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## Clearing the Political Thicket: Why Political Gerrymandering for Partisan Advantage is Unconstitutional

Michael Parsons

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**CLEARING THE POLITICAL THICKET: WHY  
POLITICAL GERRYMANDERING FOR PARTISAN  
ADVANTAGE IS UNCONSTITUTIONAL**

Michael Parsons\*

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INTRODUCTION

A corrosive concept has infected the roots of our democracy. This insidious notion, which has eluded judicial grasp, is that legislators may constitutionally draw electoral districts for the purpose of securing their own victory (“incumbency advantage”) or the victory of their party (“political advantage”). Political gerrymandering is popularly

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\* Gary Michael Parsons, Jr., J.D., Georgetown University Law Center, 2013; A.B., Davidson College, 2008.

perceived as being disreputable but legal.<sup>1</sup> This is only half-true. The Supreme Court has explicitly recognized that political gerrymandering may offend constitutional principles. Unfortunately, it has failed to articulate when this is the case and why.<sup>2</sup> This Article seeks to answer those questions.

A careful reading of Supreme Court precedent exposes that electoral advantage is not a legitimate state interest. Those who claim legal cover to pursue political gain through the redistricting process have ignored three critical distinctions. These conceptual snares have spawned a set of false premises that this Article aims to elucidate and dispel: (1) the assumption that *legislators' personal considerations* are synonymous with the *legislature's state interests*; (2) the assumption that the constitutionality of political gerrymandering turns on the *degree* of “political interest” sought rather than the *type* of “political interest” sought; and (3) the assumption that there is *one* political gerrymandering offense rather than *two*: dilution and sorting.

This Article canvasses the history of redistricting case law and provides precedential authority for judges and litigants alike to identify and uproot the nettlesome notions that have plagued political gerrymandering claims to date. Naming these misconceptions points a way out of the wilderness and cuts a clear course through the political thicket. The Article proceeds as follows: Part I surveys the background and current state of redistricting law; Part II explores the analytical pitfalls that have plagued political gerrymandering claims to date; and Part III proposes a path for pursuing such claims going forward.

## I. BACKGROUND

Since 1886, the Supreme Court has recognized the right to vote as “fundamental” under the Constitution because it is “preservative of all rights.”<sup>3</sup> A democracy

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<sup>1</sup> See Laura Vozzella, *Va. House Map Constitutional, Federal Judges Rule*, WASH. POST (Oct. 22, 2015), [https://www.washingtonpost.com/local/virginia-politics/va-house-map-constitutional-federal-judges-rule/2015/10/22/4dccba8-78ff-11e5-b9c1-f03c48c96ac2\\_story.html](https://www.washingtonpost.com/local/virginia-politics/va-house-map-constitutional-federal-judges-rule/2015/10/22/4dccba8-78ff-11e5-b9c1-f03c48c96ac2_story.html) [<https://perma.cc/AWA2-JYCQ>] (“The court had a choice between whether these districts are racially gerrymandered or politically gerrymandered . . . . The court chose [to rule that] this was a political gerrymander, which while completely damaging to our democracy, is completely legal.” (quoting Brian Cannon, Executive Director of OneVirginia2021 (second alteration in original))) (discussing the decision in *Bethune-Hill v. Va. State Bd. of Elections*, No. 3:14CV852, 2015 WL 6440332 (E.D. Va. Oct. 22, 2015), *cert. docketed*, No. 15-680, 84 USLW 3305 (Nov. 20, 2015)); see also *Harris v. McCrory*, No. 1:13-CV-49, 2016 WL 482052, at \*21, 23 (M.D.N.C. Feb. 5, 2016) (Cogburn, J., concurring) (expressing “concerns about how unfettered gerrymandering is negatively impacting our republican form of government,” but lamenting, without citation, that “redistricting to protect the party that controls the state legislature is constitutionally permitted and lawful”).

<sup>2</sup> See, e.g., *Hunt v. Cromartie*, 526 U.S. 541, 551 n.7 (1999) [hereinafter *Cromartie I*] (“This Court has recognized . . . that political gerrymandering claims are justiciable under the Equal Protection Clause although we [are] not in agreement as to the standards that would govern such a claim.”).

<sup>3</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

without a fair and functional electoral system is a democracy in name only. Therefore, a state's "denial of constitutionally protected rights demands judicial protection,"<sup>4</sup> even if the denial of rights comes in the form of redistricting legislation and judicial protection risks drawing the courts into the "political thicket."<sup>5</sup>

The Court has recognized at least three ways in which redistricting legislation risks abridging constitutional rights in a manner amenable to judicial review: (1) numerical vote dilution in violation of the one person, one vote principle; (2) racial gerrymandering; and (3) political gerrymandering.

#### *A. One Person, One Vote*

In *Gray v. Sanders*,<sup>6</sup> the Supreme Court examined the constitutionality of a Georgia "county unit" voting system that gave "every qualified voter one vote in a statewide election," but "weigh[ed] the rural vote more heavily than the urban vote and weigh[ed] some small rural counties heavier than other larger rural counties."<sup>7</sup> "One unit vote in Echols County represented 938 residents, whereas one unit vote in Fulton County represented 92,721 residents. Thus, one resident in Echols County had an influence in the nomination of candidates equivalent to 99 residents of Fulton County."<sup>8</sup>

The Supreme Court recognized that "every voter is equal to every other voter . . . when he casts his ballot" and that "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."<sup>9</sup> As the Court stated: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."<sup>10</sup>

As the Court would more fully explain in later cases, "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."<sup>11</sup> Because "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise," the state cannot allow some legislators to be elected by a substantially different number of voters than other legislators.<sup>12</sup> Doing so accords voters' ballots different numerical weight based merely on where those voters reside and implicates the state in *quantitative* vote dilution.

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<sup>4</sup> *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

<sup>5</sup> *Id.*

<sup>6</sup> 372 U.S. 368 (1963).

<sup>7</sup> *Id.* at 379.

<sup>8</sup> *Id.* at 371.

<sup>9</sup> *Id.* at 379–80.

<sup>10</sup> *Id.* at 381.

<sup>11</sup> *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

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

The modern “one person, one vote” (OPOV) principle is derived from two separate constitutional provisions. In congressional elections, voters are protected by Article I, Section 2 of the Constitution, which commands that Representatives be chosen “by the People of the several States.”<sup>13</sup> This provision, “construed in its historical context, . . . means that as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.”<sup>14</sup> In state legislative elections, voters are protected by the Equal Protection Clause of the Fourteenth Amendment.<sup>15</sup> As the Supreme Court held in *Reynolds v. Sims*:

[T]he concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment. Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators.<sup>16</sup>

Although the Equal Protection Clause still requires that “a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable,”<sup>17</sup> the Supreme Court has long recognized a “dichotomy”<sup>18</sup> between the stringent equal population requirement of Article I and the “broader latitude” afforded to state legislative redistricting under the Equal Protection Clause.<sup>19</sup>

### 1. Congressional Districts

Under Article I, “the ‘as nearly as practicable’ standard requires that the State make a good-faith effort to achieve precise mathematical equality.”<sup>20</sup> This standard

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<sup>13</sup> U.S. CONST. art. I, § 2.

<sup>14</sup> *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (footnote omitted).

<sup>15</sup> U.S. CONST. amend. XIV; *see also Reynolds*, 377 U.S. at 565–66.

<sup>16</sup> *Reynolds*, 377 U.S. at 565–66.

<sup>17</sup> *See Mahan v. Howell*, 410 U.S. 315, 324–25 (1973) (quoting *Reynolds*, 377 U.S. at 577).

<sup>18</sup> *Id.* at 322.

<sup>19</sup> *Id.* at 324–25.

<sup>20</sup> *Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969) (citing *Reynolds*, 377 U.S. at 577).

requires that the state *strive* for precise mathematical equality, but does not demand that the state *attain* precise mathematical equality.<sup>21</sup> “Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives.”<sup>22</sup> So long as the state’s objective is “legitimate” and its criteria are “nondiscriminatory” and “consistently applied,” the state may be able to justify minor deviations from precise mathematical equality.<sup>23</sup>

Whether a state’s congressional redistricting plan can meet this standard is evaluated under a two-prong test.<sup>24</sup> “First, the parties challenging the plan bear the burden of proving the existence of population differences that ‘could practicably be avoided.’”<sup>25</sup> Second, if the plaintiffs make this showing, then “the burden shifts to the State to ‘show with some specificity’ that the population differences ‘were necessary to achieve some legitimate state objective.’”<sup>26</sup> The state’s burden under this second step “is a ‘flexible’ one, which ‘depend[s] on the size of the deviations, the importance of the State’s interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely.’”<sup>27</sup> For example, if an alleged “state interest” is applied in an ad hoc or discriminatory manner, rather than a consistent manner, this may reveal that the state’s proclaimed interest is a “subterfuge” that cannot support the population deviations in question.<sup>28</sup>

## 2. State Legislative Districts

The Equal Protection Clause “requires both houses of a bicameral state legislature to be apportioned substantially on a population basis.”<sup>29</sup> Although states must still “make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable,”<sup>30</sup> the implementation of the OPOV principle is more flexible in state legislative redistricting.<sup>31</sup> This is because the

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

<sup>22</sup> *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

<sup>23</sup> *Id.*

<sup>24</sup> *See Tennant v. Jefferson Cty. Comm’n*, 133 S. Ct. 3, 4 (2012) (per curiam) (noting the two-prong test set out by the *Karcher* Court).

<sup>25</sup> *Id.* at 5 (quoting *Karcher*, 462 U.S. at 734).

<sup>26</sup> *Id.* (quoting *Karcher*, 462 U.S. at 741).

<sup>27</sup> *Id.* (alteration in original) (quoting *Karcher*, 462 U.S. at 741).

<sup>28</sup> *See Kirkpatrick v. Preisler*, 394 U.S. 526, 535 (1969) (“Findings as to population trends must be thoroughly documented and applied throughout the State in a systematic, not an *ad hoc*, manner.”).

<sup>29</sup> *Mahan v. Howell*, 410 U.S. 315, 321 (1973).

<sup>30</sup> *Id.* at 324–25 (quoting *Reynolds v. Sims*, 377 U.S. 533, 577 (1964)).

<sup>31</sup> *Id.* at 321 (citing *Reynolds*, 377 U.S. 533) (noting that the Court in *Reynolds* held

application of an “‘absolute equality’ test” to state legislative redistricting “may impair the normal functioning of state and local governments.”<sup>32</sup> Moreover, “[i]ndiscriminate [state legislative] districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering.”<sup>33</sup> As such, “[s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible.”<sup>34</sup>

Whether a state legislative redistricting plan complies with the Equal Protection Clause is also evaluated under a “step test,” but the Supreme Court has alternated between formulations that posit the test as a “two-step” test or a “three-step” test.<sup>35</sup> Under any formulation, however, the first step evaluates the size of the plan’s total population deviation.<sup>36</sup> If the plan’s total population deviation exceeds 10%, then this creates a *prima facie* case of discrimination, which must be justified by the state.<sup>37</sup> If the plan’s total population deviation is below 10%, then the plaintiff bears the burden of showing some evidence of “invidiousness.”<sup>38</sup> In other words, the plaintiff must present some evidence that the state’s interest was illegitimate or that the state’s criteria were discriminatory or inconsistently applied.<sup>39</sup>

Once the initial burden-shifting step is complete, the second step evaluates “[t]he consistency of application and the neutrality of effect of the nonpopulation criteria . . . along with the size of the population disparities [to] determin[e] whether [the] state legislative apportionment plan contravenes the Equal Protection Clause.”<sup>40</sup> In other formulations, the Supreme Court has broken this evaluation into two distinct stages. Under this approach, the state first bears the burden of showing that the

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“more flexibility was constitutionally permissible with respect to state legislative reapportionment than in congressional redistricting” (citing *Reynolds*, 377 U.S. at 578)).

<sup>32</sup> *Id.* at 323 (referencing the absolute equality test from *Kirkpatrick*, 394 U.S. 526, and *Wells v. Rockefeller*, 394 U.S. 542 (1969)).

<sup>33</sup> *Reynolds*, 377 U.S. at 578–79.

<sup>34</sup> *Mahan*, 410 U.S. at 324–25 (alteration in original) (quoting *Reynolds*, 377 U.S. at 579) (reaffirming the conclusion reached by the *Reynolds* Court).

<sup>35</sup> *See Brown v. Thomson*, 462 U.S. 835, 842–46 (1983). In still other formulations, the test has been viewed as involving four steps. *See id.* at 852 (Brennan, J., dissenting).

<sup>36</sup> *See id.* at 842–43 (majority opinion); *see also id.* at 852 (Brennan, J., dissenting).

<sup>37</sup> *Id.* at 842–43 (majority opinion).

<sup>38</sup> *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 743–45 (1973) (noting that “minor deviations from mathematical equality among state legislative districts are insufficient to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State”); *Brown*, 462 U.S. at 842 (noting that “as a general matter, . . . an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations”).

<sup>39</sup> *See Brown*, 462 U.S. at 844–46.

<sup>40</sup> *Id.* at 845–46.

population deviations were “the result of the consistent and nondiscriminatory application of a legitimate state policy”<sup>41</sup> (or, that its criteria were employed “free from any taint of arbitrariness or discrimination”).<sup>42</sup> For example, a population deviation may not be employed to “[d]iscriminat[e] against a class of individuals[ ] merely because of the nature of their employment.”<sup>43</sup> Next,<sup>44</sup> the question becomes “whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits.”<sup>45</sup> This is because “a State’s policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted to emasculate the goal of substantial equality.”<sup>46</sup> If the goal of population equality “is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State’s citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired.”<sup>47</sup> A total population deviation of 16.4%, for example, “may well approach tolerable limits.”<sup>48</sup>

### B. Racial Gerrymandering

The Fourteenth Amendment prohibits legislatures from engaging in two forms of racial gerrymandering: intentional racial vote dilution (under the *Bolden-Rogers* line of cases)<sup>49</sup> and racial sorting (under the *Shaw-Miller* line of cases).<sup>50</sup> Additionally, the Voting Rights Act (VRA)<sup>51</sup> statutorily prohibits redistricting legislation that results in racial vote dilution (regardless of intent) or, in some jurisdictions, redistricting legislation that causes a retrogression in minority voters’ ability to elect their preferred candidate of choice.<sup>52</sup>

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<sup>41</sup> *Id.* at 844.

<sup>42</sup> *Roman v. Sincock*, 377 U.S. 695, 710 (1964).

<sup>43</sup> *Davis v. Mann*, 377 U.S. 678, 691 (1964).

<sup>44</sup> Justice Brennan’s four-step formulation would interpose an extra tailoring step here, requiring the State to show that any deviations attributed to the State’s asserted policy “are not significantly greater than is necessary to serve the . . . policy.” *Brown*, 462 U.S. at 852 (Brennan, J., dissenting).

<sup>45</sup> *Id.* at 843 (majority opinion) (quoting *Mahan v. Howell*, 410 U.S. 315, 328 (1973)).

<sup>46</sup> *Mahan*, 410 U.S. at 326.

<sup>47</sup> *Reynolds v. Sims*, 377 U.S. 533, 581 (1964).

<sup>48</sup> *Mahan*, 410 U.S. at 329.

<sup>49</sup> *See Rogers v. Lodge*, 458 U.S. 613 (1982); *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

<sup>50</sup> *See Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993) [hereinafter *Shaw I*].

<sup>51</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at scattered sections of 52 U.S.C.)

<sup>52</sup> In *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013), the Court held the jurisdictional coverage formula unconstitutional, thereby suspending the application of Section 5 of the Voting Rights Act until Congress enacts a new coverage formula. *Id.* at 2631.

## 1. Fourteenth Amendment Intentional Racial Vote Dilution

After establishing the OPOV principle and holding *quantitative* vote dilution unconstitutional, the Supreme Court was soon faced with “the other half of *Reynolds v. Sims*”: whether gerrymandering resulting in *qualitative* vote dilution could be considered constitutionally impermissible.<sup>53</sup> In a qualitative vote dilution claim, the state accords each vote approximately equal numerical weight, but renders a group of voters electorally weak by “cracking” the group apart between districts (to render a large group of voters an ineffective minority in each district) or by “packing” the group into as few districts as possible (to pile up the group’s supporters redundantly and to prevent them from having any effective influence in adjacent districts).<sup>54</sup> When the targeted group consists of voters in a racial minority, the practice constitutes racial vote dilution and is prohibited by the Fourteenth Amendment.<sup>55</sup>

In the Court’s early racial vote dilution cases, it expressed concern about categorically barring districting devices—such as multi-member districts—that were not “inherently invidious.”<sup>56</sup> The Court was also troubled about looking solely to proportionate electoral outcomes to gauge whether vote dilution had occurred.<sup>57</sup>

In *Fortson v. Dorsey*,<sup>58</sup> the Court first observed that a “constituency apportionment scheme” may not “comport with the dictates of the Equal Protection Clause” if it “designedly or otherwise . . . would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.”<sup>59</sup> Over the next several years, the Court struggled with how to analyze the issue and draw the line between unconstitutional vote dilution and the commonplace loss of elections.<sup>60</sup>

In *Whitcomb v. Chavis*, for example, the Court acknowledged that racial vote dilution presented a cognizable offense, but also noted that the Court “ha[d] not yet sustained such an attack.”<sup>61</sup> In *Whitcomb*, the Court observed:

[T]he failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes. The voting power of ghetto

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<sup>53</sup> *Whitcomb v. Chavis*, 403 U.S. 124, 176–77 (1971) (Douglas, J., concurring in part and dissenting in part). The “qualitative”/“quantitative” nomenclature is borrowed from DANIEL P. TOKAJI, *ELECTION LAW IN A NUTSHELL* 45 (2013). It should be noted, however, that quantitative dilution can target racial and political groups as well.

<sup>54</sup> *See Shaw I*, 509 U.S. at 670 (White, J., dissenting).

<sup>55</sup> *See, e.g., White v. Regester*, 412 U.S. 755 (1973).

<sup>56</sup> *See Whitcomb*, 403 U.S. at 159–60.

<sup>57</sup> *Id.* at 144–46.

<sup>58</sup> 379 U.S. 433 (1965).

<sup>59</sup> *Id.* at 438–39.

<sup>60</sup> *See infra* notes 61–74 and accompanying text.

<sup>61</sup> *Whitcomb*, 403 U.S. at 144.

residents may have been “cancelled out” as the District Court held, but this seems a mere euphemism for political defeat at the polls.<sup>62</sup>

Unable to identify any distinction between these phenomena, the Court was “unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them.”<sup>63</sup>

In an opinion concurring in part and dissenting in part, Justice Douglas observed the importance of determining “whether a gerrymander can be ‘constitutionally impermissible’”<sup>64</sup>:

The question of the gerrymander is the other half of *Reynolds v. Sims*. Fair representation of voters in a legislative assembly—one man, one vote—would seem to require (1) substantial equality of population within each district and (2) the avoidance of district lines that weigh the power of one race more heavily than another. The latter can be done—and is done—by astute drawing of district lines that makes the district either heavily Democratic or heavily Republican as the case may be. Lines may be drawn so as to make the voice of one racial group weak or strong, as the case may be.

The problem of the gerrymander is how to defeat or circumvent the sentiments of the community. The problem of the law is how to prevent it.<sup>65</sup>

Two years later, the Court found its answer and struck down a multi-member districting scheme in *White v. Regester*.<sup>66</sup> Rather than looking to *proportional* electoral *outcomes*, the Court looked to whether the scheme interfered with *equal* electoral *opportunities*:

To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs’ burden is to produce evidence to support findings that the political processes leading

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<sup>62</sup> *Id.* at 153.

<sup>63</sup> *Id.* at 160.

<sup>64</sup> *Id.* at 176 (Douglas, J., concurring in part and dissenting in part) (citing *Wells v. Rockefeller*, 394 U.S. 542, 544 (1969); *Dorsey*, 379 U.S. at 439).

<sup>65</sup> *Id.* at 176–77 (footnote omitted) (citation omitted).

<sup>66</sup> 412 U.S. 755 (1973).

to nomination and election were *not equally open to participation* by the group in question—that its members had *less opportunity* than did other residents in the district to participate in the political processes and to elect legislators of their choice.<sup>67</sup>

Although the Court did not specify at the time whether it was necessary to prove discriminatory purpose in addition to discriminatory effect, the Court finally upheld a racial vote dilution challenge under the Fourteenth Amendment.<sup>68</sup>

Eventually, in *City of Mobile v. Bolden*, the Court indicated in a plurality opinion that both discriminatory intent and discriminatory effect were required to establish a claim of unconstitutional racial vote dilution.<sup>69</sup> This requirement was confirmed by a majority of the Court in *Rogers v. Lodge*.<sup>70</sup> There, Justice White wrote that “a showing of discriminatory intent has long been required in *all* types of equal protection cases charging racial discrimination.”<sup>71</sup> The Court reiterated its prior position that multi-member districts are not unconstitutional *per se*, notwithstanding that they may cause a “distinct minority, whether it be a racial, ethnic, economic, or political group” to be unable to elect their chosen representatives.<sup>72</sup> Although “[t]he minority’s voting power . . . is particularly diluted when bloc voting occurs and ballots are cast along strict majority-minority lines,”<sup>73</sup> such results do not violate the Fourteenth Amendment if they cannot be traced to a discriminatory purpose.<sup>74</sup>

Following the plurality opinion in *Bolden*, Congress sought to update the VRA and amend Section 2 to create a statutory cause of action whenever, “based on the totality of circumstances,” a challenged practice gave racial minorities “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>75</sup> By enacting *Regester*’s “discriminatory effect” language and omitting any discriminatory purpose requirement, Congress created a statutory “results test” that could be used by plaintiffs who might not otherwise be able to proceed pursuant to the Equal Protection Clause as interpreted in *Rogers*.<sup>76</sup> As a result of the legislative compromise necessary to pass the 1982

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<sup>67</sup> *Id.* at 765–66 (emphasis added).

<sup>68</sup> *See generally id.*

<sup>69</sup> 446 U.S. 55, 66 (1980).

<sup>70</sup> 458 U.S. 613, 617 (1982).

<sup>71</sup> *Id.* (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 240 (1976)).

<sup>72</sup> *Id.* at 616.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 616–17.

<sup>75</sup> 52 U.S.C. § 10301 (2012) (formerly 42 U.S.C. § 1973).

<sup>76</sup> *See Shaw I*, 509 U.S. 630, 641 (1993) (“In 1982, [Congress] amended § 2 of the Voting Rights Act to prohibit legislation that *results* in the dilution of a minority group’s voting strength, regardless of the legislature’s intent.”).

amendment, the section also included a proviso, stating “[t]hat nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.”<sup>77</sup> This language was meant to ensure that the legislation’s focus on equal electoral opportunities did not evolve into a requirement to achieve proportional electoral outcomes.<sup>78</sup>

Because the VRA created a statutory cause of action with a lower threshold than the Fourteenth Amendment itself, the constitutional claim of intentional racial vote dilution has been rendered largely dormant.<sup>79</sup> Yet, this constitutional claim does still exist and may, in fact, incorporate aspects of the Court’s Section 2 “results test” case law for analyzing discriminatory effect.<sup>80</sup>

## 2. Fourteenth Amendment Racial Sorting

The other form of racial gerrymandering prohibited by the Fourteenth Amendment is “racial sorting.” A racial sorting claim is “analytically distinct” from an intentional vote dilution claim.<sup>81</sup>

Whereas a vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device “to minimize or cancel out the voting potential of racial or ethnic minorities,” an action disadvantaging voters of a particular race, the essence of . . . [a racial sorting claim] is that the State has used race as a basis for separating voters into districts.<sup>82</sup>

The theory of harm advanced in racial sorting cases is that the State has imposed “expressive” and “representational” harms on individual citizens by sorting them between districts based on suspect criteria.<sup>83</sup> In *Shaw I*, the Court held that “[c]lassifications of citizens solely on the basis of race ‘are by their very nature odious to a

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<sup>77</sup> 52 U.S.C. § 10301.

<sup>78</sup> See S. REP. NO. 109-295, at 11–12 (2006).

<sup>79</sup> See Rick G. Strange, *Application of Voting Rights Act to Communities Containing Two or More Minority Groups—When Is the Whole Greater Than the Sum of the Parts?*, 20 TEX. TECH L. REV. 95, 102 (1989) (noting that courts often decline to review constitutional claims of vote dilution and instead decide cases under the Voting Rights Act).

<sup>80</sup> See *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1326 (S.D. Fla. 2002) (“We maintain that, even though *Gingles* did not involve an equal protection claim, the three factors were derived by the Court from the principles set forth in the vote dilution cases brought under the Equal Protection Clause. We therefore conclude that the three preconditions have always been and remain elements of constitutional vote dilution claims.”).

<sup>81</sup> *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quoting *Shaw I*, 509 U.S. at 652).

<sup>82</sup> *Id.* (citation omitted).

<sup>83</sup> See *id.* at 911–13 (citing *Shaw I*, 509 U.S. at 647; *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting)); see also *id.* at 930 (Stevens, J., dissenting).

free people whose institutions are founded upon the doctrine of equality.’ They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.’<sup>84</sup> Such “classifications” constitute “expressive” harms.

State classifications of this nature also threaten “representational” harms:

The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.<sup>85</sup>

Thus, racial gerrymandering—even for remedial purposes—threatens to “balkanize” citizens into competing factions.<sup>86</sup> These harms are personal and suffered by individuals within the violative districts.<sup>87</sup>

Just because a legislature may be aware of its citizens’ race when districting does not “lead inevitably to impermissible race discrimination.”<sup>88</sup> In redistricting, a legislature “always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors.”<sup>89</sup> However, when a district subordinates traditional, neutral districting conventions to racial considerations and race becomes the predominant basis upon which voters are placed “within or without a particular district,” then the redistricting legislation is the legal equivalent of a facially discriminatory classification and the Fourteenth Amendment demands justification.<sup>90</sup>

Like any other law that includes a suspect facial classification, redistricting legislation that reflects subordination to racial considerations on its face must advance a compelling interest by narrowly tailored means.<sup>91</sup> Thus, the state must show a “strong basis in evidence” that it was “cur[ing] the effects of past discrimination,”<sup>92</sup> or that such race-based districting was required under a constitutional reading of

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<sup>84</sup> *Shaw I*, 509 U.S. at 643 (citations omitted) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

<sup>85</sup> *Id.* at 648.

<sup>86</sup> *Id.* at 657.

<sup>87</sup> *United States v. Hays*, 515 U.S. 737, 745 (1995) (“Voters in [racially sorted] districts may suffer the special representational harms racial classifications can cause in the voting context.”).

<sup>88</sup> *Shaw I*, 509 U.S. at 646.

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

<sup>90</sup> *See Miller v. Johnson*, 515 U.S. 900, 916 (1995).

<sup>91</sup> *Id.* at 920 (“To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest.”).

<sup>92</sup> *Id.* at 922.

federal law.<sup>93</sup> In tailoring to the latter interest, a state cannot go “beyond what was reasonably necessary to avoid” a violation of the VRA.<sup>94</sup> For example, a state cannot avoid vote dilution in one part of the state by drawing a performing minority district in another part of the state.<sup>95</sup>

Thus, the *Shaw-Miller* line of racial sorting cases is “analytically distinct” from the *Bolden-Rogers* line of intentional racial vote dilution cases because it employs the Court’s suspect facial classification jurisprudence rather than its traditional intent-plus-effect jurisprudence.<sup>96</sup> In addition to complying with these dual constitutional commands, state legislators drafting redistricting legislation must also comply with the federal statutory requirements of the VRA.

### 3. The Voting Rights Act

“The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting,”<sup>97</sup> and prohibits two different redistricting offenses: dilution and retrogression.

#### *a. Section 2: Non-Dilution Standard*

Section 2 of the VRA bars states from adopting redistricting legislation that “results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color.”<sup>98</sup> In 1982, Congress incorporated the Supreme Court’s language from *Regester* into the statute, which made it a Section 2 violation when a redistricting plan results in minority voters “hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>99</sup> In other words, Congress “amended § 2 of the Voting Rights Act to prohibit legislation that *results* in the dilution of a minority group’s voting strength, regardless of the legislature’s intent.”<sup>100</sup>

For a plan to constitute a Section 2 violation, “a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically

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<sup>93</sup> *Id.* at 921.

<sup>94</sup> *Shaw I*, 509 U.S. at 655.

<sup>95</sup> See *Shaw v. Hunt*, 517 U.S. 899, 917 (1996) [hereinafter *Shaw II*]. A “performing minority district,” for purposes of the VRA, is one in which minority voters possess the ability to elect the candidate of their choice. See, e.g., *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1322 (S.D. Fla. 2002).

<sup>96</sup> See *Miller*, 515 U.S. at 911–14.

<sup>97</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966), *abrogated by* *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

<sup>98</sup> 52 U.S.C. § 10301(a) (2012).

<sup>99</sup> *Id.* § 10301(b).

<sup>100</sup> *Shaw I*, 509 U.S. 630, 641 (1993).

insular minority group.”<sup>101</sup> Thus, plaintiffs must satisfy the three prerequisites set out in *Thornburg v. Gingles* before the Court can find a violation based on the totality of circumstances.<sup>102</sup> “First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a [numerical] majority in a single-member district.”<sup>103</sup> “Second, the minority group must be able to show that it is politically cohesive.”<sup>104</sup> “Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority’s preferred candidate.”<sup>105</sup> If the plaintiffs demonstrate the existence of all three *Gingles* prerequisites, then the court evaluates the evidence based on the totality of circumstances.<sup>106</sup>

Therefore, states aiming to comply with Section 2 of the VRA must look to their demographics and determine where minority groups are sufficiently large and geographically compact to constitute a numerical majority in a hypothetical district.<sup>107</sup> In these areas, the state must ensure that minority voters maintain an “equal opportunity” to “elect representatives of their choice.”<sup>108</sup> It should be noted, however, that nothing in the VRA would seem to require states to create “majority-minority” districts (i.e., districts where minority voters represent more than 50% of the voting population). In *Bartlett v. Strickland*, the Supreme Court held that Section 2 requires the creation of a *performing* minority district wherever minority voters would constitute a numerical majority in a hypothetical district.<sup>109</sup> But *Strickland*’s observation that “§ 2 can require the creation of [majority-minority] districts” only meant that when a reasonably compact group of minority voters would constitute a numerical majority in a *hypothetical* district, Section 2 would require the creation of a performing “ability-to-elect” district as a remedy.<sup>110</sup>

Although a district may need to be a majority-minority district in order to retain the ability to elect where racial polarization is stark, *Strickland* need not—and, indeed, should not—be read to require the creation of majority-minority districts

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<sup>101</sup> *Thornburg v. Gingles*, 478 U.S. 30, 48–49 (1986).

<sup>102</sup> *Id.* at 46, 50.

<sup>103</sup> *Id.* at 50; *see also* *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (establishing numerical majority requirement).

<sup>104</sup> *Gingles*, 478 U.S. at 51.

<sup>105</sup> *Id.* (citation omitted).

<sup>106</sup> *Johnson v. De Grandy*, 512 U.S. 997, 1013–14 (1994).

<sup>107</sup> *See Strickland*, 556 U.S. at 13.

<sup>108</sup> *De Grandy*, 512 U.S. at 1026 (O’Connor, J., concurring) (noting that “§ 2’s command [is] that minority voters be given equal opportunity to participate in the political process and to elect representatives of their choice”).

<sup>109</sup> *Strickland*, 556 U.S. at 25–26.

<sup>110</sup> *See id.* at 13.

wherever minorities would constitute a hypothetical numerical majority. Where white crossover voting emerges, minority voters maintain their equal ability to elect even when they do not constitute a numerical majority.<sup>111</sup> Moreover, if white crossover voting is present, plaintiffs would be hard-pressed to satisfy the *Gingles* prerequisite of “white bloc voting” in the first place.<sup>112</sup> This reading allows the threshold necessary to satisfy the VRA to decrease over time as racial polarization dissipates. In other words, the stringency of the VRA’s prophylactic requirements becomes directly correlated with the demonstrable, continuing need for those requirements, thereby avoiding constitutional concern with the VRA itself.

*b. Section 5: Non-Retrogression Standard*

Section 5 of the VRA, on the other hand, prohibits “voting changes with ‘any discriminatory purpose’ as well as voting changes that diminish the ability of [minority] citizens . . . ‘to elect their preferred candidates of choice.’”<sup>113</sup> In other words, Section 5 is focused on “proposed *changes* in voting procedures” and prohibits those changes that “would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”<sup>114</sup> Unlike Section 2, which applies to jurisdictions nationwide and prohibits redistricting legislation that submerges minority voters’ ability to elect in areas where they would constitute a numerical majority, Section 5 applies only to specific jurisdictions specified by Congress in the VRA<sup>115</sup> and prohibits redistricting legislation that submerges minority voters’ ability to elect below that provided by the existing, or “benchmark,” redistricting plan.<sup>116</sup>

Thus, Section 5 requires the state to look to those areas where minority voters’ ability to elect is currently reflected in the benchmark plan—including both

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<sup>111</sup> *Id.* at 23–24 (“Our holding that § 2 does not require [the State to create] crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion. . . . Much like § 5, § 2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts.”).

<sup>112</sup> *Id.* at 16.

<sup>113</sup> *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2621 (2013) (quoting Voting Rights Act of 1965, 42 U.S.C. § 1973c(b)–(d) (2012) (now codified as amended at 52 U.S.C. § 10304)).

<sup>114</sup> *Holder v. Hall*, 512 U.S. 874, 883 (1994) (emphasis added) (quoting *Beer v. United States*, 425 U.S. 130, 138, 141 (1976)).

<sup>115</sup> The coverage formula provided in Section 4 has been ruled unconstitutional, thereby suspending the application of Section 5 until Congress enacts a new coverage formula. *See Shelby Cty.*, 133 S. Ct. at 2631.

<sup>116</sup> *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 478 (1997) (“Retrogression, by definition, requires a comparison of a jurisdiction’s new voting plan with its existing plan. It also necessarily implies that the jurisdiction’s existing plan is the benchmark against which the ‘effect’ of voting changes is measured.” (citation omitted)).

majority-minority districts and crossover districts<sup>117</sup>—to ensure that the proposed redistricting legislation does not diminish minority voters’ ability to elect relative to that benchmark.<sup>118</sup> As with Section 2, nothing in Section 5 specifically requires that performing “ability-to-elect” districts be “majority-minority” districts.<sup>119</sup> If a state replaces an existing majority-minority district with a performing crossover district (or maintains an existing crossover district as an effective crossover district), then there would be no reduction in voters’ ability to elect and no retrogression in the effective exercise of their electoral franchise.<sup>120</sup>

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<sup>117</sup> See *Strickland*, 556 U.S. at 13 (“[A] crossover district is one in which minority voters make up less than a majority of the voting-age population . . . [but are] large enough [in population] to elect the candidate of [their] choice with help from voters who are members of the majority . . .”).

<sup>118</sup> Both “majority-minority” and “crossover” ability to elect must be protected to ensure that a redistricting plan does not result in retrogression. This is for several reasons. First, Congress’s 2006 VRA amendments rejected the majority opinion in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), and adopted the dissent of Justice Souter. See *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1273 (2015) (citing H.R. REP. NO. 109-478, at 68–69 & n.183 (2006)). Although Justice Souter found the substitution of “influence” districts too “unmoored” from the ability-to-elect standard in his *Ashcroft* dissent, he found crossover districts to constitute performing ability-to-elect districts. See *Ashcroft*, 539 U.S. at 493–94 (Souter, J., dissenting). Second, the House Report to the 2006 amendments specifically endorsed this view. See H.R. REP. NO. 109-478, at 71 (“Voting changes that leave a minority group less able to elect a preferred candidate of choice, either directly or when coalesced with other voters, cannot be precleared under Section 5.” (emphasis added)). Third, the Senate Report, which endorsed a contrary view, did not provide the same persuasive insights into legislative intent as the House Report. See S. REP. NO. 109-295 (2006). The Senate Report to the 2006 amendments marked the first time in American history that “a Senate committee that unanimously voted in favor of a law later published a postenactment committee report that was supported only by members of one party.” Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 178 (2007). In the post-enactment Senate Report, the minority party emphasized, “We object and do not subscribe to this Committee Report . . . which . . . has become a very different document than the draft Report circulated by the Chairman on July 24, 2006.” S. REP. NO. 109-295, at 54. Fourth, a reading of Section 5 that would only protect majority-minority districts would come close to conflating the protections of Section 2 and Section 5 in violation of basic principles of statutory interpretation.

<sup>119</sup> See *Strickland*, 556 U.S. at 23–24 (“Our holding that § 2 does not require [the State to create] crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion. . . . Much like § 5, § 2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts.”).

<sup>120</sup> Of course, districts must be redrawn to comply with the OPOV principle. If “maintaining” the ability to elect in a new district would require the substantial disregard of neutral districting principles or would require deviation from OPOV principles, then it cannot truly be said that a protectable ability-to-elect interest presently exists in the benchmark plan. Non-retrogression does not require that an enacted plan possess the exact same number of ability-to-elect districts

### C. Political Gerrymandering

The Fourteenth Amendment also limits legislatures' ability to engage in political gerrymandering. Racial and political gerrymandering claims share a common judicial genesis in *Fortson v. Dorsey*, where the Supreme Court first stated that a "constituency apportionment scheme" may not "comport with the dictates of the Equal Protection Clause" if it "designedly or otherwise . . . would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."<sup>121</sup> Following this foray into policing qualitative vote dilution, the Supreme Court considered racial and political gerrymandering to be offenses of the same species for over twenty years.<sup>122</sup> For example, in *Whitcomb*, the Court recognized that any rule of law preventing the invidious dilution of a racial minority's right to vote would be equally applicable to the invidious dilution of a political minority's right to vote.<sup>123</sup> Similarly, both the majority and dissent in *Rogers*—which cemented the modern "intent-plus-effect" intentional vote dilution test—understood political vote dilution to fall within the same category as racial vote dilution.<sup>124</sup>

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as the benchmark plan. See *Ashcroft*, 539 U.S. at 492 (Souter, J., dissenting). Any other reading of retrogression would require districters to ignore changing demographic realities.

<sup>121</sup> 379 U.S. 433, 438–39 (1965) (emphasis added).

<sup>122</sup> See *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973); *Abate v. Mundt*, 403 U.S. 182, 184 n.2 (1971); *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1970); *Burns v. Richardson*, 384 U.S. 73, 88 (1966).

<sup>123</sup> See *Whitcomb*, 403 U.S. at 156 (noting that recognizing a racial vote dilution claim would "make it difficult to reject claims of Democrats, Republicans, or members of any political organization in Marion County who live in what would be safe districts in a single-member district system but who in one year or another, or year after year, are submerged in a one-sided multi-member district vote").

<sup>124</sup> See *Rogers v. Lodge*, 458 U.S. 613, 616–17 (1982) ("At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district. A distinct minority, whether it be a racial, ethnic, economic, or political group, may be unable to elect any representatives in an at-large election, yet may be able to elect several representatives if the political unit is divided into single-member districts. The minority's voting power in a multimember district is particularly diluted when bloc voting occurs and ballots are cast along strict majority-minority lines. While multimember districts have been challenged for 'their winner-take-all aspects, their tendency to submerge minorities and to overrepresent the winning party,' this Court has repeatedly held that they are not unconstitutional *per se*." (citation omitted) (quoting *Whitcomb*, 403 U.S. at 158–59)); *id.* at 650–51 (Stevens, J., dissenting) ("Persons of different races, like persons of different religious faiths and different political beliefs, are equal in the eyes of the law. . . . A constitutional standard that gave special protection to political groups identified by racial characteristics would be inconsistent with the basic tenet of the Equal Protection Clause. Those groups are no more or no less able to pursue their interests in the political arena than are groups defined by other characteristics. Nor can it be said that racial alliances are so unrelated to political action that any electoral decision that is influenced by racial consciousness—as opposed to other forms of political consciousness—is

In *Davis v. Bandemer*,<sup>125</sup> however, this historically and analytically consistent approach appeared to collapse, and the Supreme Court's treatment of political gerrymandering claims began to diverge from its treatment of racial gerrymandering claims.<sup>126</sup> This chasm would widen over the next thirty years as the Supreme Court wandered further from the claim's original basis and attempted—unsuccessfully—to craft new and novel tests for political gerrymandering in *Vieth v. Jubelirer*<sup>127</sup> and *League of United Latin American Citizens v. Perry (LULAC)*.<sup>128</sup>

In *Bandemer*, the plaintiffs raised a political—rather than racial—gerrymandering claim under the Fourteenth Amendment, alleging that the State's "reapportionment plans constituted a political gerrymander intended to disadvantage Democrats."<sup>129</sup> In evaluating the justiciability of that claim, the Court invoked the language from *Baker v. Carr* that "[u]nless one of [the specific 'political question'] formulations is inextricable from the case at bar, . . . [t]he courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."<sup>130</sup> Therefore, a majority of the Justices found political gerrymandering claims to be justiciable.<sup>131</sup>

When the time came to evaluate the merits of the claim, however, the Court fractured. The plurality—led by Justice White and joined by Justices Blackmun, Brennan, and Marshall—held that the intent-plus-effect test used in racial vote dilution cases should govern.<sup>132</sup> In fact, the plurality expressly stated that "the principles developed in [racial vote dilution] cases would apply equally to claims by political groups in individual districts," but noted that "the elements necessary to a successful vote dilution

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inherently irrational. For it is the very political power of a racial or ethnic group that creates a danger that an entrenched majority will take action contrary to the group's political interests. 'The mere fact that a number of citizens share a common ethnic, racial, or religious background does not create the need for protection against gerrymandering. It is only when their common interests are strong enough to be manifested in political action that the need arises. Thus the characteristic of the group which creates the need for protection is its political character.' It would be unrealistic to distinguish racial groups from other political groups on the ground that race is an irrelevant factor in the political process." (citation omitted) (quoting *Cousins v. City Council of Chi.*, 466 F.2d 830, 852 (7th Cir. 1972) (Stevens, J., dissenting), *cert. denied*, 409 U.S. 893)).

<sup>125</sup> 478 U.S. 109 (1986) (plurality opinion)

<sup>126</sup> *Id.*

<sup>127</sup> 541 U.S. 267 (2004) (plurality opinion).

<sup>128</sup> 548 U.S. 399 (2006) [hereinafter *LULAC*].

<sup>129</sup> *Bandemer*, 478 U.S. at 115 (plurality opinion).

<sup>130</sup> *Id.* at 122 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

<sup>131</sup> *See generally id.*

<sup>132</sup> *See id.* at 127 (holding that "in order to succeed the *Bandemer* plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group," and citing the constitutional test for racial vote dilution established in *City of Mobile v. Bolden*, 446 U.S. 55, 67–68 (1980)).

claim”—such as “historical patterns of exclusion from the political processes”—“may be more difficult to prove in relation to a claim by a political group.”<sup>133</sup>

Despite this explicit parallel, the plurality opinion raised a number of concerns about political gerrymandering claims. The plurality observed:

[W]henver a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate or is a competitive district that either candidate might win.<sup>134</sup>

The plurality then quoted *Gaffney v. Cummings* at length, including the observation that “[i]t would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. . . . The reality is that districting inevitably has and is intended to have substantial political consequences.”<sup>135</sup>

The plurality raised other concerns. For example, just because a disproportionate number of representatives from one party are elected in a given election does not mean that the election was unfair or that the districts had any kind of discriminatory effect.<sup>136</sup> This is simply a common consequence “inherent in winner-take-all, district-based elections” and is “true of a racial as well as a political group.”<sup>137</sup>

The plurality also observed that *any* district lines drawn “to maximize the representation of each major party would require creating as many safe seats for each party as the demographic and predicted political characteristics of the State would permit.”<sup>138</sup> This, the plurality observed, was precisely the approach endorsed by the Court in *Gaffney*, “*despite* its tendency to deny safe district minorities any realistic chance to elect their own representatives.”<sup>139</sup> Thus, the Court noted:

[W]e have required a substantially greater showing of adverse effects than a mere lack of proportional representation to support a finding of unconstitutional vote dilution. Only where there is

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<sup>133</sup> *Id.* at 131 n.12.

<sup>134</sup> *Id.* at 128.

<sup>135</sup> *Id.* at 128–29 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 752–53 (1973)).

<sup>136</sup> *See id.* at 132 (noting that “the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination”).

<sup>137</sup> *Id.* at 130 (“[W]e are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them.” (alteration in original) (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971))).

<sup>138</sup> *Id.* at 130–31.

<sup>139</sup> *Id.* at 131 (emphasis added).

evidence that excluded groups have “less opportunity to participate in the political processes and to elect candidates of their choice” have we refused to approve the use of multimember districts.<sup>140</sup>

This approach “rest[s] on a conviction that the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm.”<sup>141</sup>

The plurality further indicated that its racial vote dilution cases had relied upon evidence of a “lack of responsiveness by those elected to the concerns of the relevant groups.”<sup>142</sup> Because even someone who votes for a losing candidate “is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district,” the plurality said it could not presume in a political vote dilution case, “without actual proof to the contrary, that the candidate elected will entirely ignore the interests of [the political minority].”<sup>143</sup>

Because the losing voters in a district would still have *some* access to the political process through the elected candidate, the Court held that “unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will *consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.*”<sup>144</sup> Despite the plurality’s indication that “[i]n *both* [racial and political] *contexts*, the question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process,”<sup>145</sup> Justice O’Connor observed in her concurring opinion that this seemed to spell out a higher threshold for success in political gerrymandering cases.<sup>146</sup> Lower courts interpreting the impact of *Bandemer* agreed with Justice O’Connor, and, for the next eighteen years, not a single political gerrymandering case involving redistricting lines would succeed.<sup>147</sup>

Justice Powell, joined by Justice Stevens, wrote a separate opinion concurring in part and dissenting in part.<sup>148</sup> Hewing to the principles announced in *Reynolds*, Justice Powell argued that a different approach should prevail:

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<sup>140</sup> *Id.* (quoting *Rogers v. Lodge*, 458 U.S. 613, 624 (1982)) (citing *White v. Regester*, 412 U.S. 755, 765–66 (1973); *Whitcomb*, 403 U.S. at 150) (citing the Court’s racial vote dilution cases).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* (citing *Rogers*, 458 U.S. at 625–27; *White*, 412 U.S. at 766–67).

<sup>143</sup> *Id.* at 132.

<sup>144</sup> *Id.* (emphasis added).

<sup>145</sup> *Id.* at 132–33 (emphasis added).

<sup>146</sup> *See id.* at 146–47 (O’Connor, J., concurring) (noting that the lower threshold adopted by the plurality “can only lead to political instability and judicial malaise”).

<sup>147</sup> *See Vieth v. Jubelirer*, 541 U.S. 267, 280 n.6 (2004) (plurality opinion) (listing cases “in which courts rejected prayers for relief under [*Bandemer*]”).

<sup>148</sup> *Bandemer*, 478 U.S. at 161–85 (Powell, J., concurring in part and dissenting in part).

The Equal Protection Clause guarantees citizens that their State will govern them impartially. . . . Since the contours of a voting district powerfully may affect citizens' ability to exercise influence through their vote, district lines should be determined in accordance with neutral and legitimate criteria. When deciding where those lines will fall, the State should treat its voters as standing in the same position, regardless of their political beliefs or party affiliation.<sup>149</sup>

Justice Powell said the plurality's "most basic flaw . . . is its failure to enunciate any standard that affords guidance to legislatures and courts."<sup>150</sup> To help guide the inquiry, he suggested a multifactor test examining, *inter alia*, the shape of the districts, adherence to the boundaries of political subdivisions, the procedures used to adopt the plan and whether they were designed to exclude the minority party from participating in the legislative process, and the legislative history and statements reflecting the legislature's goals.<sup>151</sup>

Finally, Justice O'Connor—joined by Justice Rehnquist and Chief Justice Burger—concurd in the judgment, but argued that the claim should be dismissed for lack of justiciability.<sup>152</sup> Justice O'Connor contended that recognition of a political gerrymandering claim would lead to a "proportional representation" requirement at odds with U.S. history, traditions, and political institutions, and that the claim brought by the plaintiffs that their power "as a group" was diluted failed to recognize that the Equal Protection Clause protects individual rights, not "group rights."<sup>153</sup>

Over the next eighteen years, lower courts grappled with the Supreme Court's mixed guidance.<sup>154</sup> The Court then entered the fray again, this time splintering even further. In *Vieth v. Jubelirer*, the legislature was pressured by the Republican Party to adopt a partisan redistricting plan "as a punitive measure against Democrats for having enacted pro-Democrat redistricting plans elsewhere."<sup>155</sup> Democrats filed suit, alleging that the plan was a political gerrymander in violation of Article I and the Equal Protection Clause of the Fourteenth Amendment.<sup>156</sup>

Justice Scalia led a plurality attempting to overrule *Bandemer* and render political gerrymandering a nonjusticiable question. Reciting the historical roots of

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<sup>149</sup> *Id.* at 166 (citations omitted).

<sup>150</sup> *Id.* at 171.

<sup>151</sup> *See id.* at 173 (citing factors from *Karcher v. Daggett*, 462 U.S. 725, 753–61 (1983)).

<sup>152</sup> *Id.* at 144 (O'Connor, J., concurring) (arguing that the "partisan gerrymandering claims of major political parties raise a nonjusticiable political question that the judiciary should leave to the legislative branch").

<sup>153</sup> *Id.* at 144–61.

<sup>154</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 280 n.6 (2004) (plurality opinion) (listing cases involving political gerrymandering that were unsuccessful).

<sup>155</sup> *Id.* at 272.

<sup>156</sup> *Id.*

gerrymandering, Justice Scalia observed that gerrymandering has long existed in American politics,<sup>157</sup> and that Congress has the power to intervene in the regulation of elections if it deems it necessary.<sup>158</sup> He also noted that all of the cases that involved districting lines over the eighteen years after *Bandemer* had failed,<sup>159</sup> and that the Justices themselves were still unable to agree on any coherent approach to adjudicating such claims.<sup>160</sup> Justice Scalia also raised a number of concerns and objections to judicial involvement in political gerrymandering cases, which will be discussed at greater length below.<sup>161</sup>

Justice Kennedy, in an unusual disposition, agreed with the plurality that the claim should be dismissed in the case at hand, but did not foreclose the possibility of relief in a future case.<sup>162</sup> Justice Kennedy also floated a theory that future litigants might try to proceed under a First Amendment theory, reasoning that partisan gerrymanders might have “the purpose and effect of burdening a group of voters’ representational rights.”<sup>163</sup>

Among the remaining four Justices—Justices Stevens, Souter, Ginsburg, and Breyer—three separate dissenting opinions issued, all offering different visions of how a partisan gerrymandering claim should proceed. First, Justice Stevens suggested that political gerrymandering claims should be governed by the *Shaw* line of racial sorting cases<sup>164</sup> because “political affiliation is not an appropriate standard” for districting<sup>165</sup> and the Court has protected political belief and association vigorously under the First Amendment.<sup>166</sup> In reiterating that “the concept of equal justice under law requires the State to govern impartially,” Justice Stevens stated:

Today’s plurality opinion would exempt governing officials from that duty in the context of legislative redistricting and *would give license, for the first time, to partisan gerrymanders that are devoid of any rational justification.* In my view, *when partisanship is the legislature’s sole motivation*—when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage—*the governing body cannot be said to have acted impartially.*<sup>167</sup>

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<sup>157</sup> See *id.* at 274–77 (noting “[p]olitical gerrymanders are not new to the American scene”).

<sup>158</sup> See *id.* at 276–77 (reciting instances of congressional intervention).

<sup>159</sup> See *id.* at 280 n.6.

<sup>160</sup> See *id.* at 292 (noting that “four dissenters [had] come up with three different standards”).

<sup>161</sup> See *infra* notes 182–87 and accompanying text.

<sup>162</sup> See *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring) (noting a possibility of relief “if some limited and precise rationale were found to correct an established violation of the Constitution”).

<sup>163</sup> *Id.* at 314.

<sup>164</sup> See *id.* at 322–23 (Stevens, J., dissenting) (describing the *Shaw* line of cases in which racial gerrymandering can lead to equal protection concerns).

<sup>165</sup> *Id.* at 325.

<sup>166</sup> See *id.* at 324 (citing *Elrod v. Burns*, 427 U.S. 347, 356 (1976)).

<sup>167</sup> *Id.* at 317–18 (emphasis added).

Thus, according to that view, “the critical issue in both racial and political gerrymandering cases is the same: whether a single nonneutral [sic] criterion controlled the districting process to such an extent that the Constitution was offended.”<sup>168</sup> Whenever this occurs, it “imposes a cognizable ‘representational har[m].’”<sup>169</sup>

Next, Justice Souter—joined by Justice Ginsburg—argued for a multifactor test, requiring plaintiffs to show (1) membership in a cohesive political group, (2) the legislature’s disregard for traditional districting criteria, (3) correlations between these deviations and the distribution of plaintiff’s political group, (4) the existence of a hypothetical district with less deviation from traditional criteria, and (5) defendants’ intentional manipulation of districts to pack or crack plaintiff’s political group.<sup>170</sup> In articulating the theory of harm, Justice Souter called it “a species of vote dilution: the point of the gerrymander is to capture seats by manipulating district lines to diminish the weight of the other party’s votes in elections.”<sup>171</sup>

Lastly, Justice Breyer would have looked at the plan as a whole—rather than individual districts—and inquired into whether it reflected the “*unjustified* use of political factors to entrench a minority in power.”<sup>172</sup> This approach would look for “strong indicia of abuse.”<sup>173</sup>

The final major chapter in the Supreme Court’s political gerrymandering saga is *League of United Latin American Citizens v. Perry (LULAC)*.<sup>174</sup> Although continuing to express disagreement, the majority reaffirmed that such claims are justiciable, even if clear standards have not yet evolved.<sup>175</sup> In the majority opinion, Justice Kennedy entertained the appellants’ proposed “sole-intent” test, but ultimately found it “not convincing”:

To begin with, the state appellees dispute the assertion that partisan gain was the “sole” motivation for the decision to replace Plan 1151C. . . . The legislature does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority, but partisan aims did not guide every line it drew. . . . [T]he contours of some contested district lines were drawn based on more mundane and local interests. . . . [And] a number of line-drawing requests by Democratic state legislators were honored.<sup>176</sup>

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<sup>168</sup> *Id.* at 326.

<sup>169</sup> *Id.* at 330 (alteration in original) (citing *United States v. Hays*, 515 U.S. 737, 745 (2002)).

<sup>170</sup> *See id.* at 347–50 (Souter, J., dissenting).

<sup>171</sup> *Id.* at 354.

<sup>172</sup> *Id.* at 360 (Breyer, J., dissenting).

<sup>173</sup> *Id.* at 365.

<sup>174</sup> 548 U.S. 399 (2006).

<sup>175</sup> *See id.* at 414 (noting the historical split as to whether such claims were justiciable but that the Court would “not revisit [its] justiciability holding”).

<sup>176</sup> *Id.* at 417–18 (citation omitted).

In addition, Justice Kennedy postulated that “a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do what appellants’ sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants’ representational rights.”<sup>177</sup>

Justice Stevens—joined by Justice Breyer—then proposed a test wherein a plaintiff must prove discriminatory intent by showing that: (1) “redistricters subordinated neutral districting principles to political considerations”; and (2) “their predominant motive was to maximize one party’s power,” along with discriminatory effect by showing that: “(1) her candidate of choice won election under the old plan; (2) her residence is now in a district that is a safe seat for the opposite party; and (3) her new district is less compact than the old district.”<sup>178</sup> Justices Scalia and Thomas adhered to their prior position in *Vieth*, arguing that the question should be non-justiciable.<sup>179</sup> Finally, Chief Justice Roberts and Justice Alito—both of whom had yet to express an opinion on the matter since joining the Court—declined to weigh in, stating that the plaintiffs had not provided an adequate standard but that the question of justiciability had not been argued.<sup>180</sup>

Following these fractured decisions, only two things seem clear. First, political gerrymandering claims remain justiciable. Indeed, the Supreme Court reiterated the justiciability of political gerrymandering claims just this past term.<sup>181</sup> Second, any viable political gerrymandering claim must be able to successfully respond to the arguments raised by the plurality in *Vieth*. These include the following:

1. *Race is an impermissible factor to consider in drawing legislative districts, whereas political affiliation is a permissible factor to consider.*<sup>182</sup>
2. *Race is an immutable characteristic, whereas political affiliation is not.*<sup>183</sup>
3. *Political gerrymandering claims do not provide manageable and administrable standards.*<sup>184</sup>

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<sup>177</sup> *Id.* at 418.

<sup>178</sup> *Id.* at 475–76 (Stevens, J., concurring in part and dissenting in part).

<sup>179</sup> *See id.* at 511 (Scalia, J., concurring in part and dissenting in part) (citing *Vieth v. Jubelirer*, 541 U.S. 267, 271–306 (2004) (plurality opinion)).

<sup>180</sup> *See id.* at 492 (Roberts, C.J., concurring in part and dissenting in part) (“The question whether any such standard exists—that is, whether a challenge to a political gerrymander presents a justiciable case or controversy—has not been argued in these cases.”).

<sup>181</sup> *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015).

<sup>182</sup> *Vieth*, 541 U.S. at 285–86 (plurality opinion) (noting that the Constitution “contemplates districting by political entities,” but “segregating voters on the basis of race is not . . . lawful”).

<sup>183</sup> *Id.* at 287 (“[A] person’s politics is rarely as readily discernable—and *never* as permanently discernable—as a person’s race.”).

<sup>184</sup> *Id.* at 286 (noting that a court is “justified in accepting a modest degree of unmanageability to enforce a constitutional command” such as policing race discrimination, but is “not justified in inferring a judicially enforceable constitutional obligation . . . not to apply *too*

4. *Political gerrymandering claims require courts to determine what political systems and theories are “fair.”*<sup>185</sup>
5. *Consideration of political factors is “inevitable” in the legislative districting process.*<sup>186</sup>
6. *Political gerrymandering claims are grounded in a presumed right to proportional representation, which the Constitution does not provide.*<sup>187</sup>

Although these arguments may appear difficult to overcome at first glance, the inevitable intersection of OPOV, racial gerrymandering, and political gerrymandering claims has provided a useful framework for analyzing the similarities and distinctions between each. We now turn to these cases.

#### *D. Cromartie: The Intersection of Racial and Political Gerrymandering*

As racial sorting claims became more common, a question arose about the role of “political considerations” in crafting districts. If voters were sorted between districts on the basis of their political affiliations, and there was a strong correlation between political affiliation and race, would politics or race be considered to have predominated?

In *Hunt v. Cromartie (Cromartie I)*,<sup>188</sup> the district court had granted summary judgment in favor of the plaintiffs on a racial sorting claim.<sup>189</sup> The Supreme Court found a material dispute of fact and reversed.<sup>190</sup> Although the evidence presented “tend[ed] to support an inference that the State drew its district lines with an impermissible racial motive,”<sup>191</sup> state officials offered testimony from legislators stating that “in crafting their districting law, they attempted to protect incumbents, to adhere to traditional districting criteria, and to preserve the existing partisan balance in the State’s congressional delegation, which in 1997 was composed of six Republicans and six Democrats.”<sup>192</sup>

In reversing and sending the case back to the district court for further examination, the Court stated that their “prior decisions ha[d] made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were

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*much* partisanship in districting,” which is an obligation that is “both dubious and severely unmanageable”).

<sup>185</sup> *Id.* at 291 (“‘Fairness’ does not seem to us a judicially manageable standard.”).

<sup>186</sup> *Id.* at 285 (arguing that districting by political entities is “root-and-branch a matter of politics”).

<sup>187</sup> *Id.* at 287–88 (“[T]his standard rests upon the principle that groups . . . have a right to proportional representation. But the Constitution contains no such principle.”).

<sup>188</sup> 526 U.S. 541 (1999).

<sup>189</sup> *Id.* at 543.

<sup>190</sup> *Id.* at 553–54.

<sup>191</sup> *Id.* at 548–49.

<sup>192</sup> *Id.* at 549.

conscious of that fact.”<sup>193</sup> The Court included a string citation to the full line of *Shaw* doctrine cases,<sup>194</sup> including *Bush v. Vera*,<sup>195</sup> *Shaw v. Hunt (Shaw II)*,<sup>196</sup> *Miller v. Johnson*,<sup>197</sup> and *Shaw v. Reno (Shaw I)*.<sup>198</sup> This seemingly straightforward statement and list of citations was followed by an unassuming footnote. The footnote states: “This Court has recognized, however, that political gerrymandering claims are justiciable under the Equal Protection Clause although we [are] not in agreement as to the standards that would govern such a claim.”<sup>199</sup>

In other words, political considerations may predominate so long as the jurisdiction engages in “constitutional political gerrymandering.”<sup>200</sup> Just as a state may engage in some degree of racial gerrymandering in order to fulfill a compelling state objective, so too may a state engage in political gerrymandering, assuming it complies with the requirements of some as-of-yet-undefined constitutional rule.

This raises a question of confounding variables. If a district appears to be gerrymandered, did racial or political considerations predominate in the districting calculus? If there is a tight correlation between race and political preference, then the court must look carefully to determine if racial considerations predominated or if political considerations predominated.

The *Cromartie* case would eventually return to the Supreme Court.<sup>201</sup> On remand, the district court found that the State had sought to “maintain the existing partisan balance in the State’s congressional delegation . . . [by] avoid[ing] placing two incumbents in the same district and . . . preserv[ing] the partisan core of the existing districts.”<sup>202</sup> In addition, the lower court found that the legislature used “facially race driven” criteria in the districting process.<sup>203</sup> Ultimately, the lower court held that racial considerations predominated.<sup>204</sup>

In *Easley v. Cromartie (Cromartie II)*, the Supreme Court reversed, holding that the lower court’s finding was clearly erroneous.<sup>205</sup> This was because the burden on plaintiffs alleging racial sorting was a “demanding one.”<sup>206</sup> The Court observed that

<sup>193</sup> *Id.* at 551.

<sup>194</sup> *Id.*

<sup>195</sup> 517 U.S. 952 (1996).

<sup>196</sup> 517 U.S. 899 (1996).

<sup>197</sup> 515 U.S. 900 (1995).

<sup>198</sup> 509 U.S. 630 (1993).

<sup>199</sup> *Cromartie I*, 526 U.S. at 551 n.7 (citing *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (plurality opinion)).

<sup>200</sup> *Id.* at 551 (emphasis added).

<sup>201</sup> *Easley v. Cromartie*, 532 U.S. 234 (2001) [hereinafter *Cromartie II*].

<sup>202</sup> *Id.* at 239–40 (quoting *Cromartie v. Hunt*, 133 F. Supp. 2d 407, 413 (E.D.N.C. 2000)).

<sup>203</sup> *See id.* at 240 (citing *Cromartie*, 133 F. Supp. 2d at 420).

<sup>204</sup> *See id.* at 237.

<sup>205</sup> *Id.* at 258.

<sup>206</sup> *See id.* at 241, 257 (quoting *Miller v. Johnson*, 515 U.S. 900, 928 (1995) (O’Connor, J., concurring)).

“the underlying districting decision is one that ordinarily falls within a legislature’s sphere of competence,”<sup>207</sup> and “the legislature ‘must have discretion to exercise the political judgment necessary to balance competing interests.’”<sup>208</sup> This is especially the case “where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated.”<sup>209</sup> Here, where the State sought “to maintain a six/six Democrat/Republican delegation split,”<sup>210</sup> “the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles.”<sup>211</sup>

Following *Cromartie II*, states have tended to rely upon “political predominance” arguments to defeat allegations of “racial predominance” in districting decisions.<sup>212</sup> In attempting to show political predominance, states frequently contend that they sought to advance partisan goals or insulate incumbents. But *Cromartie II* did not completely answer the question left open in *Cromartie I*: Can political or incumbency considerations *constitutionally* predominate for *these* purposes?

#### *E. Larios: The Intersection of OPOV and Gerrymandering*

The Supreme Court has also been faced with cases treading the boundary between its OPOV precedents and its gerrymandering precedents. The most well-known case in this line is *Larios v. Cox*.<sup>213</sup>

In *Larios*, the Northern District of Georgia struck down a plan with a total population deviation of 9.98%.<sup>214</sup> Although Georgia’s plan was entitled to a presumption of good faith because the total population deviation was below 10%, the lower court noted that the 10% marker “does not completely insulate a state’s districting plan from attack of any type” but only determines how to allocate the burden for proving the OPOV violation.<sup>215</sup> Although the State attempted to justify its deviations on the basis of “incumbency protection,” the court held that “the protection of incumbents is a permissible cause of population deviations *only* when it is limited to the avoidance of contests between incumbents and is applied in a consistent and nondiscriminatory manner.”<sup>216</sup> In the plan at issue in *Larios*, “the deviations were created to protect

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<sup>207</sup> *Id.* at 242 (citing *Miller*, 515 U.S. at 915).

<sup>208</sup> *Id.* (quoting *Miller*, 515 U.S. at 915).

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

<sup>210</sup> *Id.* at 246–47.

<sup>211</sup> *Id.* at 258.

<sup>212</sup> *See, e.g., Cox v. Larios*, 542 U.S. 947, 947 (2004).

<sup>213</sup> 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *summ. aff’d by Cox*, 542 U.S. 947.

<sup>214</sup> *Id.* at 1322.

<sup>215</sup> *Id.* at 1340 (quoting *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996)).

<sup>216</sup> *Id.* at 1338.

incumbents in a wholly inconsistent and discriminatory way.”<sup>217</sup> The court went on to observe in dicta that “the Supreme Court has never sanctioned partisan advantage as a legitimate justification for population deviations.”<sup>218</sup>

The Supreme Court summarily affirmed the lower court’s decision.<sup>219</sup> Writing in concurrence, Justice Stevens—joined by Justice Breyer—noted that “selective incumbent protection” and partisan advantage could not justify the State’s “conceded deviations from the principle of one person, one vote.”<sup>220</sup> In closing, Justice Stevens argued that “in time the present ‘failure of judicial will’” to adjudicate political gerrymandering “will be replaced by stern condemnation of partisan gerrymandering that does not even pretend to be justified by neutral principles.”<sup>221</sup>

Justice Scalia dissented, arguing that “politics as usual” is a “traditional” redistricting criterion,<sup>222</sup> and is constitutional “so long as it does not go too far.”<sup>223</sup> As such, Justice Scalia would have “set the case for argument” instead of affirming.<sup>224</sup> There was, however, no explanation of what action would “go too far.”<sup>225</sup>

In later cases, the Court has qualified its decision, noting that the district court in *Larios* “[did] not resolve the issue of whether or when partisan advantage alone may justify deviations in population” because the plans were ‘plainly unlawful’ and any partisan motivations were ‘bound up inextricably’ with other clearly rejected objectives.”<sup>226</sup> As such, the constitutionality of deviations from population equality for partisan advantage remains an open question.

## II. THREE CONCEPTUAL SNARES

The Supreme Court’s hesitance in this arena is perhaps well warranted. Lost in the midst of the political thicket, the Court has had a difficult time ascertaining when, and why, political gerrymandering offends constitutional principles. Without a clear analytical and precedential path, it makes sense to exercise restraint. Justice Scalia’s attempts to render political gerrymandering a nonjusticiable question typified this caution.<sup>227</sup>

Yet, stronger still has been Justice Kennedy’s conviction that though “great caution is necessary when approaching this subject,” the Court should remain prepared to afford judicial relief if a “precise rationale [is] found to correct an established

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<sup>217</sup> *Id.* at 1342.

<sup>218</sup> *Id.* at 1351.

<sup>219</sup> *Cox v. Larios*, 542 U.S. 947 (2004).

<sup>220</sup> *Id.* at 949 (Stevens, J., concurring).

<sup>221</sup> *Id.* at 951 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 341 (2004) (Stevens, J., dissenting)).

<sup>222</sup> *Id.* at 952 (Scalia, J., dissenting).

<sup>223</sup> *Id.* (emphasis added).

<sup>224</sup> *Id.*

<sup>225</sup> *See generally id.* at 951–52.

<sup>226</sup> *LULAC*, 548 U.S. 399, 423 (2006) (quoting *Larios v. Cox*, 300 F. Supp. 2d 1320, 1352 (N.D. Ga. 2004)).

<sup>227</sup> *See Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion).

violation of the Constitution.”<sup>228</sup> Below, I explore three conceptual snares that appear to have frustrated the Court’s effort to identify constitutional violations with the necessary precision.

*A. Personal Interests v. State Interests*

Let us consider, for a moment, a state that enacts a strict voter identification law. This law ostensibly is passed to prevent voter fraud and enhance the legitimacy of the democratic process. When the law is challenged in court, the government comes forth and proffers this interest. One might well argue that the *actual* purpose of the law is to disadvantage a particular political party, but that is a proposition that requires proof. The government has defended the law on the ground of “preventing voter fraud,” which is a legitimate, neutral state interest.

In *Crawford v. Marion County Election Board*,<sup>229</sup> the Supreme Court upheld just such a voter identification law because it was “a nondiscriminatory law . . . supported by valid neutral justifications.”<sup>230</sup> In his concurring opinion, Justice Scalia noted that the law should be upheld because it “draws no classifications, let alone discriminatory ones,” and the legislature’s judgment should prevail unless the law “is intended to disadvantage a particular class.”<sup>231</sup>

But now, let us consider a slightly different hypothetical. What if the same state passes the same voter identification law and, when called to account in court, the government comes forth and proffers “political advantage” as its state interest? Rather than defending the law on the basis of a neutral interest in “preventing voter fraud,” the government—representing the entire body politic—is now arguing in open court that the law should stand because it furthers the *state’s* interest in “advantaging” Republicans or Democrats. Would any court truly entertain the legitimacy of a “state interest” in “preventing” the election of Democrats or Republicans? The notion is risible.

And yet, this is precisely the issue upon which the Supreme Court has been found waffling when the legislation in question is redistricting legislation.<sup>232</sup> The problem here is the Court’s failure to distinguish between the unavoidable personal considerations of individual legislators and the “state interest” proffered on behalf of the government itself.

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<sup>228</sup> *Id.* (Kennedy, J., concurring).

<sup>229</sup> 553 U.S. 181 (2008).

<sup>230</sup> *Id.* at 204.

<sup>231</sup> *Id.* at 205, 208 (Scalia, J., concurring).

<sup>232</sup> *See, e.g.*, Jurisdictional Statement, *Harris v. Ariz. Indep. Redistricting Comm’n*, No. 14-232, 2015 WL 2473529, at i (probable jurisdiction noted June 30, 2015) (Question Presented: “Does the desire to gain partisan advantage for one political party justify intentionally creating over-populated legislative districts that result in tens of thousands of individual voters being denied Equal Protection because their individual votes are devalued, violating the one-person, one-vote principle?”).

As the Supreme Court held in *Romer v. Evans*,<sup>233</sup> when legislation is “inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”<sup>234</sup> In *Romer*, the Court was confronted with a facial classification regarding sexual orientation.<sup>235</sup> By requiring that the facial classification at least “bear a rational relationship to an independent and legitimate legislative end, [the Court] ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”<sup>236</sup> A law adopted for the bare desire to disadvantage an identifiable subset of the population is, simply put, *not* enacted pursuant to a legitimate state interest.<sup>237</sup>

There is a difference between the “incidental disadvantages” that result to certain persons due to “laws enacted for broad and ambitious purposes . . . explained by reference to legitimate public policies,” and the “bare . . . desire to harm” a group politically disfavored by a majority of legislators.<sup>238</sup> This would be “a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.”<sup>239</sup> As the *Romer* Court stated, “A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”<sup>240</sup>

Whether or not legislation employs a facial classification, the suggestion that “partisan advantage” could be proffered in court as a *state* interest is a disturbing one. As the Supreme Court recognized in *Yick Wo v. Hopkins*, “while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.”<sup>241</sup>

Simply put, the state, *qua* state, has no cognizable interest in which party wins a democratic election or which party ascends to power. That is what distinguishes a vibrant, functioning democracy that respects the will of the voters from a corrupt shell of a republic where partisans openly rig elections in order to retain their grip on power with the blessing of a complicit judiciary.<sup>242</sup> Because “the election of

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<sup>233</sup> 517 U.S. 620 (1996).

<sup>234</sup> *Id.* at 632 (emphasis added).

<sup>235</sup> *Id.* at 625.

<sup>236</sup> *Id.* at 633.

<sup>237</sup> *See id.*

<sup>238</sup> *Id.* at 634–35 (second alteration in original) (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

<sup>239</sup> *Id.* at 635.

<sup>240</sup> *Id.* at 633.

<sup>241</sup> 118 U.S. 356, 370 (1886).

<sup>242</sup> “Whether spoken with concern or pride, it is unfortunate that our legislators have reached the point of declaring that, when it comes to apportionment: ‘We are in the business of rigging elections.’” *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring) (quoting J. Hoeffel, *Six Incumbents Are a Week Away from Easy Election*, WINSTON-SALEM

Democrats” or “the election of Republicans” cannot be said to advance a neutral interest on behalf of the entire body politic, an interest in “partisan advantage” cannot be proffered in court as a constitutional *state* interest. A claimed interest in “partisan advantage” is inherently tantamount to a claimed interest in “partisan suppression.” And, although partisans may have a *personal* interest in defeating their rivals at the polls, one cannot claim that their personal interest in victory constitutes a legitimate *state* interest. As the Supreme Court recently stated in *Arizona State Legislature v. Arizona Independent Redistricting Commission*: “[P]artisan gerrymanders’ . . . [are incompatible] with democratic principles.’ . . . [T]he true principle of a republic is, that the people should choose whom they please to govern them.”<sup>243</sup> The sad cliché that representatives now pick the voters instead of voters picking the representatives reflects the twisted outcome of an assumption that the State can proffer personal, rather than public, interests in court as “legitimate state interests.”

This conflation of personal interests with state interests applies to districts defended on the basis of “incumbency advantage” as well. As explained above, the very notion of “incumbency advantage” suggests a cognizable state interest in “challenger suppression.” But entrenching incumbents and preventing the success of new entrants is not a *state* interest.

The Supreme Court has repeatedly reflected upon the impropriety of laws that shield incumbents from vigorous democratic competition. For example, in the context of campaign finance law, the Court has not hesitated to strike down even *neutral* laws advancing *neutral* state interests based at least in part on the risk that such laws “can harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.”<sup>244</sup> In a particularly trenchant passage regarding such laws, Justice Thomas, joined by Justice Scalia and Chief Justice Rehnquist, wrote:

[It is] submit[ted] that we should “accord special deference to [Congress’] judgment on questions related to the extent and nature of limits on campaign spending.” This position poses great risk . . . [and] let[s] the fox stand watch over the henhouse. There is good reason to think that campaign reform is an especially inappropriate area for judicial deference to legislative judgment. What the argument for deference fails to acknowledge is the potential for legislators to set the rules of the electoral game so as to keep themselves in power and to keep potential challengers out of it. (“Courts must police inhibitions

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J., Jan. 27, 1998, at B1); *see also id.* at 331 (Stevens, J., dissenting) (“The problem, simply put, is that the will of the cartographers rather than the will of the people will govern.”).

<sup>243</sup> 135 S. Ct. 2652, 2658, 2675 (2015) (first, third, and fifth alterations in original) (citations omitted).

<sup>244</sup> *Randall v. Sorrell*, 548 U.S. 230, 232 (2006).

on . . . political activity because we cannot trust elected officials to do so.”)<sup>245</sup>

The Supreme Court likely would not take the view that its bone-deep skepticism of incumbency entrenchment in the campaign finance context is somehow unwarranted in the redistricting context where legislators openly “declar[e] that . . . [they] are in the business of rigging elections.”<sup>246</sup> Such entrenchment is antithetical to democratic principles of representativeness and accountability and could potentially contribute to degradation in functional governance by reducing the electoral consequences of gridlock and mismanagement.

In short, “electoral advantage”—whether in the form of “partisan advantage” or “incumbency advantage”—is not a legitimate state interest that can be proffered in court as a justification for redistricting legislation. To allow such an interest to be claimed is contrary to the very notion that “sovereignty itself remains with the people, by whom and for whom all government exists and acts.”<sup>247</sup> If the government may openly place its thumb upon the scales in determining who wins and loses its elections, and receives judicial cover in doing so, then our constitution protects little more than the illusion of democracy.

Therefore, the Court should recognize the difference between legislators’ personal considerations—which will unavoidably motivate the enactment of neutral laws with incidental partisan effects—and the legislature’s proffered state interests—which must provide neutral justifications for challenged state action.

### *B. How Much “Political Interest” v. What Type of “Political Interest”*

Once we have dispelled the notion that the state can claim a constitutional interest in electing particular parties or individuals, we can view Supreme Court precedent with a more discerning eye. As recently as this last term, for example, the Court reiterated that “incumbency protection” and “political affiliation” are legitimate criteria that legislatures may consider in drawing legislative districts.<sup>248</sup> This much is well established. But a closer look at these precedents unearths the second snare: the assumption that the constitutionality of political districting turns on whether legislators have “go[ne] too far.”<sup>249</sup>

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<sup>245</sup> Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 644 n.9 (1996) (Thomas, J., concurring in part and dissenting in part) (third and eighth alterations in original) (citations omitted).

<sup>246</sup> *Vieth*, 541 U.S. at 317 (Kennedy, J., concurring) (quoting Hoefel, *supra* note 242, at B1).

<sup>247</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1986).

<sup>248</sup> Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1270 (2015) (citing *Bush v. Vera*, 517 U.S. 952, 964, 968 (1996)).

<sup>249</sup> See, e.g., *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting).

The question is not “how much” a state can use incumbency considerations and political affiliation before offending the Constitution; rather, the principal question is “what type” of “political interest” or “incumbency protection” is constitutionally permissible. In other words, the constitutionality of political districting primarily turns on the *purpose*, not the *degree*, of the gerrymander.

In *Alabama Legislative Black Caucus v. Alabama*, the Supreme Court listed “incumbency protection” and “political affiliation” among the race-neutral districting principles that may “offset” racial considerations when determining whether a district has been drawn predominantly on the basis of race or other criteria.<sup>250</sup> For support, the Court cited to the principal opinion in *Bush v. Vera*.<sup>251</sup> It is here that we find the precedential lineage of these criteria and the contours of their constitutional—and unconstitutional—use.

With respect to the proper use of “political affiliation” in districting, the principal opinion in *Bush* cites to *Davis v. Bandemer* and *Gaffney v. Cummings*.<sup>252</sup> A clear majority of the *Bandemer* Court held that districting for political purposes could violate the Equal Protection Clause but split on the applicable test.<sup>253</sup> We will return to *Bandemer* when we evaluate the third analytical oversight plaguing political gerrymandering case law below. The principal *Bush* opinion’s citation to *Gaffney*, however, is revealing. The opinion properly cites *Gaffney* for the proposition that states “may draw irregular district lines *in order to allocate seats proportionately to major political parties*.”<sup>254</sup> Unlike an interest in “political advantage,” the state *can* claim an interest in “political fairness.”<sup>255</sup>

In *Gaffney*, repeated legislative attempts at districting had failed, and the final step under the State’s constitution was to convene a three-person bipartisan board.<sup>256</sup> In crafting its plan, the Board attempted to achieve “substantial population equality” under the OPOV principle and also “consciously and overtly adopted and followed a policy of ‘political fairness,’ which aimed at a rough scheme of proportional representation of the two major political parties.”<sup>257</sup>

Senate and House districts were structured so that the composition of both Houses would reflect “as closely as possible . . . the actual [statewide] plurality of vote on the House or Senate lines

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<sup>250</sup> *Alabama*, 135 S. Ct. at 1270 (citing *Bush*, 517 U.S. at 964, 968).

<sup>251</sup> *Id.* (citing *Bush*, 517 U.S. at 964, 968).

<sup>252</sup> *Bush*, 517 U.S. at 964–65.

<sup>253</sup> See *Davis v. Bandemer*, 478 U.S. 109, 143 (1986) (plurality opinion); *id.* at 161 (Powell, J., concurring in part and dissenting in part).

<sup>254</sup> *Bush*, 517 U.S. at 964–65 (emphasis added) (citing *Gaffney v. Cummings*, 412 U.S. 735, 757–59 (1973)).

<sup>255</sup> See generally *Gaffney*, 412 U.S. 735.

<sup>256</sup> *Id.* at 736.

<sup>257</sup> *Id.* at 738.

in a given election.” Rather than focusing on party membership in the respective districts, the Board took into account the party voting results in the preceding three statewide elections, and, on that basis, created what was thought to be a proportionate number of Republican and Democratic legislative seats.<sup>258</sup>

In challenging the plan, “[c]onsiderable evidence was introduced demonstrating the obvious political considerations in the Board’s district making.”<sup>259</sup>

In upholding the plan, the Court cited *Reynolds* and began with the observation that “the achieving of fair and effective representation for all citizens is . . . the basic aim of legislative apportionment.”<sup>260</sup> The Court stated:

We are quite unconvinced that the reapportionment plan offered by the three-member Board violated the Fourteenth Amendment *because it attempted to reflect the relative strength of the parties* in locating and defining election districts. It would be idle, we think, to contend that *any* political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. . . . *The very essence of districting is to produce a different—a more “politically fair”—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats.* Politics and political considerations are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but, when overlaid on a census map, it requires no special genius to *recognize* the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. *The reality is that districting inevitably has and is intended to have substantial political consequences.*<sup>261</sup>

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<sup>258</sup> *Id.* (alterations in original) (footnote omitted).

<sup>259</sup> *Id.* at 739.

<sup>260</sup> *Id.* at 748. (alteration in original) (quoting *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964)).

<sup>261</sup> *Id.* at 752–53 (emphasis added).

The Court further noted that a “politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results.”<sup>262</sup>

In closing, the Court reiterated that “[w]hat is done in so arranging for elections, or to achieve political ends or allocate political power, is *not* wholly exempt from judicial scrutiny under the Fourteenth Amendment,” and that a districting scheme “may be vulnerable, if racial or political groups have [had] . . . their voting strength invidiously minimized. *Beyond this*, we have not ventured far or attempted the impossible task of *extirpating politics* from what are the essentially political processes of the sovereign States.”<sup>263</sup> Because the State had “purport[ed] *fairly to allocate political power* to the parties in accordance with their *voting strength* and, within quite tolerable limits, *succeed[ed] in doing so*,” the judicial interest in intervention was “at its lowest ebb.”<sup>264</sup> Rather than attempting “to minimize or eliminate the political strength of any group or party,” the State had instead attempted “to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.”<sup>265</sup> Thus, the plan was upheld.<sup>266</sup>

Astonishingly, *Gaffney* is frequently ripped from this unique context and cited for the wider proposition that political considerations are “inevitable”—and, therefore, “permissible”—in the districting process, regardless of the interest advanced.<sup>267</sup> To the contrary, *Gaffney* recognized that the State was not attempting to “minimize or eliminate the political strength of any group or party,” but rather was attempting “to recognize it and, through districting, provide a rough sort of proportional representation.”<sup>268</sup> The Court accepted this use of “political affiliation” criteria, but explicitly recognized that the allocation of political power through redistricting was *not* exempt from judicial scrutiny.<sup>269</sup>

*Gaffney*, then, provides our guiding light to understanding the difference between the constitutional and unconstitutional uses of “political affiliation” districting criteria.<sup>270</sup> As we recognized above, legislators will undoubtedly be aware of the political consequences of their districting decisions, and it would be an “impossible task” to “extirpat[e] politics” from the redistricting process.<sup>271</sup> That does not, however,

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<sup>262</sup> *Id.* at 753.

<sup>263</sup> *Id.* at 754 (emphasis added) (citations omitted).

<sup>264</sup> *Id.* (emphasis added).

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 285–86 (2004) (plurality opinion) (quoting *Gaffney*, 412 U.S. at 753, for its phrase: “The reality is that districting inevitably has and is intended to have substantial political consequences”).

<sup>268</sup> *Gaffney*, 412 U.S. at 754.

<sup>269</sup> *Id.*

<sup>270</sup> See *id.*

<sup>271</sup> *Id.*

grant legislators carte blanche to leverage redistricting legislation to advance an interest in “political advantage” as opposed to “political fairness.”<sup>272</sup>

Similarly, in *Cromartie II*, the Supreme Court was faced with competing racial and political explanations for the challenged districts.<sup>273</sup> The Court found that political considerations predominated and upheld the district boundaries.<sup>274</sup> There, the State’s purported interest was in “partisan balance” and the map was drawn to reflect a “six/six Democrat/Republican delegation split.”<sup>275</sup> Based on the State’s then-recent statewide elections, this six/six split appears to have reflected a fairly even split in statewide voter political preferences.<sup>276</sup> In other words, the political districting in *Cromartie II* advanced a *state* interest in “political fairness.”<sup>277</sup>

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<sup>272</sup> *See id.*

<sup>273</sup> *See generally Cromartie II*, 532 U.S. 234 (2001).

<sup>274</sup> *Id.* at 258 (reversing district court determination that race, rather than politics, predominated in the North Carolina legislature’s drawing of district boundaries).

<sup>275</sup> *Id.* at 246–47, 253.

<sup>276</sup> In North Carolina’s 1996 elections, three statewide races reflected a fairly even split in voter political preference. The race for Governor yielded 55.98% Democratic and 42.75% Republican voting inputs. N.C. State Bd. of Elections, *Abstract of Votes Cast in the General Election Held on November 5, 1996: Governor*, NCSBE.GOV (Dec. 6, 2011), [ftp://alt.ncsbe.gov/ENRS/ElectResults\\_Pre\\_2007/1996\\_11\\_05/19961105\\_results\\_Governor.pdf](ftp://alt.ncsbe.gov/ENRS/ElectResults_Pre_2007/1996_11_05/19961105_results_Governor.pdf). The race for U.S. Senator yielded 45.92% Democratic and 52.64% Republican voting inputs. N.C. State Bd. of Elections, *Abstract of Votes Cast in the General Election Held on November 5, 1996: United States Senate*, NCSBE.GOV (Dec. 6, 2011), [ftp://alt.ncsbe.gov/ENRS/ElectResults\\_Pre\\_2007/1996\\_11\\_05/19961105\\_results\\_US\\_Senate.pdf](ftp://alt.ncsbe.gov/ENRS/ElectResults_Pre_2007/1996_11_05/19961105_results_US_Senate.pdf). The race for U.S. President yielded 44.04% Democratic and 48.73% Republican voting inputs. N.C. State Bd. of Elections, *Abstract of Votes Cast in the General Election Held on November 5, 1996: United States President*, NCSBE.GOV (Dec. 6, 2011), [ftp://alt.ncsbe.gov/ENRS/ElectResults\\_Pre\\_2007/1996\\_11\\_05/19961105\\_results\\_President.pdf](ftp://alt.ncsbe.gov/ENRS/ElectResults_Pre_2007/1996_11_05/19961105_results_President.pdf).

Admittedly, the *Cromartie* Court appears to have examined a plan based off of prior congressional delegate numbers. *See Cromartie I*, 526 U.S. 541, 549 (1999) (“[I]n crafting their districting law, they attempted to . . . preserve the existing partisan balance in the State’s congressional delegation . . .”). But to the extent this interest in retaining the same partisan delegation numbers still reasonably reflected the underlying political strength of parties in the state, the difference between a state interest in reflecting the “outputs” (i.e., how many representatives were elected for party X in the preceding elections) as opposed to a state interest in reflecting the “inputs” (i.e., how many voters cast a ballot for party X in the preceding elections) was never explored by the Court in that case. *See id.* An attempt to conflate these outputs and inputs may be a clever way to couch raw political gain in the language of electoral fairness, but the interest proposed would be an irrational one. The representatives elected are a byproduct of the very lines in question, so looking to prior legislative delegations does not gauge the political preferences of the voters without the interfering variable of the lines themselves. The purpose of redistricting is to redraw the lines in light of underlying changes in the State’s population densities and demographics. Resort to the outputs of the prior lines (i.e., “preserving the status quo”) undermines the meaning of the redistricting exercise by attributing unwarranted weight to the very lines being replaced.

<sup>277</sup> *See Gaffney*, 412 U.S. at 738.

Admittedly, districting for predominantly political reasons to achieve a rough approximation of statewide proportional representation may require intentional political vote dilution within each of the state's districts. As Justice O'Connor remarked in her concurring *Bandemer* opinion, "[a] bipartisan gerrymander employs the same technique, and has the same effect on individual voters, as does a partisan gerrymander."<sup>278</sup> Similarly, advancing an interest in "competitive" elections could require states to draw lines that disregard neutral districting conventions as well. As Justice Scalia observed in *Vieth*, the Equal Protection Clause does not "take sides" in a dispute over "whether it is better for Democratic voters to have their [representatives] include 10 wishy-washy Democrats (because Democratic voters are 'effectively' distributed so as to constitute bare majorities in many districts), or 5 hardcore Democrats (because Democratic voters are tightly packed in a few districts)."<sup>279</sup> There is a danger in mindless obedience to "neutral shapes," which may themselves result in "self-gerrymandering."<sup>280</sup> "[B]ecause, in recent political memory, Democrats have often been concentrated in cities while Republicans have often been concentrated in suburbs and sometimes rural areas, geographically drawn boundaries have tended to 'pac[k]' the former."<sup>281</sup>

The legislature need not bend the knee to neutral districting conventions. Political classifications may be employed to reflect differing views about what constitutes the "fairest" political system, whether it be one that encourages strong partisan identities and more stable representation or one that encourages moderation, competition, and the possibility of more frequent "turking." This is a judgment that the people and their representatives—not the courts—are equipped to make. And, a state interest in adopting a "fair" system of democratic representation is undoubtedly a compelling interest.

However, when the state enters a federal court and explicitly confesses to intentional political vote dilution based on a proffered interest in "*partisan advantage*" rather than "partisan balance," "competitive districts," or any other state justification

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<sup>278</sup> *Davis v. Bandemer*, 478 U.S. 109, 154 (1986) (O'Connor, J., concurring).

<sup>279</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 288 n.9 (2004) (plurality opinion).

<sup>280</sup> *Id.* at 290.

<sup>281</sup> *Id.* at 359 (Breyer, J., dissenting) (second alteration in original). The Court has upheld the states' power to employ offsetting instances of political vote dilution within individual districts in order to achieve statewide proportional representation. *See Gaffney*, 412 U.S. at 738. The Court has not, however, permitted the same in the racial vote dilution context. *See LULAC*, 548 U.S. 399, 429 (2006). The simplest answer to this apparent conflict is that such districting does not actually remedy VRA violations. The constitutional answer, however, is that a state cannot seek to cure racial dilution in one part of the state with countervailing opportunities in another part of the state because doing so entails "offensive and demeaning assumption[s] that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Miller v. Johnson*, 515 U.S. 900, 912 (1995) (quoting *Shaw I*, 509 U.S. 630, 647 (1993)). Voters of the same party, on the other hand, will tend to "share the same political interests, and will prefer the same candidates at the polls" almost by definition. *Id.*

reasonably reflecting an interest in “political fairness,” the opposing party can challenge the legitimacy of that argument as offensive to the Equal Protection Clause. In such a scenario, Justice Scalia’s hypothetical choice between two arguably fair alternatives (10 wishy-washy Democrats or 5 hardcore Democrats) breaks down because the state is no longer “purport[ing] fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeed[ing] in doing so.”<sup>282</sup> Instead, the state is requesting judicial sanction to intentionally suppress the vote of those who do not favor its preordained candidates.

As with race, the mere awareness or consideration of voters’ political affiliation by legislators is both unavoidable and constitutionally acceptable. As the *Gaffney* Court observed:

It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. . . . The very essence of districting is to produce a different—a more “politically fair”—result . . . . Politics and political considerations are inseparable from districting and apportionment.<sup>283</sup>

Accordingly, districting on the basis of political affiliation may be a legitimate criterion for the legislature to consider. But, as with racial demographic information, there are “permissible” and “impermissible” uses of political affiliation information.<sup>284</sup> Just because a legislator may be aware of racial demographics and may use that information to advance an interest in compliance with federal antidiscrimination law, does not mean a legislator could use the same information to advance an “interest” in “black voter suppression” or “white voter suppression.” The same divide between permissible and impermissible uses arises when a legislator consciously employs political affiliation information.

A similar dichotomy can be found with respect to “incumbency considerations.” As the Court noted in *LULAC*, “incumbency protection can be a legitimate factor in districting, but experience teaches that incumbency protection can take various forms, not all of them in the interests of the constituents.”<sup>285</sup>

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<sup>282</sup> *Gaffney*, 412 U.S. at 754.

<sup>283</sup> *Id.* at 752–53 (emphasis added).

<sup>284</sup> *See id.* at 754 (“What is done in so arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment.”); *see also* *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015) (reaffirming that “partisan gerrymanders . . . are incompatible with democratic principles” and that partisan gerrymanders present justiciable claims) (brackets omitted) (quoting *Vieth*, 541 U.S. at 292 (plurality opinion); *id.* at 316 (Kennedy, J., concurring)); *LULAC*, 548 U.S. at 413–14 (holding that political gerrymandering is unconstitutional).

<sup>285</sup> *LULAC*, 548 U.S. at 440–41 (citation omitted) (citing *Karcher v. Daggett*, 462 U.S. 725, 740 (1983)).

The principal opinion in *Bush*—again, carefully adhering to the precise contours of prior precedent—discerned that the Supreme Court had “recognized incumbency protection, *at least in the limited form of ‘avoiding contests between incumbents,’*” as a legitimate state goal.<sup>286</sup> Just like racial and political considerations, incumbency considerations may be permissible depending upon the interest sought. Reviewing Court precedent on this question makes clear that, although the state may have a legitimate interest in “incumbency pairing prevention,”<sup>287</sup> it does not have a legitimate interest in “incumbency advantage.”<sup>288</sup> To the extent prior precedent endorses an interest in “incumbency protection,” that interest is in protection *from each other* and not protection *from all others*.<sup>289</sup>

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<sup>286</sup> *Bush v. Vera*, 517 U.S. 952, 964–65 (1996) (alterations omitted) (emphasis added).

<sup>287</sup> See *Tennant v. Jefferson Cty. Comm’n*, 133 S. Ct. 3, 8 (2012) (“[O]ur cases leave little doubt that avoiding contests between incumbents . . . [is a] valid, neutral state districting polic[y].”). Admittedly, this statement might be a bit oversold. The seminal cases frequently cited by the Supreme Court for this proposition do not so clearly hold.

In *Burns v. Richardson*, the State proffered a number of justifications for its selection of multimember districts, none of which included “incumbent contest prevention.” 384 U.S. 73, 89 n.15 (1966). Rather, the *district court* found that the choice “was the conscious or unconscious—though not unnatural—reluctance of the affected senators to carve out single-member districts which thereafter would in all probability result in a political duel-to-the-death with a fellow and neighbor senator.” *Id.* at 87. The Supreme Court held that “[t]he fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does *not in and of itself* establish invidiousness.” *Id.* at 89 n.16 (emphasis added). In other words, the fact that the lines were drawn in a way that happened to prevent incumbents from being forced into competition with each other was relevant to, but not dispositive of, whether the lines were intentionally *designed or operated to dilute* the vote of “political elements” in the population. *Id.* Far from endorsing “incumbency protection” as a *legitimate* government interest, *Burns* implies that “incumbency protection” is an *illegitimate* government interest and that lines drawn on this basis constitute circumstantial evidence of unconstitutional vote dilution. See *generally id.*

In *Gaffney v. Cummings*, the Court observed in passing that incumbents would naturally be well aware of the consequences of their decisions, and that “[r]edistricting may pit incumbents against one another.” 412 U.S. at 753. As this Article discusses, however, a mere *consideration* or awareness of districting consequences by individual legislators—whether with respect to race, party, or incumbency—is different than a proffered state *interest* in these districting criteria.

Finally, in *White v. Weiser*, 412 U.S. 783 (1973), the Court acknowledged the State’s proffered interest in retaining incumbents and “d[id] not disparage this interest,” but also did not pass judgment on it: “[W]e need not decide whether this state interest is sufficient to justify the deviations at issue here.” *Id.* at 791.

All cases reaffirming this state interest stem from these three cases, particularly *Burns*. Notwithstanding this questionable precedent, there are good reasons to believe that avoiding incumbent pairing may be a legitimate interest supporting limited population deviations or limited departures from neutral districting criteria. These reasons are discussed below.

<sup>288</sup> See *LULAC*, 548 U.S. at 440–41.

<sup>289</sup> *Bush*, 517 U.S. at 964–65 (noting that “incumbency protection” is a legitimate state goal in the “limited form of ‘avoiding contests between incumbents’” (brackets omitted)).

The difference between “incumbency pairing prevention” and “incumbency advantage” is the difference between a claimed interest in drawing a district boundary between two incumbents’ residences and a claimed interest in drawing a district boundary around incumbents’ supporters, detractors, or challengers. When a state gently nudges district boundaries (or slightly deviates from population equality) to prevent the pairing of incumbents, it preserves the opportunity for voters in both districts to weigh the incumbents’ experience, legislative seniority, and community ties against the promises and platforms offered by the electoral challengers. This renders a neutral, public benefit to the voters in both districts with minimal impact on voters’ rights and electoral prerogatives.

However, when a state radically distorts district boundaries (or substantially or inconsistently departs from population equality) to fence out challengers or fence in supporters, the state is advancing a *personal* interest that cannot be proffered in court to defend the deviations. By wrapping the incumbent’s residence in an electoral artifice, the state usurps voters’ rightful role in choosing which candidate to elect and attempts to coronate a state-sanctioned winner instead. Moreover, convoluted and far-flung districts that substantially disregard neutral principles for “incumbency protection” purposes are inherently at odds with the “community relations” interests supposedly underlying these districting decisions.

The imperative animating the promise of equal protection under the law has long been that courts “reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose.”<sup>290</sup> The very act of creating a “safe seat” for a party or incumbent implicitly entails a deprivation of constitutional rights through intentional vote dilution.<sup>291</sup> This is not an act that can be considered reasonable in light of a purpose to advantage a particular party or particular candidate.<sup>292</sup>

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<sup>290</sup> *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

<sup>291</sup> *See Davis v. Bandemer*, 478 U.S. 109, 154 (1986) (O’Connor, J., concurring) (“A bipartisan gerrymander employs the same technique, and has the same effect on individual voters, as does a partisan gerrymander. . . . Some groups within each party will lose any chance to elect a representative who belongs to their party, because they have been assigned to a district in which the opposing party holds an overwhelming advantage.”).

<sup>292</sup> Justice O’Connor would disagree. *See id.* at 154–55 (“If this bipartisan arrangement between two groups of self-interested legislators is constitutionally permissible, as I believe and as the Court held in *Gaffney*, then—in terms of the rights of individuals—it should be equally permissible for a legislative majority to employ the same means to pursue its own interests over the opposition of the other party.”). But this is where Justice O’Connor’s *Bandemer* analysis strays from the path provided by *Gaffney*. The distinction between political gerrymandering for “political fairness” purposes and political gerrymandering for “partisan advantage” purposes was *central* to the holding in that case. *See Gaffney*, 412 U.S. at 754 (holding that “neither we nor the district courts have a constitutional warrant to invalidate a state plan . . . because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation”).

In both cases, the state admits its intention to make the effective execution of the electoral franchise more difficult for those voters who disagree with its own value judgments. The legislature, as then configured, may believe that a Democrat—or that Congressman Smith—would be better to represent a particular district, but these are not “legitimate state interests” of the state *qua* state. Whatever may be the virtues of a rule that protects the private political machinations of individual legislators when the resulting legislation has objectively legitimate merits, is nondiscriminatory, and is defended by the state on that basis,<sup>293</sup> those virtues vanish when the legislation has openly discriminatory and illegitimate aims that the state proffers to the court without shame or pretense.

Although the state has a compelling interest in organizing “fair and effective elections” as well as a legitimate interest in “incumbent pairing prevention,” the state does not have a legitimate interest in “partisan advantage” or “incumbency advantage.” The question, therefore, is not whether the state has engaged in “too much” partisan gerrymandering for the purposes of electoral advantage; *any* gerrymandering undertaken for these purposes is constitutionally questionable.<sup>294</sup> Rather, the primary question is whether the state has used political considerations for constitutional ends, such as “political fairness” or “incumbency pairing prevention.”

### C. The Pursuit of “One” Political Gerrymandering Claim

Finally, we are left with a question of proof. What must plaintiffs show in order to prevail on a political gerrymandering claim? Sundry tests and standards have been floated promising varying degrees of mathematical surety.<sup>295</sup> Yet, a fundamental issue plagues these novel tests: none possess any greater claim to precedential authority or constitutional legitimacy than any other. Where in the Constitution or its well-established judicial constructions, for example, can we find definitive authority for the use of a “symmetry” standard or an “efficiency gap” standard?<sup>296</sup> Can it be said

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<sup>293</sup> See generally *Gaffney*, 412 U.S. 735.

<sup>294</sup> As discussed below, some questions of degree *are* raised in the process of evaluating whether a claim of partisan gerrymandering will ultimately succeed, but these questions are identical to those raised in racial gerrymandering cases. See *infra* notes 332–35, 350–51. Here, the question is whether any degree of “electoral advantage,” taken alone, constitutes a legitimate state interest. The answer is no.

<sup>295</sup> See, e.g., Mem. of Amici Curiae Common Cause and New Virginia Majority Regarding Proposed Remedial Plans, *Personhuballah v. Alcorn*, No. 3:13-CV-678 (E.D. Va. Nov. 12, 2015) (proposing “equal vote weight” standard for evaluating political gerrymandering claims).

<sup>296</sup> It should be noted that many proposed political gerrymandering tests aim to follow the breadcrumbs left by Justice Kennedy in *Vieth* and to measure the degree of burden placed upon First Amendment rights. See, e.g., *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015) (discussing political gerrymandering claim based on Justice Kennedy’s suggestion that “the First Amendment may offer a sounder and more prudential basis for intervention than does the Equal Protection Clause” (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 315 (2004) (Kennedy, J., concurring))). This Article declines to take a First Amendment route.

that any model's specific kind of injury—as defined by its particular mathematical threshold—has always marked the constitutional bounds of political gerrymandering? And, if not, what must be proven? And how?

This leads us to the most important false premise that must be discarded for a political gerrymandering claim to succeed. And that is the Court's fruitless search for "a" political gerrymandering claim. When one traces the evolution of gerrymandering, this fatal flaw becomes clear: there is no *singular* gerrymandering offense. There are two: dilution and sorting.

Returning to the roots of the political gerrymandering claim and respecting its shared lineage with racial gerrymandering jurisprudence (beginning with *Fortson v. Dorsey*),<sup>297</sup> we find that political vote dilution and political sorting are two different gerrymandering offenses raising two separate constitutional concerns. Just as the scope of the racial sorting claim should not be widened so far as to force it into constitutional double-duty with the racial vote dilution claim, neither should the Court have ever sought to have addressed both of these political gerrymandering offenses under the singular umbrella of a "political gerrymandering" claim.

Disrupting this faulty premise also rehabilitates the precedential force of *Bandemer* by combining the principal opinion and Justice Powell's opinion into an effective "majority" holding.<sup>298</sup> Rather than marking a departure from the Court's historical treatment of racial gerrymandering claims, *Bandemer* can be read as presaging the Court's future treatment of racial gerrymandering claims. The *Bandemer* plurality cited the Court's racial vote dilution cases for the argument that an intent-plus-effect test should apply and stated, "[T]he principles developed in these cases would apply equally to claims by political groups in individual districts."<sup>299</sup> This is precisely the standard that should prevail in a *political vote dilution* claim.

Meanwhile, Justice Powell's opinion, though seemingly accepting the "common practice of the party in power to choose the redistricting plan that gives it an advantage at the polls," was quick to decry "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes,"<sup>300</sup> noting that "district lines should be determined in accordance with neutral and legitimate criteria," and that "the State should treat its voters as standing in the same position, regardless of their political beliefs or party affiliation" "[w]hen deciding where [district] lines will fall."<sup>301</sup> Among the relevant evidentiary factors for making this determination, Justice Powell included "the shapes of voting districts," "adherence

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<sup>297</sup> 379 U.S. 433, 439 (1965) (suggesting that racial and political vote dilution may state a claim under the Equal Protection Clause).

<sup>298</sup> See *Davis v. Bandemer*, 478 U.S. 109, 143 (1986) (plurality opinion); *id.* at 161 (Powell, J., concurring in part and dissenting in part).

<sup>299</sup> *Id.* at 127, 131 n.12 (plurality opinion).

<sup>300</sup> *Id.* at 164 (Powell, J., concurring in part and dissenting in part) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (1969) (Fortas, J., concurring)).

<sup>301</sup> *Id.* at 166 (citations omitted).

to established political subdivision boundaries,” and “legislative history reflecting contemporaneous legislative goals.”<sup>302</sup> This proposal prophesies the emergence of the *political sorting* standard.

In other words, courts should follow *both* the plurality opinion *and* Justice Powell’s opinion in *Bandemer* and recognize that political vote dilution and political sorting present equally valid and equally justiciable political gerrymandering claims under the Fourteenth Amendment. Rather than viewing *Bandemer* as a fractured holding with no precedential authority, we should view *Bandemer* as a collectively vindicated majority holding endorsing both dilution and sorting claims and maintaining the seminal link between racial and political gerrymandering claims.<sup>303</sup>

This approach also reconciles Justice Kennedy’s diverging political gerrymandering “requirements.” In *LULAC*, Justice Kennedy argued that any claim of partisan gerrymandering must “show a burden, as measured by a reliable standard, on the complainants’ representational rights.”<sup>304</sup> In *Vieth*, however, Justice Kennedy observed, “If a State passed an enactment that declared ‘All future apportionment shall be drawn so as most to burden Party X’s rights to fair and effective representation, though still in accord with one-person, one-vote principles,’ we would surely conclude the Constitution had been violated.”<sup>305</sup>

These two postulated constraints are inconsistent only if one operates from the misplaced premise that there can be only one political gerrymandering claim. If the claim is split between political vote dilution and political sorting, however, these two requirements are equally valid. In order to prove a political *dilution* claim, plaintiffs

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<sup>302</sup> *Id.* at 173 (footnote omitted).

<sup>303</sup> The Court’s multifarious suggestions notwithstanding. *See generally* *LULAC*, 548 U.S. 399 (2006); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opinion). Some courts have claimed that *Vieth* “rejected” both an intent-plus-effect equal protection test as well as a *Shaw*-like equal protection test. *See, e.g.*, *Radogno v. Ill. State Bd. of Elections*, No. 1:11-CV-04884, 2011 WL 5868225, at \*2–3 (N.D. Ill. Nov. 22, 2011). This seems misguided.

First, the *Vieth* Court—like the *Bandemer* Court—was still split on what “the” test for political gerrymandering was. *See Vieth*, 541 U.S. at 284–85 (plurality opinion). This Article rejects the misplaced premise that there is one singular gerrymandering claim rather than two. Accepting that political gerrymandering, like racial gerrymandering, can come in two equally impermissible flavors based on two different analytical foundations and be resolved by two fundamentally different tests, there is no sound reason why both *Bandemer* opinions cannot be correct.

Second, the idea that Justice Kennedy’s concurrence in *Vieth* managed to upend the precedential effect of *Bandemer* is, at best, a questionable proposition. *See Radogno*, 2011 WL 5868225, at \*2 n.2 (stating that Kennedy in his *Vieth* concurrence agreed no standard had been met). As Professor Daniel Lowenstein has eloquently put it, “[s]omething cannot be replaced by nothing.” Daniel H. Lowenstein, *Vieth’s Gap: Has the Supreme Court Gone from Bad to Worse on Partisan Gerrymandering?*, 14 CORNELL J.L. & PUB. POL’Y 367, 393 (2005).

<sup>304</sup> *LULAC*, 548 U.S. at 418.

<sup>305</sup> *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring).

must “show a burden, as measured by a reliable standard, on the complainants’ representational rights.”<sup>306</sup> In order to prove a political *sorting* claim, however, plaintiffs need only show that the legislature’s use of a political criterion subordinated other districting criteria.<sup>307</sup> This is tantamount to a facial classification—like the one hypothesized by Justice Kennedy in *Vieth*<sup>308</sup>—and places the burden upon the state to justify its use of partisan districting. Because “political advantage” does not state a *legitimate* state interest, such districting fails to clear the hurdle posed by even the most deferential standard of review: rational basis review.

With these three conceptual snares removed, clearing the political thicket becomes a readily understandable and manageable task. Relying upon the standards that have evolved in both racial vote dilution and racial sorting case law, we can now coherently develop our political gerrymandering claims and understand the proof necessary to prosecute such claims.

### III. CLEARING THE PATH

Like racial gerrymandering, there are two different claims available for political gerrymandering plaintiffs to pursue. For a political sorting claim, plaintiffs from the gerrymandered district must prove that political affiliation or preference was the predominant districting criterion employed insofar as it subordinated all other neutral and non-political districting criteria in the formation of the district.<sup>309</sup> Where this is proven, the facially neutral legislation is treated as the legal equivalent of a facial classification, and the burden shifts to the state to demonstrate that its use of the political criterion was sufficiently tailored to an adequate state interest.<sup>310</sup>

For a political vote dilution claim, plaintiffs must prove discriminatory intent and discriminatory effect.<sup>311</sup> Proving discriminatory effect requires plaintiffs to satisfy a set of modified *Gingles* prerequisites and then prove that the minority party voter was deprived of equal political opportunity under the totality of circumstances.<sup>312</sup>

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<sup>306</sup> *LULAC*, 548 U.S. at 418.

<sup>307</sup> *See Miller v. Johnson*, 515 U.S. 900, 916 (1995).

<sup>308</sup> *See Vieth*, 541 U.S. at 312 (Kennedy, J., concurring) (suggesting that a statute expressly classifying by party would violate the Constitution).

<sup>309</sup> *See Miller*, 515 U.S. at 916 (“[A] plaintiff must prove that the legislature subordinated traditional [party]-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to [political] considerations.”).

<sup>310</sup> *See id.* (explaining how a state may defeat a sorting claim).

<sup>311</sup> *See Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (plurality opinion).

<sup>312</sup> *See Johnson v. De Grandy*, 512 U.S. 997, 1011–12 (noting that *Gingles* showing is necessary, but not sufficient, to prevail on a claim of vote dilution, which is adjudged under the totality of circumstances).

Plaintiffs may introduce any number of mathematical theories or proofs to help bolster a showing of discriminatory effect under the totality of circumstances inquiry, but none of these methods is determinative per se.<sup>313</sup>

In either instance, the state may rebut a claim of localized political vote dilution or political sorting by demonstrating that its political gerrymandering advanced a statewide interest in political fairness, whether in the form of “partisan balance,” “competitive districts,” or any other reasonable articulation of “fair and effective representation.”<sup>314</sup>

#### A. Fourteenth Amendment Political Sorting

The theory of expressive and representational harm in a political sorting claim arises from the state’s unjustifiable facial classification of voters on the basis of their political opinions, affiliations, and preferences. The constitutional rule established in the *Shaw-Miller* line of cases was not grounded on whether a gerrymander impedes a minority voter’s ability to elect a candidate of choice.<sup>315</sup> On the contrary, the decision enforced the outer permissible bounds of an undoubtedly compelling interest in avoiding racial vote dilution.<sup>316</sup> The offense was not that minority voters in those districts were disenfranchised, but that they were sorted between districts on the basis of a suspect classification alone and that this classification was evident on the face of the law.<sup>317</sup> In other words, the constitutional offense was in the predominant and facially evident use of this classification.<sup>318</sup>

The expressive and representational harms discussed by *Shaw* appear prescient when applied in the political context. With respect to expressive harm, it appears quite possible that partisan gerrymandering has contributed to an increasingly volatile political culture: “Classifications of citizens solely on the basis of [their political beliefs] ‘are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.’ They threaten to stigmatize individuals by reason of their [political beliefs] and to incite [partisan] hostility.”<sup>319</sup> The representational harms of political sorting, and their consequences for a properly functioning representative democracy, appear even more compelling:

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<sup>313</sup> See *id.* at 1000 (noting that a showing of proportionality is relevant to, but not dispositive of, whether members of a minority group have equal political opportunity).

<sup>314</sup> See *Bush v. Vera*, 517 U.S. 952, 976 (1996) (stating racial classifications in gerrymandering must be analyzed to determine whether there is a sufficient state interest furthered by their use).

<sup>315</sup> See *Miller*, 515 U.S. at 911 (noting that a *Shaw* claim is “analytically distinct” from a claim of vote dilution).

<sup>316</sup> See *Shaw I*, 509 U.S. 630, 650–51 (1993) (noting that racial classifications receive strict scrutiny even when employed to “benefit the races equally”).

<sup>317</sup> *Id.* at 642.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 643 (citations omitted).

The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one [political] group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.<sup>320</sup>

And, as with racial gerrymandering:

[T]he harms that underlie a [political sorting] claim . . . are personal. They include being “personally . . . subjected to [a] . . . classification,” as well as being represented by a legislator who believes his “primary obligation is to represent only the members” of a particular . . . group. They directly threaten a voter who lives in the *district* attacked.<sup>321</sup>

Political gerrymandering, no less than racial gerrymandering, “strikes at the heart of our democratic process, undermining the electorate’s confidence in its government as representative of a cohesive body politic in which all citizens are equal before the law.”<sup>322</sup> Unlike in a vote *dilution* claim, however, plaintiffs are not required in a sorting claim to provide evidence that the representational harms postulated have come to pass.<sup>323</sup> That is because the state bears the burden of justifying facial classifications.<sup>324</sup>

As with race, the mere awareness or consideration of voters’ political affiliation by legislators is both unavoidable and constitutionally acceptable. As the *Gaffney* Court observed:

It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. . . . The very essence of districting is to produce a different—a more “politically fair”—result . . . . Politics and political considerations are inseparable from districting and apportionment.<sup>325</sup>

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<sup>320</sup> *Id.* at 648.

<sup>321</sup> *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) (second and third alterations in original) (citations omitted).

<sup>322</sup> *Id.* at 1275 (Scalia, J., dissenting).

<sup>323</sup> *See Miller v. Johnson*, 515 U.S. 900, 916 (1995) (holding that plaintiffs must show subordination of race-neutral principles to state a sorting claim).

<sup>324</sup> *Id.*

<sup>325</sup> *Gaffney v. Cummings*, 412 U.S. 735, 752–53 (1973).

*Legislators* will always possess a range of motivations for their votes. And, districting on the basis of political affiliation may—in some circumstances—be a legitimate criterion for the *legislature* to overtly employ as well. Again, as with race, there is nothing inherently “permissible” or “impermissible” about the overt use of demographic information during the districting process. The “permissibility” of such a criterion is a function of whether or not the use of the classification passes muster under the applicable standard.<sup>326</sup> Although a facial political classification may be inherently less *suspect* than a facial racial classification, the degree of “suspect-ness” determines which standard applies; it does not foreclose the classification’s use altogether.<sup>327</sup> A racial, like a political, classification may be employed by the State for a constitutionally permissible purpose.<sup>328</sup>

Therefore, when political affiliation or preference becomes the predominate basis upon which district lines are drawn, that is tantamount to a facial classification under the Fourteenth Amendment demanding adequate justification. This is black-letter equal protection jurisprudence for *any* facial classification.<sup>329</sup> I would suggest that classifications in the redistricting context must pass heightened scrutiny, but if the proffered justification is “political advantage,” then the districting would not survive any degree of scrutiny, including rational basis review.<sup>330</sup>

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<sup>326</sup> *Miller*, 515 U.S. at 920 (citing *Shaw I*, 509 U.S. 630, 653–57 (1993)).

<sup>327</sup> *See Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) (plurality opinion).

<sup>328</sup> *See Shaw II*, 517 U.S. 899, 908 (1995).

<sup>329</sup> *See, e.g., Romer v. Evans*, 517 U.S. 620, 631 (1996) (“[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”).

<sup>330</sup> The Court has held that discriminatory facial classifications employing party affiliation are not “subject to *precisely* the same constitutional scrutiny” as race, *Shaw I*, 509 U.S. at 650 (emphasis added), but the Court has assiduously avoided stating whether political affiliation is a suspect classification, *see, e.g., id.* This Article demonstrates that gerrymandering for partisan advantage based predominantly on political criteria cannot even satisfy rational basis review, but this might not be the most appropriate standard of review.

Although the principal opinion in *Bush* expressly stated that classifications by political preference should not be subjected to strict scrutiny under the Equal Protection Clause, 517 U.S. 952, 964 (1996) (principal opinion), this is a question that a majority of the Supreme Court has never specifically answered. Early Court precedents included “political affiliation” among the list of classifications that have since been deemed “suspect” on the basis that such classifications “would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes.” *Am. Sugar Ref. Co. v. Louisiana*, 179 U.S. 89, 92 (1900). And, at least one circuit court appears to agree that political affiliation is a suspect classification. *See Abcarian v. McDonald*, 617 F.3d 931, 938 (7th Cir. 2010) (“The Equal Protection Clause of the Fourteenth Amendment most typically reaches state action that treats a person poorly because of the person’s race or other suspect classification, such as sex, national origin, religion, *political affiliation*, among others, or because the person has exercised a ‘fundamental right,’ or because the person is a member of a group that is the target of irrational government discrimination.” (emphasis added)), *cert denied*, 562 U.S. 1288 (2011); *see also Allbritton v. Village of Dolton*, No. 10C7581, 2012 WL 10516, at \*4 (N.D. Ill. Jan. 3, 2012).

Yet, a Fourteenth Amendment political sorting claim is not merely limited to the crafting of “partisan” districts. “Incumbency considerations” may cause deviations from neutral districting criteria as well. And, just like race and political affiliation, incumbency considerations have permissible and impermissible purposes. Legislators may not district predominantly on the basis of “incumbency protection” if that “protection” comes in the form of suppression or advantage rather than “incumbency pairing prevention.”

As discussed above, the subordination of neutral principles in order to classify voters based on their political opinions or preferences may give rise to a claim of political sorting. This remains true if the political preference is for an identified candidate, or even if the facial classification is by individual.<sup>331</sup> For example, district boundaries that substantially disregard neutral principles in order to snatch a specific primary challenger out of one district and place her in another district require a legitimate state justification under the Equal Protection Clause. In short, when discriminatory districting criteria predominate over neutral districting criteria, plaintiffs may maintain a sorting claim under the Fourteenth Amendment.<sup>332</sup>

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The Court need not hold that political affiliation is a “suspect” classification, however, in order to apply heightened scrutiny to such classifications in the redistricting context. The Court could also apply—and I would recommend applying—heightened scrutiny in this context based on the Court’s “precedents involving discriminatory restructuring of governmental decisionmaking.” *Romer*, 517 U.S. at 625. In *Kramer v. Union Free Sch. Dist. No. 15*, for example, the Court stated,

The presumption of constitutionality and the approval given “rational” classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.

395 U.S. 621, 628 (1969) (footnote omitted). Because a constitutional challenge to redistricting legislation challenges the “assumption that the institutions of state government are structured so as to represent fairly all the people,” a facial classification here should be subjected to heightened scrutiny *regardless* of the type of classification employed, be it racial, political, or even religious. *Id.* This, perhaps, is a more analytically consistent and enduring approach to sorting claims.

<sup>331</sup> See *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 601–02 (2008) (noting that a plaintiff can make an equal protection claim based on being singled out as a “class of one”).

<sup>332</sup> It should be noted at this juncture that if a plaintiff brings a claim of racial sorting *and* a claim of political sorting, then the state should be estopped from arguing that a district has been constructed predominantly on the basis of discriminatory criteria—such as race, politics, *and* incumbency—but that the plaintiff has failed to prove *which* discriminatory basis actually predominated. If the plaintiff brings both claims, the state cannot argue that a district is predominantly *both* and therefore predominantly *neither*. Of course, if a plaintiff brings *only* a racial sorting claim and then fails to show that race subordinated all other criteria, then the plaintiff’s claim must fail. See *Personhuballah v. Alcorn*, No. 3:13CV678, 2016 WL 93849, at \*10 n.13 (E.D. Va. Jan. 7, 2016) (Payne, J., concurring in part and dissenting in part) (“It is one thing to find . . . that race was not shown to be the predominate reason for drawing the district; and, therefore, that the Plaintiffs did not prove the only theory of the

Of course, the predominance inquiry does raise a question regarding the “degree” of the gerrymander in some regards. However, this “how much” question is not particularly unique. Courts routinely grapple with ascertaining predominance in racial sorting cases, and the Court’s holding in *Cromartie II* implicitly recognizes that political predominance is a readily identifiable phenomenon.<sup>333</sup>

In short, although the state has a compelling interest in organizing “fair and effective elections,” as well as a legitimate interest in “incumbent pairing prevention,” the state does not have a legitimate interest in “partisan advantage” or “incumbency advantage.”<sup>334</sup> If the state can demonstrate that its predominant political sorting furthers an interest in “political fairness” or “incumbent pairing prevention,” then the districting plan should survive. As part of this demonstration, the state may defeat a claim of political gerrymandering in a particular challenged district by showing that it was attempting to provide proportional electoral opportunities, competitive districts, or any other such neutral, democratic interest on a *statewide* basis.

#### *B. Fourteenth Amendment Political Vote Dilution*

Political gerrymandering may also cause constitutional harm by burdening the free and effective exercise of the electoral franchise through intentional vote dilution and the invidious minimization of equal electoral opportunity based on political identity. This theory of harm is the one most frequently envisioned in political gerrymandering opinions.

But although this theory of harm is perhaps more immediately relatable, it is also more difficult to demonstrate. That is *not* because political vote dilution should be subject to any higher threshold of evidence than racial vote dilution, but rather because “the elements necessary to a successful vote dilution claim may be more difficult to prove in relation to a claim by a political group.”<sup>335</sup> As the *Bandemer* Court stated, “the principles developed in [racial vote dilution] cases . . . apply equally to claims by political groups in individual districts.”<sup>336</sup>

The reason political and racial vote dilution should be adjudged under the same legal standard is twofold. First, the Court historically defined the concepts of political and racial vote dilution in the same breath. This common lineage only began to split in *Bandemer*, and the plurality opinion in *Bandemer* itself said that the standards were the same.<sup>337</sup> This was validated by the *Bolden-Rogers* line of cases, which affirmed that *constitutional* race dilution claims are *also* subject to an intent-plus-effect test.<sup>338</sup>

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case which they presented. On the merits, the Plaintiffs did not assert the alternate theory that the Enacted Plan was an unconstitutional political gerrymander, and it would have been improper for the Court to have decided the case on a theory neither raised nor tried.”)

<sup>333</sup> See generally *Cromartie II*, 532 U.S. 234 (2001).

<sup>334</sup> See *supra* Part II.A.

<sup>335</sup> Davis v. Bandemer, 478 U.S. 109, 131 n.12 (1986) (plurality opinion).

<sup>336</sup> *Id.*

<sup>337</sup> See *id.*

<sup>338</sup> See *Rogers v. Lodge*, 458 U.S. 613, 621–22 (1982) (establishing intent as a necessary

Second, the Court has developed a set of manageable legal standards for ascertaining the presence of impermissible vote dilution in the Section 2 context under *Gingles*.<sup>339</sup> By utilizing a modified set of *Gingles* prerequisites and then allowing for judicial balancing under the totality of circumstances test, courts would have a ready-made standard to apply to claims of intentional political vote dilution. Providing sufficient evidence to survive this legal standard in the political context may be more difficult, but that does not mean that the standard itself should be different.

The false premise that the standard for political vote dilution *should* be more difficult is arguably the initial logical flaw that caused this doctrine to wander in the wilderness for so long. But government discrimination based on one's beliefs—especially in the political arena—receives just as much constitutional scrutiny as discrimination on the basis of race: the strongest form of strict scrutiny.

Therefore, political vote dilution claims—just like *constitutional* racial vote dilution claims—should be adjudicated under the *Bolden-Rogers* line of cases and should be subject to an equivalent intent-plus-effect standard. *Rogers* itself implies as much.<sup>340</sup> Under *Gingles*, a “majority must usually be able to defeat” minority-preferred candidates.<sup>341</sup> “In both contexts,” however, the ultimate “question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process.”<sup>342</sup> Although there is no statutory “political section 2,” the standards developed in *Gingles* should be applied as prerequisites to any political vote dilution claim since the statutory language is drawn from the constitutional vote dilution cases themselves.<sup>343</sup>

To adjudicate a political vote dilution claim, plaintiffs would possess district-by-district standing and allege that the legislature acted with discriminatory intent to pack, stack, or crack voters by political affiliation in order to dilute their equal electoral opportunities.<sup>344</sup> As a prerequisite, plaintiffs would need to satisfy a modified *Gingles* test. First, they would be required to show that they constitute a geographically

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element for a constitutional claim of race dilution); *Mobile v. Bolden*, 446 U.S. 55, 66–68 (1980) (same).

<sup>339</sup> See *Thornburg v. Gingles*, 478 U.S. 30, 48–51 (1985) (articulating the three-part *Gingles* test).

<sup>340</sup> See *Rogers*, 458 U.S. at 616 (noting that, absent discriminatory intent, districting schemes are not unconstitutional just because they may cause a “distinct minority, whether it be a racial, ethnic, economic, or *political group*” to be unable to elect their chosen representatives (emphasis added)).

<sup>341</sup> See *Gingles*, 478 U.S. at 49.

<sup>342</sup> See *Bandemer*, 478 U.S. at 132–33 (plurality opinion).

<sup>343</sup> See *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1326 (S.D. Fla. 2002).

<sup>344</sup> See *Shaw I*, 509 U.S. 630, 670 (1993) (White, J., dissenting) (noting that “gerrymanders come in various shades,” such as at-large voting schemes; “cracking” (“the fragmentation of a minority group among various districts ‘so that it is a majority in none’”); “stacking” (placing “a large minority population concentration . . . with a larger [majority] population”) (first alteration in original); and “packing” (“the ‘concentration of [minority voters] into districts where they constitute an excessive majority’”) (alteration in original)).

compact numerical majority in a hypothetical district. For members of a major party, this will normally be quite simple. Next, they would need to show that voting in the region is politically polarized (i.e., that the group is politically cohesive and that bloc voting by the majority usually enables that majority to defeat the minority's preferred candidate). This prerequisite will be more difficult to prove. The presence of sufficient crossover—or, more importantly, “coalition”—voting may be sufficient to defeat a claim of political vote dilution at the prerequisites stage. If non-affiliated or independent voters move between party candidates in sufficient and frequent numbers, for example, the plaintiffs would be unable to show that their ability to elect has been effectively submerged.

Of course, a political minority may lose elections repeatedly because the majority *rationaly* disagrees with its political opinion. That is the nature of democracy. However, the whole point of a vote dilution claim is that the majority in that district is an *unconstitutionally constituted* majority. The inquiry into political polarization is not to show that voters “invidiously” discriminated on the basis of political affiliation. Such an inquiry is absurd. Deciding between competing political visions is the *purpose* of a democratic electoral device.<sup>345</sup> A finding of political polarization is neither an evil to be avoided nor a good to be sought; it is just an amoral prerequisite to a finding of dilutive effect. The final inquiry is on whether the *legislature* intentionally installed or maintained the districting scheme in order to dilute electoral opportunities for voters in the political minority in that district.

Because political polarization is more likely to fluctuate than racial polarization, many political vote dilution claims will founder at the prerequisites stage based on a failure to demonstrate sufficiently durable polarization. To the extent functional voting analyses reflect a sizable centrist or unaffiliated voting contingency willing to vote for minority-preferred candidates, the meaningful presence of swing voters will undermine a claim of dilutive effect. Similarly, a temporal spike in polarization is far less likely to be legally significant than a showing of enduring, intense polarization because this is likely to reflect the presence of a particularly sharp issue in an election rather than a dilutive device. It is incumbent upon the courts to weigh these factors and determine whether a political group is sufficiently compact and whether voting is sufficiently polarized in order to advance to the next stage of the inquiry. There is not yet a simple doctrinal test for the existence of legally significant political bloc voting.<sup>346</sup>

The role of functional analyses will be particularly important in order to avoid undue reliance on electoral results themselves. This is arguably part of the reason

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<sup>345</sup> Politics is the assigned battleground for the resolution of competing democratic claims. Political parties—unlike racial characteristics—are intended to serve as the legitimate rallying posts for political disagreement. Thus, polarization of voting by party is an amoral fact. Polarization may wax and wane based on public opinion, party position, and the merits or foibles of individual candidates.

<sup>346</sup> *Gingles*, 478 U.S. at 58.

why the *Bandemer* Court struggled so mightily to determine *how* political vote dilution should be measured. In *Bandemer*, a “multitude of conflicting statistical evidence was . . . introduced at the trial” before the district court.<sup>347</sup> “The District Court, however, specifically declined to credit any of this evidence, noting that it did not ‘wish to choose which statistician is more credible or less credible.’”<sup>348</sup> But, statistical evidence is *precisely* the kind of vital information that courts rely upon today in ascertaining the presence of racial vote dilution. Such evidence should be welcomed, rather than dismissed, in political vote dilution claims because electoral results themselves are a confluence of many interwoven variables, including the personal merits of the candidates, the pressing issues of the day, and the platforms offered by the parties.

If a court finds the *Gingles* prerequisites satisfied, it should then evaluate the totality of the circumstances to determine whether there is sufficient evidence for a finding of both discriminatory intent and dilutive effect. Those claims that do manage to survive the *Gingles* prerequisites analysis are likely to encounter even greater difficulties of proof in presenting sufficient evidence of discriminatory intent and effect to support an actionable claim. Several of the factors examined by courts in racial vote dilution claims will be inapplicable in the political vote dilution context.<sup>349</sup> Other factors, however, may provide for a more fruitful inquiry.

These “other factors” may include legislative history, contemporaneous statements, proportionality, “symmetry,” “efficiency,” “equal vote weight,” or any other number of metrics that have been proposed to help “show a burden, as measured by a reliable standard, on the complainants’ representational rights.”<sup>350</sup> None of these

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<sup>347</sup> *Bandemer*, 478 U.S. at 116 n.3 (plurality opinion).

<sup>348</sup> *Id.* (quoting *Davis v. Bandemer*, 603 F. Supp. 1479, 1485 (S.D. Ind. 1984)).

<sup>349</sup> See S. REP. NO. 97-417, at 28–29 (1982), as reprinted in 1982 U.S.C.C.A.N. 206–07 (providing a non-exhaustive list, including “1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; 2. the extent to which voting in the elections of the state or political subdivision is racially polarized; 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process; 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; 6. whether political campaigns have been characterized by overt or subtle racial appeals; 7. the extent to which members of the minority group have been elected to public office in the jurisdiction . . . [; 8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group[; 9.] whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous” (footnotes omitted)).

<sup>350</sup> *LULAC*, 548 U.S. 399, 418 (2006). Several of these measures may be gauged at the statewide level. Although the plaintiff must make a showing of intentional vote dilution in

indicators, taken alone, provides a dispositive metric for finding unconstitutional political vote dilution. Each, however, is a factor that a court conducting a totality of circumstances inquiry can consider in determining the presence of *both* discriminatory intent *and* dilutive political effect. Assuming that the plaintiff satisfies a modified *Gingles* analysis, any additional evidence contributes to the court's overarching totality of circumstances analysis.

Of course, this inquiry does raise a question of degree, or "how much is too much." But, once we have identified the true locus and scope of the "degree" question, it becomes far less treacherous to navigate. As with the predominance inquiry in a sorting claim, the question of "how much dilutive impact is required" to prevail on a dilution claim is a rather routine one. Although courts facing racial vote dilution claims (in the constitutional or statutory context) must grapple with tough questions and make difficult judgment calls, that does not mean the question itself is irresolvable or nonjusticiable. It is clear that a mere change—upward or downward—in minority ability to elect is insufficient to show unlawful discriminatory effect. This has never been—and could not practicably be—the standard in either the racial or political dilution context. Ascertaining an actionable level of dilution in the racial or political context is more art than science. But just as the Court is not afraid to eschew bright lines in the racial dilution context, the Court should not be afraid to embrace difficult judgments in the political dilution context.<sup>351</sup>

If the totality of circumstances reveals that a political majority has intentionally diminished the ability of a political minority to effectively participate in the political process and elect its representative of choice in that district, then a political vote dilution claim may succeed. Of course, if the state can demonstrate that the dilutive burden upon the individual's right to vote in that district was tailored to a compelling government interest, such as providing for proportional electoral opportunities or competitive districts on a statewide basis, then the state may be able to defeat even a successful showing of localized political vote dilution.<sup>352</sup>

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her specific district, there is nothing preventing the plaintiff from introducing statewide evidence to help advance her claim.

<sup>351</sup> For example, although there is no independent right to proportional representation, a showing of proportionality is a "relevant"—but not "dispositive"—fact "in the totality of circumstances to be analyzed when determining whether members of a minority group have 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994) (quoting the former 42 U.S.C. § 1973). Similarly, so long as states employ single-member districts with first-past-the-post voting methods, there can be no guarantee that a majority of votes in a state will translate into a majority of seats in the legislature. However, despite the absence of any independent right to this particular definition of "majority rule," any analysis showing that a majority of votes will usually fail to result in a majority of seats would be "relevant"—but not "dispositive"—evidence that members of a particular party lack equal political opportunity.

<sup>352</sup> This may not be the case if a third-party voter successfully demonstrates the existence of intentional political vote dilution. The two major parties could not split the entire state to

*C. Re-examining the Vieth Arguments*

Having evaluated the legal and analytical justifications for examining political vote dilution and political sorting separately, it now becomes imperative to gauge whether the two standards hold up to the concerns raised above.

1. Race is an “impermissible” factor to consider in drawing legislative districts, whereas political affiliation is a “permissible” factor to consider.<sup>353</sup>

Based on the analysis above, neither of these premises is true. The Court has recognized that considerations of race do not, taken alone, render legislation unconstitutional, but that when race predominates, it is an impermissible factor unless justified by a compelling interest. Race could be a permissible factor to comply with federal antidiscrimination law, for example, while simultaneously being an impermissible factor to advance a legislator’s “interest” in “racial advantage.” Similarly, the approach above recognizes that considerations of political affiliation do not, taken alone, render legislation unconstitutional, but when political affiliation predominates in the sorting process, it is an impermissible factor unless justified by a sufficiently weighty state interest. Thus, *Gaffney*’s observation that politics in districting is inevitable remains true, but does not sanction sorting voters predominantly on the basis of political preference absent a cognizable interest in “political fairness.”<sup>354</sup> Reading *Gaffney* otherwise conflates legislators’ personal districting considerations with the State’s legitimate districting interests.

2. Race is an immutable characteristic, whereas political affiliation is not.<sup>355</sup>

It is true that political opinion is not an immutable characteristic, but it is also irrelevant. As the *Bandemer* Court observed, the immutability of the characteristic does not bear on the justiciability of the claim.<sup>356</sup> “That the characteristics of the complaining group are not immutable or that the group has not been subject to the same historical stigma may be relevant to the manner in which the case is adjudicated, but these differences do not justify a refusal to entertain such a case.”<sup>357</sup> The mutability of political affiliation may make the plaintiffs’ evidence more complex, but it does not

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reflect “partisan balance” between those two parties if it simultaneously entailed diluting the vote of third-party voters. Third-party voters, however, are likely to founder on the modified *Gingles* prerequisites’ first prong: showing that there are enough third-party voters to form a numerical majority in a compact hypothetical district.

<sup>353</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) (plurality opinion).

<sup>354</sup> *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973).

<sup>355</sup> See *Vieth*, 541 U.S. at 287 (plurality opinion).

<sup>356</sup> See *Davis v. Bandemer*, 478 U.S. 109, 125 (1986) (plurality opinion).

<sup>357</sup> *Id.*

make the case nonjusticiable or mean the case should be subjected to a higher threshold showing.

While “public opinion” on discrete issues may sway on a daily basis and individuals’ opinions do change subtly over time, *political identities* are rarely subject to constant and unpredictable fluctuation. As Justice Stevens observed in *Vieth*: “The plurality asserts that a person’s politics, unlike her race, is not readily ‘discernible.’ But that assertion is belied by the evidence that the architects of political gerrymanders seem to have no difficulty in discerning the voters’ political affiliation.”<sup>358</sup> This task of discerning political affiliation has grown—and will continue to grow—even simpler as increasingly fine-tuned data sets paint a startlingly detailed picture of the individual and his or her likely political affiliation or preference. A single look at some states’ bizarre and detailed maps should dispel any notion that gauging political affiliation is an “impossible” enterprise.

Moreover, the fact that the population’s characteristics, demographics, and identities shift over time is the *sole reason* for redistricting. The Court would not let an OPOV violation go unchecked upon the basis that residence is a “mutable” characteristic, despite the fact that voters are regularly moving between districts and between states, lending an air of unpredictability to the districting exercise. As the *Karcher* Court stated, “the well-known restlessness of the American people means that population counts for particular localities are outdated long before they are completed.”<sup>359</sup>

In short, the objection that a political gerrymandering claim is unmanageable or unwieldy because political preference is “mutable” is a weak one. This is especially so following the Supreme Court’s holding in *Cromartie II*, wherein districting upon the basis of political affiliation was found to predominate over other districting criteria. This holding rests entirely upon the assumption that political gerrymandering is both feasible and readily identifiable.

3. Political gerrymandering claims do not provide manageable and administrable standards.<sup>360</sup>

This objection proceeds more by *ipse dixit* than argument. As the *Bandemer* Court indicated, there is little reason to believe that political vote dilution standards “are less manageable than the standards that have been developed for racial [vote dilution] claims.”<sup>361</sup> This is especially true now that clearer standards and precedents have developed within the racial vote dilution case law based on the *Gingles* prerequisites. The fact that these same standards may be harder to satisfy in the political

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<sup>358</sup> *Vieth*, 541 U.S. at 338 n.32 (Stevens, J., dissenting) (citation omitted).

<sup>359</sup> *Karcher v. Daggett*, 462 U.S. 725, 732 (1983).

<sup>360</sup> *Vieth*, 541 U.S. at 281 (plurality opinion) (noting that there are no “judicially discernable and manageable standards”).

<sup>361</sup> *Bandemer*, 478 U.S. at 125 (plurality opinion).

context does not mean they are any less manageable. Plaintiffs very well may fail to prove an actionable level of political dilution as consistently as they succeed in proving political sorting. A string of failures on the “judgment score card”—like a string of successes—says less about whether the standard is “manageable” and more about how difficult the standard is to meet and whether the legislature has or has not engaged in the prohibited behavior.

The standards are also equally *justifiable* in the political context. In *Vieth*, Justice Scalia juxtaposed a “constitutional command” to “refrain from racial discrimination” with an “inference” not to apply “too much partisanship.”<sup>362</sup> But the primary question under the Equal Protection Clause is not whether partisan advantage went too far, just as the primary question under the Equal Protection Clause is not whether racial advantage went too far. The initial inquiry is one of type, not degree.

In a discriminatory sorting claim—of the racial or political variety—the only question of degree is whether the discriminatory criterion “predominated.” If so, then this is tantamount to a facial classification and the state bears the burden of showing that its racial or political districting was sufficiently tailored to attain a constitutional goal. Sheer racial or political advantage, taken alone, is not a legitimate state interest in *any* degree.

In a discriminatory dilution claim—of the racial or political variety—the intent to benefit one race or party is, taken alone, not a legitimate interest. If this intent can be proven, then the only question of degree is whether the discriminatory effect is sufficient to be actionable. If the state intentionally packed or cracked an identifiable group of voters that could have constituted a numerical majority in a compact hypothetical district in order to dilute their equal opportunity to elect a candidate of their choice and the record reflects that this effort, in fact, succeeded in denying equal electoral opportunity, then a quite routine and traditional Equal Protection Clause claim grounded in discriminatory intent and effect will have been established. Both of these approaches reflect black-letter Equal Protection Clause jurisprudence. Neither involves fuzzy inferences.

4. Political gerrymandering claims require courts to determine what political systems and theories are “fair.”<sup>363</sup>

The approaches outlined above leave legislatures in control of determining proper district boundaries, crafting districts that embrace particular political cultures, and deciding what form of democratic vision to advance, whether it be more stable and partisan or more competitive and centrist. What the claims above *do* require is that the state at least put forth a colorable argument that its use of discriminatory districting enhances democratic values and fair and effective representation. The claims do not impose a particular version of “fairness” upon the state; instead, they

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<sup>362</sup> *Vieth*, 541 U.S. at 286 (plurality opinion).

<sup>363</sup> *Id.* at 290–92.

prevent unequal treatment under the law on the basis of political affiliation. When the State aims to distort the impact of individual votes or classify voters on the basis of their political beliefs, it is hardly an imposition to ask the state to explain its own view of “fairness” to the Court. If the state can make a reasonable argument why its actions *advance* some theory of electoral fairness or effective representation, then its articulation of fairness should prevail. At present, however, many states do not even pretend to advance such a theory or vision.

5. Consideration of political factors is “inevitable” in the legislative districting process.<sup>364</sup>

The approach outlined herein does not pretend that legislators will cease considering the consequences of various districting plans, whether on racial or political groups or on incumbents’ opportunities for reelection. As with any legislation, it would be a fool’s errand to attempt to remove the politics from politics. However, the *Gaffney* Court clearly expressed its willingness to defend against unconstitutional incursions upon the Fourteenth Amendment.<sup>365</sup> All laws are inevitably “political,” but courts review their constitutionality all the same. When racial or political classifications predominate in a redistricting plan or when plaintiffs make a threshold showing of political vote dilution under a modified *Gingles* analysis, the state passes the point of “politics as usual” and is no longer entitled to judicial deference.

6. Political gerrymandering claims are grounded in a presumed right to proportional representation, which the Constitution does not provide.<sup>366</sup>

One might have presumed this persistent red herring was officially cast back out to sea in 1973 with the Court’s decision in *Regester*.<sup>367</sup> There is no constitutional right to political proportional representation just as there is no right to racial proportional representation.<sup>368</sup> There is, however, a constitutional right to the fair and effective exercise of the electoral enterprise. So long as the judiciary ensures that the legislature does not intentionally diminish voters’ electoral opportunities or facially classify voters for illegitimate purposes, then the judiciary has no further role to play. The fact that one party prevails over another in any given election is the very essence of a democracy, and the fact that the outcome is not proportional to the votes cast is an inherent function

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<sup>364</sup> *Id.* at 285.

<sup>365</sup> *See Gaffney v. Cummings*, 412 U.S. 735, 754 (1973).

<sup>366</sup> *Vieth*, 541 U.S. at 288 (plurality opinion).

<sup>367</sup> *White v. Regester*, 412 U.S. 755 (1973).

<sup>368</sup> *See id.* at 765–66 (noting that, to sustain a claim of vote dilution, “it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential”; rather, the plaintiffs must show that “the political processes . . . were not equally open to participation by the group in question”).

of our country's tradition of geographic representation and first-past-the-post elections. So long as the legislature continues to employ single-member districts and a first-past-the-post counting system, some degree of disproportionality is likely to result. If neutral districting criteria predominate and the state has not intentionally diminished an identifiable group's equal political *opportunities*, then the Equal Protection Clause demands no more. As such, neither a political vote dilution claim nor a political sorting claim is "grounded in a presumed right to proportional representation."<sup>369</sup>

In short, none of the arguments raised in *Vieth* offer a sound reason to reject a dual-claim approach to political gerrymandering. The claims of dilution and sorting provide familiar and readily administrable standards based on existing Supreme Court precedent and grounded in well-established Equal Protection Clause jurisprudence.

#### *D. Legislative Practicum*

Our extended detour through the Court's districting case law may prove pedagogically useful, but legislators and their advisors may be left wondering in the final analysis what they can and cannot do under the theory above. Although district architects might find it prudent to engage outside counsel in order to navigate the finer nuances of their drafting decisions, there would be at least two basic avenues open to legislators who wish to reduce litigation risk in districting.

The "process-first" approach would be for legislators to craft plans that predominantly rely upon neutral districting criteria in determining where district boundaries fall and then to verify that the enacted plan has limited dilutive impact. Neutral districting criteria are those that are "geography-based" (rather than "identity-based") and advance basic democratic interests, such as accountability, responsiveness, ease of administration, etc. Examples of these neutral criteria include compactness, contiguity, and respect for political subdivisions and geographic boundaries. If an enacted plan has districts that comply with equal population goals, substantially reflect neutral districting principles, and avoid splitting areas wherein racial minorities would possess an ability to elect a representative in a hypothetical, compact district, then the plan is likely to satisfy the OPOV principle, meet the requirements of the VRA, and avoid triggering predominance of identity-based criteria, such as politics or race.

To ensure that districts substantially reflect neutral districting principles while still complying with OPOV and VRA requirements, districters might well aim to "backstop" neutral principles with other neutral principles. For example, if it is impossible to align district boundaries with political subdivisions and achieve equal population goals, then a legislator might add relatively compact territory along precinct boundaries from an adjacent subdivision or might shift the boundary to align with a natural geographic feature. Of course, for state legislative districts, population equality is also a feature that can be more freely shifted in order to advance a neutral and consistent state policy, such as respect for political subdivisions. Similarly,

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<sup>369</sup> *Vieth*, 541 U.S. at 287 (plurality opinion).

legislators are permitted to slightly deviate from equal population goals or neutral districting principles in order to avoid pairing two incumbent members in the same district, assuming this policy is pursued on a consistent—rather than a discriminatory or partisan—basis.

Among the various predominantly neutral proposals generated by the “process-first” approach above, legislators will be unavoidably aware of which maps are advantageous to the majority party and which maps are not. At this stage, legislators in the majority are likely to enact a plan with promising electoral prospects for their party. It is technically true that a map that predominantly reflects neutral districting principles on its face still might be so dilutive of minority voting power in effect that it creates an actionable claim for political vote dilution under the Fourteenth Amendment. However, even assuming that the intent to enact an advantageous plan can be proven, the dilutive effect would need to be especially acute for a federal court to find, under the totality of circumstances, that voters in the minority party did not have an equal political opportunity to elect their candidate of choice or influence the political process. Regardless, legislators should be cognizant of this risk in determining which “substantially neutral” plan to enact.

Alternatively, legislators could employ a “purpose-first” approach to districting. Under this approach, legislators establish a political goal up front and then tailor their districting decisions to advance that model of representation, whether by intentionally creating highly competitive districts, safe seats in rough proportion to statewide party voting strength, or any other reasonably “fair and effective” form of representation. These districts may flagrantly disregard neutral principles in order to advance the political goal sought, but—as in *Gaffney*—the goal must be some form of political fairness, not raw political advantage. By predominantly districting on the basis of political preference or affiliation, the enacted map will constitute a form of facial political classification, but so long as the map is sufficiently tailored to an adequate state interest, it will likely survive.

Of course, districts formed predominantly on the basis of political criteria must also comply with the OPOV principle and the VRA. As to the latter, legislators must still ensure that they do not split areas wherein racial minorities would possess an ability to elect a representative in a hypothetical, compact district. Assuming legislators avoid racial vote dilution and retrogression, however, it is highly unlikely that they will need to be concerned about racial sorting under a “purpose-first” approach. This is because political affiliation—not race—will almost certainly be considered the predominate criterion employed in constructing the district in question.

#### CONCLUSION

There is no doubt that the Supreme Court’s redistricting precedents are both confused and confusing. But by identifying and jettisoning the three false assumptions woven throughout existing case law, the full weight and authority of those precedents becomes clear.

First, the Court must distinguish between the amoral considerations of individual legislators and the interests of the state itself. Legislators will always be conscious of the racial, political, and incumbency ramifications of their districting decisions, but this does not immunize the state from constitutional scrutiny if it attempts to substitute personal interests for public interests. The *State* cannot claim an interest in who wins a democratic election.

Second, the Court must distinguish between the permissible and impermissible uses of racial, political, and incumbency criteria. A state may constitutionally use these criteria to advance interests in compliance with federal antidiscrimination law, political fairness, or incumbency pairing prevention. A state may *not* use these criteria simply to “advantage” one race over another, one party over another, or an incumbent over a challenger.

Finally, the Court must recognize that—like racial gerrymandering—there are two types of political gerrymandering offense: political vote dilution and political sorting. Racial and political gerrymandering claims share the same precedential lineage and are prosecuted using the same methods of proof. These standards rest upon decades of jurisprudential authority and are grounded in well-trod judicial constructions.

The consequence of this recognition would be the creation of a coherent and comprehensive approach to political gerrymandering and a rehabilitation of the Court’s historically unified treatment of racial and political gerrymandering claims. Because political and racial gerrymandering claims share a common jurisprudential root, the Court’s divergent treatment of racial and political claims, starting with *Bandemer*,<sup>370</sup> should be viewed as an historical aberration. The failure of the Court to adjudicate such analytically identical claims over the course of the past thirty years has had a tragically predictable consequence: the nationwide deprivation of citizens’ equal protection under the law due to discriminatory state treatment on the basis of political opinion, preference, and affiliation. This reflects a loophole at odds with history and reason, and it should finally be closed.

Justice James Wilson—one of our nation’s founding fathers, a leading luminary at the Constitutional Convention, and one of the first Justices nominated by President George Washington to the Supreme Court—once compared the British House of Commons to the United States House of Representatives, writing:

With us, *no preference is given to any party*, any interest, any situation, any profession, or any description over another. With us, those votes, equally, freely, and universally diffused, will have their frequent and powerful operation and influence. *With us, therefore, it may be expected, that the voice of the representatives will be the faithful echo of the voice of the people.*<sup>371</sup>

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<sup>370</sup> See *Davis v. Bandemer*, 478 U.S. 109 (1986) (plurality opinion).

<sup>371</sup> I BIRD WILSON, *THE WORKS OF THE HONOURABLE JAMES WILSON*, L.L.D. 433 (The Lawbook Exchange, Ltd. 2005) (1804) (emphasis added).

As one of the primary drafters of the Constitution and one of the first individuals entrusted with its interpretation, Justice Wilson's views might be entitled to more authority than most.

Of course, the approach advanced above has the potential to result in widespread litigation. This litigation could cast doubt upon the constitutional legitimacy of legislative districts throughout the nation and have a profound effect upon the composition of state legislatures and the United States House of Representatives. The interpretation above is not proposed lightly or idly. In *Reynolds v. Sims*, the Court observed, "the problem of state legislative malapportionment is one that is perceived to exist in a large number of the States."<sup>372</sup> Yet, the Court held that the widespread and long-practiced nature of the violation did not thereby sanction its continuation. Rather, the Court's answer was this: "[A] denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."<sup>373</sup>

It is this author's belief that political and racial sorting and political and racial vote dilution are equally valid constitutional claims, and that legislatures engaging in either practice have transgressed those rights protected under the Fourteenth Amendment. Some would undoubtedly consider such a suggestion adventuresome. The Supreme Court has offered precious little guidance in this area, save an occasional reminder that political gerrymandering may—in some circumstances—be unconstitutional. But as Justice Stevens stated in *Cox v. Larios*, there will come a time when the Court's ambivalence in this field "will be replaced by stern condemnation of partisan gerrymandering that does not even pretend to be justified by neutral principles."<sup>374</sup> That time is now. And, eventually, the only thing astonishing about such claims may be that they did not prevail sooner.

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<sup>372</sup> *Reynolds v. Sims*, 377 U.S. 533, 556 (1964).

<sup>373</sup> *Id.* at 566.

<sup>374</sup> *Cox v. Larios*, 542 U.S. 947, 951 (2004) (Stevens, J., concurring).

