meet, and so long as there is any discriminatory effect.²¹⁷ In a Voting Rights Act adjudication, a plaintiff will win a racial gerrymander claim on Section Two grounds if he shows the requisite level of effect required under *Thornburg v. Gingles*, regardless of whether he can prove that the legislators had the intent to racially gerrymander.²¹⁸ Thus, by requiring the plaintiff to show both intent and the heightened effect as required under the modified *Gingles* test, the bar will be significantly higher for most partisan gerrymandering plaintiffs. As stated above, the purpose of requiring both tests is to eliminate any possible motive other than pure animus. Therefore, this test should fit within the rational basis framework, without making political affiliation a *de facto* suspect class.

B. Establishing Intent

The ideal partisan gerrymandering test would require the plaintiff to demonstrate that the defendant acted with the intent to dilute the opposition's influence. Intent is not part of the original *Gingles* Section Two of the Voting Rights Act test.²¹⁹ However, intent will be a necessary element for two reasons. First, intent is a common requirement in Equal

217. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 268–69 (2003); *Palmer v. Thompson*, 403 U.S. 217, 225 (1971) (holding there was no Equal Protection Clause violation when a city council closed a public pool with discriminatory intent, but the effect was equal on both African American and white citizens).

218. See *Thornburg v. Gingles*, 478 U.S. 30, 35–36, 50–51 (1986). Though this will be described in further detail later in this section, a Voting Rights Act plaintiff cannot merely point to a minority neighborhood that has been drawn into a separate district; he must actually show that the minority vote is being cancelled out when a majority-minority district is possible, and he must show there are possible alternatives. See discussion *infra* Part IV.B–C; see *Gingles*, 478 U.S. at 50–51 (noting that a Section 2 claim requires the racial group be sufficiently large and geographically compact, and it requires evidence of racial bloc voting).

219. See generally *Gingles*, 478 U.S. 30.

Protection jurisprudence.²²⁰ Second, partisan effect may be too easy to show on its own, because any time a legislature redistricts, one party will be harmed.²²¹ Plaintiffs will not be required to show that intent based on partisan discrimination was the sole motivation, nor will the plaintiffs be allowed to meet the burden by showing intent was a motivation; because as mentioned before, these two standards would be impossible to meet or impossible to defeat respectively.²²² Therefore, as suggested by Justice Stevens in his *LULAC* concurrence, plaintiffs should be required to show predominant intent.²²³ To show a predominant intent to partisan gerrymander, the courts should borrow and modify the test used in racial equal protection claims—the *Arlington Heights* test.²²⁴ While not every possible *Arlington Heights* test will be applicable, the test should still help give the courts a clear idea of when there is enough evidence of intent.

When determining intent, the *Arlington Heights* test considers whether the impact of the official action “‘bears more heavily on one race than another.’”²²⁵ In the racial context, if the official action burdens one race considerably more than another, this alone can establish intent.²²⁶ Even if by comparison, the burden is not quite that extreme, this element, in conjunction with others, can still suggest intent to discriminate against a race.²²⁷ When ascertaining discriminatory effect in the racial context, courts have often relied on statistical evidence²²⁸ and expert testimony.²²⁹

220. See generally *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

221. Any time lines are drawn, it is bound to mean one group will constitute a majority more often than other groups.

222. See generally *supra* Part III.

223. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 474–75 (2006) (Stevens, J., concurring in part and dissenting in part).

224. See *Vill. of Arlington Heights*, 429 U.S. at 265–68.

225. *Id.* at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

226. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 347–48 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886).

227. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)

228. See *Obrey v. Johnson*, 400 F.3d 691, 694–95 (9th Cir. 2005). For instance, the District Court for the Western District of Louisiana once found intent to gerrymander districts based on race when it noted that one district gathered a disproportionate number of black voters and excluded a disproportionate number of white voters. See *Hays v. Louisiana*, 936 F. Supp.

In the partisan gerrymandering context, courts would be more than able to rely upon both statistical evidence and expert testimony when ascertaining impact. If the suit is brought after an election using the new district maps, a court could examine the new seat allocations of each party.²³⁰ In *Vieth*, Democrats were the majority, but the redistricting plan passed by the legislature created Republican majorities in sixty-eight percent of the state congressional districts.²³¹ In *LULAC*, the middecennial redistricting increased the Republican representation in the legislature from forty-seven to sixty-nine percent.²³² Other types of statistical evidence would work too. In *Larios*, while the redistricting plan protected Democrat incumbents, Republicans were paired so that fifty percent of the Republican caucus in the house would be running against one another.²³³ And of course, just like in the racial context, expert testimony can also be useful.²³⁴ District courts could simply have experts look at the partisan make-up of the proposed districts, and analyze whether or not they were drawn so as to harm one party. Therefore, courts should be able to use this test to ascertain disproportionate impact, and thus evidence of intent.

The second aspect of the *Arlington Heights* test focuses on the historical background of the decision. If it reveals a series of actions taken for invidious purposes, then the official action was likely taken with the intent to harm.²³⁵ A court

360, 368 (W.D. La. 1996).

229. See *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 920 (8th Cir. 1986). In *Wilmington*, the expert presented proof of discrimination against African Americans by highlighting that while African Americans made up 4.5% of the workforce, they accounted for 43% of those discharged. *Id.*

230. For instance, if a party received roughly the same proportion of the total vote that it received in the previous election, but this time only won a fraction of the seats, this would demonstrate disproportionate impact.

231. McDonald, *supra* note 28, at 254.

232. *Id.* at 257.

233. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1329 (N.D. Ga. 2004), *aff'd*, *Cox v. Larios*, 542 U.S. 947 (2004).

234. See *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 655–59 (N.D. Ill. 1991).

235. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). In one racial equal protection case, the Court used several historical studies and testimony of two expert historians to determine that a provision of the Alabama constitution was enacted for the purpose of disenfranchising African Americans because it was ratified at the end of reconstruction when a zeal for white supremacy ran rampant throughout the constitutional convention

could examine the history surrounding the redistricting decision to determine what the drive behind the selection was. For instance, in *LULAC*, the legislature decided to redistrict following a democratic gerrymander a few years before.²³⁶ Courts could use experts to determine if districts were historically drawn to dilute a party's influence.²³⁷ Though it would likely not be dispositive, this could provide evidence that a legislature intended to dilute the opposing party's influence.

Third, the racial gerrymandering cases investigate the sequence of events leading up to the decision.²³⁸ Similar evidence could be used in partisan gerrymandering. In *LULAC*, the redistricting followed a Republican takeover.²³⁹ In *Vieth*, the redistricting plan was pushed after national figures suggested the Pennsylvania State Legislature take such action for revenge against Democrats for making similar moves elsewhere.²⁴⁰ In *Larios*, the redistricting by Democrats came as the Republican electorate began to grow.²⁴¹ The courts could use this as evidence that the legislature was more concerned with harming the opposition's vote than adherence to nonpartisan motives.

The *Arlington Heights* test also allows courts to focus on departures from normal procedural sequences, such as sudden changes in voting procedures or mechanisms, as evidence of racially discriminatory intent.²⁴² This would also

and the state. See *Hunter v. Underwood*, 471 U.S. 222, 229 (1985).

236. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 410–11 (2006).

237. In the racial gerrymandering context, a district court found a historical invidious districting scheme when it noted that, while the Hispanic population had grown in the most heavily populated Hispanic district in Los Angeles between 1959 and 1971, no Los Angeles redistricting scheme had created a supervisorial district in which Hispanic persons were a majority of the population. See *Garza v. Cnty. of L.A.*, 756 F. Supp. 1298, 1313 (C.D. Cal. 1990).

238. See *Vill. of Arlington Heights*, 429 U.S. at 267. For example, a court once found the fact that a city re-zoning and declaring a development moratorium shortly after learning of plans for a low-income housing complex to be evidence of discriminatory intent. See *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108, 109, 115 (2d. Cir. 1970).

239. *League of United Latin Am. Citizens*, 548 U.S. at 413.

240. McDonald, *supra* note 28, at 253–54.

241. *Id.* at 259.

242. See, e.g., *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 144–45 (3d Cir. 1977) (finding evidence of racial animus when a city council changed the

be applicable in partisan gerrymandering claims. For instance, in *LULAC*, the Texas State Legislature decided to redistrict middecade.²⁴³ Because mandatory redistricting occurs once a decade with every new census,²⁴⁴ this is evidence that partisan harm was the motivation behind a redistricting scheme.

Departures from substantive norms have also been used as evidence of invidious intent.²⁴⁵ In a partisan gerrymandering case, the court could examine similar departures. For instance, in all three of the modern partisan gerrymandering cases, there were accusations that the legislatures completely disregarded the traditional redistricting criteria.²⁴⁶ Such maneuvers could be strong evidence of partisan bias being the true motivation of a redistricting move, as it would rule out other possible motivations for a decision to redistrict.

The *Arlington Heights* test also uses the legislative history behind an official action to determine if invidious discrimination was the motivation behind a bill.²⁴⁷ Such evidence exists in the partisan gerrymandering context as well. Often, politicians will explicitly state what their

procedure it followed when voting on a bill).

243. See *League of United Latin Am. Citizens*, 548 U.S. at 413.

244. *Id.* at 420; *Strength in Numbers*, CENSUS.GOV, <http://www.census.gov/rdo/pdf/StrengthInNumbers2010.pdf> (last visited Mar. 29, 2013); U.S. CONST. art. I, § 2 cl. 3; see *Reynolds v. Sims*, 377 U.S. 533, 568–69 (1964).

245. *Vill. of Arlington Heights*, 429 U.S. at 267. In a racial setting, evidence of racial animus was found in the fact that a city refused to re-zone a low-income housing site to a multifamily zone, despite the fact that the entire surrounding area was zoned for multifamily residences. See *Dailey v. City of Lawton*, 425 F.2d 1037, 1040 (10th Cir. 1970). Further, in *Hays v. Louisiana*, court noted that the district in question was 250 miles long, cut across fifteen parishes while only containing three whole parishes, and linked divergently differing communities with unique cultures, identities, histories, economies, and religions. *Hays v. Louisiana*, 936 F. Supp. 360, 368 (W.D. La. 1996).

246. See generally *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Cox v. Larios*, 542 U.S. 947 (2004); *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

247. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977). For instance, officials' knowledge of the disproportionate impact the action would have on a group, while not being dispositive of the intent behind the action, was considered to be pertinent evidence. See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 283 (1979).

motives are.²⁴⁸ For instance, the redistricting measure challenged in *Vieth* was openly pushed as a means to counter other partisan gerrymanders favorable to Democrats.²⁴⁹ Courts could use such blanket statements as strong evidence that there was intent to harm.

Naturally, this list of factors would not be exhaustive, and not every piece of the *Arlington Heights* test could be applied to the partisan gerrymandering standard.²⁵⁰ Courts could still use these elements, in addition to any other relevant factors,²⁵¹ to help ascertain whether or not a legislature acted with the intent to dilute the influence of the opposing political party when it decided to redistrict.

There is one other crucial factor to the *Arlington Heights* test that should be applied to the partisan gerrymandering standard. A defendant should be given the opportunity to demonstrate the plan would have been adopted anyway, even if there was intent to harm.²⁵² If the defendants could show that there is no preferable districting scheme, or no alternative scheme that adheres more closely to traditional redistricting criteria, a court cannot fairly say a legislature acted with bad intent.

C. *The Altered Gingles Test*

Now that the extra intent standard has been analyzed, it is important to explain how the *Gingles* test would evolve in

248. See McDonald, *supra* note 28, at 254.

249. See *id.*

250. For instance, many of the racial discrimination cases will use racial or derogatory comments by officials as evidence of discriminatory intent. *Mullen v. Princess Anne Volunteer Fire Co., Inc.*, 853 F.2d 1130, 1133 (4th Cir. 1988) (holding evidence that members of a fire company used racial slurs was relevant in lawsuit alleging discriminatory hiring practices). But political discourse is usually heated. Derogatory comments about the opposing party would not be very strong evidence of discriminatory intent.

251. This is not meant to be an exhaustive list of factors, just as it is not meant to be exhaustive in the realm of ascertaining racially discriminatory intent either. *Vill. of Arlington Heights*, 429 U.S. at 268 ("The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed.").

252. For instance, in *Webb v. City of Chester*, the Seventh Circuit said it was not only relevant that the plaintiff's performance as a policeman could have been the true, nondiscriminatory reason for his discharge, but also that excluding the evidence would have been an abuse of discretion. *Webb v. City of Chester*, 813 F.2d 824, 833 (7th Cir. 1987).

the partisan gerrymandering context. The first factor requires a racial group to prove it is sufficiently large and geographically compact.²⁵³ The second and third prongs of the *Gingles* test requires a plaintiff to show whether the disadvantaged race votes as a cohesive group,²⁵⁴ and whether the advantaged race votes sufficiently as a bloc to defeat the disadvantaged race's candidate.²⁵⁵ These two factors are often analyzed together to see whether the races vote as a bloc,²⁵⁶ and these same factors could be utilized in the partisan gerrymandering context.²⁵⁷

The first prong of this test should be easy to satisfy. In the racial context, courts often engage in a two-pronged analysis, by first looking at the population of a minority group, and then its compactness.²⁵⁸ Courts will typically assess the size of population via the minority group's voting age population;²⁵⁹ if plaintiffs are split into multiple districts when they could be the majority in one, or if they are being packed into one district when they could be the majority in two, a Section Two claim may exist.²⁶⁰ When assessing compactness, courts often examine the district's shape to see if it conforms to traditional redistricting principles, including

253. *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

254. *Id.* at 51.

255. *Id.*

256. LOWENSTEIN, *supra* note 2, at 165.

257. For purposes of Voting Rights Act analysis, there used to be a dispute as to the significance of meeting these three factors. Some courts held the three factors established a voting dilution claim while others held that these three factors were a threshold requirement that must be met before the courts engaged in a totality-of-the-circumstances test. *Gomez v. City of Watsonville*, 863 F.2d 1407, 1419 (9th Cir. 1988) (“[F]actors other than the three elements discussed above, while supportive of a Section 2 violation, are not essential to a minority voter's claim.”); *McNeil v. Springfield Park Dist.*, 851 F. 2d 937, 942 (7th Cir. 1987) (referring to the factors as a threshold for surviving summary judgment before the court engages in a totality-of-the-circumstances analysis). The Supreme Court answered the question by stating that these factors are a requisite to show a Voting Rights Claim, but courts must also examine the totality of the circumstances to see if impermissible racial vote dilution is occurring. *Johnson v. De Grangy*, 512 U.S. 997, 1011–12 (1994). For the purposes of the proposed partisan gerrymandering test, these factors will be sufficient to show effect. *See supra* Part IV.B.

258. Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act since 1982*, 39 U. MICH. J.L. REFORM 643, 661 (2006).

259. *See Old Person v. Cooney*, 230 F.3d 1113, 1121 (9th Cir. 2000).

260. *See* LOWENSTEIN, *supra* note 2, at 161.

whether or not it captures a particular community.²⁶¹ If the district fails to capture a community, yet there is a single minority community, then there is a racial gerrymandering issue.²⁶² Courts could do the same thing with partisan gerrymandering by looking at data to determine if a political party lives in a sufficiently large and geographically compact area.²⁶³ With this, courts could determine whether or not a political group is sufficiently compact. If a political group is so spread out that no district adhering to traditional criteria could be drawn so they are the majority, then it would not be fair to find an unconstitutional partisan gerrymander. The key question is whether or not the group is sufficiently compact to form the majority in a traditional district.²⁶⁴

The second and third prongs of the test are more complicated, but these are crucial steps in ascertaining effect.²⁶⁵ The most obvious way a court determines whether bloc voting is occurring is by finding a political race where a minority candidate is running and assuming he is the candidate of choice for minorities.²⁶⁶ This type of analysis would be unhelpful in a partisan gerrymandering context. People do not always prefer the candidate of their party, as evidenced by the fact that even Barack Obama won nine percent of the Republican vote in 2008.²⁶⁷ Further, ideologies vary considerably within political parties,²⁶⁸ so it is important that courts consider how people within parties are actually voting, or are actually going to vote, before concluding that bloc voting is occurring.

261. See Katz et al., *supra* note 258, at 662–63.

262. See *id.*

263. As mentioned earlier, this data is readily available. See *Report of Registration*, *supra* note 126.

264. See *Thornburg v. Gingles*, 478 U.S. 30, 49 (1986).

265. See Katz et al., *supra* note 258, at 663–64.

266. See *id.* at 665–66. For instance, in *Barrett v. City of Chicago*, the court assumed that African Americans would want to elect the African American candidate for alderman, and when they could not, the court assumed racial bloc voting was occurring. See *Barnett v. City of Chi.*, 141 F.3d 699, 703 (7th Cir. 1998).

267. *Inside Obama's Sweeping Victory*, PEW RES. CENTER (Nov. 5, 2008), <http://www.pewresearch.org/2008/11/05/inside-obamas-sweeping-victory/>.

268. See Lydia Saad, *U.S. Political Ideology Stable with Conservatives Leading*, GALLUP (Aug. 1, 2011), <http://www.gallup.com/poll/148745/Political-Ideology-Stable-Conservatives-Leading.aspx>.

However, other methods that courts use for determining racial bloc voting would be more helpful. Courts in the Ninth, Sixth, and Second Circuits look to election results to determine if bloc voting is occurring.²⁶⁹ If a court finds that a racial group consistently supports candidates of that race, and those candidates consistently lose, this suggests bloc voting.²⁷⁰ This could be used in a partisan gerrymandering test, by utilizing exit polls to determine if people vote for their party.

Some courts demand extra evidence to determine a group's candidate of choice.²⁷¹ Courts have required plaintiffs to show the depth and vigor of minority support and the scope of the candidate's interest in the minority community on top of showing that the minority votes for the candidate.²⁷² Here, a court could use exit poll information to determine how party members voted, and could examine how much excitement surrounded the campaign.²⁷³ Courts could also review the candidate's ideology and the parties' platforms, to test whether the candidate's ideology was both in line with members of his party and opposed by members of the opposing party.²⁷⁴

Of course, whichever system courts choose to employ, certain elections should be excluded from the analysis because of the risk of having anomalous results. Plurality victories, elections where lots of uncertainty surround procedural issues, elections where candidates run unopposed, elections where a major party candidate only runs against a third party candidate, and any election where a candidate is the subject of a criminal investigation, is a celebrity, or is virtually unknown, are not considered when determining

269. See Katz et al., *supra* note 258, at 667.

270. See *Gomez v. City of Watsonville*, 863 F.2d 1407, 1416–17 (9th Cir. 1988) (finding that because Hispanics always supported the Hispanic candidate and because that candidate was consistently defeated, bloc voting must be occurring).

271. See Katz et al., *supra* note 258, at 667.

272. *Id.* at 666.

273. In other words, if there is a hyper partisan election with very prominent campaigns, this could be evidence of polarized voting.

274. If an extremely pro-life Democrat runs, and abortion happens to be the hot button issue that year, Republicans might not be able to blame their loss on partisan gerrymandering.

racial bloc voting.²⁷⁵ These elections should be similarly discounted in partisan gerrymandering cases too.

By accounting for outlier elections and utilizing the well-polished racial gerrymandering tests, courts should be able to use the *Gingles* factors for ascertaining whether a partisan gerrymander had a harmful effect. Further, by using the *Arlington Heights* test, courts should be able to ascertain discriminatory intent. For instance, Michigan Democrats have recently accused Republicans of drawing districts to dilute the Democrat vote.²⁷⁶ Admittedly, the following facts were all taken from the accusations, but assuming them to be true, and assuming there is no rebuttal, a court could take the facts to demonstrate the Democrats have a viable claim. Michigan is a state with a close divide of Democrats and Republicans.²⁷⁷ However, in 2010, Republicans swept the elections, and took complete control of the government.²⁷⁸ With this new control, Republicans drew the maps so two Democratic incumbents must run against each other while no Republican incumbents must do so,²⁷⁹ it created seven safe Republican seats while only creating five safe Democratic seats,²⁸⁰ and the districts split urban communities where Democrats are primarily located.²⁸¹ These facts suggest intent. First, the action bears more heavily on Democrats than Republicans. Second, the sequence of events leading up

275. See, e.g., *Old Person v. Brown*, 312 F.3d 1036, 1048 n.13 (9th Cir. 2002) (discounting an election where one of the two candidates was merely a third party candidate); *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997) (discounting an election when determining racial bloc voting when a candidate ran unopposed); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1389 (8th Cir. 1995) (discounting a plurality victory when determining if racial bloc voting was occurring); *Martin v. Allain*, 658 F. Supp. 1183, 1193 (S.D. Miss. 1987) (discounting an election where a candidate was the subject of an investigation); *Jordan v. Winter*, 604 F. Supp. 807, 812 (N.D. Miss. 1984) (discounting an election where voters were unsure about the election date).

276. Mark Brewer, *Testimony of Mark Brewer Regarding Congressional Redistricting*, MICHIGAN DEMOCRATIC PARTY (June 21, 2011), <http://www.michigandems.com/2011BrewerRedistrictingTestimony.pdf>.

277. Rob Richie & Jais Mehaji, *Gerrymandering in Michigan and the Super District Remedy*, FAIRVOTE (July 20, 2011), <http://www.fairvote.org/gerrymandering-in-michigan-and-the-super-district-remedy>.

278. *Id.*

279. *Id.*

280. *Id.*

281. See Brewer, *supra* note 276.

to redistricting suggests intent, as the maps were drawn after a sudden Republican takeover. Further, the districts drawn do not adhere to community boundaries, and are oddly shaped.²⁸² These departures from the substantive norms that a legislature typically adheres to when redistricting suggest intent. Unless the Republicans could rebut the claims with legitimate, nonpartisan reasons for drawing these districts, the intent prong would likely be met.

The Democrats should also be able to demonstrate effect. There is a fairly even split between Democrats and Republicans, with Democrats concentrated in urban areas, so Democrats are likely sufficiently large and geographically compact.²⁸³ Demonstrating bloc voting could be difficult. Because Republicans swept the 2010 elections, some Democrats must have voted for them then.²⁸⁴ However, by utilizing polling data and expert testimony, Democrats may be able to demonstrate future bloc voting. Assuming this is true and not rebuttable, Michigan Democrats would be able to demonstrate that the Republicans have engaged in an unconstitutional partisan gerrymander.

CONCLUSION

The courts are likely to revisit partisan gerrymandering as legislatures redistrict following the recent 2010 Census. Unfortunately, courts do not have any real guidance on whether these claims will be justiciable, or even if they are, how these claims should be adjudicated. However, considering the very real harm partisan gerrymandering can cause to the power of an individual's vote, the Supreme Court should consider adopting a uniform, workable standard. By adopting a modified *Gingles* plus intent test, courts should be able to handle these claims effectively.

282. One district spans over fifty miles while only being a half a mile wide at some points, while another district is only a few blocks wide at times. *Id.*

283. *See* Richie & Mehaji, *supra* note 277.

284. *See id.*