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Not Gill-ty: Challenging and Providing a Workable Alternative to the Supreme Court's Gerrymandering Standing Analysis in Gill v. Whitford

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NOT *GILL*-TY: CHALLENGING AND PROVIDING A WORKABLE ALTERNATIVE TO THE SUPREME COURT'S GERRYMANDERING STANDING ANALYSIS IN *GILL V. WHITFORD*

Colin Neal*

INTRODUCTION

In *Gill v. Whitford*, the Supreme Court denied standing to a group of Wisconsin voters challenging the partisan gerrymander entrenching Republican politicians by "cracking" and "packing" Democratic voters to increase safe Republican seats.[1] In an opinion authored by Chief Justice Roberts, the Court unanimously determined that the voters had not sufficiently shown their votes were diluted by being "packed" or "cracked" in their specific districts.[2]

In a concurrence joined by three other members of the Court, Justice Kagan laid out her theory of a First Amendment freedom of association claim that she believes may provide a separate, albeit more attenuated, standing claim.[3] Justice Kagan wrote that "an active member of the Democratic Party in Wisconsin who resides in a district that a partisan gerrymander has left untouched" may not have his vote directly diluted by the gerrymander, "[b]ut if the gerrymander ravaged the party he works to support, then he indeed suffers harm, as do all other involved members of that party."[4] Per Justice Kagan, this is an associational harm sufficient to create standing to challenge a statewide districting plan, regardless of an individual voter's "packed" or "cracked" status.[5] Analyzing both the *Gill* majority opinion and Justice Kagan's concurrence, this Note argues that the distinction of harms between vote

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[1] 138 S. Ct. 1916, 1920 (2018). The term "pack" refers to "concentrating one party's backers in a few districts that they win by overwhelming margins," and the term "crack" refers to "dividing a party's supporters among multiples districts so that they fall short of a majority in each one." Whitford v. Gill, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016), *vacated and remanded by* 138 S. Ct. 1916.

[2] 138 S. Ct. at 1920–21.

[3] *See id.* at 1934 (Kagan, J., concurring).

[4] *Id.* at 1938.

[5] *See id.* (explaining that the First Amendment associational harms to a plaintiff are distinct from his individual vote dilution injury).

dilution and freedom of association is a flawed formalistic division employed by the Court. The thesis of this Note is that the right to vote, in regards to partisan gerrymandering, is necessarily a right of both equal protection and association that emanates from the individual—not the organization—and extends beyond a single district. Supreme Court standing doctrine in regards to partisan gerrymandering should reflect as such.

The Supreme Court has erroneously treated partisan gerrymandering harm like the harm from racial vote dilution under the Voting Rights Act.[6] This has—perhaps with good reason—given the Court fear of entering the "political thicket"[7] of partisan gerrymandering with the same rigor with which it stepped into state legislatures to right the wrongs of racial vote dilution.[8] This Note provides an alternative theory of harm to voters who live in partisan gerrymandered states. The *Anderson-Burdick* test, which courts have employed in a variety of voting rights cases,[9] is the proper means of analysis for determining statewide standing for partisan gerrymandering cases. This test considers an interwoven injury to a plaintiff's First and Fourteenth Amendment rights, adequately considering the complex ways in which partisan gerrymanders violate a voter's constitutional rights.[10]

Rather than dodge the issue of partisan gerrymandering by requiring unnecessarily high hurdles for district-by-district injury—or, by Justice Kagan's theory, harm for partisan activists—the Court should acknowledge that gerrymandering affects each "individual's right to vote and his right to associate with others for political ends,"[11] and should redefine its standing analysis of such claims to reflect this standard.

In light of the Supreme Court's decision in *Rucho v. Common Cause*, handed down in June of 2019, partisan gerrymandering claims are no longer a justiciable constitutional question in the federal courts.[12] In reaching this decision, the Court has passed on the opportunity to weigh in on an issue that directly affects the weight of an individual's vote—an issue that strikes at the heart of American democracy. This Note does not grapple with the political question doctrine; however, *Rucho* does not weaken the thrust of this Note for three principal reasons. First, the recommendations

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[6] *See, e.g.*, Davis v. Bandemer, 478 U.S. 109, 109 (1986) (holding that claims of vote dilution as a result of partisan gerrymandering are justiciable). *But see* Vieth v. Jubelirer, 541 U.S. 267, 281 (2004) (plurality opinion) (writing for the opinion of the Court, Justice Scalia determined that there was no judicially manageable standard to determine when partisans have had their votes diluted).

[7] *See* Colegrove v. Green, 328 U.S. 549, 556 (1946).

[8] *See generally* Avi Frey, Note, *Manipulated Doctrines, Improper Distinctions, and the Law of Racial Vote Dilution*, 64 N.Y.U. ANN. SURV. AM. L. 343 (2008) (discussing the variety of difficult questions with which the Court has grappled in the field of racial vote dilution and racial gerrymandering).

[9] *See* Daniel P. Tokaji, *Voting Is Association*, 43 FLA. ST. U. L. REV. 763, 777–80 (2016).

[10] *Id.* at 763.

[11] Anderson v. Celebrezze, 460 U.S. 780, 788 (1983).

[12] 139 S. Ct. 2484, 2506–07 (2019).

of this Note stand insofar as state courts rely upon rules of standing from the Supreme Court and federal law, generally.[13] Furthermore, the states have traditionally been more lenient in granting standing, especially in regards to core questions of public interest.[14] Second, should the Court revisit the question of the constitutional justiciability of partisan gerrymandering,[15] the analysis provided in this Note may offer a pathway towards a more coherent standing jurisprudence for statewide partisan gerrymandering claims. Finally, the injury analysis and test proposed in Part IV[16] may provide some guidance to Congress should it seek to enact a statutory ban on partisan gerrymandering in the states.[17] To survive judicial scrutiny, a congressionally enacted cause of action for statewide partisan gerrymandering claims will likely need to articulate some form of injury, such as that proposed in this Note. As such, this Note focuses purely on the *Gill v. Whitford* holding and the injuries identified in partisan gerrymandering, as these injuries exist whether a gerrymandering challenge is brought in state or federal court. In sum, rather than grappling with the new law elucidated in *Rucho*, this Note concentrates solely on standing for partisan gerrymandering claims.

In Part I, this Note provides a survey of standing doctrine and the way the Court has defined injuries in voting rights claims.[18] Part II addresses the *Gill v. Whitford* lawsuit's history, up to and including the two opinions issued by the Supreme Court remanding the case.[19] Part III challenges the theories of partisan gerrymandering standing proposed by both Chief Justice Roberts and Justice Kagan.[20] Part IV proposes a new theory of partisan gerrymandering rooted in the *Anderson-Burdick* First and Fourteenth Amendment harm analysis.[21] Lastly, Part V considers two challenges to the use of the *Anderson-Burdick* test.[22]

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[13] *See generally* Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. EQUINE, AGRIC., & NAT. RESOURCES L. 349 (2015–2016).

[14] *See* Peter N. Salib & David K. Suska, *The Federal-State Standing Gap: How to Enforce Federal Law in Federal Court Without Article III Standing*, 26 WM. & MARY BILL RTS. J. 1155, 1169–73 (2018) (explaining that there are typically three tiers of state standing scrutiny: no cognizable requirements, sufficient adversity, and public interest requirements).

[15] Given the Court's fairly rapid change in position on the justiciability of partisan gerrymandering from *Bandemer* to *Vieth*, and most recently in *Rucho*, a further reconsideration is not outlandish. *See* discussion *infra* Section I.B.

[16] *See* discussion *infra* Part IV.

[17] For a comprehensive catalog of bills considered and passed by the 116th Congress considering partisan gerrymandering, redistricting commissions, and other election law reforms, see *Congressional Redistricting Bills—116th Congress*, BRENNAN CTR. FOR JUST. (July 23, 2019), https://www.brennancenter.org/our-work/policy-solutions/congressional-redistricting-bills-116th-congress [https://perma.cc/7S9R-XYCR].

[18] *See* discussion *infra* Part I.

[19] *See* discussion *infra* Part II.

[20] *See* discussion *infra* Part III.

[21] *See* discussion *infra* Part IV.

[22] *See* discussion *infra* Part V.

I. STANDING DOCTRINE AND ITS APPLICATION TO PARTISAN GERRYMANDERING

A. Standing Doctrine Generally

The Supreme Court modernized the standing doctrine in the eras of the Burger and early Rehnquist Courts as a means to manage the federal docket in regards to frivolous lawsuits.[23] In the watershed 1992 case *Lujan v. Defenders of Wildlife*, the Court, speaking through Justice Scalia, plainly explained the centrality of standing doctrine to Article III adjudication: standing is necessary for a dispute to be a "case" or "controversy" justiciable by the federal courts.[24] The Court established three necessary elements of standing: (1) injury in fact, which is "concrete and particularized" and "actual or imminent"; (2) causation that is "fairly traceable" between alleged conduct and injury; and (3) redressability, the notion that the courts can "likely" redress this injury via some remedy at law or equity.[25] In addition, "[t]he party invoking federal jurisdiction bears the burden of establishing these elements."[26]

In subsequent cases, the Court established the bounds of the injury element. The Court clarified that a plaintiff's alleged injury cannot be abstract, generalized, or based on a special interest in a particular issue,[27] nor can the injury be a general interest in enforcing the law or the Constitution,[28] but the harm must actually affect the plaintiff bringing the suit.[29] The crux of the injury-in-fact requirement emanates from the question of whether the plaintiff has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[30]

B. Injury and Vote Dilution

The standing framework for voting rights claims stems from the seminal case of *Baker v. Carr*.[31] In *Baker*, the plaintiffs brought an Equal Protection Clause challenge

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[23] Scott Michelman, *Who Can Sue over Government Surveillance?*, 57 UCLA L. REV. 71, 110 (2009).

[24] 504 U.S. 555, 559–60 (1992).

[25] *Id.* at 560–61.

[26] *Id.* at 561.

[27] *See* Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (holding that an environmental group does not have general standing to sue for environmental issues just because its core goal is environmental advocacy).

[28] *See* United States v. Richardson, 418 U.S. 166, 175 (1974) (holding that a plaintiff lacks standing to compel the government to comply with a constitutional mandate in regards to the taxing and spending power).

[29] *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 401–02 (2013). Additionally, the Court has averred from manufactured injury in order to satisfy this standing requirement. *See id.* at 402.

[30] Baker v. Carr, 369 U.S. 186, 204 (1962).

[31] *See id.* at 187–88.

to a Tennessee law that apportioned the state legislature's seats by county, which greatly diluted the representation of urban voters.[32] The Court plainly found that the Tennessee urban voters had standing: "[V]oters who allege facts showing disadvantage to themselves as individuals have standing to sue."[33] The *Baker* plaintiffs demonstrated standing because they were classified in a way that disadvantaged them in the electoral system, as compared to Tennessee voters in more rural areas.[34] Just two years later in *Reynolds v. Sims*, the Court reiterated and clarified the doctrine of "one person, one vote" when it held that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."[35] Voting is an individual right, held the *Reynolds* Court, and a "legislative apportionment scheme [that] constitutes an invidious discrimination [in violation of] the Equal Protection Clause" is one that "impair[s] [rights] individual and personal in nature."[36] In these two cases, the Court established the centrality of vote dilution in asserting injury to voting rights claims under the Equal Protection Clause. Following *Baker* and *Reynolds*, voting rights cases were often based on a concern that "[o]verweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there."[37] The vote dilution concern not only reached legislative apportionment questions generally, but became the backbone of many unconstitutional racial districting claims under the Equal Protection Clause and the Voting Rights Act.[38]

In *Davis v. Bandemer*, the first major case the Court faced regarding partisan gerrymandering vote dilution, a majority of the Court determined that partisan gerrymandering claims are justiciable under the Equal Protection Clause,[39] but it provided a splintered answer on what degree and form of injury a plaintiff must show in order to bring such a claim.[40] A plurality of the justices rejected the district court's finding that "*any* interference with an opportunity to elect a representative of one's choice would be sufficient to allege or make out an equal protection violation,"[41] but rather,

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[32] *Id.*

[33] *Id.* at 206.

[34] *Id.* at 207–08.

[35] 377 U.S. 533, 568 (1964).

[36] *Id.* at 561.

[37] *Id.* at 563.

[38] *See generally* Bartlett v. Strickland, 556 U.S. 1 (2009); League of United Latin Am. Citizens (LULAC) v. Perry, 548 U.S. 399 (2006); Shaw v. Reno, 509 U.S. 630, 658–75 (1993) (White, J., dissenting); Thornburg v. Gingles, 478 U.S. 30 (1986); City of Mobile v. Bolden, 446 U.S. 55 (1980); United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).

[39] 478 U.S. 109, 125 (1986) (plurality opinion); *id.* at 143.

[40] *See id.* at 129–31 (Burger, C.J., concurring); *id.* at 185 (Powell, J., concurring in part and dissenting in part); *see also* Allison J. Riggs & Anita S. Earls, "*The Only Clear Limitation on Improper Districting Practices": Using the One-Person, One-Vote Principle to Combat Partisan Gerrymandering*, 12 DUKE J. CONST. L. & PUB. POL'Y 23, 29 (2017) (describing how the splintered *Bandemer* opinion made for a morass of problems for plaintiffs).

[41] *Bandemer*, 478 U.S. at 133.

the plurality agreed with Justice White 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."[42] Per the plurality, to show this discrimination by vote dilution, plaintiffs were required to leap the high hurdle of demonstrating that "a particular group has been unconstitutionally denied its chance to effectively influence the political process."[43]

Because this standard proved unworkable in the lower federal courts,[44] eighteen years later in *Vieth v. Jubelirer*, the Court revisited whether partisan gerrymandering claims were at all justiciable.[45] The *Vieth* plurality found the case nonjusticiable,[46] but a separate concurrence by Justice Kennedy preserved the possibility of a future standard coming before the Court.[47] Justice Kennedy suggested that a standard may arise that could rest upon "a conclusion that the [law's use of political] classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective."[48] Justice Kennedy's concurrence contemplated a First Amendment cause of action for future partisan gerrymandering plaintiffs, musing that partisan line drawing "penaliz[es] citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views."[49] Though this standard has yet to be adopted by the Court, it has not gone unnoticed by legal scholars.[50]

C. Other Voting Rights Injuries Recognized by the Court

The cause of action perhaps most similar to the associational rights at question in partisan gerrymandering conflicts are those rights as observed in the *Anderson-Burdick*

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[42] *Id.* at 127.

[43] *Id.* at 132–33.

[44] Easha Anand, Comment, *Finding a Path Through the Political Thicket: In Defense of Partisan Gerrymandering's Justiciability*, 102 CALIF. L. REV. 917, 933–35 (2014) (cataloging the ways in which district courts struggled to apply *Bandemer* to any alleged gerrymander).

[45] *See* 541 U.S. 267, 271–72 (2004) (plurality opinion); Riggs & Earls, *supra* note 40, at 29.

[46] *Vieth*, 541 U.S. at 305–06.

[47] *Id.* at 306 (Kennedy, J., concurring).

[48] *Id.* at 307.

[49] *Id.* at 314.

[50] *See* G. Michael Parsons, *The Institutional Case for Partisan Gerrymandering Claims*, 2017 CARDOZO L. REV. DE NOVO 155, 157 (suggesting that a future coherent doctrine for partisan gerrymandering claims may arise from the Fourteenth or First Amendments); *see also* David Schultz, *The Party's Over: Partisan Gerrymandering and the First Amendment*, 36 CAP. U. L. REV. 1, 2 (2007) (arguing that the First Amendment is the proper cause of action in partisan gerrymandering claims because there is no state interest in restricting speech in such a way); Timothy D. Caum II, Note, *Partisan Gerrymandering Challenges in Light of* Vieth v. Jubelirer*: A First Amendment Alternative*, 15 TEMP. POL. & C.R. L. REV. 287, 289 (2005) (discussing the simpler avenue of litigation via the First Amendment).

line of cases.[51] These cases focus primarily on the statewide claims for associational rights of parties and their access to ballots, but the test utilized in these disputes has also been applied to determine the constitutionality of voter identification laws.[52] The *Anderson-Burdick* analysis rejects subjecting each state election regulation to strict scrutiny: the requirement that the law advance a compelling state interest and be narrowly tailored to further that interest.[53] Rather, the test recognizes that states have a constitutional delegation of power over elections and that any regulation in furtherance of that electoral power will necessarily place some burden on the right to vote or the right to associate.[54] The *Anderson-Burdick* test balances the magnitude of injury upon voters' First and Fourteenth Amendment rights against state interests in regulating the election process.[55] To measure the degree of injury—the first prong of the standing analysis[56]—the *Burdick* Court acknowledged two classes of injury: "severe" and "reasonable."[57] Severe burdens are analyzed like a typical strict scrutiny case.[58] The Court distinguishes severe burdens from those "impos[ing] only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters" whereby state interests are generally subject only to deferential rational basis scrutiny.[59]

The *Anderson-Burdick* cases focus on an injury distinct from that in the Supreme Court's partisan gerrymandering jurisprudence because they blend both First Amendment and Fourteenth Amendment burdens.[60] For instance, in discussing *Williams v. Rhodes*, an earlier case analyzing the concern of burdening voters based on party affiliation, the *Anderson-Burdick* Court reproduced a quote which illustrated this blended understanding of injury:

> In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to

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[51] Tokaji, *supra* note 9, at 764.

[52] *See id.* at 763.

[53] *See* Burdick v. Takushi, 504 U.S. 428, 432–33 (1992).

[54] *Id.*

[55] *Id.* at 434.

[56] *See* discussion *supra* Section I.A.

[57] *Burdick*, 504 U.S. at 434.

[58] *Id.*

[59] *Id.* (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)). The Court has applied this deferential standard to voter identification cases analyzed under the Constitution, finding that the "burden of acquiring, possessing, and showing a free photo identification is simply not severe, because it does not even represent a significant increase over the usual burdens of voting." Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 209 (2008) (Scalia, J., concurring) (internal quotations omitted).

[60] Tokaji, *supra* note 9, at 765–66.

> cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms.[61]

The Court goes on to explain how the restriction of ballot access for political candidates diminishes the efficacy of some voters to voice their political opinions in meaningful ways: "As we have repeatedly recognized, voters can assert their preferences only through candidates or parties or both. 'It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues.'"[62]

The Court has used this standard to strike down laws it finds to be burdens both on candidate and voters, whose interests are often too intertwined to separate their injuries.[63] The Court has never gone so far as to use the *Anderson-Burdick* standard to define voting as speech, but it has clearly expressed a concern for the associative rights of voters.[64]

II. *GILL V. WHITFORD*

Pursuant to its decennial census in 2010,[65] the Wisconsin state legislature, controlled by Republicans, sought to redraw the districts for both the Wisconsin House of Representatives and Wisconsin Senate via Act 43.[66] The Wisconsin Constitution binds the state redistricting plan "by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable."[67] Federal law also dictates that Wisconsin's state legislature must respect the Supreme Court mandate of "one person, one vote," and any districting plan must comport with section 2 of the Voting Rights Act, which requires the preservation of minority voting power.[68]

The legislature delegated the work of redistricting to staff members of the House Speaker and Senate Majority leader, as well as the law firm Michael Best & Freidrich.[69] A significant focus of this redistricting team was the use of "customized demographic data" to determine the partisan makeup of the state's voters.[70] The eventual map the team submitted to the legislature was designed via the partisan demographic

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[61] *Anderson*, 460 U.S. at 787 (quoting Williams v. Rhodes, 393 U.S. 23, 30–31 (1968)).

[62] *Id.* (quoting Lubin v. Panish, 415 U.S. 709, 716 (1974)).

[63] *See id.* at 786.

[64] Tokaji, *supra* note 9, at 771–75 (discussing the history of the Supreme Court "flirt[ing]" with holding the right to vote to be a First Amendment right through an exploration of cases as disparate as *Bush v. Gore*, 531 U.S. 98 (2000), and *NAACP v. Alabama*, 357 U.S. 449 (1958)).

[65] WIS. CONST. art. IV, § 3.

[66] *See* Whitford v. Gill, 218 F. Supp. 3d 837, 853 (W.D. Wis. 2016), *vacated and remanded by* 138 S. Ct. 1916 (2018).

[67] WIS. CONST. art. IV, § 4.

[68] *Whitford*, 218 F. Supp. 3d at 844–45.

[69] *Id.* at 846–47.

[70] *See id.* at 848.

data and was drawn so that "the Republicans could expect to win 59 Assembly seats, with 38 safe Republican seats, 14 leaning Republican, 10 swing, 4 leaning Democratic, and 33 safe Democratic seats."[71] Republican Governor Scott Walker, who presided over the first Republican-unified government in Wisconsin in forty years,[72] signed the Act into law in 2011.[73]

The map has lived up to its partisan design. In 2012, the first full election cycle in Act 43's lifespan, Republicans won sixty seats in the House and eighteen in the Senate, compared to Democrats' thirty-nine and fifteen seats, respectively.[74] The map continued to be effective in 2014, where Republicans increased their hold in the lower chamber to sixty-three seats to Democrats' thirty-four.[75] In the State Senate, Republicans increased their hold on the body to nineteen seats.[76] The 2016 election saw Republicans continue to increase their monopoly on the legislature with a sixty-four to thirty-five seat advantage in the Assembly and a twenty to thirteen seat advantage in the Senate.[77] In the 2018 election, Republicans maintained a sixty-three to thirty-six seat majority in the Assembly and a nineteen to fourteen majority in the Senate.[78]

A. The Plaintiffs' Claim of Partisan Gerrymandering

The plaintiffs in *Whitford v. Gill* were thirteen Democratic voters in the state of Wisconsin alleging that the practice of the state legislature in Act 43 was to "pack" ("concentrating one party's backers in a few districts that they win by overwhelming margins") and "crack" ("dividing a party's supporters among multiple districts so that they fall short of a majority in each one") Democratic votes so as "to dilute [their

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[71] *Id.* at 851.

[72] *Id.* at 846.

[73] *Id.* at 853.

[74] *See Wisconsin State Assembly Elections, 2012*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_State_Assembly_elections,_2012 [https://perma.cc/A3V4-Z9QS] (last visited Feb. 24, 2020); *Wisconsin State Senate Elections, 2012*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_State_Senate_elections,_2012 [https://perma.cc/3T6K-2XWL] (last visited Feb. 24, 2020).

[75] *See Wisconsin State Assembly Elections, 2014*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_State_Assembly_elections,_2014 [https://perma.cc/V9MJ-Z3MP] (last visited Feb. 24, 2020).

[76] *Wisconsin State Senate Elections, 2014*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_State_Senate_elections,_2014 [https://perma.cc/9ZMH-HDAU] (last visited Feb. 24, 2020).

[77] *See Wisconsin State Assembly Elections, 2016*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_State_Assembly_elections,_2016 [https://perma.cc/463H-SSAC] (last visited Feb. 24, 2020); *Wisconsin State Senate Elections, 2016*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_State_Senate_elections,_2016 [https://perma.cc/92R5-25MU] (last visited Feb. 24, 2020).

[78] *Wisconsin State Assembly Elections, 2018*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_State_Assembly_elections,_2018 [https://perma.cc/C226-9U4S] (last visited Feb. 24, 2020); *Wisconsin State Senate Elections, 2018*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_State_Senate_elections,_2018 [https://perma.cc/GFW5-XN7F] (last visited Feb. 24, 2020).

power] statewide."[79] The plaintiffs put forth the novel concept of the "efficiency gap," a means of measuring "the discriminatory effect of political gerrymanders."[80] "The efficiency gap is the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast."[81] This test excited academics and was accepted by the three-judge district court panel hearing the case, as it provided a potential solution to the workable standard problem plaguing the courts since *Bandemer*.[82]

The district court found that the Whitford plaintiffs had standing to challenge Act 43.[83] Democratic voters suffered an Equal Protection Clause injury, said the district court, because the entrenchment effect of Act 43 reduced the efficacy of Democratic voters for the lifespan of the map.[84] The district court relied on the difficulty of legislating in the Wisconsin state government without a majority coalition in finding an Equal Protection Clause injury.[85] Summing up the plaintiffs' harm, the district court wrote that "erecting a barrier that prevents the plaintiffs' party of choice from commanding a legislative majority diminishes the value of the plaintiffs' votes in a very significant way."[86] That injury is analogous to the unfair system of representation in *Baker v. Carr*, reasoned the court.[87] Next, the district court found an obvious causal connection between Act 43 and the effect of Republican entrenchment to the dismay of Democratic voters.[88] Lastly, a favorable decision by the court would certainly result in a map giving Democrats the opportunity to elect a governing coalition; the court pointed to the other maps deemed less aggressively Republican that the districting team could have selected, which had less "packing" and "cracking" of Democrats.[89]

The district court found the Act 43 map unconstitutional in November 2016.[90] On February 24, 2017, the State of Wisconsin asked the U.S. Supreme Court to review the district court's decision.[91] The Court was bound to review the three-judge panel,

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[79] Whitford v. Gill, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016), *vacated and remanded by* 138 S. Ct. 1916 (2018).

[80] *Id.*

[81] *Id.* (citation omitted).

[82] *Id.* at 903–06; *see* Nicholas O. Stephanopoulos & Eric M. McGhee, Essay, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 STAN. L. REV. 1503, 1503 (2018); *see also* Benjamin Plener Cover, *Quantifying Partisan Gerrymandering: An Evaluation of the Efficiency Gap Proposal*, 70 STAN. L. REV. 1131, 1131–32 (2018); Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 WM. & MARY L. REV. 2115, 2115 (2018).

[83] *Whitford*, 218 F. Supp. 3d at 856.

[84] *Id.* at 927.

[85] *Id.*

[86] *Id.* at 927–28.

[87] *Id.* at 928.

[88] *Id.*; *see supra* text accompanying notes 63–76.

[89] *Whitford*, 218 F. Supp. 3d at 928.

[90] *See id.* at 838.

[91] Gill v. Whitford, BRENNAN CTR. FOR JUST. (July 3, 2018), https://www.brennancenter.org/our-work/court_case/gill-v-whitford [https://perma.cc/7CTF-UCE4].

and heard oral argument on October 3, 2017.[92] On June 18, 2018, the Court, in a 9–0 decision, held that the plaintiffs lacked standing to bring a claim of partisan gerrymandering.[93] Chief Justice Roberts wrote for a five-justice majority, joined by Justices Kennedy, Thomas, Alito, and Gorsuch.[94] Justice Kagan filed an opinion concurring in the judgment, which was joined by Justices Ginsburg, Breyer, and Sotomayor.[95]

B. The Majority's Standing Analysis

Chief Justice Roberts's opinion for the majority of the Court began by invoking *Baker* and *Reynolds* to establish that "a person's right to vote is 'individual and personal in nature.'"[96] Building from that precedential proposition, the Court reasoned that "[t]o the extent that the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific."[97] So much as there is injury to voters in partisan gerrymandering claims, it is a harm that stretches as far as the district boundaries, but no further.[98] The Court distinguished a claim by these plaintiffs from those in *Baker v. Carr*, in which the apportionment law was stricken statewide because the remedy to an unconstitutional gerrymander is the redrawing of each individual district deemed invalid.[99] In this sense, the Court compared partisan gerrymandering with racial vote dilution. Citing recent precedent, the Court noted that to make a claim of racial gerrymandering, a plaintiff must show that they are in a district that has been impermissibly drawn and may only receive a remedy on a "district-by-district" basis.[100] The Court further expressed distaste for the Efficiency Gap standard. The Court acknowledged that the math associated with the Efficiency Gap may very well be accurate, but because the calculation fails to acknowledge the discrete circumstances of different plaintiffs, it fails to satisfy the individualism requirement that voting rights claims require.[101]

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[92] *See generally* Mark Tushnet, *The Mandatory Jurisdiction of the Supreme Court—Some Recent Developments*, 46 U. CIN. L. REV. 347 (1977) (discussing the history and constitutional theories of the Supreme Court's mandatory jurisdiction for appeals arising from three-judge district court panels).

[93] Gill v. Whitford, 138 S. Ct. 1916, 1920 (2018).

[94] *Id.* at 1922.

[95] *Id.*

[96] *Id.* at 1929 (quoting Reynolds v. Sims, 377 U.S. 533, 561 (1964)).

[97] *Id.* at 1930.

[98] *See id.*

[99] *See id.* at 1921 ("[R]emedying the harm does not necessarily require restructuring all of the State's legislative districts. It requires revising only such districts as are necessary to reshape the voter's district.").

[100] *Id.* at 1930 (quoting Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1265 (2015)).

[101] *Id.* at 1933.

The Court also rejected the plaintiffs' statewide-injury claims.[102] Plaintiffs claimed that Act 43 inflicted "harm to their interest 'in their collective representation in the legislature,' and in influencing the legislature's overall 'composition and policymaking.'"[103] This argument failed to persuade Chief Justice Roberts and the majority.[104] This alleged injury, held the Court, was a generalized interest in the conduct of government that each citizen holds in common, but lacked particularization to a certain class of plaintiffs different from the citizenry at whole.[105] Having determined that there was no statewide Equal Protection Clause injury for partisan gerrymandering and that the plaintiffs failed to show that their votes were individually "packed" or "cracked," the Court remanded the case for the plaintiffs to make a showing of standing.[106]

C. Justice Kagan's Concurrence

According to Justice Kagan, Chief Justice Roberts and the Court's majority put forth an adequate theory of standing for partisan gerrymandering, but their construction was not the sole injury plaintiffs could show.[107] According to Justice Kagan's concurrence, "[p]artisan gerrymandering no doubt burdens individual votes, but it also causes other harms," such as the specific harm she focuses on: "[A]n infringement of [voters'] First Amendment right of association."[108] Justice Kagan agreed that the plaintiffs failed to show injury under the traditional vote dilution framework,[109] but her concurrence aimed to provide the plaintiffs—and future litigants in partisan gerrymandering cases—an alternative means to a statewide judicial remedy.[110]

Justice Kagan attempted to provide a means of admitting statewide evidence of partisan gerrymandering in vote dilution claims, as the plaintiffs brought here.[111] She noted that the plaintiffs alleged that the Republican government sought to make the State Assembly as Republican as possible, and to do so it necessarily enacted a plan that effectuated pro-Republican seats in as many districts as possible.[112] With the goal of maximizing Republican power on the legislature as a whole, the districting plan's partisan tint trickled down to individual districts.[113] Therefore, a statewide

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[102] *Id.* at 1931.

[103] *Id.* (quoting Brief for Appellees at 31, *Gill*, 138 S. Ct. 1916 (No. 16-1161), 2017 WL 3726003).

[104] *See id.*

[105] *See id.*

[106] *Id.* at 1934.

[107] *See id.* (Kagan, J., concurring).

[108] *Id.*

[109] *Id.* at 1936.

[110] *See id.* at 1934.

[111] *Id.* at 1934–37.

[112] *See id.* at 1937.

[113] *See id.*

plan had regional and district effects, so, like in racial gerrymandering cases, the Court should consider statewide evidence.[114]

Having established that, even in vote dilution claims, the Court should admit statewide evidence, Justice Kagan set out to establish a vehicle by which plaintiffs can show statewide injury—and thus be awarded a statewide remedy—if the districting plan can be shown to infringe upon their First Amendment rights.[115] Among the potential parties that could demonstrate this injury, posits Justice Kagan, are "[political] parties, other political organizations, and their members."[116] Justice Kagan further contemplated that an active member of a given political party may have a special cognizable injury, even when residing in a non-gerrymandered district, if the gerrymander "ravaged the party he works to support."[117] This plaintiff, she reasoned, has standing based on harm distinct from that of the average voter.[118] Standing "turns on the nature and source of the claim asserted," and the harm of vote dilution is distinct from that of the infringement of associational rights.[119] Ultimately, Justice Kagan determined that the plaintiffs failed to adequately plead an associational harm, but she noted that the Court left open "for another day consideration of other possible theories of harm" arising from partisan gerrymanders which may "give[ ] rise to statewide remedies."[120]

III. THE FAILURES OF THE MAJORITY AND CONCURRENCE STANDING THEORIES

Although the ultimate aim of this Note is to propose a new theory of standing for the Court to apply to partisan gerrymandering cases, to do so without illustrating the failures of the current system would be a disservice. This Part challenges the standing theories proposed in *Gill v. Whitford* by Chief Justice Roberts in his majority opinion and Justice Kagan's four-Justice concurrence. Section A argues that basing a partisan gerrymandering claim on vote dilution, as is done in racial claims, ignores the reality of partisan gerrymandering—there is a necessary associational right and that right necessarily extends beyond a single district.[121] Section B demonstrates that Justice Kagan's alternative theory of injury for partisan activists is too high a bar.[122] One need not show that they have done some extra degree of work to create associational injury; this proposed nexus of activism and injury is at odds with the Court's distaste for manufactured injury.[123] Therefore, Justice Kagan's requisite for standing

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[114] *Id.* (citing Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1265 (2015)).
[115] *See id.* at 1938.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.* at 1938–39 (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)).
[120] *Id.* at 1939–40 (quoting *id.* at 1931 (majority opinion)).
[121] *See* discussion *infra* Section III.A.
[122] *See* discussion *infra* Section III.B.
[123] *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 402 (2013).

injury is incompatible with the principles of Article III standing because it asks plaintiffs to make their own injury before they ask the Court to remedy the harm. Upon demonstrating the failures of the two injury-in-fact standing theories put forth in *Gill v. Whitford*, Part IV provides an alternative to these flawed models.[124]

A. The Equal Protection "Vote Dilution" Standing Theory

The *Gill* majority's standing analysis, as described above,[125] is flawed in two regards. First, in comparing partisan gerrymandering claims to racial vote dilution, the Court fails to acknowledge a necessary component of racial vote dilution claims that is inherent in partisan vote dilution: the existence of a voting bloc. The inherent partisan bloc ought to make it easier, not harder, to make a partisan claim in that regard. Second, the Court's holding that partisan gerrymanders do not extend beyond the districts in which partisans are packed or cracked ignores the necessarily statewide impact of a single district's drawing.

1. Partisan and Racial Gerrymandering

Expressing the crux of the *Gill* majority's distaste for the plaintiffs' claim of injury, Chief Justice Roberts emphatically stated, "[T]his Court is not responsible for vindicating generalized partisan preferences. The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it."[126] This quote, which caps the Court's discussion of the *Gill* plaintiffs' lack of standing,[127] aptly shows the false equivalence the Court draws between racial vote dilution and partisan gerrymandering. These forms of unequal voter treatment practices differ in a number of brightly obvious ways. First, racial vote dilution claims are predicated on the vote dilution injury that emanates from the *Thornburg v. Gingles* test.[128] That inquiry requires the showing of (1) a large and cohesive minority, sufficient to make a single-member district majority; (2) a politically cohesive minority; and (3) the fact that the opposing majority acts as a cohesive bloc to defeat the minority.[129] Should a racial minority satisfy these three requirements, they may bring a claim under section 2 of the Voting Rights Act.[130] Though racial gerrymandering cases differ from a *Gingles*-esque vote dilution question, the underlying question in racial gerrymandering cases remains whether race was a factor in the legislature to dilute the electoral effect of racial minorities.[131] Unlike racial vote dilution

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[124] *See* discussion *infra* Part IV.
[125] *See supra* text accompanying notes 94–104.
[126] Gill v. Whitford, 183 S. Ct. 1916, 1933 (2018).
[127] *See id.*
[128] *See* Thornburg v. Gingles, 478 U.S. 30, 56 (1986).
[129] *Id.*
[130] Shaw v. Hunt, 517 U.S. 899, 914 (1996).
[131] Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1266–67 (2015) (explaining

plaintiffs,[132] partisans should not need to show that they have the electoral cohesion to demonstrate that the packing or cracking of partisans tends to result in the failure to elect a fairly proportional amount of partisans. Given the increased polarization in American politics and the ease with which map-drawers are able to use electoral data to predict which voters will vote with which party, there is little argument for state legislatures that they could not predict the cohesion of partisan voters.[133]

Partisan gerrymandering differs from racial vote dilution in another, admittedly obvious, way: in a two-party system, partisans of both parties tend to have a sufficiently large voting bloc to elect governing majorities in many states.[134] Contrast the size of partisan voting blocs to racial voting blocs[135] and the Court's comparison of the two continues to crumble.

Lastly, racial vote dilution differs from partisan gerrymandering in the injury that results from each. In racial vote dilution, the racial minority loses its power to elect a representative that can advocate for the interests of that group.[136] In partisan gerrymandering, the voters of the party packed and cracked lose their power to govern even when a great majority of voters express agreement with its causes and positions at the ballot box.[137] Consider the following metaphor that demonstrates the

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that Alabama's practice of maintaining the same percentage of racial minorities in each minority-majority district had the effect of using race as a primary factor in districting, which had the effect of minimizing the voice of racial minorities as their portion of the population grew); *see also* Vann R. Newkirk II, *The Supreme Court Finds North Carolina's Racial Gerrymandering Unconstitutional*, ATLANTIC (May 22, 2017), https://www.theatlantic.com/politics/archive/2017/05/north-carolina-gerrymandering/527592/ [https://perma.cc/84NW-X3RA].

[132] *See* Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1349–61 (2016) (analyzing the history and dynamics of racially polarized voting since *Gingles*).

[133] *See* PEW RES. CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC 6–16 (June 12, 2014) (demonstrating how American voters have become more reliably liberal or conservative); Stephen Ornes, *Science and Culture: Math Tools Send Legislators Back to the Drawing Board*, PNAS (June 26, 2018), https://www.pnas.org/content/115/26/6515 [https://perma.cc/B9FF-2XU3].

[134] *See generally Annual State Legislative Competitiveness Report: Vol. 8, 2018*, BALLOTPEDIA, https://ballotpedia.org/Annual_State_Legislative_Competitiveness_Report:_Vol._8,_2018 [https://perma.cc/S3LN-7L63] (last visited Feb. 24, 2020) [hereinafter *2018 Competitiveness Report*].

[135] *Compare Party Affiliation*, GALLUP, https://news.gallup.com/poll/15370/party-affiliation.aspx [https://perma.cc/T9WP-ZV9E] (last visited Feb. 24, 2020) (showing that party affiliation among American citizens has stayed between 20–38% for each party since 2004), *with Quick Facts, United States*, U.S. CENSUS BUREAU (July 1, 2017), https://www.census.gov/quickfacts/fact/table/US/PST045217 [https://perma.cc/MXD9-R6CN] (indicating that the largest racial bloc was Hispanic or Latino, at 18.3%, Black and African Americans constituted 13.4% of the population, and non-Hispanic whites made up 60.4% of the population).

[136] *See* Thornburg v. Gingles, 478 U.S. 30, 34 (1986).

[137] *See* Robin I. Mordfin, *Proving Partisan Gerrymandering with the Efficiency Gap*, U. CHI. L. SCH. (Sept. 25, 2017), https://www.law.uchicago.edu/news/proving-partisan-gerrymandering-efficiency-gap [https://perma.cc/U5M9-QFGA].

difference between racial vote dilution and partisan gerrymandering: Eight people are rowing in a boat. One of them loses her paddle in whitewater. As a result, she no longer has the ability to row for herself. But the harm does not end with the individual rower. Now, the seven other rowers on the boat have to increase their effort to make up for the loss of one of their members' ability to row. Voting is similar. When one district is gerrymandered in a way to make a partisan group's vote less efficacious, it necessarily puts pressure on partisans in other districts. In order to create a governing coalition, those voters must exercise their voices with more fervor to effectuate the policies their faction prefers. On the other hand, racial vote dilution is like the rower who lost her paddle. She (representing the racial minority in a jurisdiction) lost the ability to advocate for herself, but the other rowers still have the power to row. Though the result of racial vote dilution may be that a minority may lose its power to choose its own representative in a given geographic area, there may be others in the legislature sympathetic to the cause of the minority which has been disenfranchised by vote dilution.

Admittedly, there is some merit in the comparison between unconstitutional race-based voting laws and partisan gerrymandering. Though the two forms of line drawing have their distinct differences, the Court has acknowledged an injury in racial gerrymandering that does have some relation to partisan gerrymandering: the injury of being subjected to unjust classification.[138] Like in racially gerrymandered claims, Wisconsin voters represented by the *Gill* plaintiffs were subject to invidious classifications based on their voting preferences.[139] The legislative staffers and the law firm appointed and hired by the Wisconsin State Legislature used electoral data to determine which voters preferred which candidates in order to minimize the representation of Democratic voters in the legislature.[140] Democratic voters, while not the statutorily protected class that black citizens are,[141] were systematically classified and targeted on the basis of their ideological preference.[142] Racial minorities and partisans thus share the harm of unconstitutional classification when they are subject to invidious gerrymanders.

Notwithstanding the similarities between impermissible racial voting laws and partisan gerrymandering in regards to classification injury, the differences between the two demonstrate that they should not be treated as analogous. Partisan gerrymandering overcomes the cohesion question of racial vote dilution claims,[143] partisan line drawing extends well beyond the individual districts in which the voters have been cracked or packed because of the number of citizens who are predictable

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[138] Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1265 (2015).

[139] Whitford v. Gill, 218 F. Supp. 3d 837, 911–12 (W.D. Wis. 2016) (finding that the Wisconsin districting law applied political classifications in "a way unrelated to any legitimate legislative objective" (quoting Vieth v. Jubelirer, 541 U.S. 267, 351 (2004) (Kennedy, J., concurring in part and dissenting in part))), *vacated and remanded by* 138 S. Ct. 1916 (2018).

[140] *Id.* at 890–96.

[141] *See Thornburg*, 478 U.S. at 34.

[142] *Whitford*, 218 F. Supp. 3d at 890–96.

[143] *Thornburg*, 478 U.S. at 56.

partisans,[144] and a primary injury suffered by partisans reaches beyond dilution to their ability to govern.[145]

2. District-by-District Injury

The second failure of Chief Justice Roberts's partisan gerrymandering standing theory in *Gill* is that it relies on the declaration that the harm of a partisan gerrymander ends at the borders of the district packed or cracked.[146] This presupposition ignores the reality of gerrymandering and the way in which it affects a state as a whole.[147] Here again, the Chief Justice compared the remedy of partisan gerrymandering to the remedy of racial gerrymandering: the redrawing of a single offending district.[148] This is a glaringly unsatisfactory comparison. Racial gerrymandering generally involves a single offending district which can be remedied with the redrawing of that district,[149] whereas a partisan gerrymandered district exists in the ecosystem of a gerrymandered state where the line-drawers have acted in a way to most effectively benefit their party statewide.[150] In partisan gerrymandering, states, not individual districts, are the macro-level targets of line-drawers.[151]

B. Justice Kagan's Associational Harm Theory

This analysis must begin by noting the ways in which Justice Kagan's standing analysis improves on the rigid formula set forth in the majority. First, Justice Kagan steps back to acknowledge the ways in which a gerrymandered districting plan affects the state as a whole, not limiting the effect to individual districts operating in a political and electoral vacuum.[152] Justice Kagan also begins with the presupposition that the First

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[144] *See* Stephanopoulos, *supra* note 132; *2018 Competitiveness Report*, *supra* note 134.

[145] *Whitford*, 218 F. Supp. 3d at 927–28.

[146] *See* Gill v. Whitford, 138 S. Ct. 1916, 1930 (2018).

[147] *See* Ginger Strand, *Among the Gerrymandered*, PAC. STANDARD (Feb. 22, 2019), https://psmag.com/magazine/among-the-gerrymandered [https://perma.cc/8RAX-ULA2] (noting that a small districting shift can ripple across the state to affect the partisan makeup of other districts).

[148] *See Gill*, 138 S. Ct. at 1930 ("[A] plaintiff's remedy must be 'limited to the inadequacy that produced [his] injury in fact.'" (quoting Lewis v. Casey, 518 U.S. 343, 357 (1996))).

[149] *See generally* Hunt v. Cromartie, 526 U.S. 541 (1999) (concerning North Carolina's 12th Congressional District).

[150] *See* sources cited *infra* notes 163–64.

[151] *See* Christopher Ingraham, *How Maryland Democrats Pulled Off Their Aggressive Gerrymander*, WASH. POST (Mar. 28, 2018, 1:23 PM), https://www.washingtonpost.com/news/wonk/wp/2018/03/28/how-maryland-democrats-pulled-off-their-aggressive-gerrymander/?utm_term=.5fd547eabd2e [https://perma.cc/QQ7F-693M].

[152] *See Gill*, 138 S. Ct. at 1936–37 (Kagan, J., concurring); *see also* discussion *supra* Section II.C.

Amendment bars the infringement of one's right to associate because state actors disagree with the viewpoint or content of that association's speech.[153] Of course, it is also necessary to note that Justice Kagan's concurrence adheres to the majority's concept that vote dilution is district-specific; the flaw of such a misunderstanding of a state's electoral landscape has been fleshed out above and need not be repeated here.[154]

Notwithstanding the improvements Justice Kagan makes upon the majority's standing formula, there are still flaws specific to her analysis of the plaintiffs' injury. These flaws arise from Justice Kagan's determination that First Amendment associational harms are necessarily distinct from vote dilution injury. The concurrence determines that "the associational injury flowing from a statewide partisan gerrymander, whether alleged by a party member or the party itself, has nothing to do with the packing or cracking of any single district's lines."[155] Justice Kagan falls into the trap of electoral naivety that plagues the majority opinion when she adopts this formalist injury distinction. Mere lines after Justice Kagan acknowledged that the goal of a partisan gerrymander is to maximize the number of legislative seats held by a specific party, she reverted to the majority's formalist view that each state district exists separate from another.[156] Like the majority, this ignores the way the state electoral ecosystem interacts in a political context. Furthermore, this distinction fails to acknowledge the ways in which voting is an acutely individual and intimate right.[157] In sum, the distinction proposed by Justice Kagan faces issues on both sides of the "electoral injury coin."

1. Vote Dilution Causes Associational Injury

Contrary to what Justice Kagan asserted, "the associational injury flowing from a statewide partisan gerrymander" is a necessary result of successful "packing or cracking of any single district's lines."[158] This all stems from the purpose of a partisan gerrymander: to limit the effectiveness of the opposition party's voters while maximizing one's own party's electoral successes.[159] Once again, the Court fails to understand this logical step because it, whether expressly or implicitly, draws inferential connections between partisan and racial vote dilution. In the context of partisan gerrymandering, there tends to be a more equal split between consistent partisans than there is a split between racial groups in racial vote dilution cases.[160] Furthermore,

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[153] *Gill*, 138 S. Ct. at 1939 (Kagan, J., concurring).

[154] *See* discussion *supra* Section III.A.2.

[155] *Gill*, 138 S. Ct. at 1939 (Kagan, J., concurring).

[156] *Id.* at 1930 (majority opinion).

[157] *See* Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1298–1330 (2011).

[158] *Contra Gill*, 138 S. Ct. at 1939 (Kagan, J., concurring).

[159] *See* Strand, *supra* note 147 ("[G]errymandering means legislators draw maps that make their own party's votes count more than the opposition's.").

[160] *See* sources cited *supra* note 135.

there tends to be a more equal statewide distribution of voters along the political spectrum than those of different racial groups.[161] As stated above, the goal of these two styles of electoral manipulation is sufficiently different that the Court should be incredibly wary about drawing logical inferences between the two.[162] A partisan gerrymander tends to be most advantageous and effective when applied to the state as a whole, rather than an individual district.[163] This is why the Wisconsin legislature, as well as other states accused of partisan gerrymandering, have drawn maps that scientifically work to maximize partisan representation in the state or federal legislature across the districts.[164] Vote dilution in partisan gerrymandering is thus part of a statewide scheme in which individual districts are mere instruments to a statewide goal of electoral success and entrenchment.[165]

Upon implementing a partisan gerrymandered map, a state proceeds to discriminate against voters', parties', and political organizations' associational rights.[166] The First Amendment is thus implicated only once a partisan map proves to be effective.[167] Justice Kagan attempts to draw a line erecting a barrier between the two harms,[168] when in reality the only line that should be drawn between the harms of vote dilution and associational injury is a straight arrow from the former leading to the latter.

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[161] *See* sources cited *supra* note 135 (showing that a significantly larger portion of Americans self-identify as partisans—about fifty percent—than as racial minority group members); *see also* Christopher Devine, *Even Self-Identified Independents Are Partisan in America*, SOC. SCI. SPACE (Nov. 2, 2018), https://www.socialsciencespace.com/2018/11/even-self-identified-independents-are-partisan-in-america/ [https://perma.cc/9LU6-A5N7] (showing that only about 10% of self-identified independents lack a predictable partisan affiliation). *But see* Steven Webster, *Partisan Geographic Sorting*, SABATO'S CRYSTAL BALL (Dec. 15, 2016), http://crystalball.centerforpolitics.org/crystalball/articles/partisan-geographic-sorting/ [https://perma.cc/9V2M-XT7E] (demonstrating that Americans increasingly cluster in ideologically homogenous regions).

[162] *See* discussion *supra* Section III.A.1.

[163] *See* Michael Li & Thomas Wolf, *5 Things to Know About the Wisconsin Partisan Gerrymandering Case*, BRENNAN CTR. FOR JUST. (June 19, 2017), https://www.brennancenter.org/blog/5-things-know-about-wisconsin-partisan-gerrymandering-case [https://perma.cc/W9VF-DXBX] (noting that Wisconsin, a battleground state with a fairly even popular vote split across the state's geographic regions, has a Republican-dominated and entrenched state legislature).

[164] *See id.*; *see also* Robert Barnes, *North Carolina's Gerrymandered Map Is Unconstitutional, Judges Rule, and May Have to Be Redrawn Before Midterms*, WASH. POST (Aug. 27, 2018, 9:50 PM), https://www.washingtonpost.com/politics/courts_law/2018/08/27/fc04e066aa4611e8-b1da-ff7faa680710_story.html?utm_term=.ff07e97292a9 [https://perma.cc/7BSN-52T2]; Ingraham, *supra* note 151.

[165] *See* Ingraham, *supra* note 151 (explaining how Maryland line-drawers used the concentrated and highly Democratic D.C. Metro voters to dilute the votes of more-Republican rural voters).

[166] *See* Tokaji, *supra* note 9, at 784–85.

[167] *See id.* at 787–88 (explaining that *Anderson-Burdick* analysis generally focuses on the effect, not the intent of the particular election registration).

[168] Gill v. Whitford, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring) ("[T]he associational harm of a partisan gerrymander is distinct from vote dilution.").

It is vote dilution, pervasive across the state as part of a partisan map, that "burden[s] the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects."[169] Justice Kagan's concurrence considers a state where associational rights of a party member are burdened, even though votes in a number of districts are not diluted in a way that diminishes the effectiveness of a particular party.[170] In defense of this theory, Justice Kagan is transparently creating a means for plaintiffs who do not reside in packed or cracked districts, such as Professor Whitford and Mary Lynne Donohue in this action,[171] to be able to bring cases analogous to the complaint in *Gill v. Whitford*.[172]

2. An Associational Harm-Only Regime Undermines the Individuality of Voting Rights

In creating an unnecessarily formal distinction between vote dilution and associational harms, Justice Kagan treads on the right that the majority opinion holds sacrosanct: the individuality of the right to vote.[173] Chief Justice Roberts is correct in the notion that the right to vote is one acknowledged as intimately personal in our country's history and tradition.[174] For the merits of Justice Kagan attempting to find a means to amplify the harm of a single voter into a package-deal harm suffered by an association of voters, she does so in a manner that is at odds with the Court's long line of precedent treating voting as an individual right.[175]

First, Justice Kagan's theory of the party-activist harm leaves too open the potential of manufactured injury to create standing, which the Court has treated with harsh distaste.[176] Justice Kagan supposes if a districting plan ravages the party of which a state citizen is an active member, she may suffer a burden even if her vote is unchanged.[177] While the party activist harm is likely very real, it is hard to imagine that the Court would be willing to establish a judicially manageable standard to discern between a sufficiently active party member and a voter who volunteered a handful of instances in order to create this "activist injury."[178]

Second, the concurrence incorrectly assumes that political parties have a magnified associational right to associate *effectively*.[179] Justice Kagan asserted that, if there

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[169] *Id.* at 1939.

[170] *Id.* at 1938 (explaining that less electoral opportunity stemming from an unfavorably gerrymandered map will hurt a party's ability to fundraise, recruit, etc.).

[171] *Id.* at 1933 (majority opinion).

[172] *See id.* at 1934 (Kagan, J., concurring).

[173] *See id.* at 1929 (majority opinion).

[174] *See id.*; Fishkin, *supra* note 157, at 1332–59 (explaining the various intangible benefits the right to vote provides beyond the ability to influence the outcome of an election).

[175] *See supra* text accompanying notes 31–34.

[176] *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 402 (2013).

[177] *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring).

[178] *See Clapper*, 568 U.S. at 402.

[179] *Gill*, 138 S. Ct. at 1939 (Kagan, J., concurring) ("The complaint in [an associational

is a burden on the associational rights of party activists, that burden "may be doubly true for party officials and triply true for the party itself (or for related organizations)."[180] To make this assertion, Justice Kagan referenced *California Democratic Party v. Jones*,[181] in which the Court found an associational right belonging to political parties.[182] However, this is a misapplication of the precedent set forth in *Jones*. As it did in *Jones*,[183] the Court has repeatedly found an associational right of political parties to determine their membership in interparty activities, such as primaries and conventions.[184] However, the Court has not found that a political party's right to associate extends to the ability to actually win seats in a general election or to govern upon having a representative majority.[185] The right to cast an effective ballot is not a right belonging to an association, but one that fundamentally rests in the individual.[186] The associational right of the party extends to the arena in which it is determining its membership, rules, and policies, but this does not reach to winning general elections.[187]

Justice Kagan's standing theory thus fails on two grounds. First, her analysis makes an erroneous formalist distinction between vote dilution and associational rights of voters, and second, her associational rights of parties ignores the individual nature of the vote. However, Justice Kagan's analysis is not to be wholly discounted.

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partisan gerrymandering] case is . . . that the gerrymander has burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects.").

[180] *Id.*

[181] *Id.* at 1938.

[182] California Democratic Party v. Jones, 530 U.S. 567 (2000).

[183] *See id.* (holding that, though states have the right to regulate the structure of party primaries, the California "blanket primary" oversteps the state's role as regulating the public aspect of elections). The Court determined that primaries are also a private affair in which parties must have the capacity to associate freely to determine their candidate for the general election. *See id.*

[184] *See generally* Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) (determining that parties have the power to determine their association by allowing open primaries to increase those with a voice in the party's association); Democratic Party of the U.S. v. Wis. *ex rel.* La Follette, 450 U.S. 107 (1981) (determining that the freedom of association of a state party's convention delegation can be governed to an extent by state law, but ultimately the national party's rules may still control the convention voting rights of the delegation's members); Cousins v. Wigoda, 419 U.S. 477 (1975) (holding that the national party can determine the membership of a state delegation over the state's laws); O'Brien v. Brown, 409 U.S. 1 (1972) (holding that political parties are voluntary associations of people that can solve their membership disputes internally at events like conventions).

[185] Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274 (2001) (discussing the general rights of political parties the Supreme Court has acknowledged over time).

[186] *Gill*, 138 S. Ct. at 1929 ("We have long recognized that a person's right to vote is 'individual and personal in nature.'"(quoting Reynolds v. Sims, 377 U.S. 533, 561 (1962))).

[187] *See* cases cited *supra* note 184 (identifying a survey of cases in which the Court has identified the breadth of a political party's associational rights).

The *Gill* concurrence sets a course for acknowledging the connection between partisan gerrymandering and associational harms. Alas, the theory set forth by Justice Kagan supposes that associational harms may stand alone from vote dilution,[188] when, in reality, the two harms are best understood in conjunction.

C. The Gill v. Whitford *Standing Theories Are Fatally Flawed*

This Section has demonstrated the pervasive failures of the partisan gerrymandering standing theories set forth in the majority and concurring opinions in *Gill v. Whitford*. The majority theory, as elaborated by Chief Justice Roberts, incorrectly makes logical analogues between racial vote dilution and partisan gerrymandering in limiting the injury of partisan gerrymandering cases to the harm of vote dilution.[189] Furthermore, the majority's insistence on demonstrating district-by-district injury fails to recognize the statewide reality of partisan gerrymandering.[190] Though purporting to desire a statewide remedy, Justice Kagan reinforces the majority's erroneous belief that each state legislative district exists in an ecosystem free and distinct from every other.[191] Her concurrence created a false dichotomy between vote dilution and the freedom of association, a distinction that ignores the relationship the two injuries have that reinforce one another.[192] Lastly, in her valiant effort to create a statewide claim and remedy for partisan gerrymandering, Justice Kagan provided a freedom of association framework that troublingly creates voting rights claims independent of the individual voting rights of any specific voter.[193]

The failures of these two theories of partisan gerrymandering are too pervasive to reform. Rather, the Court needs to radically reimagine its partisan gerrymandering standing jurisprudence by acknowledging that voting is an individual right that manifests itself in an associational expression. There are salvageable aspects of the *Gill* standing theories put forth by the majority and concurrence, but standing alone, these theories will prevent the actual delivery of justice to plaintiffs who have been invidiously discriminated against because of their political affiliation.

IV. PROVIDING A WORKABLE ALTERNATIVE: THE FRAMEWORK OF THE *ANDERSON-BURDICK* TEST

In Part IV, this Note advocates for reframing injury-in-fact for partisan gerrymandering cases based on the connected relationship of First and Fourteenth Amendment harms. First, Section A lays out the contours of the *Anderson-Burdick*

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188 *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring).
189 *See* discussion *supra* Section III.A.1.
190 *See* discussion *supra* Section III.A.2.
191 *See* discussion *supra* Section III.B.
192 *See* discussion *supra* Section III.B.1.
193 *See* discussion *supra* Section III.B.2.

analysis and how it should apply to claims of partisan gerrymandering.[194] Next, Section B demonstrates the ways the *Anderson-Burdick* analysis improves upon the Chief Justice's individualized injury formula as elaborated in the *Gill* majority opinion.[195] Lastly, Section C explains the improvements the *Anderson-Burdick* standing inquiry makes upon Justice Kagan's theory of associational harm.[196]

A. The Anderson-Burdick *Test and Partisan Gerrymandering*

It is important to note at the outset of this analysis that the *Anderson-Burdick* test is not generally applied for standing analysis, but for determining whether a specific regulation or law on the topic of voting rights is in violation of a constitutional right.[197] Therefore, the application of the *Anderson-Burdick* standard as proposed in this Section is not directly analogous to the way in which the test is applied in precedential cases.[198] Rather, the *Anderson-Burdick* test as it may apply to partisan gerrymandering allows plaintiffs to demonstrate a compound constitutional injury resulting from state action, which, when taken together, would allow a plaintiff to bring both district-specific and statewide challenges to partisan districting maps.[199]

The intersection between the First and Fourteenth Amendment rights in electoral regulation is not a novel idea.[200] The Court has previously acknowledged that there can be a connection between these two constitutional rights and that it is implicated in voting rights claims related to party affiliation.[201] The *Anderson-Burdick* test provides the framework for such claims. If plaintiffs can show injury upon their First and Fourteenth Amendment rights "to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," then they have demonstrated injury-in-fact for Article

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[194] *See* discussion *infra* Section IV.A.

[195] *See* discussion *infra* Section IV.B.

[196] *See* discussion *infra* Section IV.C.

[197] *See* Burdick v. Takushi, 504 U.S. 428, 428–29 (1992) (applying the standard to Hawaii's ban on write-in candidates to determine that it burdened the right to vote and associate for the benefit of a write-in candidate); *see also* Anderson v. Celebrezze, 460 U.S. 780, 780–81 (1983) (determining that Ohio's early registration requirement for independent candidates prevented independent voters from associating for an effect on the political process).

[198] *See* discussion *supra* Section I.C.

[199] I acknowledge that the distinction between the harm alleged in a standing claim and the actual merits of a claim can grow hazy in instances of discrimination. *See* Heckler v. Matthews, 465 U.S. 728, 729 (1984); *see also* Baker v. Carr, 369 U.S. 186, 206–08 (1962); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954). Nonetheless, the injury demonstration bar should be lowered to afford plaintiffs the opportunity to develop a factual record to prove actual discrimination. The *Anderson-Burdick* test, though originally designed for the deliberation of the merits, is useful to consider the scope of a plaintiff's alleged injury.

[200] *See* discussion *supra* Section I.C.

[201] *See* sources cited *supra* note 184.

III standing.[202] The application of the *Anderson-Burdick* test is desirable because it lowers the bar for plaintiffs to bring partisan gerrymandering cases—which allows voters to remedy the political process breakdown—but the test still respects the difficult decisions the state government has to make in drawing legislative districts.[203] The application of this test will not allow every plaintiff in every state under each new decennial map to show that she has suffered injury to her right to effectively cast her vote,[204] but it will overcome the unnecessarily expensive and mechanical system the Court demands in *Gill*.[205]

Questions of partisan gerrymandering have proven difficult for the Court because jurists have erroneously considered the scope of these claims as analogous to *Baker* "one person, one vote" claims and their progeny.[206] Alternatively, as Justice Kennedy identified in *Vieth* and Justice Kagan proposed in *Gill*, partisan gerrymandering injuries may arise from a strict First Amendment freedom of association claim.[207] However, both of these standards ignore the reality of partisan gerrymandering.[208] Mapmakers, when engaging in partisan gerrymandering, classify voters based on their political affiliation and then use that classification to harm the electoral efficacy of the opposing partisan association.[209] Thus, the harm "cracked" and "packed" plaintiffs bring is twofold. The Court has been loath to find that an individual's First or Fourteenth Amendment harms alone rise to the requisite standing injury requirement.[210] Perhaps this jurisprudence is correct; taken individually, neither harm may be cognizably sufficient to be an Article III case or controversy. However, considered through the lens of the *Anderson-Burdick* test, which combines the constitutional considerations of both Amendments, the compounded harm to individual and associational rights may be ample standing injury.

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[202] *See Anderson*, 460 U.S. at 787 (quoting Williams v. Rhodes, 393 U.S. 23, 30–31 (1968)); *see also Burdick*, 504 U.S. at 434.

[203] *See* Tokaji, *supra* note 9, at 784 ("[The *Anderson-Burdick* test] also captures the necessity of scrutinizing the specific interests proffered by the State in support of its restrictions, with stronger interests required to justify greater burdens.").

[204] *See id.* at 784.

[205] *See* Gill v. Whitford, 138 S. Ct. 1916, 1934 (2018) (remanding the case for plaintiffs to show individualized injury in fact); *see also* Amended Complaint, Whitford v. Gill, No. 15-cv-421-jdp (W.D. Wis. Sept. 14, 2018) (adding plaintiffs to the original suit to bring the complaining party up to forty Wisconsin citizens in order to show the injuries sustained in each alleged gerrymandered district).

[206] *See Gill*, 138 S. Ct. at 1930–31.

[207] *Id.* at 1938–39 (Kagan, J., concurring).

[208] *See* sources cited *supra* notes 163–64.

[209] Christopher Ingraham, *This Is the Best Explanation of Gerrymandering You Will Ever See*, WASH. POST (Mar. 1, 2015, 9:06 AM), https://www.washingtonpost.com/news/wonk/wp/2015/03/01/this-is-the-best-explanation-of-gerrymandering-you-will-ever-see/?utm_term=.24e7cadac13e [https://perma.cc/EN86-HJG9].

[210] *See Gill*, 138 S. Ct. at 1938–39 (Kagan, J., concurring).

Generally stated, the Equal Protection Clause prohibits government-sanctioned action that treats people unequally.[211] By classifying people based on their political affiliation and using that classification to determine that some people do not deserve an equal opportunity to cast a meaningfully determinative vote, partisan gerrymandering implicates some concern under the Equal Protection Clause.[212] Discrimination and diminished capacity to participate equally in a state-sanctioned system are sufficient injuries to give rise to a claim under the Clause.[213]

Furthermore, the Equal Protection Clause protects against disparate treatment with regard to fundamental rights.[214] Though acknowledging "voting is of the most fundamental significance under our constitutional structure,"[215] the Court has properly acknowledged that some role of electoral regulation is necessary if "[elections] are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."[216] Thus, restrictions on the fundamental right to vote are tolerated to some degree and do not give way to the immediate application of strict scrutiny.[217] District line drawing, like issues of ballot access, voter I.D. requirements, and write-in campaigns, implicates a state need to regulate free and fair elections.[218] Thus, an individual voter in this scheme could not show harm by demonstrating that she has been placed in a district she does not like.[219] Rather, under the *Anderson-Burdick* test, she would have to show first that she suffered injury to her right to be treated equally in the electoral process, and then show that the state lacked valid justification for such unequal treatment.[220] State interest in electoral management receives great deference, so this standard would not open litigious floodgates.[221]

The Equal Protection harm is only half of the injury suffered by cracked and packed voters. Justices Kennedy and Kagan have identified the other harm associated with partisan gerrymandering: the right to associate as protected by the First Amendment.[222] Though not garnering a majority of the Court in *Vieth* or *Gill*, Justices Kennedy and Kagan's acknowledgment that "voting is a form of *expressive*

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[211] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (internal citations omitted).

[212] Davis v. Bandemer, 478 U.S. 109, 161–62 (1986) (Powell, J., concurring in part and dissenting in part); Karcher v. Daggett, 462 U.S. 725, 748 (1983) (Stevens, J., concurring).

[213] *See* Allen v. Wright, 468 U.S. 737, 738 (1984).

[214] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

[215] Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979).

[216] Storer v. Brown, 415 U.S. 724, 730 (1974).

[217] *See* Burdick v. Takushi, 504 U.S. 428, 433 (1992).

[218] *See id.*

[219] *See id.* (contemplating a balancing test for election regulations that considers state interest).

[220] *Id.* at 434.

[221] *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 204–05 (2008) (Scalia, J., concurring) ("Burdens are severe only if they go beyond the merely inconvenient.").

[222] *See* discussion *supra* Section II.C.

association protected by the First Amendment" is a concept that Supreme Court majorities have repeatedly adopted.[223] The right to associate in electoral politics belongs to members of major parties as well as independents.[224] The First Amendment protects voters' rights to "associate together to express their support for [someone's] candidacy and the views he espouse[s]."[225] Though by itself fundamental to the right to vote, the First Amendment right to associate is intimately intertwined with the Fourteenth Amendment right to equal protection as well.

Constitutional guarantees do not all exist distinct from one another, but rather interact in an ecosystem of rights and privileges that provide the foundation of a free citizenry in a democratic society.[226] Partisan gerrymandering implicates "multiple constitutional claims that gain meaning when heard together and amplify the cognizable harm."[227] The First and Fourteenth Amendment injuries suffered by gerrymandered plaintiffs may be incoherent or nebulous when considered alone, but these harms become more cognizable when "the constitutional provisions are read to inform and bolster one another."[228] The Court has failed by treating these harms distinctly, and has thus created an unreasonably high hurdle for plaintiffs to show standing. The *Anderson-Burdick* test, in contemplating both the Equal Protection and expressive/associative harms voters suffer, allows plaintiffs to combine these "intersectional rights"[229] into impairment sufficient to demonstrate Article III standing. This framework does not just allow plaintiffs to more easily access the federal judiciary to address a political process breakdown,[230] but also it provides a cognizable means for the courts to consider the complex and interlaced issues associated with electoral regulations.[231]

But what does a partisan gerrymandering claim under the *Anderson-Burdick* test look like? This analysis demands a "two-track approach"[232] in which the presiding court must first consider whether the burden imposes "severe" or "reasonable, nondiscriminatory restrictions."[233] A frivolous partisan gerrymandering claim would end at this first inquiry. Given the strict one person, one vote restriction the Supreme

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[223] Tokaji, *supra* note 9, at 771–84 (providing a survey of cases in which the Court has ruled on the associative rights of voting).

[224] *See id.*

[225] Anderson v. Celebrezze, 460 U.S. 780, 806 (1983).

[226] *See* Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1313–16 (2017).

[227] *Id.* at 1330.

[228] *Id.* at 1313.

[229] *See id.*

[230] Gill v. Whitford, 138 S. Ct. 1916, 1929 (2018) ("At argument on appeal in this case, counsel for the plaintiffs argued that this Court *can* address the problem of partisan gerrymandering because it *must*: The Court should exercise its power here because it is the 'only institution in the United States' capable of 'solv[ing] this problem.'").

[231] *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992).

[232] Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 205 (2008) (Scalia, J., concurring).

[233] *Burdick*, 504 U.S. at 434.

Court has demanded of state legislature districts,[234] state legislatures will necessarily be given some latitude in line drawing. If an alleged gerrymander is determined non-discriminatory, "the State's important regulatory interests are generally sufficient to justify . . . restrictions."[235] *Anderson-Burdick* gerrymandering plaintiffs would have the burden of showing that the regulation was sufficiently severe or discriminatory as to cause them harm.[236] In cases like Wisconsin and North Carolina, where there is overt evidence of attempted Republican vote maximization,[237] this initial inquiry may not be difficult. Given that the demonstration of injury—severe or reasonable—is the dispositive question in standing analysis, the *Anderson-Burdick* test would solve the Court's gerrymandering standing problem on its first prong. The inquiry into whether this harm is minimal enough to protect the "competing interest" of the government's role in regulating elections is left to the Court's resolution on the merits.[238]

A major benefit of using the *Anderson-Burdick* analysis is that it allows states some latitude in drawing lines while still acknowledging that some voters will necessarily suffer some injury to association or voting power from a districting scheme.[239] This analysis provides important improvement on existing partisan gerrymandering standing analysis: it allows for statewide, rather than district-by-district inquiry. By implicating the First Amendment right to freely associate, the *Anderson-Burdick* test allows a single plaintiff's proposed harm to transcend district lines.[240] Associational harms are "not district specific"—if the valued association exists statewide, "the proof needed for standing should not be district specific either."[241]

Using the *Anderson-Burdick* test for understanding the harm caused by partisan gerrymandering provides three major benefits to courts, plaintiffs, and states. First, the test allows plaintiffs to synthesize their First and Fourteenth Amendment rights to indicate an intersectional injury perhaps more palatable to courts than the existing Equal Protection analysis for gerrymandering. Second, *Anderson-Burdick* recognizes the role states have in regulating elections and thus allows states a powerful rebuttal

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[234] *See* Lyle Denniston, *Argument Preview: How to Measure "One Person, One Vote,"* SCOTUSBLOG (Dec. 1, 2015, 12:19 AM), https://www.scotusblog.com/2015/12/argument-preview-how-to-measure-one-person-one-vote/ [https://perma.cc/7Q4Y-R947].

[235] Anderson v. Celebrezze, 460 U.S. 780, 788 (1983).

[236] *See Burdick*, 504 U.S. at 434.

[237] *See* Armand Emamdjomeh et al., *Why North Carolina's House District Lines Have Been Upended—Again*, WASH. POST (Aug. 31, 2018), https://www.washingtonpost.com/graphics/2018/politics/north-carolina-redistricting/ [https://perma.cc/D4Y7-4YXZ] ("'I think electing Republicans is better than electing Democrats,' said Rep. David Lewis, a Republican member of the North Carolina General Assembly, addressing fellow legislators when they passed the plan in 2016. 'So I drew this map to help foster what I think is better for the country.'"); *see also supra* notes 163–64.

[238] Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 210 (2008) (Souter, J., dissenting).

[239] *Burdick*, 504 U.S. at 433.

[240] *See* Gill v. Whitford, 138 S. Ct. 1916, 1938–39 (2018) (Kagan, J., concurring).

[241] *Id.* at 1939.

to alleged plaintiff injury. Lastly, the *Anderson-Burdick* test allows for statewide consideration of rights and injury that more accurately reflects the realities of partisan gerrymandering. In Sections IV.B and IV.C, this Note demonstrates the improvements this test makes on the *Gill* majority and concurrence standing analyses.[242]

B. The Anderson-Burdick *Analysis Corrects the Flaws of the Majority's Standing Theory*

Although Chief Justice Roberts is correct that Supreme Court jurisprudence is predicated on the concept that "a person's right to vote is 'individual and personal in nature,'"[243] partisan gerrymandering goes further than encroaching only on the right for an individual to vote. The Chief Justice concluded his analysis in *Gill* by restating the Article III mandate to the federal courts to "vindicate the individual rights of the people appearing before it."[244] The plaintiffs, determined the Chief Justice, had failed to show this individuality, finding that "[this] is a case about group political interests, not individual legal rights."[245]

Yet, the Chief Justice fails to address the fact that the Court has long acknowledged the individual's right to form a group for the advancement of political interests.[246] Rather than allow a group of plaintiffs in a state to bring a statewide claim against a partisan district map that disfavors them and their ability to organize with similarly minded voters, the Chief Justice demands a plaintiff-representative from every offending district.[247] This requirement places an illogical burden on individual plaintiffs to bring what amounts to a gerrymandering class action.[248] By demanding a hyper-individualized standing analysis for what has been demonstrated to be a simultaneously individual and associative right,[249] the Chief Justice has required lower courts to make incredibly piecemeal and mathematical inquiries into partisan intent and effect. The *Anderson-Burdick* analysis improves on this archaic formula by allowing evidence of statewide partisan intent to harm a class of voters to demonstrate injury to voters' rights.[250] The proposed inquiry does not require

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[242] *See* discussion *infra* Sections IV.B–C.

[243] *Gill*, 138 S. Ct. at 1929 (quoting Reynolds v. Sims, 377 U.S. 533, 561 (1964)).

[244] *Id.* at 1933.

[245] *Id.*

[246] *See* Anderson v. Celebrezze, 460 U.S. 780, 793–94 (1983).

[247] *See* sources cited *supra* note 205 and accompanying parentheticals.

[248] *See* Marc E. Elias (@marceelias), TWITTER (June 18, 2018, 7:36 AM), https://twitter.com marceelias/status/1008720179545731072?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed 7Ctwterm%5E1008720179545731072&ref_url=https%3A%2F%2Fwww.vox.com%2F2018 2F6%2F18%2F17474912%2Fsupreme-court-gerrymandering-gill-whitford-wisconsin [https://perma.cc/S2SA-JD4C] ("In light of today's SCOTUS decision in Gill, it seems that the most logical (and perhaps the only) plaintiffs with standing to bring a statewide partisan gerrymandering claim are the political parties (or quasi-parties, like certain partisan superpacs).").

[249] *See* discussion *supra* Section IV.A.

[250] *See supra* notes 224–36 and accompanying text.

plaintiffs from each district in a state to undertake the costly, intimidating, and time-consuming process of litigation in order to remedy the violation of fundamental voting rights that are irreparable via the normal political process.

C. The Anderson-Burdick *Analysis Is Superior to Justice Kagan's Associational Harm Theory*

Justice Kagan's alternative theory for standing based on association harm for party activists is a falsely formalist "distinct" harm that is derivative of the statewide harm experienced by claimants under the rights-integrating *Anderson-Burdick* test.[251] As explained at length in Section III.B, Justice Kagan's proposed theory ignores prerequisite Equal Protection violations whereby voters are classified before suffering their respective associative injuries.[252] Justice Kagan incorrectly viewed the associative harm suffered by political activists and organizations to be distinct from the gerrymandering of any specific district and believed that party activists and organizations have a better standing claim than loyal party voters.[253] This is flawed in two regards that are remedied by the alternative *Anderson-Burdick* analysis: (1) voting is an individual right,[254] and (2) voters should not manufacture injury for Article III standing.[255]

First, Justice Kagan, in an attempt to allow statewide evidence to demonstrate partisan gerrymanders, determined that political parties and associations may suffer the requisite injury in fact to their organizational goals.[256] While this may be true, allowing parties, rather than individuals, to fight in court for the individual's right to associate puts the cart before the horse. The *Anderson-Burdick* test allows an individual to assert her right to associate in a political organization without discrimination, which retains the right to vote in the individual. This analysis is more consistent with the longstanding jurisprudence that "a person's right to vote is 'individual and personal in nature.'"[257]

Second, the *Anderson-Burdick* test, unlike Justice Kagan's standing analysis, does not encourage loyal party voters to manufacture injury. Justice Kagan posited that the active party member may have standing to challenge a statewide map, which could encourage would-be plaintiffs to volunteer for their party in order to gain access to the courts.[258] This is both uneconomic and at odds with standing jurisprudence.[259] The *Anderson-Burdick* test circumvents the unnecessary step proposed by Justice Kagan.

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[251] Tokaji, *supra* note 9, at 783–84.
[252] *See* discussion *supra* Section III.B.
[253] *See* Gill v. Whitford, 138 S. Ct. 1916, 1939 (2018) (Kagan, J., concurring).
[254] Reynolds v. Sims, 377 U.S. 533, 561 (1964).
[255] *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 402 (2013).
[256] *Gill*, 138 St. Ct. at 1937 (Kagan, J., concurring).
[257] *Id.* at 1929 (majority opinion) (quoting *Reynolds*, 377 U.S. at 561).
[258] *See id.* at 1938–39 (Kagan, J., concurring).
[259] *See* discussion *supra* Section III.B.2.

So long as an individual voter can show severe burdens on her ability to associate equally under the right to vote, she can assert a claim against a statewide gerrymander.

V. CHALLENGES TO THE *ANDERSON-BURDICK* ANALYSIS

There are countless potential challenges to the analysis provided above, ranging from those who believe that partisan gerrymandering is permissible under our constitutional structure to those who may take issue with this Note's choice of *Anderson-Burdick* to remedy the problem of pervasive political districting. Both the corruptions and justiciability of partisan gerrymandering generally has been implied in the preceding Sections, and a more in-depth analysis of these arguments would be beyond the scope of this Note. So, this Part focuses on the more specific challenges levied against the *Anderson-Burdick* test specifically.

While courts have regularly applied the *Anderson-Burdick* test for a litany of voting rights questions in the decades since its inception, the test is not without its critics in scholarship.[260] This Part addresses two potential challenges to the application of the *Anderson-Burdick* test to partisan gerrymandering: (1) that the focus on the individual in gerrymandering is misplaced,[261] and (2) that the *Anderson-Burdick* test should be scrapped entirely for a more explicit inquiry into partisan intent.[262]

A. Tokaji: Anderson-Burdick *Should Concern Parties, Not Individuals*

Daniel Tokaji criticizes the modern application of the *Anderson-Burdick* test as having lost sight of the associative rights of political parties initially concerning that line of cases.[263] Tokaji argues that "a focus on political parties would also best capture the injury that underlies [*Anderson-Burdick*] plaintiffs' claims."[264] For practically all modern restrictions on voting, Tokaji claims, the goal is "partisan manipulation, designed to help the dominant major party at the expense of its main competitor."[265] The standard Tokaji proffers is a simple amendment to *Anderson-Burdick*: "The greater the disparate impact on voters affiliated with the non-dominant party, the stronger the State's justification should be."[266] Applied to partisan gerrymandering, Tokaji's standard would consider injury as the extent to which the district map injured any plaintiffs' ability to associate, balanced against a sliding scale of state interest.[267]

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[260] *See* Tokaji, *supra* note 9, at 786–91; *see also* Edward B. Foley, Essay, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836 (2013).

[261] *See* discussion *infra* Section V.A.

[262] *See* discussion *infra* Section V.B.

[263] *See* Tokaji, *supra* note 9, at 786.

[264] *See id.*

[265] *Id.*

[266] *Id.* at 787–88.

[267] *See id.* at 786–88.

While an interesting cosmetic alteration to the process of *Anderson-Burdick*, Tokaji's test fails to improve on the proposed application of *Anderson-Burdick* in partisan gerrymandering cases specifically. Though conceptually intriguing, Tokaji fails to provide a test that would be more palatable for adjudicating partisan gerrymandering tests.[268] Furthermore, his test, to a lesser extent than Justice Kagan's,[269] still shifts the focus of voting rights too far from the individual.

The Supreme Court has struggled to find a justiciable test for partisan gerrymandering since *Bandemer*.[270] The *Anderson-Burdick* test is particularly attractive to remedy this problem because it has a fairly clear, two-tiered scrutiny analysis illuminated by precedential guideposts.[271] Tokaji's test would leave too much guesswork in the hands of the fact-finder to determine how much partisan injury should be balanced against the state interest. The vagueness of the standard treads towards unworkability, a position many justices have already taken in regard to partisan gerrymandering.[272] Though *Anderson-Burdick* provides a sliding scale analysis, it maintains fairly clear standards to guide the presiding judge.[273] Tokaji's test lacks these standards.

In addition, Tokaji contemplates that voting restrictions should be viewed through the lens of partisan manipulation and party effect.[274] While this argument has merit, it muddies the water as to whether individual plaintiffs alone may have injury-in-fact to challenge voting restrictions. Like Justice Kagan's associational analysis, this formulation is in conflict with the foundational understanding that voting is an individual right.[275]

B. Foley: Explicit Inquiry of Partisan Intent

Professor Edward Foley provides an inquiry on the other side of the coin as Tokaji's partisan effect analysis. Foley argues that courts should abandon the "current morass"[276] of balancing voting rights and state regulatory power; "[i]nstead of attempting to measure burdens and interests, perhaps federal judges should ask whether the state's administration of the voting process is a ploy to achieve a partisan advantage."[277] For him, the question is not whether a state actor was particularly effective in an effort to discriminate against the opposing party, but merely if it attempted such

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[268] *See* discussion *supra* Section I.B.

[269] *See* discussion *supra* Section III.B.2.

[270] *See* discussion *supra* Section I.B.

[271] *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 205 (2008) (Scalia, J., concurring) (explaining the two-tiered analysis of *Anderson-Burdick* and considering these tiers with respect to precedent).

[272] *See* Vieth v. Jubelirer, 541 U.S. 267, 267 (2004).

[273] *See Crawford*, 533 U.S. at 205–06 (Scalia, J., concurring).

[274] *See* Tokaji, *supra* note 9, at 786.

[275] *See* discussion *supra* Section III.B.2.

[276] Foley, *supra* note 260, at 1860.

[277] *Id.* at 1861.

discrimination.[278] A major benefit to this analysis that Foley acknowledges is its predictability: "Lawyers would know that their task would be to introduce, or refute, evidence of partisan bias, rather than guessing about how to weigh competing and immeasurable values or what qualifies as arbitrary."[279]

Again, this critique of *Anderson-Burdick* is certainly intriguing, but it leaves much to be desired. First, Foley's test would contemplate a cognizable claim even where plaintiffs faced no discernable injury.[280] Second, as how courts have occasionally struggled to discern racial intent,[281] courts may have difficulty determining partisan intent from circumstantial evidence.

If a map was intended to be a partisan gerrymander, but was actually ineffective at achieving partisan goals, it would still give rise to a cause of action under Foley's formulation.[282] This is problematic for standing analyses, as a plaintiff may only bring an Article III case or controversy when she can show injury in fact.[283] Thus, Foley's test fails to provide a clear formulation of injury as *Anderson-Burdick* can.[284] Given that standing proves a substantial hurdle for gerrymandering plaintiffs, Foley's test seems wholly inapplicable to this realm of election law.

Foley confidently states that the partisan intent inquiry would be a reprieve from the "current morass" posed by the *Anderson-Burdick* balancing test.[285] However, it is not so clear that an intent inquiry would provide any more bright a line than the current survey.[286] Legislatures can hide their intent in the broad swaths of power that states are provided in regulating elections.[287] Given the constitutional directive of election oversight to the states, courts may be loath to read a partisan intent into

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[278] *See id.*

[279] *See id.* at 1862.

[280] Foley asks judges to inquire only as to whether state actors are manipulating the electoral regulations as a "ploy," not whether these ploys result in successful election manipulation. *See id.* at 1861.

[281] *See* Derek W. Black, *The Contradiction Between Equal Protection's Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It*, 15 WM. & MARY BILL RTS. J. 533, 564–75 (2006) (discussing the myriad of shortcomings in the Supreme Court's intent standard for racial Equal Protection claims).

[282] *See* Foley, *supra* note 260, at 1862.

[283] *See* discussion *supra* Section I.A.

[284] *See* discussion *supra* Part IV.

[285] Foley, *supra* note 260, at 1861.

[286] *See* Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993, 2026 (2018) ("Some Justices and commentators have raised a[n] . . . issue: not the notion that redistricting is inherently political, but the notion that in a political body like a legislature, some intent to gain political—or even partisan—advantage is inevitable.").

[287] *See* Aaron Deslatte, *Redistricting Records: GOP-Led Process Was an 'Illusion,'* ORLANDO SENTINEL (Nov. 25, 2014, 3:57 PM), https://www.orlandosentinel.com/news/politics/political-pulse/os-redistricting-records-gopled-process-was-an-illusion-20141125-post.html [https://perma.cc/K8CK-ELCU] (describing how Florida Republican operatives worked clandestinely to orchestrate a pro-GOP map).

facially neutral statutes.[288] Though Foley believes this intent analysis will free litigants from the muddled inquiries of *Anderson-Burdick*, it may instead subject litigants to a battle of vague circumstantial evidence resulting in difficult questions of great political implication left to finders of fact. The *Anderson-Burdick* analysis, on the other hand, allows for greater structure in defining the factual record, and it is less susceptible to factual manipulation by state actors.

In sum, although there are compelling challenges to *Anderson-Burdick* for purposes of many election regulations, the test this Note proffers is superior in its ability to define the contours of injuries suffered by individual voters and provides a workable standard to a judiciary that has been unwilling to define a new test for such a politically important question.

CONCLUSION

The Court has struggled for decades to grapple with the extent to which it should enter the "political thicket"[289] of partisan gerrymandering, ultimately deciding in June 2019 that it would not hear such political questions.[290] Even before *Rucho*, the *Gill* majority, in rejecting the compelling mathematical evidence that a statewide map entrenched Republican representatives, demonstrated this persistent fear in adjudicating politically sensitive questions of partisan gerrymanders.[291] The two standing analyses provided by the *Gill* Court, however, are at odds with the realities of partisan gerrymandering and the Court's approach to state restrictions on voting rights.[292]

The *Anderson-Burdick* test, first iterated in 1983 and crystallized in 1992, is a decades-old test the Court has applied to a variety of challenges to voting restrictions.[293] Though never before applied in a question of gerrymandering, the test provides a compelling framework for determining how partisan maps disfavor and injure individual voters.[294] In subjecting voting restrictions to a two-tiered analysis that considers both First and Fourteenth Amendment rights implicated in voting, the *Anderson-Burdick* test effectively protects voters from state overreach while insulating states from frivolous court cases.[295] Rather than look to new formulations for determining what amounts to a cognizable injury in fact, the Supreme Court, as well as state courts now shouldered with the burden of solving this process failure, should look to the precedential past to find the answer for the partisan gerrymandering puzzle in the *Anderson-Burdick* analysis.

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[288] *But see* Levitt, *supra* note 286, at 2034–37 (explaining that courts are actually quite adept at determining impermissibly invidious partisanship).

[289] Colegrove v. Green, 328 U.S. 549, 556 (1946).

[290] *See* discussion *supra* Section I.B.

[291] *See* discussion *supra* Sections II.A–B.

[292] *See* discussion *supra* Part III.

[293] *See* discussion *supra* Section I.C.

[294] *See* discussion *supra* Section IV.A.

[295] *See* discussion *supra* Section IV.A.

As partisanship and gridlock intensify across the country, the political process has broken down to a degree where voters are incapable of resolving the perversions of partisan districting through the traditional electoral means. The Supreme Court "*can* address the problem of partisan gerrymandering because it *must*"[296]—because, as Paul Smith, counsel for the Wisconsin plaintiffs in *Gill* argued: "[The Supreme Court is] the only institution in the United States that can . . . solve this problem just as democracy is about to get worse because of the way gerrymandering is getting so much worse."[297] While Smith's plea for action ultimately fell on deaf ears, his impassioned request now echoes in the chambers of state courts and the halls of Congress, which should consider the intertwined speech and equality concerns inherent to issues of partisan gerrymandering.

[296] Gill v. Whitford, 138 S. Ct. 1916, 1929 (2018).
[297] Transcript of Oral Argument at 62, *Gill*, 138 S. Ct. 1916 (2018) (No. 16-1161).