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ANSWERING THE POLITICAL QUESTION: DEMONSTRATING AN INTENT-BASED FRAMEWORK FOR PARTISAN GERRYMANDERING

Kyle H. Keraga*

Partisan gerrymandering is widely recognized as a threat to the foundations of our democracy. Political parties with control over their state legislatures routinely leverage the redistricting process to entrench themselves in power—suppressing political adversaries, chilling public participation, and polarizing the electorate. Nevertheless, despite a persistent recognition that partisan gerrymandering is incompatible with basic democratic principles, the Supreme Court struggled to develop a stable and consistent doctrinal approach to this issue, even as reliable standards emerged to adjudicate malapportionment and racial gerrymandering claims. Recently, in *Rucho v. Common Cause*, the Court abandoned the search entirely, holding that partisan gerrymandering is a nonjusticiable political question, grounded in impossible quantifications of fairness that leave it too amorphous for the federal courts to review.

This Article challenges the Supreme Court's political question holding, diagnoses the breakdown of federal partisan gerrymandering doctrine, and argues in favor of an intent-based framework. Part I invokes Professor John Hart Ely's theory of representation-reinforcing review to argue that the political question doctrine is an exploration of political discretion, and that courts have authority to overturn laws that restrict the democratic process. Part II asserts that the Supreme Court's decision to frame partisan gerrymandering doctrine around a map's impact on future elections, rather than the predominant intent of the mapmakers, was the source of its inability to develop manageable standards and the genesis of the doctrine's collapse. Part III provides a unique, comprehensive synthesis of leading state and federal gerrymandering cases under the rubric of predominant legislative intent. The result is a manageable, proof-of-concept standard for partisan gerrymandering that guards

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against the worst distortions of the democratic process, while preserving the separation of powers and addressing the prudential concerns that hindered the evolution of this doctrine.

INTRODUCTION 886
I. *RUCHO V. COMMON CAUSE* AND THE POLITICAL QUESTION DOCTRINE 890
  A. *Retracing the Court's Steps* 891
  B. *Challenging the Court's Application of Political Question* 894
    1. The Limits of Separation of Powers: Judicial Authority to Preserve Democracy 896
    2. The Meaning of Political Question: Exploring the Boundaries of Political Discretion 901
II. A STRONGER FOUNDATION FOR PARTISAN GERRYMANDERING DOCTRINE 905
  A. *Equal Protection Standards for Malapportionment and Racial Gerrymandering* 905
  B. *The Supreme Court's Struggle to Address Partisan Gerrymandering* 908
  C. *Alternative Approaches and Success in the State Courts* 912
  D. *Challenging the Supreme Court's Insistence on an Effects-Based Jurisprudence* 914
III. A PROOF-OF-CONCEPT PREDOMINANT INTENT FRAMEWORK 922
  A. *The Framework: Translating* Arlington Heights *into a Partisan Gerrymandering Test* 922
  B. *The Easy Cases: Evidence Internal to the Legislative Process* 925
  C. *The Hard Cases: Circumstantial Evidence of Predominant Partisan Intent* 929
    1. The Parade of Animal Analogies: Substantive Departures from Traditional Principles 930
    2. When Election Results Matter: Disproportionate Impact on an Affected Population 933
  D. *Rebuttal Evidence: State Interests to Defend Against Gerrymandering Claims* 936
CONCLUSION 938

INTRODUCTION

Partisan gerrymandering, "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power," has been a polarizing force in American politics for decades.[1] As a partisan entrenchment tactic,

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[1] L. PAIGE WHITAKER, CONG. RSCH. SERV., LSB10324, PARTISAN GERRYMANDERING

it is alarmingly effective: political parties in control of state legislatures have drawn district maps that cement their majority with as little as forty percent of the statewide vote,[2] or relegate political adversaries to one third of the available seats, even with a popular vote lead.[3] It is also widespread: According to a report by the Center for American Progress, as many as fifty-nine seats in the House of Representatives have been decided, election-to-election, by gerrymanders—twenty in favor of Democrats, and thirty-nine in favor of Republicans.[4] And the gerrymanderers are getting better at it—more prolific, more precise, more coordinated. Following the 2010 census, the Republican Party funneled tens of millions of dollars into the Redistricting Majority Project (REDMAP), an expansive gerrymandering initiative with the transparent and unambiguous objective of entrenching Republican majorities in state legislatures for decades to come.[5]

Democracy is not supposed to work this way—and the voting public broadly agrees. Gerrymanders have been the subject of widespread opposition since our nation's earliest years.[6] As recently as 2021, as many as nine in ten Americans

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CLAIMS NOT SUBJECT TO FEDERAL COURT REVIEW: CONSIDERATIONS GOING FORWARD 1–2 (2019), https://crsreports.congress.gov/product/pdf/LSB/LSB10324; *see* Michael Wines, *What Is Gerrymandering? And How Does It Work?*, N.Y. TIMES (Mar. 26, 2019), https://www.nytimes.com/2019/06/27/us/what-is-gerrymandering.html [https://perma.cc/WVE7-43HY].

2 Henderson v. Perry, 399 F. Supp. 2d 756, 762–64 (E.D. Tex. 2005).

3 League of Women Voters v. Commonwealth, 178 A.3d 737, 763–64 (Pa. 2018).

4 Alex Tausanovitch, *The Impact of Partisan Gerrymandering*, CTR. FOR AM. PROGRESS (Oct. 1, 2019), https://www.americanprogress.org/issues/democracy/news/2019/10/01/475166/impact-partisan-gerrymandering/ [https://perma.cc/FL4C-G46E].

5 *See* 2012 REDMAP SUMMARY REP., REDISTRICTING MAJORITY PROJECT (Jan. 4, 2013, 9:23 AM), http://www.redistrictingmajorityproject.com/ [https://perma.cc/5RKN-EKLE]; Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race*, ATLANTIC (Oct. 28, 2017), https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/ [https://perma.cc/8XV2-PYQG]. REDMAP district maps have been the centerpiece of many of the last decade's most contentious gerrymandering cases. *E.g.*, Common Cause v. Rucho, 318 F. Supp. 3d 777, 803 (M.D.N.C. 2018); League of Women Voters v. Benson, 373 F. Supp. 3d 867, 882–83 (E.D. Mich. 2019); Ohio A. Philip Randolph Inst. v. Larose, 761 Fed. App'x 506, 508 (6th Cir. 2019).

6 Anna Khomina, *Elbridge Gerry and the Original Gerrymander*, GILDER LEHRMAN INST. OF AM. HIST. (Oct. 2, 2017), https://www.gilderlehrman.org/news/elbridge-gerry-and-original-gerrymander [https://perma.cc/5SLB-4M3K] (discussing contemporary disdain for Elbridge Gerry's original gerrymander). For some creative examples, see Dylan Moriarty & Joe Fox, *Play Mini Golf to See How Politicians Tilt Elections Using Maps*, WASH. POST (May 3, 2022, 9:50 AM), https://www.washingtonpost.com/politics/interactive/2022/redistricting-mini-golf/ [https://perma.cc/9BEQ-8BSN]; Harlow G. Unger, *Elbridge Gerry's Monster Salamander that Swallows Votes*, HIST. NEWS NETWORK (Nov. 3, 2019), https://historynewsnetwork.org/article/173464 [https://perma.cc/8ZY2-KP6L]; Grace Panetta, *There's a New Downloadable Font Inspired by Gerrymandered Congressional Districts*, BUS. INSIDER (Aug. 1, 2019, 1:25 PM), https://www.businessinsider.com/you-can-download-font-gerrymandered-congressional-districts-2019-8/ [https://perma.cc/6NAY-82ZA].

expressed support for removing partisan bias from the redistricting process entirely, even if it could cost their party an election.[7] This disdain is well-founded, as partisan gerrymanders have substantial, well-documented suppressive effects on public participation; they chill turnout among minority parties, raise the costs of challenging incumbents, distort trust and accountability between voters and their representatives, exacerbate ideological segregation among the electorate, and reinforce a pervasive sentiment that voting is an exercise in futility.[8] The judiciary is no stranger to this reality. Supreme Court Justices from both parties have described gerrymandering as "cherry-pick[ing] voters,"[9] "rigging elections,"[10] and a subversion of "the core principle of republican government . . . that the voters should choose their representatives, not the other way around."[11]

Despite a persistent recognition that partisan gerrymandering is "incompatible with democratic principles,"[12] the Supreme Court was unable to find an answer. Its search spanned decades, stretching from *Gaffney v. Cummings* and *Davis v. Bandemer*, to *Vieth v. Jubelirer* and *Gill v. Whitford*.[13] With each dispute, litigants offered principled standards capable of evaluating the remarkably partisan facts at hand.[14] With each decision, the Court fractured, its indecisiveness feeding a growing doubt that partisan gerrymandering is susceptible to evenhanded adjudication.[15]

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[7] John Kruzel, *American Voters Largely United Against Partisan Gerrymandering, Polling Shows*, HILL (Aug. 4, 2021, 12:48 PM), https://thehill.com/homenews/state-watch/566327-american-voters-largely-united-against-partisan-gerrymandering-polling [https://perma.cc/YX7T-F9JP]; *Supermajority of Americans Want Supreme Court to Limit Partisan Gerrymandering*, CAMPAIGN LEGAL CTR. (Sep. 11, 2017), https://campaignlegal.org/press-releases/supermajority-americans-want-supreme-court-limit-partisan-gerrymandering/ [https://perma.cc/PAE6-PEYB].

[8] *See* Danny Hayes & Seth C. McKee, T*he Participatory Effects of Redistricting*, 53 AM. J. POL. SCI. 1006, 1008–09 (2009) (reviewing effects on turnout and incumbency costs); Fred Dews, *A Primer on Gerrymandering and Political Polarization*, BROOKINGS (July 6, 2017), https://www.brookings.edu/blog/brookings-now/2017/07/06/a-primer-on-gerrymandering-and-political-polarization/ [https://perma.cc/R5N6-CMGP] (discussing polarization and ideological segregation); Sam Fleming, *Battle Lines: The Fight for a Fair Vote in America*, FT MAG. (Aug. 2, 2018), https://www.ft.com/gerrymandering [https://perma.cc/QZV4-AZKQ] (highlighting widespread voter frustration); Thomas E. Mann, *We Must Address Gerrymandering*, TIME (Oct. 13, 2016, 7:00 AM), https://time.com/4527291/2016-election-gerrymandering/ [https://perma.cc/43YN-P5YJ] (observing "hyper-partisanship that paralyzes our politics and governance").

[9] Rucho v. Common Cause, 139 S. Ct. 2484, 2512 (2019) (Kagan, J., dissenting).

[10] Vieth v. Jubelirer, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring).

[11] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 824 (2015) (Ginsburg, J.) (quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 781 (2005)).

[12] *Rucho*, 139 S. Ct. at 2506 (quoting *Ariz. State Legislature*, 576 U.S. at 791).

[13] *See infra* Section II.B.

[14] *See infra* Section II.B.

[15] *See infra* Section II.B.

Then in *Rucho v. Common Cause*, the Court abandoned the hunt, holding that partisan gerrymandering is a nonjusticiable political question, properly assigned to the political branches and too amorphous for the federal courts to review.[16] As a result, voters seeking to challenge partisan entrenchment and political suppression must seek relief from the state courts, or from the gerrymanderers themselves.[17]

Partisan gerrymandering doctrine collapsed even as the Supreme Court developed workable standards to adjudicate racial gerrymandering and malapportionment claims. This divergence begs a fundamental question: How did we get here? Why are the same entrenchment tactics justiciable in one context, and unmanageable in the next? This Article asserts that partisan gerrymandering doctrine deteriorated due to the Supreme Court's decision to frame the constitutional analysis around the impact of the map, rather than the intent of the mapmakers. This effects-based framework required the judiciary to decide how much partisan entrenchment is too much—an inquiry that forced courts to grapple with abstract questions of fairness and predict the outcome of future elections. Instead, the Court should have proscribed the practice of districting for partisan gain, and held that a map drawn with the predominant intent to entrench a party in power or suppress political outsiders is unconstitutional. A standard grounded in the legislature's predominant intent would be better positioned to thwart pervasive partisan gerrymandering, providing a more coherent path for the doctrine's evolution and a stronger foundation for our democracy.

This Article unravels the collapse of partisan gerrymandering doctrine, retraces the Supreme Court's steps through the history of this ill-fated jurisprudence, and demonstrates the viability of an intent-based approach. Part I responds directly to *Rucho v. Common Cause* and the Court's application of the political question doctrine, providing the foundational justifications for the judiciary to address partisan gerrymandering.[18] Part II explores state and federal gerrymandering doctrines, and argues that federal partisan gerrymandering doctrine should have been framed around the legislature's predominant suppressive intent, rather than the impact of the challenged map.[19] Part III engages in an extended extrapolation of this principle by developing a proof-of-concept intent-based partisan gerrymandering standard from a synthesis of leading state and federal gerrymandering cases.[20] The result is a doctrine that draws on the established *Arlington Heights* framework for legislative intent and corresponding principles in racial gerrymandering cases to guard against

[16] *Rucho*, 139 S. Ct. at 2506–07; *see infra* Section I.A (discussing *Rucho* at length).

[17] *See* Gretchen Frazee & Laura Santhanam, *What the Supreme Court's Gerrymandering Decision Means for 2020*, PBS NEWS HOUR (Jun. 28, 2019, 5:51 PM), https://www.pbs.org/newshour/nation/what-the-supreme-courts-gerrymandering-decision-means-for-2020/ [https://perma.cc/2KXY-694C].

[18] *See infra* Part I.

[19] *See infra* Part II.

[20] *See infra* Part III.

the worst distortions of the redistricting process, while constraining judicial intervention and addressing the Court's persistent separation of powers concerns.

I. *RUCHO V. COMMON CAUSE* AND THE POLITICAL QUESTION DOCTRINE

There is a pattern to partisan gerrymandering cases. The Supreme Court's opinion in *Rucho v. Common Cause* highlights this pattern and illustrates how partisan gerrymandering doctrine went sideways.[21] In *Rucho*, a collection of voters and civil rights organizations in Maryland and North Carolina alleged that their states' congressional district maps were unconstitutional partisan gerrymanders, in violation of the First and Fourteenth Amendments.[22] The plaintiffs in each state presented the district courts with a mountain of evidence that the challenged maps were drawn with the unambiguous goal of entrenching the mapmakers in power and suppressing their political adversaries.[23] The courts responded by adopting coherent three-prong tests to adjudicate partisan gerrymandering, and applied them to the facts to strike down the challenged maps.[24] However, the Supreme Court rejected both tests and found the issue nonjusticiable.[25] Instead of adjudicating the clear facts presented by each case, the Court left them "forever behind,"[26] focusing its analysis primarily on prudential concerns raised by future disputes not yet litigated, and future maps not yet drawn.

The foregoing pattern demonstrates a fundamental problem with the *Rucho* Court's holding: the Court used the political question doctrine to carve an entire legal issue out of the scope of its power of review, even in the face of unambiguous circumstances that would have been quite easy to adjudicate. This Part contends that he political question doctrine is an exploration of political discretion, and is not meant to defer review of a clear constitutional issue. Section I.A reviews the facts and reasoning in *Rucho* to provide a foundation for this analysis.[27] Section I.B responds to the underpinnings of the *Rucho* Court's holding, arguing: (1) that the Equal Protection Clause grants courts authority to address legislative actions that imperil the foundations of the democratic system; and (2) that the Supreme Court failed to answer the critical question of whether the Maryland and North Carolina legislatures exceeded the authority granted to them by the Elections Clause.[28]

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[21] 139 S. Ct. 2484 (2019).

[22] *Id.* at 2491 (further alleging violations of the Elections Clause and Article I, § 2 of the Constitution).

[23] *See infra* text accompanying notes 29–44.

[24] *See infra* note 45 and accompanying text.

[25] *See infra* note 49 and accompanying text.

[26] Rucho v. Common Cause, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting).

[27] *See infra* Section I.A.

[28] *See infra* Section I.B.

A. Retracing the Court's Steps

The two consolidated cases addressed in *Rucho* involved a strikingly partisan set of facts. The first case, *Common Cause v. Rucho*, addressed North Carolina's 2016 district map.[29] After two elections in which Republicans secured at least seventy-five percent of the state's congressional seats despite earning no more than fifty-five percent of the vote,[30] North Carolina Representative David Lewis and Senator Robert Rucho hired a Republican specialist to draw a map that would cement the Republican Party's ten to three advantage in the state's Congressional delegation.[31] The legislature did not hide its motives—the redistricting committee listed "Partisan Advantage" as a guiding criterion in the districting process and used political data to guide its decisions.[32] Moreover, Representative Lewis "acknowledge[d] freely that this would be a political gerrymander," and that he had optimized the map for a ten to three Republican advantage only "because he did not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats."[33] Adopted on party lines, the map ossified the Republican Party's advantage in 2016 and 2018, despite a dwindling popular vote lead.[34]

The second case, *Benisek v. Lamone*, presented the same issue along inverse party lines.[35] In 2010, Maryland Democrats aggressively pursued a redistricting plan that would create a seven to one advantage in Congress, even as the party's electoral returns peaked at sixty-five percent.[36] Maryland Senate President Thomas V. Mike Miller, Jr., characterized this gerrymander as a "serious obligation" to counteract the Republican Party's nationwide redistricting efforts.[37] According to then-Governor Martin O'Malley, the map was calibrated to guarantee Democratic control of Maryland's Sixth Congressional District.[38] The Democrat-led redistricting committee hired Eric Hawkins, an analyst at a Democratic consulting firm, "to ensure that the

[29] 318 F. Supp. 3d 777, 799 (M.D.N.C. 2018).

[30] *Id.* at 804.

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

[32] *Id.*

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

[34] *Rucho*, 139 S. Ct. at 2510 (Kagan, J., dissenting). This advantage persisted into 2020. *See* Billy Corriher, *North Carolina Election Results Show the Persistence of Partisan Gerrymandering*, FACING S. (Nov. 18, 2020), https://www.facingsouth.org/2020/11/north-carolina-election-results-show-persistence-partisan-gerrymandering [https://perma.cc/8BEZ-HH7G].

[35] 348 F. Supp. 3d 493, 497 (D. Md. 2018).

[36] *Rucho*, 139 S. Ct. at 2511 (Kagan, J., dissenting).

[37] *Benisek*, 348 F. Supp. 3d at 506.

[38] *Id.* at 502.

new map produced 7 reliable Democratic seats, and to protect all Democratic incumbents."[39] To achieve this goal, Hawkins moved approximately 360,000 voters out of the Sixth District, and 350,000 voters in—reducing the number of registered Republicans by over 66,000 while increasing the number of Democrats by 24,000.[40] Following this map's adoption—also on party lines—the Sixth District has remained firmly in Democratic control.[41]

Collections of citizens, political activists, and civil rights organizations brought suit, offering a wealth of evidence that the Maryland and North Carolina congressional maps were drawn to minimize the representation of each state's minority party. At the forefront of each case were public statements by lawmakers acknowledging their suppressive intentions, and the tools and data they used to gerrymander both states with technical precision.[42] Plaintiffs also produced evidence that the dominant parties locked their opponents out of the redistricting process—in North Carolina, the Republican Party coordinated with a REDMAP "redistricting team" through private counsel, and in Maryland, the Democratic Party surreptitiously engaged Hawkins' firm to draw maps while the legislature was still holding public hearings and seeking input from voters.[43] They supplemented this analysis with expert testimony regarding each map's political effects—in *Benisek*, plaintiffs demonstrated a historic swing in the Sixth District's "Partisan Voter Index," and in *Common Cause*, plaintiffs compared the challenged map to thousands of hypothetical alternatives to show that it was an extreme statistical outlier.[44]

Adjudicating these claims under the First and Fourteenth Amendments, the United States District Courts for the Districts of Maryland and North Carolina ruled in favor of the plaintiffs and enjoined both challenged maps.[45] The *Common Cause* Court found that the North Carolina plaintiffs established a representational injury by demonstrating that their natural political strength was diluted through the "widespread cracking and packing" of their party's votes.[46] The *Benisek* Court held

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[39] *Rucho*, 139 S. Ct. at 2511 (citing *Benisek*, 348 F. Supp. 3d at 503).

[40] *Id.* at 2493.

[41] *Id.*

[42] *See, e.g.*, *Common Cause*, 318 F. Supp. 3d at 806–08; *Benisek*, 348 F. Supp. 3d at 506, 518; *Rucho*, 139 S. Ct. at 2511.

[43] *Common Cause*, 318 F. Supp. 3d at 803; *Benisek*, 348 F. Supp. 3d at 502–03, 506; *Rucho*, 139 S. Ct. at 2511 (citing *Benisek*, 348 F. Supp. 3d at 503).

[44] *See Benisek*, 348 F. Supp. 3d at 500–01, 507; *Common Cause*, 318 F. Supp. 3d at 896–97.

[45] *Rucho*, 139 S. Ct. at 2491. I have previously argued that the First Amendment is a stronger foundation for partisan gerrymandering doctrine. *See* Kyle Keraga, Note, *Drawing the Line: A First Amendment Framework for Partisan Gerrymandering in the Wake of* Rucho v. Common Cause, 79 MD. L. REV. 798 (2020).

[46] *Common Cause*, 318 F. Supp. 3d at 884. Cracking involves spreading members of a disfavored group across multiple districts to dilute their voting strength; packing entails concentrating members of that group into supermajorities in a limited number of districts to

that the Maryland plaintiffs suffered an associational injury, as residents of the Sixth District had been "burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting in an atmosphere of general confusion and apathy."[47] Both sets of plaintiffs prevailed, both district maps were enjoined, and both legislative defendants appealed directly to the Supreme Court.[48]

In an opinion by Chief Justice Roberts, the Supreme Court reversed both decisions, and held that partisan gerrymandering is a nonjusticiable political question.[49] This ruling rested on two grounds. First, the Court reasoned that "federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding they were [constitutionally] authorized to do so."[50] The Framers had granted Congress supervision over the redistricting process through the Elections Clause, which does not contemplate judicial review of partisan gerrymandering.[51] Although the Equal Protection Clause gives courts an intervening mandate to address racial gerrymandering and malapportionment, the judiciary has "no plausible grant of authority" to address "[e]xcessive partisanship" in redistricting.[52] Second, and more urgently, the Court held that the Constitution contains no "clear, manageable, and politically neutral" standards to adjudicate partisan gerrymandering claims.[53] As the Court has consistently held that "a jurisdiction may engage in constitutional political gerrymandering,"[54] any analysis of partisan gerrymandering requires judges to determine "when political gerrymandering has gone too far," and "how much partisan dominance is too much."[55] This was a question of degree with no clear answer, requiring an "unmoored determination" based on amorphous notions of political fairness that are difficult to quantify, and incompatible with judicial neutrality.[56]

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minimize the impact of their votes. *Id.* at 811; League of Women Voters of Mich. v. Benson, 373 F. Supp. 3d 867, 897 (E.D. Mich. 2019).

[47] *Benisek*, 348 F. Supp. 3d at 524.

[48] *Id.* Pursuant to 28 U.S.C. § 2284(a), "[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts." A losing party may appeal the grant of an injunction issued by a three-judge panel directly to the Supreme Court. 28 U.S.C. § 1253 (1948).

[49] *Rucho*, 139 S. Ct. at 2506–07.

[50] *Id.* at 2499.

[51] *Id.* at 2494–96 ("At no point was there a suggestion that the federal courts had a role to play.").

[52] *Id.* at 2491, 2502, 2506–07.

[53] *Id.* at 2498. The Court drew heavily on Justice Kennedy's concurring opinion in *Vieth* to reason that "[w]ith uncertain limits, intervening courts . . . would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Id.* (quoting Vieth v. Jubelirer, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring)).

[54] *Id.* at 2497 (quoting Hunt v. Cromartie, 526 U.S. 541, 551 (1999), and citing Gaffney v. Cummings, 412 U.S. 735, 753 (1973)).

[55] *Id.* (quoting *Vieth*, 541 U.S. at 296).

[56] *See id.* at 2498–500 ("The initial difficulty in settling on a 'clear, manageable and

In an extended dissent, Justice Kagan argued that the Supreme Court declared partisan gerrymandering nonjusticiable "just when courts across the country . . . have coalesced around manageable judicial standards to resolve partisan gerrymandering claims."[57] The dissent observed that the majority overlooked the straightforward facts and "the constitutional harms at their core" in favor of an analysis of the potential for judicial overreach in future cases.[58] Reviewing those facts in detail, Justice Kagan argued that the district maps adopted by Maryland and North Carolina denied citizens "the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives."[59] Accordingly, she argued that those maps violate the Fourteenth Amendment, which "guarantees the opportunity for equal [electoral] participation," and the First Amendment, which "gives its greatest protection to political beliefs, speech, and association."[60] The tests adopted by the lower courts offered manageable standards to review these maps and ameliorate these harms while avoiding the majority's prudential concerns.[61] The use of a state's "own political geography and districting criteria" as a baseline consideration would limit judicial subjectivity,[62] while digital technology and algorithms would enable courts and litigants to accurately quantify a map's suppressive effect.[63] And while future disputes may be more difficult to adjudicate, both tests "set the bar high, so that courts could intervene in the worst partisan gerrymanders, but no others."[64]

B. Challenging the Court's Application of Political Question

Responding to the *Rucho* Court's holding requires a review of the history and purpose of the political question doctrine. The modern political question framework was articulated in *Baker v. Carr*, where the Supreme Court addressed the justiciability of an Equal Protection challenge to Tennessee's legislative district map.[65] To determine the scope of its power of review, the *Baker* Court synthesized a set of

politically neutral' test for fairness is that it is not even clear what fairness looks like in this context.") (quoting Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012)).

[57] *Id.* at 2509 (Kagan, J., dissenting).

[58] *Id.* at 2509–11 ("After dutifully reciting each case's facts, the majority leaves them forever behind, instead immersing itself in everything that could conceivably go amiss if courts became involved.").

[59] *Id.* at 2509.

[60] *Id.* at 2514 (quoting Reynolds v. Sims, 377 U.S. 533, 566 (1964)).

[61] *Id.* at 2516–17.

[62] *Id.* at 2521 (emphasis omitted).

[63] *See id.* at 2517–18 ("[T]he same technologies and data that today facilitate extreme partisan gerrymanders also enable courts to discover them, by exposing just how much they dilute votes.").

[64] *Id.* at 2522.

[65] 369 U.S. 186, 196–98 (1962).

historically non-reviewable government powers,[66] and concluded that "[t]he nonjusticiability of a political question is primarily a function of the separation of powers."[67] Several features may suggest that an issue is nonjusticiable, such as "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards" to resolve the claim.[68] If "one of these formulations is inextricable from the case at bar," judicial intervention would undermine separation of powers, and the Court should decline to adjudicate the dispute.[69] Applying this standard, the *Baker* Court held that a challenge to a district map to determine "the consistency of state action with the Federal Constitution" did not implicate separation of powers, and did not present a nonjusticiable political question.[70]

The *Rucho* Court evoked these principles in its holding, but reached the opposite result.[71] The Chief Justice grounded his opinion in the symbiotic notions that (1) the Constitution provides no basis for federal courts to constrain political considerations in the redistricting process; and (2) the judiciary could not conceive a manageable standard to adjudicate partisan gerrymandering claims.[72] In this Section, I argue that each premise falls short when viewed in light of the baseline role of political question doctrine as an exploration of political discretion and a safeguard of the separation of powers. The former is contradicted by decades of judicial intervention in state elections to prevent political actors from undermining the foundations of the democratic system—notwithstanding the political discretion conferred by the Elections Clause.[73] The latter attempts to prognosticate future cases instead of adjudicating the unambiguous facts at issue in *Rucho*—overlooking the question of whether the Maryland and North Carolina legislatures exceeded the scope of that discretion in the case at bar.[74]

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[66] *Id.* at 211–15 (listing as examples the guarantee of a republican form of government, the recognition of foreign and tribal governments, the duration of hostilities, the validity of constitutional amendments, and several others).

[67] *Id.* at 210.

[68] *Id.* at 217. The full list of political question formulations provided in Baker also includes:

> the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

[69] *Id.* at 217.

[70] *Id.* at 226.

[71] 139 S. Ct. at 2494–96, 2506–07.

[72] *See supra* notes 49–56 and accompanying text.

[73] *See infra* Section I.B.1.

[74] *See infra* Section I.B.2.

1. The Limits of Separation of Powers: Judicial Authority to Preserve Democracy

The *Rucho* Court's first rationale for applying the political question doctrine was that the Constitution does not confer judicial authority to address "excessive partisanship" in redistricting.[75] Article 1, Section 4 of the U.S. Constitution (the "Elections Clause") grants state legislatures authority over the time, place, and manner of congressional elections, subject to congressional oversight.[76] The Supreme Court stopped short of holding that the Elections Clause precludes judicial review of all redistricting issues,[77] but reasoned that the Framers had committed "electoral districting problems . . . to the state legislatures, expressly checked and balanced by the Federal Congress," and had not contemplated judicial review of political considerations in the redistricting process.[78] Although the Equal Protection Clause authorizes judicial intervention in that process to address racial gerrymandering and malapportionment, the majority found that courts have "no plausible grant of authority" to resolve partisan gerrymandering claims.[79] This reasoning suggests that the Supreme Court was motivated by separation of powers concerns—that partisan gerrymandering is assigned to the political branches, and the courts have no business getting involved.

The concept of a political question is grounded in the separation of powers.[80] Certain issues are deemed nonjusticiable because the Constitution places them within the discretion of democratically elected decision makers, and gives the federal judiciary no authority to override their judgment.[81] However, while the Supreme Court often treats the idea of a textual commitment as absolute, determining whether

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[75] *Rucho*, 139 S. Ct. at 2497, 2507.

[76] U.S. CONST. art. I, § 4.

[77] *Rucho*, 139 S. Ct. at 2495. Since *Rucho*, litigants have attempted to advance such an argument. The "independent state legislature" theory suggests that the Elections Clause grants state legislatures exclusive authority over state election regulations. *See generally* Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445, 449 (2022). If adopted, this theory could prevent state and federal courts alike from addressing state election law issues. *See* Harper v. Hall, 380 N.C. 317, 390–91 (N.C. 2022), *cert. granted*, Moore v. Harper, 142 S. Ct. 2901 (2022).

[78] *Rucho*, 139 S. Ct. at 2495–96 ("At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.").

[79] *Id.* at 2499 ("[F]ederal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding they were [constitutionally] authorized to do so."); *id.* at 2506 ("The only provision in the Constitution that specifically addresses the matter assigns it to the political branches.").

[80] Baker v. Carr, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

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

that commitment applies in a given case requires courts to interpret the Constitution and ensure that the political actor did not exceed or abuse its discretion in the circumstances at hand.[82] Accordingly, even when an issue has been assigned to the political branches, conflicting constitutional principles may constrain the scope of their discretion and grant courts the authority and the imperative to intervene.[83]

Consistent with this principle, the Supreme Court has traditionally deferred to the acts of elected decision makers when they operate within the scope of their textually committed discretion.[84] Since before *Marbury*, the Court has manifested this deference by according legislative decisions a strong presumption of constitutionality.[85] When invoking this presumption, the Court construes every reasonable inference in favor of a law's validity, emphasizing that it will only interfere if a constitutional violation is readily apparent.[86] In modern jurisprudence, this concept has been formalized as rational basis scrutiny—a highly deferential analysis characterized by judicial respect for the legislature's policy judgments.[87] Rational basis

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

[83] *See, e.g.*, *Elrod*, 427 U.S. at 352 (finding "there can be no impairment of executive power . . . where actions pursuant to that power are impermissible under the Constitution"); *accord* Henkin, *supra* note 82, at 598 (recognizing that the courts' concern to be "whether the political branches of government . . . have exceeded constitutional limitations").

[84] Coleman v. Miller, 307 U.S. 433, 454–56 (1939) (referencing "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination" as "dominant considerations" in the justiciability of a substantive legal issue).

[85] *E.g.*, Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800) (opinion of Patterson, J., and Cushing, J.); *see* Hylton v. United States, 3 U.S. (3 Dall.) 171, 174–75 (1796) (opinion of Chase, J.) (granting deference to Congress and presuming its decision was constitutional under the general power to tax).

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

[87] United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) ("[L]egislation . . . is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955) ("[T]he law need not be in every respect

scrutiny operates as a judicial default, and almost invariably results in maintaining the challenged law.

This discretion does not include authority to violate the Constitution. Accordingly, the presumption of constitutionality is rebutted when a law undermines constitutional guarantees.[88] The most famous statement of this commonplace principle comes from *United States v. Carolene Products, Co.*, a Commerce Clause case addressing a congressional prohibition on the interstate shipment of filled milk.[89] In Footnote Four of that decision, the Supreme Court articulated three circumstances in which the presumption is rebutted and the judiciary should closely scrutinize the legislature's judgment: (1) laws that violate constitutional provisions; (2) laws that constrain the majoritarian political process, such as restrictions on the right to vote, the dissemination of information, or the activities of political organizations; and (3) laws that discriminate against discrete and insular minorities—groups that lack the influence and connections to defend their interests through the democratic process.[90] These predicates have evolved into a comprehensive framework for the judicial role, and a rubric for when intervention should prevail over restraint. In the ensuing decades, the Court has applied heightened scrutiny to strike down laws that discriminate against suspect classes or violate fundamental rights.[91]

The second prong of Footnote Four indicates that courts may also review laws to preserve the democratic process,[92] an idea that is entirely consistent with the role of separation of powers as a structural doctrine. Professor John Hart Ely has observed that Footnote Four supports a "representation-reinforcing" model of review,[93] one that charges courts with protecting the process of selecting decision makers and preserving the fundamental structure of democracy.[94] Under this approach, courts

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logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

[88] *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 191–92 (1964) (stating that legislation that contravened the purpose of the Fourteenth Amendment could not be presumed constitutional, and could not be upheld absent an "overriding statutory purpose").

[89] 304 U.S. at 145–46.

[90] *Id.* at 152–53 n.4.

[91] For the earliest articulations of strict scrutiny in these contexts see Skinner v. Oklahoma, 316 U.S. 535, 540–41 (1942); Korematsu v. United States, 323 U.S. 214, 216 (1944); and W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

[92] *See* Vieth v. Jubelirer, 541 U.S. 267, 311–12 (2004) ("Allegations of unconstitutional bias in apportionment are most serious claims, for we have long believed that 'the right to vote' is one of 'those political processes ordinarily to be relied upon to protect minorities.'") (citing *Carolene Prods. Co.*, 304 U.S. at 153 n.4).

[93] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 88 (1980).

[94] *See id.* at 102 (emphasizing that this theory of review recognizes "the unacceptability of the claim that appointed and life-tenured judges are better reflectors of conventional

have a responsibility to "clear the channels of political change"[95] by: (1) striking down laws that obstruct the expression of the majority will; and (2) preventing political insiders from using their power to suppress political outsiders.[96] Viewed in light of this model of review, the rights of speech and suffrage are closely guarded to ensure that the public has unfettered access to the political process, and to preserve political accountability.[97] Additionally, laws that target minorities are constitutionally suspect not only by virtue of their stigmatic effect, but also their propensity to isolate those "discrete and insular" groups from political influence.[98] The courts, as political outsiders, are uniquely well-positioned to advance these interests, capable of modulating the political process while remaining relatively detached from political incentives.[99]

Consistent with Ely's thesis, the Supreme Court has developed an extensive election law jurisprudence, characterized by decades of judicial review to preserve the democratic process.[100] The Court derived a fundamental right to vote from the Equal Protection Clause in *Harper v. Virginia Board of Elections*.[101] Since *Harper*, the Court has protected this right by applying strict scrutiny to a variety of prohibitive election regulations, including laws that restrict access to the ballot,[102] or limit participation in primary elections.[103] Less restrictive election regulations are evaluated through

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values than elected representatives, devoting itself instead to policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent").

[95] *Id.* at 105.

[96] *Id.*

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

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

[99] *Id.* at 88, 103.

[100] *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 793–94 (1983) ("The inquiry is whether the challenged restriction unfairly or unnecessarily burdens 'the availability of political opportunity'. . . such restrictions threaten to reduce diversity and competition in the marketplace of ideas.") (internal citation omitted); Reynolds v. Sims, 377 U.S. 533, 565–66 (1964) ("[T]o sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result.").

[101] 383 U.S. 663, 670 (1966) (citing *Reynolds*, 377 U.S. at 566).

[102] *See, e.g.*, Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 183–87 (1979) (applying strict scrutiny to overturn requirement that candidates obtain 25,000 signatures).

[103] Political primaries have come to be recognized as "an integral part of the [state's]

a three-prong balancing test articulated in *Anderson v. Celebrezze*, considering: (1) "the character and magnitude of the asserted injury"; (2) "the precise interests put forward by the State"; and (3) "the extent to which those interests make it necessary to burden the plaintiff's rights."[104]

These cases demonstrate that the Equal Protection Clause provides a mechanism for courts to intervene when states restrict the "channels of political change."[105] The right to vote is fundamental due to its centrality to the democratic system—in *Harper* and *Yick Wo*, the Court venerated the franchise as "preservative of other basic civil and political rights."[106] The *Anderson* balancing test weighs the value of a challenged regulation to a functioning political process against its repressive effects on "political opportunity"; ballot restrictions are upheld only when their contribution to the effectiveness or integrity of the election outweighs their propensity to restrict political participation and the burden they place on the franchise.[107] Likewise, malapportionment and racial gerrymandering doctrines are calibrated to protect political outsiders from electoral suppression;[108] the former is proscribed as a form of vote dilution and a "debasement" of the franchise,[109] while the latter is scrutinized as the suppression of a discrete and insular minority.[110] Touchstone cases in the evolution of these doctrines embraced the proposition that the Constitution

election machinery," and are afforded similar protections to general elections. United States v. Classic, 313 U.S. 299, 318 (1941). For example, in the now-famous "White Primaries" cases, the Court used the Fourteenth Amendment to strike down laws creating race-based restrictions on party primaries, despite the more obvious applicability of the Fifteenth. *See* Terry v. Adams, 345 U.S. 461, 463–64 (1953); Smith v. Allwright, 321 U.S. 649, 659 (1944); Nixon v. Condon, 286 U.S. 73, 74 (1932); Nixon v. Herndon, 273 U.S. 536, 536–37 (1927).

[104] 460 U.S. 780, 789 (1983).

[105] *See* ELY, *supra* note 93, at 105.

[106] *Harper*, 383 U.S. at 667; Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); *see also Socialist Workers Party*, 440 U.S. at 184 (emphasizing that "voting is of the most fundamental significance under our constitutional structure").

[107] *See Anderson*, 460 U.S. at 793–94 ("The inquiry is whether the challenged restriction unfairly or unnecessarily burdens 'the availability of political opportunity' . . . such restrictions threaten to reduce diversity and competition in the marketplace of ideas." (internal citation omitted)); Reynolds v. Sims, 377 U.S. 533, 565 (1964) ("[T]o sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result.").

[108] *Reynolds*, 377 U.S. at 566 ("Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race.").

[109] *Id.* at 555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

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

protects political opportunity[111]—and squarely rejected the notion that the Elections Clause is a categorical barrier to judicial review.[112]

The same principles provide a predicate for the courts to review partisan gerrymanders. Partisan gerrymandering is equally "incompatible with democratic principles," and equally damaging to "the channels of political change."[113] As Justice Kagan observed, extreme partisan gerrymanders entrench the majority in power, frustrate the ability of political outsiders to translate their votes into representation, and "promote[] partisanship above respect for the popular will."[114] They render elections noncompetitive and deter political participation.[115] They generate a "politics of polarization," reinforcing a belief that officials owe their allegiance to the members of their party rather than the voting public.[116] These trends have not escaped judicial notice: the Court has consistently recognized that gerrymandering is destructive to the foundations of our democracy.[117] That recognition provides a predicate for judicial review under the political-preservation prong of Footnote Four, and a strong constitutional foundation for the Supreme Court to take action in the face of an unambiguous claim.

2. The Meaning of Political Question: Exploring the Boundaries of Political Discretion

The *Rucho* Court's more potent rationale for finding a political question was the lack of manageable standards to resolve partisan gerrymandering claims.[118] This alone does not justify holding partisan gerrymandering nonjusticiable in every possible case—or even in *Rucho* itself. As discussed *supra*, political question is a function of the separation of powers, grounded in deference to the policymaking discretion of democratically elected decision makers.[119] The scope of this discretion is bounded by the Constitution: any political actor that violates a constitutional right has exceeded its authority.[120] Accordingly, while some have construed political

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[111] *See supra* notes 107–09.

[112] *See infra* Section II.A.

[113] *See* ELY, *supra* note 93, at 103; *supra* notes 9–12 and accompanying text.

[114] Rucho v. Common Cause, 139 S. Ct. 2484, 2509 (Kagan, J., dissenting); *see supra* notes 7–8 and accompanying text.

[115] *See* Hayes & McKee, *supra* note 8, at 1009.

[116] *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting); Vieth v. Jubelirer, 547 U.S. 267, 331 (2004) (Stevens, J., dissenting) ("The parallel danger of a partisan gerrymander is that the representative will perceive that the people who put her in power are those who drew the map rather than those who cast ballots, and she will feel beholden not to a subset of her constituency, but to no part of her constituency at all.").

[117] *See supra* notes 9–12 and accompanying text.

[118] *See supra* text accompanying note 53.

[119] *See supra* text accompanying notes 64, 80–87.

[120] *See supra* text accompanying note 83.

question as a prudential doctrine of abstention,[121] it is better read as an affirmative exercise of constitutional interpretation aimed at defining the limits of textually committed political discretion.[122] The Supreme Court's holding in *Rucho* focused extensively on prudential concerns that are incompatible with this aim. By holding that partisan gerrymandering is categorically nonjusticiable and overlooking the clear facts of the twin cases before it,[123] the Court sidestepped any inquiry as to whether North Carolina and Maryland exceeded the authority granted to them by the Elections Clause.

As discussed above, the political discretion granted by the Constitution yields in the face of conflicting Constitutional provisions.[124] Accordingly, the *Baker* Court recognized that it may review the exercise of traditionally non-reviewable powers when presented with "a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."[125] The Supreme Court has traced this distinction throughout its political question jurisprudence.[126] As early as *Marbury v. Madison*, the Court contrasted a President's non-reviewable exercise of discretion[127] with his unlawful defiance of a statutory or constitutional mandate.[128] Similar boundaries have been drawn for Congress. While the Court has declined to review impeachment trials, a matter within the discretion of the Senate,[129] it has applied "basic principles of our democratic system" to hold that the House of Representatives does not have the discretion to exclude elected representatives, notwithstanding its "textually demonstrable commitment" of authority to determine their qualifications under Article I, Section 5.[130]

This distinction supports two propositions. The first is that political question doctrine is an evaluation of discretion, not a doctrine of deferral. Applying the

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[121] *See, e.g.*, Ron Park, *Is The Political Question Doctrine Jurisdictional or Prudential?*, 6 U.C. IRVINE L. REV. 255, 271–78 (2016) (arguing, largely on surplusage grounds, that only the first Baker factor is constitutional, while the remaining five are prudential considerations).

[122] *See supra* text accompanying notes 82–83.

[123] *Rucho*, 139 S. Ct. at 2510–11 (2019) (Kagan, J., dissenting) (reviewing evidence of partisan gerrymandering in North Carolina and Maryland); *supra* note 82 and accompanying text.

[124] *See supra* notes 80–83, 88, and accompanying text.

[125] Baker v. Carr, 369 U.S. 186, 217 (1962).

[126] *See* Henkin, *supra* note 82, at 598.

[127] 5 U.S. (1 Cranch) 137, 165–66 (1803) ("By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.").

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

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

[130] Powell v. McCormack, 395 U.S. 486, 548 (1969).

political question doctrine requires courts to interpret the Constitution and define the limits of textually committed political discretion.[131] If no violation has occurred, or if that boundary is impossible to discern, the case presents a political question and courts will defer to the judgment of elected decision makers.[132] But if the line has clearly been crossed in a given case, the political question doctrine is no more applicable than the presumption of constitutionality.[133] Although the prudential factors listed in *Baker* inform this core inquiry—whether a textual commitment is exclusive, and whether a coordinate branch has acted within the scope of its authority—they carry less weight when the merits unambiguously implicate the functioning of the democratic system and "the channels of political change."[134]

The second is that political question requires a case by case analysis to determine the boundaries of political discretion; it does not carve issues out of the scope of judicial review simply because they are difficult to adjudicate with precision.[135] Constitutional issues will only be apparent after a "discriminating inquiry into the precise facts and posture of the particular case."[136] For this reason, the *Baker* Court recognized that political question doctrine is not amenable to "semantic cataloguing": As "deference rests on reason, not habit," the Court will intervene if the facts clearly demonstrate that a coordinate branch has exceeded its authority.[137] Accordingly, while the legal issues presented in two cases may be similar, the presence of a nonjusticiable political question necessarily depends on the circumstances—determining whether a political entity has acted within its discretion, and whether its actions violate an independent constitutional guarantee, requires an exploration of the facts at hand.[138] This piecemeal approach advances the underlying principles of judicial restraint by encouraging the Court to draw lines gradually, and preserve the separation of powers.[139]

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[131] *See supra* text accompanying notes 82–83.

[132] *See supra* text accompanying notes 125–29.

[133] *See supra* text accompanying note 125.

[134] *See supra* text accompanying notes 92–99 (discussing the authority of the courts to preserve the foundations of the democratic system).

[135] *See supra* text accompanying note 125 (explaining that courts may intervene when the exercise traditionally nonjusticiable powers implicates constitutional rights).

[136] Baker v. Carr, 369 U.S. 186, 217 (1962). Even in the Guaranty Clause cases, the Court has considered the substance of each case before reaching its political question determination. *See id.* at 223–24 for an overview of these decisions.

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

[138] *Baker*, 369 U.S. at 217.

[139] *See* Reynolds v. Sims, 377 U.S. 533, 578 (1964) ("Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment."); Harper v. Hall, 380 N.C. 317, 384 (2022) ("We do not believe it prudent or necessary to, at this time,

Accordingly, the *Rucho* Court's holding that partisan gerrymandering is categorically nonjusticiable is incompatible with its concession that gerrymandering is undemocratic,[140] and its long-standing recognition that extreme partisan gerrymanders are likely unconstitutional.[141] Although the Court was correct that the Elections Clause grants the North Carolina and Maryland legislatures authority to determine the "time, place, and manner" of elections, whether they have exceeded that authority in a given case depends on the circumstances at hand.[142] Finding *Rucho* nonjusticiable without a "discriminating inquiry" into its strikingly partisan facts runs counter to the *Baker* doctrine,[143] and produces an overbroad result that is deleterious to the balance of restraint and modulation at the core of the separation of powers. Whether future disputes might be more difficult to adjudicate was beside the point.[144]

The real question in *Rucho*, the one the Supreme Court never answered, was whether the Constitution was violated in the case before it—not whether it might be violated in another, more challenging case in the future.[145] Instead of skirting around the specter of future disputes and attempting to articulate a broad definition of fairness in a single decision,[146] the Court should have applied a narrow rule to the facts before it, allowing that rule to serve as the starting point for the evolution of a doctrine that could provide a roadmap for the courts to address partisan gerrymandering claims. *Rucho* would have been a great touchstone decision—in Maryland and North Carolina, the dominant party's efforts to curtail "the channels of political change" were predominant, shameless, and obvious to all.[147] Of course, gerrymandering involves challenging and convoluted issues. As disputes arise and the standard is tested, courts would inevitably find some cases much more difficult to decide.[148] But this is an intended feature of constitutional law—judicial restraint and

identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander.").

[140] *See supra* notes 9–12 and accompanying text.

[141] *E.g.*, Vieth v. Jubelirer, 541 U.S. 267, 311–12 (2004) (Kennedy, J., concurring); Davis v. Bandemer, 478 U.S. 109, 133 (1986) (White, J.); Gaffney v. Cummings, 412 U.S. 735, 754 (1973).

[142] *See supra* text accompanying note 125; *Baker*, 369 U.S. at 217, 242; *Chastleton Corp.*, 264 U.S. at 547.

[143] *See supra* text accompanying note 136.

[144] *Cf. Reynolds*, 377 U.S. at 578 ("Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment.").

[145] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2509–11 (2019) (Kagan, J., dissenting).

[146] *See id.* at 2499.

[147] ELY, *supra* note 93, at 105; *see also supra* text accompanying notes 29–48.

[148] *See, e.g.*, Igor Derysh, *Gerrymander Guru's Secret Files: He Used Racial Data to Disenfranchise Black Voters*, SALON (Sept. 11, 2019, 6:00 AM), https://www.salon.com/2019/09/11/gerrymander-gurus-secret-files-he-used-racial-data-to-disenfranchise-black-voters/ [https://perma.cc/YT25-WEG2] (illustrating how Republican redistricting specialists carefully masked racial discrimination in the North Carolina gerrymanders at issue in *Rucho*).

stare decisis demand that doctrines emerge over time. All the Court needed was the right place to start.

II. A STRONGER FOUNDATION FOR PARTISAN GERRYMANDERING DOCTRINE

The Supreme Court had an opportunity to develop a more effective doctrinal approach to partisan gerrymandering. In order to construct a manageable standard, it is critical to recognize why this doctrine failed to coalesce, while the superficially similar racial gerrymandering and malapportionment claims remain viable. In this Part, I assert that partisan gerrymandering doctrine collapsed due to the Court's decision to frame the constitutionality of a challenged map around its effect on future elections, rather than the predominant intent of the mapmakers. Section II.A explores the evolution of judicially manageable standards for malapportionment and racial gerrymandering under the Equal Protection Clause.[149] Section II.B charts the Court's decades-long struggle to develop a corresponding framework for partisan gerrymandering.[150] Section II.C contrasts this quagmire with successful efforts in state courts to address partisan gerrymandering under comparable state constitutional provisions.[151] Section II.D challenges the Supreme Court's baseline conclusion that "a jurisdiction may engage in constitutional political gerrymandering,"[152] and argues that a doctrine grounded in predominant legislative intent would provide a stronger foundation for partisan gerrymandering claims.[153]

A. Equal Protection Standards for Malapportionment and Racial Gerrymandering

As discussed *supra*, the Elections Clause grants state legislatures authority over the time, place, and manner of congressional elections, subject to congressional oversight.[154] Throughout the early twentieth century, the Supreme Court interpreted this language to hold that redistricting challenges are nonjusticiable, reasoning that state legislatures have exclusive discretion to manage the distribution of power between political subdivisions.[155] Justice Frankfurter, writing for the majority in *Colegrove v. Green*, famously described the apportionment process as a "political

[149] *See infra* Section II.A.
[150] *See infra* Section II.B.
[151] *See infra* Section II.C.
[152] Hunt v. Cromartie, 526 U.S. 541, 551 (1999).
[153] *See infra* Section II.D.
[154] U.S. CONST. art. I, § 4.
[155] *See, e.g.*, South v. Peters, 339 U.S. 276, 277 (1950) (declining to involve the federal judiciary in "political issues arising from a state's geographical distribution of electoral strength"); MacDougall v. Green, 335 U.S. 281, 284 (1948) (finding states have the prerogative to "assure a proper diffusion of political initiative" among their political subdivisions); Colegrove v. Green, 328 U.S. 549, 554 (1946) (holding that "the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States").

thicket" beyond the jurisdiction of the federal courts.[156] This attitude changed following *Baker v. Carr*, where the Court held that none of the traditional formulations of a political question are present in an ordinary redistricting case, and that the Court would intervene in a redistricting suit that implicates constitutional rights.[157] In the subsequent decades, the Court began to develop principles for evaluating district maps under the Equal Protection Clause of the Fourteenth Amendment.[158]

First, as a constitutional minimum, equal population—or "one person, one vote"—must be the legislature's controlling consideration in the redistricting process.[159] This requirement, now a bedrock principle in redistricting law, is grounded in the right to vote and its centrality to the democratic process.[160] In *Wesberry v. Sanders* and *Reynolds v. Sims*, the Court held that Article I, Section 2,[161] construed in light of the structural design of the bicameral legislature, demands "equal representation in the House for equal numbers of people."[162] Districts drawn with unequal population violate this guarantee by distorting the relative influence of individual voters.[163] This differential weighing of votes has been construed as a form of discrimination that offends the Equal Protection Clause.[164] State legislative districts may depart slightly from equal population "to accommodate traditional districting objectives," such as compactness, contiguity, respect for political subdivisions, and the protection of communities of interest.[165] Congressional districts must be "as mathematically equal as reasonably possible," permitting "only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality."[166]

Second, the Court has categorically precluded the invidious consideration of race in the redistricting process.[167] Legislative intent, not political impact, is the fulcrum of this inquiry: although legislators engaged in redistricting will inevitably be aware of racial demographics,[168] a congressional map will be subject to strict

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156 328 U.S. at 556.

157 369 U.S. 186, 226 (1962); *see supra* Section I.B.2 (reviewing political question doctrine).

158 Reynolds v. Sims, 377 U.S. 533, 557 (1964).

159 Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 271–72 (2015) (calling equal population "a background rule against which redistricting takes place").

160 *Reynolds*, 377 U.S. at 562 ("[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

161 U.S. CONST. art. I, § 2 (mandating that Congressional representatives be chosen "by the People of the several States . . . according to their respective Numbers").

162 Wesberry v. Sanders, 376 U.S. 1, 14 (1964); *Reynolds*, 337 U.S. at 559.

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

164 *Id.*

165 Evenwel v. Abbott, 136 S. Ct. 1120, 1124 (2016).

166 White v. Weiser, 412 U.S. 783, 790 (1973); Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969).

167 Miller v. Johnson, 515 U.S. 900, 911–13 (1995).

168 Shaw v. Reno (*Shaw I*), 509 U.S. 630, 646 (1993) ("[R]edistricting differs from other

scrutiny if race was the "overriding, predominant factor"—the "dominant and controlling rationale"—in the apportionment process.[169] Consistent with standard racial discrimination jurisprudence, districts that are "unexplainable on grounds other than race"—such as those with bizarre shapes—raise a presumption of improper motive.[170] However, remedial classifications to comply with the Voting Rights Act or correct past racial gerrymanders may allow a race-conscious map to survive strict scrutiny.[171]

Nevertheless, predominant intent is a high threshold, and racial gerrymandering claims often fail when the legislature can demonstrate that the map was drawn with mixed motives.[172] This challenge is illustrated by the decade-long litigation addressing North Carolina's Twelfth Congressional District.[173] In *Shaw v. Reno* (*Shaw I*) and *Shaw v. Hunt* (*Shaw II*), the first two decisions addressing this district, the Court held that the district's irregular shape, juxtaposed against its history and racial demographics, indicated that the district was drawn to segregate voters on the basis of race.[174] Consequently, the Court struck down the challenged district map as an unconstitutional racial gerrymander.[175] Thereafter, the North Carolina legislature adjusted the map to correspond closer to partisan alignment than racial demographics, packing together "heavily Democratic-registered, predominately African-American voting precincts."[176] When this map was challenged as a racial gerrymander, it survived, as the legislature's adjustments could be equally attributed to racial and partisan motives.[177] This line of cases highlights an emerging challenge for litigants: rampant partisan interests have become a consistent shield against racial gerrymandering claims.[178]

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kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines . . . [t]hat sort of race consciousness does not lead inevitably to impermissible race discrimination.").

[169] *See Miller*, 515 U.S. at 909, 911, 913, 916 (finding racial gerrymander where "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations").

[170] *Shaw I*, 509 U.S. at 643, 649; *e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960) (enjoining a redistricting law converting square-shaped district into "an uncouth twenty-eight-sided figure").

[171] North Carolina v. Covington, 138 S. Ct. 2548, 2548, 2554 (2018) (upholding adoption of "expressly race-conscious" redistricting plan that was designed to counter a racial gerrymander); Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986) (articulating test for remedial race-conscious districting under the Voting Rights Act).

[172] *See* Easley v. Cromartie, 532 U.S. 234, 257–58 (2001).

[173] *See generally Shaw I,* 509 U.S. 630; Shaw v. Hunt (*Shaw II*), 517 U.S. 899 (1996); Hunt v. Cromartie, 526 U.S. 541 (1999); *Easley*, 532 U.S. 234.

[174] *Shaw II*, 517 U.S. at 907.

[175] *Id.* at 918.

[176] *Easley*, 532 U.S. at 238.

[177] *Hunt*, 526 U.S. at 550 (reviewing expert's testimony "that the data as a whole supported a political explanation at least as well as, and somewhat better than, a racial explanation").

[178] *See* Derysh, *supra* note 148 (describing use of partisanship to mask a racial gerrymander).

B. The Supreme Court's Struggle to Address Partisan Gerrymandering

Despite the evolution of workable standards for race and population-based claims, the Supreme Court struggled for decades to develop a stable approach to partisan gerrymandering.[179] In *Gaffney v. Cummings*, decided eleven years after *Baker*, the Court upheld the constitutionality of a map drawn to achieve "political fairness" by promoting "proportional representation" between the two major political parties.[180] In its opinion, the Court reasoned that some consideration of partisan interests is a necessary incident of the apportionment process, as "districting inevitably has and is intended to have substantial political consequences."[181] Accordingly, the Court held that the Equal Protection Clause allows a state legislature to draw a map that seeks "not to minimize or eliminate the political strength of any group or party," but "to allocate political power to the parties in accordance with their voting strength."[182]

The *Gaffney* Court was arguably advancing a benign classification theory, holding that the Constitution permits legislatures to draw district maps that promote political fairness and competitive elections.[183] Nevertheless, subsequent decisions citing *Gaffney* embellished on this principle, culminating in the proposition that "a jurisdiction may engage in constitutional political gerrymandering."[184] Consequently, the challenge lies in determining how much partisan influence the Equal Protection Clause can withstand, and delineating the boundary between permissible partisan advantage and unconstitutional political entrenchment.[185]

The Court's first crack at this problem came in *Davis v. Bandemer*, featuring a challenge to a district map adopted by Indiana following the 1980 census.[186] The

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[179] *See* Vieth v. Jubelirer, 541 U.S. 267, 282, 306 (2004) (plurality opinion) (reviewing "[e]ighteen years of essentially pointless litigation" and the "long record of puzzlement and consternation" faced by federal courts resolving partisan gerrymandering claims).

[180] 412 U.S. 735, 738, 754 (1973) ("[State] Senate and House districts were structured so that the composition of both Houses would reflect 'as close as possible . . . the actual (statewide) plurality . . . in a given election.'").

[181] *Id.* at 753.

[182] *Id.* at 754.

[183] *See id.* at 753–54; *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) ("A determination that a gerrymander violates the law . . . must rest . . . on a conclusion that [political] classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective.").

[184] Hunt v. Cromartie, 526 U.S. 541, 551 (1999).

[185] Davis v. Bandemer, 478 U.S. 109, 133 (1986) ("[A]n equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively."); *accord Vieth*, 541 U.S. at 306–07 (Kennedy, J., concurring in the judgment) (identifying as core obstacles "the lack of comprehensive and neutral principles for drawing electoral boundaries" and "the absence of rules to limit and confine judicial intervention").

[186] 478 U.S. at 113.

plan was developed with negligible input from Democrats, and granted Republicans fifty-seven out of one hundred legislative seats with only forty-eight percent of the popular vote.[187] The District Court found that the legislature had discriminated against Democratic voters, and invalidated the map under the Equal Protection Clause,[188] but the Supreme Court reversed and upheld the challenged map.[189] The Court acknowledged that partisan gerrymandering claims are justiciable, finding the underlying constitutional issue analogous to racial gerrymandering as the electoral suppression of a target demographic.[190] Nevertheless, the Court reversed, and upheld the Indiana map.[191] Harkening to *Gaffney*'s recognition that partisan considerations are unavoidable in the redistricting process, and that the legislature will be aware of the political consequences of any map it adopts, the Court held that the intent to obtain partisan advantage does not itself invalidate a district map.[192] Rather, "[u]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[193]

This "consistent degradation" test proved exceedingly abstract and difficult to satisfy. Eighteen years later, in *Vieth v. Jubelirer*, the Justices repudiated *Bandemer* and fractured over the proper metric for partisan gerrymandering claims.[194] *Vieth* involved a district map drawn by the Republican-controlled Pennsylvania legislature as "a punitive measure" in response to Democratic redistricting efforts in other states—and calibrated to ensure that Republicans received thirteen of nineteen congressional seats with only 49.9% of the vote.[195] The district court upheld the map, and the Supreme Court affirmed, but failed to produce a majority.[196] Justice

[187] *Id.* at 110, 115; *see* Bandemer v. Davis, 603 F. Supp. 1479, 1495 (S.D. Ind. 1984) ("The minority party was wholly excluded from the mapmaking process."), *rev'd* 478 U.S. 109 (1986).

[188] *Bandemer*, 603 F. Supp. at 1495 (highlighting "both discriminatory intent" in the map-making process "and the discriminatory impact of the elective process which has occurred thereunder").

[189] *Bandemer*, 478 U.S. at 143.

[190] *Id.* at 124–25 ("As Gaffney demonstrates, that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability.").

[191] *Id.* at 143.

[192] *Id.* at 128–29 ("As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences . . . were intended.").

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

[194] 541 U.S. 267, 282–84 (2004) (plurality opinion).

[195] Vieth v. Pennsylvania, 188 F. Supp. 2d 532, 535–36 (M.D. Pa. 2002), *rev'd*, 541 U.S. 267 (2004). This plan did not live up to its expectations—in subsequent elections, the map produced only a narrow eleven to ten advantage for Republicans. *Vieth*, 541 U.S. at 289 (plurality opinion).

[196] *Vieth*, 541 U.S. at 271, 286, 306.

Scalia's plurality opinion drew a sharp contrast between racial discrimination, "a rare and constitutionally suspect motive," and partisan advantage, "an ordinary and lawful motive," to distinguish the two doctrines.[197] Justice Scalia emphasized that partisan gerrymandering was common during colonial times, and reasoned that the Elections Clause commits oversight of political considerations in the redistricting process to Congress.[198] Concluding that the Constitution offers no "judicially enforceable limit" to constrain those considerations, and that the federal courts had produced "no judicially discernible and manageable standards" to adjudicate partisan gerrymandering, the plurality held that partisan gerrymandering claims are nonjusticiable political questions.[199]

Five Justices—in separate opinions—concluded that partisan gerrymandering is justiciable, but could not settle on an acceptable alternative to *Bandemer*.[200] Concurring in the judgment, Justice Kennedy agreed that the facts of *Vieth* did not present a justiciable claim, but refused to categorically foreclose review of gerrymandering claims.[201] He expressed hope that a manageable standard might emerge in the future, possibly under the First Amendment.[202] Dissenting, Justices Breyer, Souter, and Ginsburg offered tests to delineate the boundary between permissible partisan influence and unconstitutional political entrenchment.[203] Justice Stevens went further, challenging the plurality's tacit conclusion that partisan advantage is "an ordinary and lawful motive" in the districting process.[204] He asserted that racial and partisan gerrymandering stem from the same constitutional injury: "[T]he drawing of district boundaries to maximize the voting strength of the dominant political faction and to minimize the strength of one or more groups of opponents."[205] Accordingly, Justice Stevens argued that the predominant intent standard

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[197] *Id.* at 286.

[198] *Id.* at 274–75. *Cf.* Wesberry v. Sanders, 376 U.S. 1, 23 (1964) (Harlan, J., dissenting) (arguing the Elections Clause provides states an exclusive grant of authority, subject only to Congressional oversight).

[199] *Vieth*, 541 U.S. at 281, 305.

[200] *Id.* at 317 (Stevens, J., dissenting).

[201] *Id.* at 309–10 (Kennedy, J., concurring in the judgment) ("It is not in our tradition to foreclose the judicial process from the attempt to define standards and remedies where it is alleged that a constitutional right is burdened or denied.").

[202] *Id.* at 314 ("First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters . . . to disfavored treatment by reason of their views.").

[203] *Id.* at 347–50 (Souter, J., dissenting) (proposing five-element test that would require the plaintiff to show an injury to their party through a departure from traditional redistricting principles; joined by Justice Ginsburg); *id.* at 360 (Breyer, J., dissenting) (suggesting test based on "the unjustified use of political factors to entrench a minority in power," measured by a lack of adherence to traditional districting criteria and by a minority party's efforts to hold political power (emphasis omitted)).

[204] *Id.* at 324 (Stevens, J., dissenting).

[205] *Id.* at 326, 335 ("[I]f the State goes 'too far'—if it engages in 'political gerrymandering

articulated in the racial gerrymandering cases would allow courts to redress the worst offenses, and ameliorate the plurality's concerns about judicial overreach.[206]

The fractures that emerged in *Vieth* only widened in subsequent decisions.[207] Although the Court continued to recognize that partisan gerrymandering subverts basic democratic principles, the Justices could not agree on a manageable standard to resolve these claims.[208] In *League of United Latin American Citizens v. Perry*, the Court considered a standard that would invalidate a district map if the "sole motivation" of the legislature "was to gain partisan advantage"—and rejected it by holding that the plaintiffs must prove that a challenged map burdened their political participatory rights.[209] In *Gill v. Whitford*, the Court considered a statistical "efficiency gap" algorithm designed to calculate each party's wasted votes—and dismissed the claim for lack of standing, describing it as "a case about group political interests, not individual legal rights."[210] Even as the doctrine failed to coalesce, concurring and dissenting Justices in each case highlighted the systemic harms caused by partisan gerrymandering and supported the idea that political entrenchment should not be a permissible redistricting motive.[211]

The Court's disagreement over the applicable standard eventually yielded to a consensus that there was no standard at all.[212] Each decision aggravated the federal

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for politics' sake'—it violates the Constitution in the same way as if it undertakes 'racial gerrymandering for race's sake.'").

206 *Id.* at 339 ("I would apply the standard set forth in the Shaw cases and ask whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles.").

207 *See generally* Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791–92 (2015); League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 417 (2006); Gill v. Whitford, 138 S. Ct. 1916, 1933 (2018).

208 *Ariz. State Legis.*, 576 U.S. 787, 791–92 (2015).

209 548 U.S. 399, 417–18 (2006) ("[A] successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do what appellants' sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants' representational rights.").

210 138 S. Ct. 1916, 1932–33 (2018). Notably, the *Gill* plaintiffs presented extensive evidence that Republican mapmakers had used voter statistics and census data to develop, test, and select a map that would maximize their advantage at a ward-by-ward level. See Whitford v. Gill, 218 F. Supp. 3d 837, 847–53 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018).

211 *League of United Latin Am. Citizens*, 548 U.S. at 448 (Stevens, J., dissenting) (arguing that a "purely partisan desire" to dilute a party's voting strength is not a "legitimate governmental purpose"); *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring) (emphasizing that "partisan gerrymanders inflict other kinds of constitutional harm . . . [and] may infringe the First Amendment rights of association held by parties, other political organizations, and their members").

212 *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2501 (2019) ("[T]he Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly.").

judiciary's confusion over the proper framework to adjudicate partisan gerrymandering cases and left the justiciability of these claims on increasingly unstable grounds.[213] That instability culminated in *Rucho*, where the Court abandoned its search, and evoked Justice Scalia's plurality opinion in *Vieth* to declare that partisan gerrymandering is a nonjusticiable political question.[214]

C. Alternative Approaches and Success in the State Courts

As the development of a federal doctrine stalled, state courts of last resort have achieved success adjudicating partisan gerrymanders under comparable state constitutional provisions.[215] Several state constitutions limit the legislature's discretion by requiring mapmakers to adhere to traditional districting criteria of compactness, contiguity, and respect for political subdivisions.[216] Throughout the early twentieth century, these provisions offered considerable ammunition to litigants by providing a neutral set of standards that could be used to evaluate a challenged map and shield against partisan gerrymandering.[217] Following *Reynolds*, these traditional criteria lost some utility, as they were subordinated to the "one-person, one-vote" rule as the overriding redistricting principle.[218] Nevertheless, the traditional criteria

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[213] *See* Vieth v. Jubelirer, 541 U.S. 267, 282, 306 (2004) (plurality opinion) (noting "[e]ighteen years of essentially pointless litigation" and the "long record of puzzlement and consternation" faced by federal courts resolving partisan gerrymandering claims).

[214] *See supra* Section I.A (reviewing the Court's reasoning in *Rucho*).

[215] *See* Samuel S.H. Wang et al., *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203, 253–55 (2019) (illustrating various strategies employed by state courts to address partisan gerrymandering).

[216] *See* Pearson v. Koster, 359 S.W.3d 35, 38 (Mo. 2012) (noting "compactness" may refer to the physical shape or size of electoral districts or "closely united[] territory", a phrase not necessarily limited to physical dimensions (internal citations omitted)); *In re* Senate Joint Resol. of Legis. Apportionment 1176, 83 So. 3d 597, 632 (Fla. 2012) (defining "compact" as "having a dense structure" or "closely or firmly united or packed . . . having a small surface or border in proportion to contents or bulk" (internal citations omitted)); Stephenson v. Bartlett, 582 S.E.2d 247, 254 (N.C. 2003) (defining "contiguity" as requiring "that two districts must share a common boundary that touches for a non-trivial distance").

[217] *See* Barrett v. Hitchcock, 146 S.W. 40, 65 (Mo. 1912) (observing that these requirements "guard . . . the system of representation adopted in the state against the legislative evil commonly known as the 'gerrymander'"); *accord* Reynolds v. Sims, 377 U.S. 533, 578–79 (1964) ("Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering.").

[218] Bartlett v. Strickland, 556 U.S. 1, 7 (2009) ("[S]tate election-law requirements like the Whole County Provision [of the North Carolina Constitution] may be superseded by . . . the one-person, one-vote principle."); Bingham Cnty. V. Idaho Comm'n for Reapportionment, 55 P.3d 863, 867 (Idaho 2002) (holding that these considerations "are subordinate to the Constitutional standard of voter equality"); *accord* League of Women Voters of Fla. v. Detzner,

are seen as vital to "the preservation of true representative government,"[219] and remain valuable comparators in state litigation against egregious partisan gerrymanders that otherwise adhere to population equality.[220]

More recently, a growing number of states have enacted "anti-gerrymandering" statutes and constitutional amendments that tackle gerrymandering by expressly limiting partisan influence on the redistricting process.[221] Florida amended its state constitution in 2010 to require that "[n]o apportionment plan or district . . . be drawn with the intent to favor or disfavor a political party or an incumbent."[222] This amendment, applied in *League of Women Voters v. Detzner* to strike down a 2012 Republican gerrymander, reoriented Florida's redistricting jurisprudence around "direct and circumstantial evidence of intent," rather than a challenged map's potential impact on future elections.[223] With motive as the constitutional threshold, statements of legislators and evidence of a map's legislative history may prove dispositive.[224] Moreover, although "a map that has the effect or result of favoring one political party over another is not *per se* unconstitutional,"[225] a traditional analysis of inexplicable shapes and political outcomes may provide powerful circumstantial evidence that a map's suppressive effect was intended.[226]

State courts have also distilled effective doctrines from constitutional provisions reflecting fundamental but abstract principles such as fair elections and equal representation. In *League of Women Voters v. Commonwealth*, the Supreme Court of Pennsylvania held that a partisan gerrymander violated a state constitutional guarantee of "free and equal" elections.[227] In *Kenai Peninsula Borough v. State*, the

172 So. 3d 363, 371 (Fla. 2015) (classifying state constitutional requirements of "compactness and the use of political or geographical boundaries" as "'tier-two' constitutional indicators").

[219] Preisler v. Kirkpatrick, 528 S.W.2d 422, 425 (Mo. 1975).

[220] *See, e.g.*, *In re* Legis. Districting of the State, 805 A.2d 292, 295 (Md. 2002) (applying Maryland constitutional compactness clause to strike down partisan gerrymander); *In re* Reapportionment of Hartland, Windsor & W. Windsor, 624 A.2d 323, 328 (Vt. 1993) (applying constitutional provision requiring maintenance of communities of interest).

[221] *See* Wang et al., *supra* note 215, at 237 n.162 (listing constitutional provisions from California, Colorado, Delaware, Florida, Hawaii, Michigan, New York, Ohio, and Washington alongside several anti-gerrymandering statutes).

[222] FLA. CONST. art. III, § 20. This provision prohibits drawing districts "with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process," a more stringent standard than the federal prohibition on racial gerrymandering under the Equal Protection Clause. *See Detzner*, 172 So. 3d at 385 (noting that under Florida's Fair Districts Amendment "there is no acceptable level of improper intent" (internal citation omitted)).

[223] 172 So. 3d at 375–76.

[224] *Id.* at 388.

[225] *Id.* at 375 (emphasis added).

[226] *Id.* at 402–13.

[227] 178 A.3d 737, 821 (Pa. 2018) (holding that a map that "subordinates the traditional redistricting criteria in service of achieving unfair partisan advantage . . . undermines voters'

Supreme Court of Alaska struck down a reapportionment scheme under the Alaska State Constitution after identifying a "significant constitutional interest" in "an equally geographically effective or powerful vote."[228] In *Common Cause v. Lewis*, a North Carolina Superior Court invalidated the map that was upheld in *Rucho v. Common Cause* by applying Article I, Section 10 of the North Carolina Constitution, which simply states: "All elections shall be free."[229] And in *Harper v. Hall*, the Supreme Court of North Carolina embraced Professor Ely's theory of representation-reinforcing review, emphatically holding that a district map that "chokes off the channels of political change on an unequal basis" violates a state constitutional "principle of political equality."[230] These provisions are only marginally more concrete than the Fourteenth Amendment's guarantee of "equal protection of the laws."[231] Nevertheless, their abstract language has not prevented state courts from developing manageable standards to adjudicate the worst partisan gerrymanders.[232]

D. Challenging the Supreme Court's Insistence on an Effects-Based Jurisprudence

Federal partisan gerrymandering doctrine collapsed due to the Supreme Court's decision to frame its jurisprudence around the effect of the map instead of the intent of the mapmakers. Across its thirty-year struggle to adjudicate this issue, the Court evaluated partisan gerrymanders based on a challenged map's political impact.[233] This framing forced the judiciary to predict the effects of a map on future elections and engage in the "unmoored determination" of "how much partisan dominance is too much."[234] In turn, that inquiry led to decades of confusion that culminated in the

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ability to exercise their right to vote in free and 'equal' elections if the term is to be interpreted in any credible way").

[228] 743 P.2d 1352, 1371–72 (Alaska 1987) ("[O]nce the Board's discriminatory intent is evident, its purpose in redistricting will be held illegitimate unless that redistricting effects a greater proportionality of representation.").

[229] N.C. CONST. art. I, § 10; Common Cause v. Lewis, 18 CVS 014001, 2019 N.C. Super. LEXIS 56, at *13 (N.C. Super. Ct. Sept. 3, 2019) ("It is not the free will of the People that is fairly ascertained through extreme partisan gerrymandering. Rather, it is the carefully crafted will of the map drawer that predominates.").

[230] 380 N.C. 317, 382 (2022) ("[T]o be effective, the channeling of 'political power' from the people to their representatives in government through the democratic processes envisioned by our constitutional system must be done on equal terms.").

[231] U.S. CONST. amend. XIV, § 1.

[232] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2524 n.6 (2019) (Kagan, J., dissenting) (reviewing the Pennsylvania and Florida examples and observing that "state courts do not typically have more specific 'standards and guidance' to apply than federal courts have").

[233] *See, e.g.*, Davis v. Bandemer, 478 U.S. 109, 133 (1986) ("[A] finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process."); *see also supra* note 185 and accompanying text.

[234] *Rucho*, 139 S. Ct. at 2498, 2500 (majority opinion).

doctrine's collapse.[235] Instead of engaging with this amorphous line-drawing problem, the Court should have started from the clear proposition that a map drawn with the predominant intent to entrench a party in power or suppress its political adversaries is a violation of the Equal Protection Clause.[236] Reorienting partisan gerrymandering doctrine around legislative intent would comport with the Court's duty to clear "the channels of political change,"[237] harmonize racial and partisan gerrymandering jurisprudence,[238] and provide a stronger foundation for the evolution of a workable doctrine.[239]

Partisan and racial gerrymandering share a common core in their damaging effects on the "channels of political change."[240] The Supreme Court recognized this commonality in its foundational cases.[241] As Justice Stevens argued in *Vieth v. Jubelirer*, "the essence of a gerrymander is the same regardless of whether the group is identified as racial or political."[242] Although partisan gerrymandering does not cause the same stigmatic harms as invidious racial discrimination, racial gerrymandering cases have consistently been decided on political egalitarian grounds[243]: "In both contexts, the question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process."[244] Each form of

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[235] *Id.* at 2497 ("Partisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, 'a jurisdiction may engage in constitutional political gerrymandering.'" (citing Hunt v. Cromartie, 526 U.S. 541, 551 (1999))).

[236] Vieth v. Jubelirer, 541 U.S. 267, 326–27 (2004) (Stevens, J., dissenting).

[237] *See* ELY, *supra* note 93, at 105; *supra* Section I.B.1 (reviewing election law doctrine).

[238] *See Vieth*, 541 U.S. at 339 (Stevens, J., dissenting) ("I would apply the standard set forth in the Shaw cases and ask whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles . . . Such a narrow test would cover only a few meritorious claims, but it would preclude extreme abuses.").

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

[240] *See* ELY, *supra* note 93, at 105.

[241] Gaffney v. Cummings, 412 U.S. 735, 754 (1973) (finding gerrymanders unconstitutional where "racial or political groups have been fenced out of the political process and their voting strength invidiously minimized"); *accord* Davis v. Bandemer, 478 U.S. 109, 125 (1986) ("That the characteristics of the complaining group are not immutable or that the group has not been subject to the same historical stigma may be relevant to the manner in which the case is adjudicated, but these differences do not justify a refusal to entertain such a case.").

[242] *Vieth*, 541 U.S. at 335 (Stevens, J., dissenting).

[243] *See* Shaw v. Reno (*Shaw I*), 509 U.S. 630, 648 (1993) (finding racial gerrymandering "antithetical to our system of representative democracy"); Thornburg v. Gingles, 478 U.S. 30, 43 (1986) (striking down redistricting plan under Voting Rights Act § 2 where "the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class]" (alteration in original)). The White Primaries, discussed *supra* in note 103, highlight the intersection between racial discrimination and political opportunity concerns in a broader context. *See generally* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

[244] *Bandemer*, 478 U.S. at 132–33.

gerrymandering involves the electoral suppression of a target demographic, crippling its voters' ability to translate their interests into representation.[245] Each practice undermines political accountability by reducing the incentives for elected officials to represent political outsiders.[246] It necessarily follows that partisan suppression, like racial discrimination, should not be considered "an ordinary and lawful motive" in the redistricting process.[247]

Despite these commonalities, and notwithstanding these pervasive harms, the Supreme Court has embraced the notion that "a jurisdiction may engage in constitutional political gerrymandering."[248] This rule grew out of an analytical misstep between *Gaffney v. Cummings* and *Davis v. Bandemer*. As discussed *supra*, *Gaffney* stands for a benign classification theory: the *Gaffney* Court held that a legislature may consider partisan demographics during the redistricting process in order to achieve proportional representation and competitive elections.[249] The *Bandemer* Court flipped *Gaffney* on its head and embraced the opposite principle—that a party may commandeer the redistricting process for its own gain so long as it does not go "too far," and cross an inchoate line between advantage and entrenchment.[250] As a result, federal redistricting doctrine splintered: partisan gerrymanders are primarily adjudicated based on their *effects* on future elections, while racial gerrymanders are strictly scrutinized based on the legislature's *intent*.[251]

From the start, this bifurcation rested on a faulty premise. *Gaffney*, a case about political fairness, "cannot reasonably be read as supporting" a district map that "subverts political fairness and proportional representation and sublimates partisan gamesmanship."[252] The Court has relied on structural and prudential concerns to construe *Gaffney* so broadly. As summarized in *Vieth* and *Rucho*, the most prominent reasons for insisting on an effects-based framework are threefold: (1) that partisan entrenchment is an "ordinary and lawful motive" in the redistricting process, as the

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[245] *See Gaffney*, 412 U.S. at 754; *Davis*, 478 U.S. at 125 (each highlighting the common political concerns at the heart of both doctrines).

[246] *Compare Shaw I*, 509 U.S. at 642, 648, *with Vieth*, 541 U.S. at 326 (Stevens, J., dissenting) (recognizing the distortion of incentives caused by each form of gerrymandering).

[247] *Vieth*, 541 U.S. at 286; *id.* at 326 (Stevens, J., dissenting) ("[I]f the State goes 'too far'—if it engages in 'political gerrymandering for politics' sake'—it violates the Constitution in the same way as if it undertakes 'racial gerrymandering for race's sake.'").

[248] Hunt v. Cromartie, 526 U.S. 541, 551 (1999).

[249] *See supra* notes 180–83 and accompanying text.

[250] *See supra* notes 184–93 and accompanying text.

[251] *See supra* note 185 and accompanying text.

[252] Raleigh Wake Citizens Assoc. v. Wake Cnty. Bd. of Elections, 827 F.3d 333, 348 (4th Cir. 2016). Moreover, this doctrinal evolution was arguably dicta. *See generally* Philip A. Doresy, *Constitutional Validity of Congressional Redistricting*, 82 A.L.R. Fed. 2d 1 (2014). The *Cromartie* Court exclusively cited racial gerrymandering cases for the broader proposition that "jurisdiction[s] may engage in constitutional political gerrymandering." 526 U.S. at 551 (citing Bush v. Vera, 517 U.S. 952, 968 (1996)). *See* Shaw v. Hunt, 517 U.S. 899, 905 (1996); Miller v. Johnson, 515 U.S. 900, 916 (1995); *Shaw I*, 509 U.S. 630, 646 (1993).

Elections Clause "clearly contemplates districting by political entities"; (2) that the Equal Protection Clause lacks "clear, manageable, and politically neutral" standards to evaluate partisan gerrymandering; and (3) that an intent-based standard would invite "extraordinary and unprecedented" judicial oversight of legislative decisions, as political considerations are inevitable during the redistricting process.[253] None of these considerations survive scrutiny.

First, partisan entrenchment should not be considered an "ordinary and lawful motive."[254] In *Vieth* and *Rucho*, Justices Scalia and Roberts reasoned that partisan gamesmanship is a necessary consequence of "the Framers' decision to entrust districting to political entities."[255] It is true that political entities will always be politically motivated. However, it does not follow that the Constitution permits partisan interests to dominate the redistricting process.[256] In our system of checks and balances, it is no answer that legislators will be legislators. The fact that political entities have every incentive to entrench themselves in power calls for an external check on their discretion; for *more* oversight of redistricting, not *less*.[257] Although the Elections Clause grants Congress supervision over the redistricting process, this authority should not be viewed as exclusive—the elected officials who stand to gain from partisan gerrymandering have little incentive to check and balance a process that facilitates their election.

Nor does it follow that the Founders sanctioned partisan gerrymandering or intended to perpetuate this practice. To the contrary, many of the Framers detested gerrymandering[258] and considered factionalism an existential threat to the system

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[253] Vieth v. Jubelirer, 541 U.S. 267, 284–86 (2004) (plurality opinion); Rucho v. Common Cause, 139 S. Ct. 2484, 2497–98, 2507 (2019) (majority opinion).

[254] *See supra* Section I.B.1.

[255] *Vieth*, 541 U.S. at 285; *Rucho*, 139 S. Ct. at 2496–97. Notably, the *Rucho* and *Vieth* Courts reasoned that redistricting oversight was committed to Congress only in the context of partisan gerrymandering—not in the context of racial gerrymandering or malapportionment. *Rucho*, 139 S. Ct. at 2495–97. However, there is nothing in the Constitution that suggests the judiciary may override the mandate of the Elections Clause to review some redistricting issues, but not others. *See* Gaffney v. Cummings, 412 U.S. 735, 754 (1973); Davis v. Bandemer, 478 U.S. 109, 125 (1986); *Vieth*, 541 U.S. at 336 (Stevens, J., dissenting). Partisan gerrymandering violates Equal Protection by curtailing political opportunity and clogging the "channels of political change," granting courts a mandate to intervene. *See* ELY, *supra* note 93, at 105; *supra* Section I.B.1.

[256] *See Vieth*, 541 U.S. at 352 n.7 (Souter, J., dissenting) ("It does not follow that the Constitution permits every state action intended to achieve any extreme form of disproportionate representation.").

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

[258] *Rucho*, 139 S. Ct. at 2512 (Kagan, J., dissenting) (noting that "partisan gerrymandering goes back to the Republic's earliest days. (As does vociferous opposition to it.)"); *accord* Common Cause v. Rucho, 318 F. Supp. 3d 777, 844–45 (M.D.N.C. 2018) (reviewing commentary

they designed.[259] More fundamentally, such unilateral focus on the Framing overlooks the intervening mandate of the Equal Protection Clause: the Constitution was ratified in 1788, the Fourteenth Amendment was adopted in 1868, and the right to vote coalesced under the Equal Protection Clause in 1966.[260] Decades of election law jurisprudence demonstrate that this provision, enacted eighty years after the Framing, grants courts a mandate to wade into the "political thicket" to preserve the foundations of the democratic system.[261] Accordingly, while the Framers granted state legislatures authority to determine the time, place, and manner of elections, the presumption of constitutionality attendant to their discretion is narrow when their actions undermine "the channels of political change."[262]

Second, there is nothing about the Equal Protection Clause that renders an intent-based framework unmanageable. State courts have crafted manageable intent-based doctrines out of equally amorphous state constitutional guarantees—such as "free and equal" elections and "equal protection of the law."[263] They have done so by departing from the Supreme Court's foundational assumption that the redistricting process may be used to attain partisan advantage.[264] With predominant legislative intent as the constitutional threshold, the analysis becomes much less amorphous, and much more evenhanded. Determining whether an impermissible intent predominates

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on founding era authority to confirm public distaste for gerrymandering); Khomina, *supra* note 6.

[259] *See* THE FEDERALIST NO. 9 (Alexander Hamilton); THE FEDERALIST NO. 10 (James Madison) ("When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.").

[260] Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966).

[261] *See supra* notes 100–12 and accompanying text (reviewing election law jurisprudence); *accord Vieth*, 541 U.S. at 310 (Kennedy, J., concurring in judgment) ("Our willingness to enter the political thicket of the apportionment process with respect to one-person, one-vote claims makes it particularly difficult to justify a categorical refusal to entertain claims against this other type of gerrymandering."). *Cf.* Harper v. Hall, 380 N.C. 317, 382 (2022) ("The [state constitutional] equal protection clause prohibits government from burdening on the basis of partisan affiliation the fundamental right to equal voting power.").

[262] *See* ELY, *supra* note 93, at 105; *see also supra* Section I.B.1.

[263] *See supra* notes 227–29 and accompanying text (highlighting state constitutional intent-based gerrymandering standards).

[264] *See, e.g.*, Harper v. Hall, 380 N.C. 317, 383 (2022) ("Achieving partisan advantage . . . is neither a compelling nor a legitimate government interest, as it in no way serves the government's interest in maintaining the democratic processes."); League of Women Voters v. Commonwealth, 178 A.3d 737, 821 (Pa. 2018) (holding that a map that "subordinates the traditional redistricting criteria in service of achieving unfair partisan advantage . . . undermines voters' ability to exercise their right to vote in free and 'equal' elections if the term is to be interpreted in any credible way"); Kenai Peninsula Borough v. State, 743 P.2d 1352, 1371–72 (Alaska 1987) ("[O]nce the Board's discriminatory intent is evident, its purpose in redistricting will be held illegitimate unless that redistricting effects a greater proportionality of representation.").

places a high burden on litigants, but it is a more "precise" and "politically neutral" inquiry than asking courts to define political fairness and to decide "how much partisan dominance is too much."[265] Moreover, while the Supreme Court has consistently rejected proposed partisan gerrymandering standards by noting that the Constitution does not provide a right to proportional representation, an intent-based standard avoids this problem.[266] The relevant injury in a partisan gerrymandering case is better defined as the deliberate suppression of individual votes and viewpoints—an effort to restrict "political opportunity" and to clog "the channels of political change," not a denial of proportional representation.[267] A plaintiff living in a district that was crafted to suppress their vote based on their political affiliation has suffered a constitutional injury, regardless of their party's natural voting strength.[268] And the constitutionality of such a district should not turn on how effectively the legislature accomplished its suppressive ends.

Third, a standard grounded in predominant intent would ameliorate the Supreme Court's prudential concerns about judicial overreach. In *Rucho*, the Court emphasized that judicial review of partisan gerrymandering would represent "an unprecedented expansion of judicial power . . . into one of the most intensely partisan aspects of American political life."[269] This conclusion rests on a long-standing recognition that "districting inevitably has and is intended to have substantial political consequences," as "[p]olitics and political considerations are inseparable from districting and apportionment."[270] However, this is equally true of racial gerrymandering. Throughout its racial gerrymandering jurisprudence, the Court has acknowledged that state legislatures will inevitably be aware of race during the apportionment process, and

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[265] *Cf.* Rucho v. Common Cause, 139 S. Ct. 2484, 2497–99 (2019).

[266] *See id.* at 2499 ("Our cases . . . foreclose any claim that the Constitution requires proportional representation or that the legislatures . . . must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." (quoting Davis v. Bandemer, 478 U.S. 109, 130 (1986))).

[267] *See* ELY, *supra* note 93, at 105; Anderson v. Celebrezze, 460 U.S. 780, 793–94 (1983) (noting that the core issue in an election regulation case "is whether the challenged restriction unfairly or unnecessarily burdens 'the availability of political opportunity.'"); *Harper*, 380 N.C. at 380 (noting that the North Carolina Constitution does not guarantee proportional representation, but holding that "voters are entitled to have substantially the same opportunity" to elect representatives). *Cf.* Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.").

[268] *See Rucho*, 139 S. Ct. at 2515–17 (Kagan, J., dissenting) (agreeing that "[t]he Constitution does not mandate proportional representation," but arguing that "when political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes too far"); Vieth v. Jubelirer, 541 U.S. 267, 352 n.7 (2004) (Souter, J. dissenting) ("I agree with this Court's earlier statements that the Constitution guarantees no right to proportional representation . . . . It does not follow that the Constitution permits every state action intended to achieve any extreme form of disproportionate representation.").

[269] *Rucho*, 139 S. Ct. at 2502–03, 2507.

[270] *Id.* at 2597; Gaffney v. Cummings, 412 U.S. 735, 753 (1973); *Bandemer*, 478 U.S. at 128–29.

that a district map will invariably affect the voting strength of racial demographics.[271] These inevitabilities have not rendered racial gerrymandering unmanageable. The Court simply chose a better path for the doctrine by designating predominant intent as the constitutional threshold—providing a shield against judicial overreach, while sidestepping the line-drawing problems created by the effects-based framework used in partisan gerrymandering cases.[272] The same approach would be equally suited to address partisan gerrymandering claims.[273] Some partisan considerations and political effects are an inevitable consequence of the redistricting process and must be tolerated for the system to function.[274] Once the intent to gain political advantage predominates—once all neutral considerations are subordinate to partisan ends—the line has been crossed, and the courts may intervene.[275]

Accordingly, the Supreme Court should have started from the proposition that a district map drawn with the predominant intent to secure partisan advantage violates the Equal Protection Clause.[276] An intent-based framework would harmonize partisan and racial gerrymandering jurisprudence and provide a stable metric for judicial review. Judges would no longer be required to predict the effects of a map on future elections, and courts would be freed of the amorphous quantifications of fairness that come with the question "[h]ow much is too much?"[277] Such a ruling would also reciprocally strengthen racial gerrymandering doctrine, as rampant partisan interests have provided lawmakers with a shield against racial gerrymandering claims.[278] Moreover, predominant intent is a demanding threshold that would

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[271] *Compare* Shaw v. Reno, 509 U.S. 630, 646 (1993) (discussing legislature's inevitable awareness of race), *with Gaffney*, 412 U.S. at 753 (discussing legislature's inevitable awareness of political effects). *See also* Olga Pierce & Kate Rabinowitz, *'Partisan' Gerrymandering Is Still About Race*, PROPUBLICA (Oct. 9, 2017, 6:48 PM), https://www.propublica.org/article/partisan-gerrymandering-is-still-about-race [https://perma.cc/Y4PK-BKAV] ("Manipulating a map to move around Wisconsin Democrats also means manipulating a map to move around Wisconsin voters who are not white.").

[272] *See supra* notes 168–71 and accompanying text.

[273] *See* Kenai Peninsula Borough v. State, 743 P.2d 1352, 1371–72 (Alaska 1987).

[274] *See supra* text accompanying note 265.

[275] *Compare* Miller v. Johnson, 515 U.S. 900, 916 (1995) (holding that to prove predominance "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations"), *with Rucho*, 139 S. Ct. at 2520–21 (observing that "the quest for partisan gain made the [s]tate[s] override [their] own political geography and districting criteria" (emphasis omitted)), and Vieth v. Jubelirer, 541 U.S. 267, 318 (2004) (Stevens, J., dissenting) ("[W]hen partisanship is the legislature's sole motivation—when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage—the governing body cannot be said to have acted impartially.").

[276] *See Vieth*, 541 U.S. at 326–27.

[277] *Rucho*, 139 S. Ct. at 2501.

[278] *See supra* text accompanying notes 172–78 (discussing difficulty of adjudicating racial gerrymandering claims when lawmakers have mixed motives); Derysh, *supra* note 148 (describing how a North Carolina mapmaker surreptitiously used racial demographics to draw the maps at issue in *Rucho* under the guise of partisan gerrymandering).

function as an effective limiting principle, guaranteeing "that courts could intervene in the worst partisan gerrymanders, but no others."[279] Plaintiffs would bear the burden to prove that all neutral criteria were subordinated to partisan ends.[280] The complexity of mixed-motive allegations in the *Shaw* cases, and the extensive evidentiary records compiled in *Benisek* and *Common Cause*, demonstrate that this is not an easy task.[281]

With predominant intent as the core constitutional threshold, the leading state and federal gerrymandering cases can be distilled into a roadmap for partisan gerrymandering claims.[282] Across multiple rounds of redistricting and several decades of litigation, political parties have used similar subversive playbooks, producing parallel patterns of evidence.[283] Throughout these cases, the most powerful evidence of predominant suppressive intent can be found right in the public record. From *Bandemer* to *Rucho*, litigants proffered unambiguous statements by lawmakers responsible for redistricting[284] and data indicating that partisan interests were at the forefront of the redistricting process.[285] Evidence of a distorted mapmaking process is just as persuasive. Over the years, parties have drawn maps in closed, private meetings, secretly hired or consulted with partisan firms, and excluded their opponents and the public from redistricting deliberations under false pretenses.[286] In more difficult situations, the circumstantial evidence standards embraced in racial gerrymandering cases are readily applicable to partisan gerrymandering claims, such as facially bizarre shapes that mark substantial departures from a state's traditional redistricting criteria.[287] And while political outcomes would no longer be the focus

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[279] *Rucho*, 139 S. Ct. at 2522 (Kagan, J., dissenting); *accord Vieth*, 541 U.S. at 309–10 (Kennedy, J., concurring in judgment) (noting difficulties with determining partisan motive).

[280] *See supra* note 168–71 and accompanying text (discussing standard for predominance).

[281] *Rucho*, 139 S. Ct. at 2517–19 (Kagan, J., dissenting) (recounting the "overwhelming direct evidence" of predominant purpose established by the litigants in the lower courts); *see supra* text accompanying notes 42–44 (summarizing this evidence).

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

[283] *Id.* at 322.

[284] *E.g.*, Davis v. Bandemer, 478 U.S. 109, 116 n.5 (1986) (noting mapmakers intended "to save as many incumbent Republicans as possible"); *see supra* notes 29–41 and accompanying text (reviewing legislative testimony and data used in the cases underlying *Rucho*).

[285] Whitford v. Gill, 218 F. Supp. 3d 837, 847–53 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018) (noting overriding prioritization of partisan advantage in spreadsheets used during the redistricting process; observing mapmaker's testimony that "[w]e have an opportunity and an obligation to draw these maps that Republicans haven't had in decades").

[286] *See, e.g.*, Vieth v. Pennsylvania, 188 F. Supp. 2d 532, 535 (M.D. Pa. 2002); Bandemer v. Davis, 603 F. Supp. 1479, 1495 (S.D. Ind. 1984), *rev'd*, 478 U.S. 109 (1986); *see supra* notes 29, 37 and accompanying text (*Benisek* and *Common Cause*).

[287] *Compare* Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960) (finding "uncouth twenty-eight-sided figure" demonstrative of racial discrimination), *with Bandemer*, 603 F. Supp. at 1493 (finding map "replete with 'uncouth' and 'bizarre' configurations" that suggest partisan motive).

of the inquiry, extreme electoral disparities, historical trends, and flipped results are valuable circumstantial evidence of the legislature's intent.[288] These evidentiary patterns will be explored in Part III, below.

III. A PROOF-OF-CONCEPT PREDOMINANT INTENT FRAMEWORK

With predominant intent as the touchstone of partisan gerrymandering doctrine, the canonical state and federal gerrymandering cases can be synthesized into a manageable standard to evaluate these claims. This Part offers a proof of concept for that standard, developing an intent-based framework that would avoid the inchoate questions of political fairness that hindered the evolution of partisan gerrymandering doctrine, while limiting judicial intervention and preserving the separation of powers. Section III.A translates the Supreme Court's established framework for evaluating legislative intent into an evidentiary rubric to address partisan gerrymandering claims.[289] Section III.B discusses the most determinative components of this standard by highlighting evidence within the legislative process that may be dispositive of a predominant partisan motive.[290] Section III.C supplements this analysis with patterns of circumstantial evidence grounded in a map's impact on "the channels of political change."[291] Section III.D concludes by discussing the legislature's opportunity to respond to a partisan gerrymandering claim.[292]

A. The Framework: Translating Arlington Heights *into a Partisan Gerrymandering Test*

The Supreme Court has a well-established framework for evaluating legislative intent.[293] In race discrimination cases, "the invidious quality of a [challenged] law . . . must ultimately be traced to a racially discriminatory purpose."[294] This is a difficult mountain to climb. Legislatures consist of political actors with competing priorities, and are rarely motivated by a unitary, overarching concern.[295] Accordingly, any

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[288] *See Rucho*, 139 S. Ct. at 2510–11; *Vieth*, 541 U.S. at 289–90 (plurality opinion); *Bandemer*, 603 F. Supp. at 1495.

[289] *See infra* Section III.A.

[290] *See infra* Section III.B.

[291] *See infra* Section III.C.

[292] *See infra* Section III.C.

[293] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 240–41 (1976).

[294] *Id.* at 240; *accord* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); Mobile v. Bolden, 446 U.S. 55, 74 (1980) (holding that in racial gerrymandering cases, "[t]he ultimate question remains whether a discriminatory intent has been proved").

[295] *See* Palmer v. Thompson, 403 U.S. 217, 224 (1971) ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a

assessment of legislative intent requires "a sensitive inquiry" into the totality of the circumstances surrounding the challenged legislative action, guided by a multifactor analysis developed in *Village of Arlington Heights v. Metropolitan Housing Development Corp*.[296] These factors may be categorized as: (1) direct evidence of unconstitutional motive, such as "contemporary statements by members of the decisionmaking body"; (2) irregularities in the legislative process, including "[t]he specific sequence of events leading up to the challenged decision" and "[d]epartures from the normal procedural sequence" used to enact legislation; and (3) "[t]he impact of the official action," viewed in light of "the historical background of the decision," including "[s]ubstantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a [contrary] decision."[297]

The *Arlington Heights* test has already been adapted in racial gerrymandering cases.[298] Racial gerrymandering doctrine turns on direct and circumstantial evidence of the legislature's predominant intent, employing an analysis that parallels *Arlington Heights,* and often cites it directly.[299] In clear cases, the "contemporaneous statements" of legislative officials may be dispositive of legislative intent.[300] In more challenging disputes, the results of the process may be demonstrative of its objectives.[301] Bizarre district shapes that "substantially depart" from traditional redistricting considerations are strongly suggestive of racial discrimination,[302] and prove particularly resonant in states with a "historical background" of discriminatory actions.[303] And

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legislative enactment."); United States v. O'Brien, 391 U.S. 367, 383–84 (1968) (noting that "[i]nquiries into congressional motives or purposes are a hazardous matter," as "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it"); *accord* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 418 (2006) (emphasizing that "affixing a single label to those acts can be hazardous," especially "[w]hen the actor is a legislature and the act is a composite of manifold choices").

[296] 429 U.S. 252, 266 (1977); *accord* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 280 (1979) (considering "the totality of legislative actions" resulting in the challenged statute).

[297] *Arlington Heights*, 429 U.S. at 266–68.

[298] In fact, these doctrines have built upon each other, as the *Arlington Heights* Court cited racial gerrymandering cases to develop its test for legislative intent. *See id.* at 265–66 (citing Wright v. Rockefeller, 376 U.S. 52, 56–57 (1964) and Gomillion v. Lightfoot, 364 U.S. 339 (1960)).

[299] *E.g.*, Rodgers v. Lodge, 458 U.S. 613, 617–18 (1982) (emphasizing applicability of Arlington Heights in racial gerrymandering claims); *see supra* notes 169–70 and accompanying text.

[300] *E.g.*, Cooper v. Harris, 137 S. Ct. 1455, 1468–69 (2017) (highlighting "[u]ncontested evidence" that legislative mapmakers determined "that District 1 'must include a sufficient number of African-Americans' to make it 'a majority black district'").

[301] Reno v. Bossier Par. Sch. Bd., 520 U.S. 471, 487 (1997) ("[T]he impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions." (citing *Arlington Heights*, 429 U.S. at 266)).

[302] *See supra* note 170 and accompanying text.

[303] *E.g.*, Shaw v. Reno, 509 U.S. 630, 639–40 (1993) (noting racial gerrymander in Alabama resembled old gerrymanders previously invalidated; supplementing this finding with Alabama's

while a map's disproportionate impact on a minority's voting strength is not dispositive,[304] a legislature's dilution of minority votes through distortions of "the channels of political change" has been used to supplement other indicia of unconstitutional intent.[305]

The remainder of this Article translates this system into a judicially manageable partisan gerrymandering doctrine by highlighting and synthesizing patterns of evidence from the canonical Supreme Court partisan gerrymandering cases, leading state court decisions in this area, and recent opinions of the lower federal courts. Under this proof-of-concept standard, litigants may establish a constitutional violation by producing four categories of evidence. First, courts may look to direct evidence of a map's purpose, such as statements by legislative officials responsible for redistricting or the tools and methodologies used during the mapmaking process.[306] Second, evidence that the dominant party distorted ordinary legislative procedures at the expense of the disfavored party or the general public would prove highly persuasive.[307] Third, substantive deviations from neutral redistricting criteria may offer reliable circumstantial indicia of intent.[308] Fourth, evidence of disproportionate election results may be impactful in limited circumstances, such as where a state's historical background provides added meaning, where the map entrenches minority control and proves resistant to electoral shifts, or where the outcome aligns with goals set by the legislature.[309]

This standard would guard against judicial overreach by placing a substantial burden on plaintiffs challenging a district map.[310] *Arlington Heights* requires *purpose*, not *knowledge*: plaintiffs must show a map was drawn "because of" the legislature's intent to obtain partisan advantage, "not merely 'in spite of'" its suppressive effects

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history of using "[o]stensibly race-neutral devices . . . to deprive black voters of the franchise"); Rogers v. Lodge, 458 U.S. 613, 624 (1982) (affirming decision based in part on "the impact of past discrimination on the ability of blacks to participate effectively in the political process"); White v. Regester, 412 U.S. 755, 766 (1973) (upholding finding based on "the history of official racial discrimination in Texas, which at times touched the right of [African Americans] to register and vote and to participate in the democratic processes").

[304] Mobile v. Bolden, 446 U.S. 55, 66 (1980).

[305] ELY, *supra* note 93, at 105; *White*, 412 U.S. at 766 ("The plaintiffs' burden is to produce evidence . . . that the political processes leading to nomination and election were not equally open to participation by the group in question.").

[306] *See infra* Section III.B.

[307] *See infra* Section III.B.

[308] *See infra* Section III.C.1.

[309] *See infra* Section III.C.2.

[310] Rucho v. Common Cause, 139 S. Ct. 2484, 2522–23 (2019) (Kagan, J., dissenting) (reasoning that "to prove the intent to entrench through circumstantial evidence . . . would be impossible unless [its] effects were even more than substantial"); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Rarely can it be said that a legislature . . . operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one.").

on the disfavored party.[311] The *Miller* predominance threshold enhances this burden: as litigants must demonstrate that all neutral considerations were subordinated to partisan ends,[312] evidence of a mixed motive or compliance with traditional redistricting criteria is a strong defense.[313] Consistent with *Arlington Heights*, should a plaintiff satisfy this heavy burden of production, the result would be a rebuttable presumption of unconstitutional motive, and legislative defendants would be afforded an opportunity to respond.[314] Viewed collectively, these doctrinal constraints preserve the separation of powers by enabling the judiciary to address "the worst partisan gerrymanders, but no others."[315]

B. The Easy Cases: Evidence Internal to the Legislative Process

The first two prongs of this standard reflect the basic principle that the best evidence of impermissible intent will be found within the legislative process itself.[316] First, "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports" may evince a predominant intent to suppress political outsiders.[317] In the present state of affairs, state legislatures have treated the Supreme Court's refusal to adjudicate partisan gerrymandering as a "constitutional green light" for partisan interests to commandeer the districting process.[318] Accordingly,

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311 Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

312 *Compare* Miller v. Johnson, 515 U.S. 900, 916 (1995) (holding that to prove predominance "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations"), *with In re* Colo. Gen. Assembly, 828 P.2d 185, 199 (Colo. 1992) ("Political considerations are not per se improper . . . . It is only when partisan factors are allowed an importance equal to or greater than the proper constitutional criteria that a plan is defective.").

313 *Cf.* Easley v. Cromartie, 532 U.S. 234, 253, 257 (2001) (declining to apply strict scrutiny where "the legislature considered race, along with other partisan and geographic considerations," as "the attacking party has not successfully shown that race, rather than politics, predominantly accounts for the result"); *Miller*, 515 U.S. at 916 (holding that a state can defeat a claim of racial gerrymandering by demonstrating that "traditional race-neutral districting principles . . . are the basis for redistricting legislation").

314 *Arlington Heights*, 429 U.S. at 270 n.19 (allowing defendant to show "that the same decision would have resulted even had the impermissible purpose not been considered").

315 *Rucho*, 139 S. Ct. at 2522 (Kagan, J., dissenting).

316 Whitford v. Gill, 218 F. Supp. 3d 837, 890 (W.D. Wis. 2016) (observing that "courts are able to discern the legislature's intent more easily and less intrusively" when direct evidence of the legislative process is available).

317 *Arlington Heights*, 429 U.S. at 268; *accord* League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 388 (Fla. 2015) (reasoning that "the actions of individual legislators and staff members may be relevant in discerning legislative intent in the context of redistricting"); *see, e.g.*, Easley v. Cromartie, 532 U.S. 234, 354 (2001); Texas v. United States, 887 F. Supp. 2d 133, 165 (D.D.C. 2012); Smith v. Beasley, 946 F. Supp. 1174, 1210 (D.S.C. 1996) (each examining communications between legislators and staff members to determine improper intent).

318 *Rucho*, 139 S. Ct. at 2523–24 (Kagan, J., dissenting) ("Illicit purpose was simple to

almost every canonical gerrymandering decision features communications from legislative officials declaring their unequivocal intention to cement their party's control for the following decade—ranging from trial testimony,[319] to statements on the legislative floor,[320] to documentary records, such as minutes, agendas, emails, memos, and other communications.[321] None of these facts are dispositive, as courts must examine the totality of the circumstances to ensure that any communication reflects the legislature's objectives, not the thoughts of a single legislator, staff member, or consultant.[322] Regardless, there can be no stronger evidence that a legislature intends to distort "the channels of political change"[323] than the affirmative and unambiguous statements of its members' suppressive motivations.

Similarly, the tools, data, and methodologies used in the redistricting process may "speak for themselves."[324] Legislatures seeking to maximize partisan advantage often rely heavily on voter data, and include partisan objectives among their list of redistricting goals.[325] Moreover, as computing technology becomes increasingly

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show here only because politicians and mapmakers thought their actions could not be attacked in court . . . . They therefore felt free to openly proclaim their intent to entrench their party in office." (citation omitted)).

[319] *E.g.*, Benisek v. Lamone, 348 F. Supp. 3d 493, 502 (D. Md. 2018) (testifying that Democrats "set out to draw the borders in a way that was favorable to the Democratic Party"); Davis v. Bandemer, 478 U.S. 109, 117 n.5 (1986) (confirming map was "political," drawn "to save as many incumbent Republicans as possible"); Raleigh Wake Citizens Assoc. v. Wake Cnty. Bd. of Elections, 827 F.3d 333, 346 (4th Cir. 2016) (highlighting testimony by various witnesses that "the true motivation[]" behind the map "was to 'ensure Republican control . . . despite the vote totals[]'" as "a 'kind of punitive and retributive effort to punish the Democrats for winning'"); Session v. Perry, 298 F. Supp. 2d 451, 473 (E.D. Tex. 2004) (recounting testimony by a prominent Senator involved with the redistricting efforts that "political gain for the Republicans was 110% of the motivation for the Plan, that it was 'the entire motivation.'").

[320] *E.g.*, *Benisek*, 348 F. Supp. 3d at 506 ("In the face of Republican gains in redistricting in other states around the nation, we have a serious obligation to create this opportunity." (citation omitted)); Whitford v. Gill, 218 F. Supp. 3d 837, 894 (W.D. Wis. 2016) ("'The maps we pass will determine who's here 10 years from now,' and '[w]e have an opportunity and an obligation to draw these maps that Republicans haven't had in decades.'"); Common Cause v. Rucho, 318 F. Supp. 3d 777, 808 (M.D.N.C. 2018) ("'[T]o the extent [we] are going to use political data in drawing this map, it is to gain partisan advantage.'" (alteration in original) (citation omitted)).

[321] *See Detzner*, 172 So.3d at 388–89; League of Women Voters of Mich. v. Benson, 373 F. Supp. 3d 867, 938–39 (E.D. Mich. 2019) (highlighting "a wide-range of documentary evidence, such as emails between the map-drawers, emails from legislators, agenda minutes and the handwritten notes from the weekly leadership meetings"); League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 192 N.E.3d 379, 392–93 (Ohio 2022) (reviewing that negotiations primarily centered on the allocation of Democratic and Republican seats).

[322] *See supra* note 295 and accompanying text.

[323] ELY, *supra* note 93, at 105.

[324] Cox v. Larios, 542 U.S. 947, 948 (2004).

[325] *E.g.*, *League of Women Voters of Ohio*, 192 N.E.3d at 391 (observing that redistricting

ubiquitous, mapmakers have been empowered by proprietary software that enables them to develop aggressively slanted maps with mathematical precision.[326] In *Cox v. Larios*, litigants uncovered evidence that Democrats used voter data to design districts that would systematically pit Republican incumbents against each other and mitigate their chance at reelection.[327] In *Gill v. Whitford*, plaintiffs obtained a spreadsheet used by Republican legislators to systematically compare several computer-generated proposals and select the most partisan alternative.[328] And in *Common Cause v. Lewis*, plaintiffs adduced a treasure trove of data and formulae employed by a paid specialist to maximize Republican advantage—and discriminate against minority voters—when drawing the North Carolina map at issue in *Rucho*.[329]

Second, evidence that the dominant party "[d]epart[ed] from the normal procedural sequence" by distorting the state's redistricting procedures to disfavor its political adversaries is highly suggestive of an unlawful motive.[330] Courts may examine whether a process was "'taint[ed]' by 'improper partisan intent'" by examining "[t]he specific sequence of events" culminating in a challenged map.[331] In

committee used software that displayed "the partisan leaning of the district" in real time); Larios v. Cox, 300 F. Supp. 2d 1320, 1327 (N.D. Ga. 2004) (enumerating "protecting or enhancing opportunities for Democrats to be elected" as one of five redistricting goals); *Common Cause*, 318 F. Supp. 3d at 808 (listing "Political Data" and "Partisan Advantage" as apportionment criteria).

[326] Vieth v. Jubelirer, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring in the judgment) ("Computer assisted districting has become so routine and sophisticated that legislatures . . . can use databases to map electoral districts in a matter of hours, not months."); *e.g.*, Ohio A. Philip Randolph Inst. v. Householder, 373 F. Supp. 3d 978, 996–97 (S.D. Ohio 2019) (relying on popular redistricting software "Maptitude," to analyze demographic and partisan political data and produce alternative maps in real time).

[327] *Larios*, 300 F. Supp. 2d at 1331 (describing this effort as "selective incumbent protection," and striking the plan down as violative of equal population mandate); s*ee also Householder*, 373 F. Supp. 3d at 1138 (noting Ohio Republican Party strategically paired off two of its own senior incumbents to obtain a greater partisan advantage statewide).

[328] Whitford v. Gill, 218 F. Supp. 3d 837, 848–53 (W.D. Wis. 2016) (noting heavy use of "'customized demographic data'" including "a composite partisan score" in process aimed at calculating alternative election scenarios to maximizing partisan advantage).

[329] Common Cause v. Lewis, 18 CVS 014001, 2019 N.C. Super. LEXIS 56, at *34–48 (N.C. Super. Ct. Sept. 3, 2019).

[330] *Arlington Heights*, 429 U.S. at 267; Bandemer v. Davis, 603 F. Supp. 1479, 1495 (S.D. Ind. 1984) ("Prima facie evidence may also be shown by a lack of fairness in the procedure surrounding the legislature's enactment of district lines."); *e.g.*, Raleigh Wake Citizens Assoc. v. Wake Cnty. Bd. of Elections, 827 F.3d 333, 346 (4th Cir. 2016) (giving strong weight to "[u]ncontroverted testimony and evidence . . . that the legislative process . . . was truncated" in "a 'stark departure' from common practice" (citation omitted)).

[331] League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 392 (Fla. 2015); *Arlington Heights*, 429 U.S. at 267; *e.g.*, Whitford v. Gill, 218 F. Supp. 3d 837, 889–90 (W.D. Wis. 2016) (citing *Arlington Heights*, examining "the sequence of events" that led to the enactment of Wisconsin's redistricting plan to discern whether one purpose behind the legislation was to entrench a political party in power).

so doing, courts should be cautious not to overvalue gridlock, as votes cast along party lines may be the result of myriad considerations and competing political priorities, particularly in a hyperpolarized political climate.[332] However, a dominant party's efforts to exclude members of the disfavored party from key deliberations—by limiting access to data, relegating them to nonvoting roles, or excluding them from the committee entirely—suggest an intent to commandeer the process itself for partisan ends.[333] Evidence of heavy-handed involvement by national party leaders who would not normally contribute to a state-level process is similarly indicative.[334] And nationwide, interstate redistricting efforts such as REDMAP—championed by party leaders with unequivocally partisan goals—may be decisive.[335]

Deceptive and subversive tactics by the majority party are also remarkably common. In a striking number of cases, the dominant party has relied on a back-channel pipeline to draw a partisan map free from public scrutiny, reducing the official process to a formalistic shell.[336] Gerrymandering parties frequently place

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[332] *See* Palmer v. Thompson, 403 U.S. 217, 224 (1971); Rucho v. Common Cause, 139 S. Ct. 2484, 2522–23 (2019); *Arlington Heights*, 429 U.S. at 265 (discussing complexities of legislative decision-making).

[333] *E.g.*, Bandemer v. Davis, 603 F. Supp. 1479, 1484, 1495 (S.D. Ind. 1984) (observing that Democrats were given no access to redistricting data until the final forty hours of the legislative session and held only nonvoting roles on the redistricting committee); Benisek v. Lamone, 348 F. Supp. 3d 493, 502, 504–05 (D. Md. 2018) (noting Governor O'Malley appointed only one Republican to redistricting committee, and privately engaged group of Democratic party staffers to develop the Maryland map at issue in *Rucho*); Vieth v. Pennsylvania, 188 F. Supp. 2d 532, 535 (M.D. Pa. 2002) (observing Republicans "effectively ignored all Democratic members of the General Assembly, including members of the Conference Committee appointed to resolve the impasse between competing plans"); Harkenrider v. Hochul, 204 A.D.3d 1366, 1371 (N.Y. 2022) (highlighting "the largely one-party process used to enact the 2022 congressional map," by which "democratic leaders in the legislature drafted the 2022 congressional redistricting map without any republican input").

[334] *E.g.*, Vieth v. Jubelirer, 541 U.S. 267, 272 (2004) ("Prominent national figures in the Republican Party pressured the General Assembly to adopt a partisan redistricting plan as a punitive measure against Democrats."); Ohio A. Philip Randolph Inst. v. Householder, 373 F. Supp. 3d 978, 999 (S.D. Ohio 2019) (noting members of redistricting team were connected to political operation run by then–Speaker of the House John Boehner).

[335] *See supra* note 5.

[336] League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 388 (Fla. 2015) ("The 'existence of a separate process to draw the maps with the intent to favor or disfavor a political party or an incumbent' . . . would 'clearly' . . . support a 'claim that the Legislature thwarted the constitutional mandate.'" (citation omitted)); *e.g.*, Harper v. Hall, 380 N.C. 317, 513 (2022) (observing that the legislator "who personally drew nearly all of the House map [later] enacted" regularly met with counsel to draw "concept maps" using unknown software in a private room); *Householder*, 373 F. Supp. 3d at 996, 1099–101 (S.D. Ohio 2019) (finding Republicans made no use of the public hearing process, instead relying on maps drawn in a private hotel room, which "[n]o Democratic legislator or staffer ever visited"); *Benisek*, 348 F. Supp. 3d at 502 (observing that even before the official committee began holding public

primary mapmaking responsibilities in the hands of hired specialists, and have gone so far as to destroy evidence of their involvement.[337] In *League of Women Voters v. Detzner*, this form of proof was overwhelming: the Republican Party conducted its mapmaking process through a series of closed-door meetings at party headquarters in concert with private political consultants.[338] The party went "to great lengths" to conceal this from the public—funneling its political suggestions to the legislature through "shell people" disguised as ordinary citizens, "systematically delet[ing] almost all of their emails and other documentation relating to redistricting," and giving "conflicting or vague" testimony at trial.[339] In the face of this evidence, a finding of unconstitutional intent was inescapable.[340]

C. The Hard Cases: Circumstantial Evidence of Predominant Partisan Intent

The foregoing analysis of *Detzner* highlights a foreseeable and potent challenge. If predominant intent is the threshold for a constitutional violation, lawmakers intent on securing partisan advantage may conceal their efforts to distort the redistricting process.[341] The absence of the "smoking gun" evidence that has characterized these cases would present undeniable challenges for plaintiffs seeking to adjudicate partisan gerrymanders.[342] Nevertheless, these difficulties would not prove fatal in all cases, as plaintiffs may be able to offer circumstantial evidence of legislative intent.[343]

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hearings to solicit input, Democratic lawmakers had already begun private mapmaking effort); *Bandemer*, 603 F. Supp. at 1483–84 (noting that Republicans housed all data processing and computer equipment in party headquarters, providing no access to Democrats).

[337] *E.g.*, Whitford v. Gill, 218 F. Supp. 3d 837, 847 (W.D. Wis. 2016) (assembling a team of law firms, political science professors, and three legislative staffers to work in "the 'map room'" in the law firm's office); *Common Cause*, 318 F. Supp. 3d at 803 (retaining Dr. Thomas Hofeller, former redistricting coordinator for the Republican National Committee, to produce Republican-dominated map); *Bandemer*, 603 F. Supp. at 1483–84 (contracting with Market Opinion Research, Inc., a Republican political firm); *Benisek*, 348 F. Supp. 3d at 502–03 (retaining NCEC Services, Inc., a Democratic political consulting firm, and specifically charging it with partisan objectives); *see also supra* note 5 (discussing REDMAP in this light).

[338] 172 So. 3d 363, 379 (Fla. 2015).

[339] *Id.* at 377, 382, 384, 390.

[340] *Id.* at 392 (upholding district court's finding that there was "'too much circumstantial evidence' to reach any conclusion other than that the 'redistricting process' and the 'resulting map' were 'taint[ed]' by 'improper partisan intent'" (alteration in original)).

[341] Rucho v. Common Cause, 139 S. Ct. 2484, 2523 (2019) (Kagan, J., dissenting) ("[I]f the Court today declared [intent] justiciable . . . such smoking guns would all but disappear," requiring plaintiffs "to prove the intent to entrench through circumstantial evidence.").

[342] *Whitford*, 218 F. Supp. 3d at 890 (noting that when "the legislature is aware that a distinction is constitutionally impermissible and surreptitiously attempts to create legislation on the basis of that distinction," courts must "engage in a careful inquiry of circumstantial evidence, because the drafters' intent often is hidden from the casual observer").

[343] *See supra* notes 301, 341 and accompanying text; *accord* Miller v. Johnson, 515 U.S.

By analogy to *Arlington Heights* and the racial gerrymandering cases, this secondary evidence may arise in two forms: (1) "[s]ubstantive departures" from traditional redistricting principles of compactness, contiguity, and respect for political subdivisions;[344] and (2) the impact of the challenged action on the disfavored party, viewed in light of the map's legislative history and the state's political background.[345]

1. The Parade of Animal Analogies: Substantive Departures from Traditional Principles

As Justice Kagan noted, an objective comparison to a state's neutral redistricting criteria may offer an important baseline for the juxtaposition and evaluation of a challenged map.[346] The traditional districting criteria—compactness, contiguity, and respect for political subdivisions—are well-established principles that support an evenhanded and nonpartisan districting process.[347] Accordingly, compliance with these criteria is "'almost universally recognized' as an appropriate anti-gerrymandering standard,"[348] and substantial deviations may suggest an unconstitutional motive.[349] This analysis is consistent with *Arlington Heights*, under which "[s]ubstantive departures" may be circumstantial evidence of intent, "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached."[350] It also finds considerable support in the weight of the early redistricting cases, which consistently treated the traditional criteria as the gold standard for apportionment.[351] Although *Reynolds* signaled a shift in favor of equal population, these criteria still provide a strong barometer for a map's neutrality.[352]

900, 913 (1995) ("Shape is relevant . . . because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale.").

[344] 429 U.S. 252, 267 (1977); *see infra* Section III.C.1.

[345] 429 U.S. at 266; *see infra* Section III.C.2.

[346] Rucho v. Common Cause, 139 S. Ct. 2484, 2520 (2019) (Kagan, J., dissenting).

[347] *See supra* notes 216–18 and accompanying text.

[348] Schrage v. State Bd. of Elections, 430 N.E.2d 483, 486 (Ill. 1981); *accord* League of Women Voters v. Commonwealth, 178 A.3d 737, 816 (Pa. 2018) (recognizing that the use of these neutral criteria "substantially reduces the risk that a voter . . . will unfairly suffer the dilution of the power of his or her vote").

[349] *E.g.*, *League of Women Voters*, 178 A.3d at 776, 819, 821 (finding the "odd shapes and seemingly arbitrary political subdivision splits" in Pennsylvania's 2011 Plan demonstrate that the plan "subordinates the traditional redistricting criteria in service of achieving unfair partisan advantage" and "undermines voters' ability to exercise their right to vote in free and 'equal' elections"); Common Cause v. Lewis, 18 CVS 014001, 2019 N.C. Super. LEXIS 56, at *293–95 (N.C. Super. Ct. Sept. 3, 2019) (emphasizing that the North Carolina gerrymander at issue in *Rucho* departed from political and geographical boundaries).

[350] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977).

[351] *See supra* notes 215–17 and accompanying text.

[352] *See supra* notes 218–20 and accompanying text.

Facially bizarre districts—almost ubiquitous among partisan gerrymandering cases—present the most visually resonant departures from the traditional districting criteria.[353] Courts have attempted to define "bizarreness" as a measure of a district's compaction and elongation,[354] or the prevalence of hooks, tendrils, and other unusual appendages.[355] However, this concept is best explained by analogy: these "[g]eographical[] . . . monstrosit[ies]"[356] have been colorfully described as "a praying mantis,"[357] "an octopus," a "mutant crab,"[358] a "bacon-strip,"[359] "a Rorschach inkblot test,"[360] "a sports car heading out of town,"[361] "Goofy kicking Donald Duck,"[362] "the Snake on the Lake,"[363] and "a dragon descending on Philadelphia from the west."[364] These illustrations are as insightful as they are entertaining. Districts that so detached from neutral criteria provide *prima facie* evidence of an unlawful motive, as they are "unexplainable on [other] grounds."[365]

Even when a district's shape is not facially inexplicable, unnecessary deviations from political subdivisions and geographical boundaries may lend weight to this

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[353] Bandemer v. Davis, 603 F. Supp. 1479, 1493 (S.D. Ind. 1984) ("[D]ramatically irregular shapes may have sufficient probative force to call for an explanation." (quoting Karcher v. Daggett, 462 U.S. 725 (1983) (Stevens, J., concurring))).

[354] *E.g.*, Bingham Cnty. v. Idaho Comm'n for Reapportionment, 55 P.3d 863, 869 (Idaho 2002) (defining "oddly shaped" as a function of the district's compactness and contiguity, and whether the challenged district is "'distorted' or 'elongated'" (citations omitted)).

[355] *E.g.*, Hellar v. Cenarrusa, 682 P.2d 539, 544 (Idaho 1984) (endorsing description of "the typical characteristics of political gerrymandering," as including "shoe string connections" and "odd-shaped long narrow districts" (citation omitted)).

[356] Miller v. Johnson, 515 U.S. 900, 909 (1995) (citation omitted).

[357] *See* Fleming, *supra* note 8.

[358] Ella Nilsen, *North Carolina's Extreme Gerrymandering Could Save the House Republican Majority*, VOX (May 8, 2018, 11:00 AM), https://www.vox.com/policy-and-politics/2018/5/8/17271766/north-carolina-gerrymandering-2018-midterms-partisan-redistricting/ [https://perma.cc/UF5W-LKMD].

[359] Session v. Perry, 298 F. Supp. 2d 451, 490 (E.D. Tex. 2004).

[360] Shaw v. Reno, 509 U.S. 630, 635 (1993).

[361] Hellar v. Cenarrusa, 682 P.2d 539, 543 (Idaho 1984).

[362] League of Women Voters v. Commonwealth, 178 A.3d 737, 819 (Pa. 2018).

[363] Ohio A. Philip Randolph Inst. v. Householder, 373 F. Supp. 3d 978, 993 (S.D. Ohio 2019).

[364] Vieth v. Jubelirer, 541 U.S. 267, 339–40 (2004) (Stevens, J., dissenting).

[365] *Compare* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."), *and* Shaw v. Reno, 509 U.S. 630, 631 (holding that "redistricting legislation that is . . . so bizarre on its face that it is unexplainable on grounds other than race" must be strictly scrutinized (citing Gomillion v. Lightfoot, 364 U.S. 399, 341 (1960)), *with Vieth*, 541 U.S. at 339–40 (finding district "so irregular on its face that it rationally can be viewed only as an effort . . . to advance the interests of one political party . . . without any legitimate or compelling justification"), *and Bandemer*, 603 F. Supp. at 1493 (observing that challenged plan "is replete with 'uncouth' and 'bizarre' configurations" that suggest partisan motive).

analysis.[366] In racial gerrymandering cases, this evidence is forceful when the deviations closely correspond with an impermissible classification.[367] In the partisan context, an unjustified division of communities that habitually vote along certain lines suggests the deliberate "cracking" of a party's votes.[368] In *Vieth*, the challenged map divided eighty-four municipalities among congressional districts without any legitimate justification, producing a map in which Democrats were projected to win only six of nineteen congressional seats despite receiving 50.6% of the statewide popular vote.[369] Comparatively, the use of elongated districts or creative contiguity methods to connect disparate communities with little in common other than their partisan affiliation may be evidence of "packing."[370] In *League of Women Voters v. Commonwealth*, the Republican gerrymander at issue used connections as narrow as a single building to incorporate Democratic communities from across the state into a single, meandering legislative district.[371]

Consistent with *Arlington Heights*, the weight of these "[s]ubstantive departures" depends on the extent to which "the factors usually considered important by the decisionmaker . . . favor a decision contrary to the one reached."[372] Many of the techniques used under the Supreme Court's effects-based framework could be converted into metrics for circumstantial evidence of intent: as Justice Kagan observed in *Rucho*, "the same technologies and data that today facilitate extreme partisan gerrymanders also enable courts to discover them."[373] As in *Common Cause*, plaintiffs may compare a map to thousands of computer-generated hypotheticals to determine whether it is a statistical outlier.[374] Alternatively, in accordance with

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[366] *See supra* notes 216–18, 349 and accompanying text.

[367] *Cf., e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 340–41 (1960) (observing that "uncouth" alterations in Tuskegee city limits "remove[d] from the city all save four or five of its 400 [Black] voters while not removing a single white voter or resident"); Cooper v. Harris, 137 S. Ct. 1455, 1469 (2017) ("Within the same counties, the portions that fall inside District 1 have [B]lack populations two to three times larger than the portions placed in neighboring districts.").

[368] *E.g.*, Common Cause v. Rucho, 318 F. Supp. 3d 777, 779–80 (M.D.N.C. 2018) (finding legislature's criteria requiring division of populous Democratic counties evidence of cracking).

[369] 188 F. Supp. 2d 532, 536 (M.D. Pa. 2002).

[370] *E.g.*, *Common Cause*, 318 F. Supp. 3d at 902 (observing that the boundaries of a newly drawn district precisely connect historically Democratic precincts from neighboring counties into the district).

[371] 178 A.3d 737, 775–76, 820–21 (Pa. 2018).

[372] 429 U.S. 252, 267 (1977).

[373] *Rucho*, 139 S. Ct. at 2517 (Kagan, J., dissenting); Harkenrider v. Hochul, 204 A.D.3d 1366, 1370–71 (N.Y. 2022) ("Recently, computer modeling and statistical analysis have garnered acceptance as evidence of partisan intent."); *accord* Vieth v. Jubelirer, 541 U.S. 267, 312–13 (2004) (Kennedy, J., concurring in the judgment) ("[T]hese new technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties.").

[374] *E.g.*, *Benson*, 373 F. Supp. 3d at 939–40 (finding map fell outside middle ninety-five percent of simulated districts based on neutral criteria, with one district more packed than

Detzner, experts may measure compliance with traditional criteria by mathematically calculating a district's compactness and elongation.[375] Each of these methods allows a plaintiff to compare a challenged map against a neutral baseline to determine whether the legislature departed from neutral redistricting criteria—narrowing the possibility of a legitimate explanation, and suggesting evenhanded considerations would yield a more equitable result.[376]

2. When Election Results Matter: Disproportionate Impact on an Affected Population

Disproportionate election results are one of the most common forms of evidence offered in partisan gerrymandering cases, as a persistent "lack of electoral success is evidence of vote dilution."[377] This is understandable. "The impact of the official action" is "an important starting point" for a discrimination claim under *Arlington Heights*, and, on its face, a disparate outcome appears to reasonably suggest a broken election process.[378] Nevertheless, the Constitution does not provide an individual right to proportional representation or competitive elections—as discussed above, gerrymandering is better framed as the deliberate distortion of "the channels of political change."[379] As circumstantial evidence of intent, the probative value of election results may be minimal.[380] Gaps between popular vote results and legislative

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any of a subset of 1,000 generated maps); *Harkenrider*, 204 A.D.3d at 1371–74 (simulating 15,000 possible maps based on neutral criteria outlined in the New York Constitution to show an "overwhelming consistent pattern" of "packing republican voters into other republican-leaning districts"); Harper v. Hall, 380 N.C. 317, 339 (2022) (observing "that the enacted congressional plan is more favorable to Republicans than 99.9999% of the comparison maps" generated by a redistricting expert).

[375] *E.g.*, League of Women Voters v. Detzner, 172 So. 3d 363, 435 (Fla. 2015) (appendix) (relying on "Reock method," measuring "the ratio between the area of the district and the area of the smallest circle that can fit around the district," and "Area/Convex Hull method," which "measures the ratio between the area of the district and the area of the minimum convex bounding polygon that can enclose the district"); *League of Women Voters*, 178 A.3d at 819 (observing that challenged map "quizzically divide[d] small municipalities which could easily be incorporated into single districts without detriment to the traditional districting criteria").

[376] *Rucho*, 139 S. Ct. at 2518 n.3 (Kagan, J., dissenting) (observing that this analysis "essentially answers the question: In a State with these geographic features and this distribution of voters and this set of districting criteria—but without partisan manipulation—what would happen?").

[377] Johnson v. DeGrandy, 512 U.S. 997, 1011–12 (1994).

[378] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977); *accord Rucho*, 139 S. Ct. at 2506 ("Excessive partisanship in districting leads to results that reasonably seem unjust.").

[379] ELY, *supra* note 93, at 103; *see supra* notes 266–68 and accompanying text.

[380] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2503 (2019) (noting that "prognostications as to the outcome of future elections" are "matters as to which neither judges nor

representation occur due to a myriad of reasons, such as a tendency for demographics to cluster over time, changes in voter sentiment, or surges of turnout during wave elections.[381] Granting too much weight to a map's political effects would distract from the threshold consideration of intent and reintroduce many of the uncertainties present under the failed effects-based framework.[382]

There are three circumstances in which election results would prove highly influential. First, election results gain considerable force when they demonstrate that a map functioned exactly as intended.[383] If partisan agents in the mapmaking process targeted a specific outcome, evidence that the map consistently achieved that outcome suggests a handcrafted electorate—a quintessential inversion of healthy majoritarian democracy.[384] This conclusion is strengthened when the partisan outcome produced by a map becomes rigid, "rendering one consistent result no matter the particularities of the election cycle."[385] *Benisek* and *Common Cause* are clear examples of this principle. In Maryland and North Carolina, legislators openly targeted specific outcomes—flipping Maryland's Sixth District, and producing a ten to three breakdown in the North Carolina congressional delegation.[386] Each map persistently maintained its intended result, even as the disfavored parties continue to mount vehement challenges and increase their voting share across successive elections.[387]

Second, if a map is an extreme statistical outlier, flipped results may be highly influential. If the party that earns a majority of votes is consistently relegated to a substantial minority of legislative seats, the will of the voters has been comprehensively stifled, and the "channels of political change" have been closed.[388] For example, in *League of Women Voters v. Commonwealth*, a Republican gerrymander

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anyone else can have any confidence"). This logic is demonstrated by the outcome in *Vieth*: As discussed in note 195, *supra*, the Pennsylvania map netted Democrats ten seats, as opposed to the anticipated six.

[381] *See* Vieth v. Jubelirer, 541 U.S. 267, 288–89 (2004); *In re* Senate Joint Resol. of Legis. Apportionment 1176, 83 So. 3d 597, 642–43 (Fla. 2012); Bandemer v. Davis, 603 F. Supp. 1479, 1485–86 (S.D. Ind. 1984).

[382] *See supra* Section II.D (discussing the bifurcation of racial and partisan gerrymandering).

[383] *Rucho*, 139 S. Ct. at 2509–11 (Kagan, J., dissenting) (discussing this pattern in both Common Cause and Benisek).

[384] *See supra* notes 9–11.

[385] *E.g.*, Ohio A. Philip Randolph Inst. v. Householder, 373 F. Supp. 3d 978, 994, 1134 (S.D. Ohio 2019) (observing that "[i]t is no coincidence that correspondence between the insiders crafting the map refer to 'lock[ing] in' the 12–4 division and ensuring 'safe seats,'" and the challenged map produced a delegation that has remained steadfastly 12–4, resisting "shifts in voter preference and turnout over the years").

[386] *See supra* text accompanying notes 29–41.

[387] *See Rucho*, 139 S. Ct. at 2509–11 (Kagan, J., dissenting).

[388] *See supra* Section I.B.2 (describing the Court's role in preventing majority entrenchment); *e.g.*, Bandemer v. Davis, 603 F. Supp. 1479, 1486 (S.D. Ind. 1984) (noting Democrats won 51.9% of vote, yet received 43 out of 100 legislative seats; finding this evidence suggests "that there is a built-in bias favoring the majority party").

in Pennsylvania consigned Democrats to five of eighteen legislative seats (or twenty-seven percent), despite winning as much as 50.8% of the vote in subsequent elections.[389] Likewise, in *Henderson v. Perry*,[390] the Supreme Court of Texas noted that a prior Democratic gerrymander—once described as "the 'shrewdest gerrymander of the 1990s'"[391]—persistently restricted Republicans to no more than forty percent of the available seats, despite a surge in popular support peaking around sixty percent over several elections.[392] These results, repeated consistently across multiple cycles, "speak for themselves": Even accounting for natural shifts in the electorate, it is difficult to conceive how such a strong and persistent disparity could emerge accidentally.[393]

Third, the "historical background" of the challenged map may provide important context and give election results added meaning.[394] In racial gerrymandering cases, a history of racial discrimination lends credence to an allegation that a map's suppressive effect was intentional.[395] In a partisan challenge, historical plans offer a useful juxtaposition: evidence that a map caused a "uniform swing" in favor of the dominant party would be persuasive,[396] particularly if a state has a history of close, competitive elections.[397] Similarly, as discussed *supra*, evidence that a map affected specific voters, communities, or incumbents who were affirmatively targeted by the

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[389] 178 A.3d 737, 763–64 (Pa. 2018) (noting Democrats won 50.8% of the vote in 2012, 44.5% of the vote in 2014, and 45.9% of the vote in 2016).

[390] 399 F. Supp. 2d 756 (E.D. Tex. 2005). *Henderson* was the second District Court decision underlying *League of United Latin Am. Citizens v. Perry*. *See generally* 548 U.S. 399, 410–13 (2006) (reviewing history of case).

[391] *Henderson*, 399 F. Supp. at 767–68 n.47 (calling plan "extreme example of what party can do in drawing a redistricting map to the detriment of the other").

[392] *Id.* at 762–64 (describing in detail "the dominance, decline, and eventual eclipse of the Democratic Party as the state's majority party").

[393] *See* Cox v. Larios, 542 U.S. 947, 948 (2004); Vieth v. Jubelirer, 541 U.S. 267, 288–89 (2004).

[394] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977).

[395] *See supra* note 303 and accompanying text.

[396] *E.g.*, Common Cause v. Lewis, 18 CVS 014001, 2019 N.C. Super. LEXIS 56, at *78 (N.C. Super. Ct. Sept. 3, 2019) (reviewing the results of past elections to demonstrate "uniform swing" across the map in favor of Republicans); Whitford v. Gill, 218 F. Supp. 3d 837, 845–46, 851 (W.D. Wis. 2016) (recognizing that maps adopted in 1990 and 2000 focused on traditional criteria and produced competitive results, whereas new plan ensured fifty-nine seats for Republicans).

[397] *E.g.*, Bandemer v. Davis, 603 F. Supp. 1479, 1485–86 (S.D. Ind. 1984) (noting "Indiana is historically a 'swing' state," characterized by a "flux in Hoosier political emotions"; contrasting this history with disparate election in which Republicans earned 57 out of 100 seats with only 48.1% of the vote under the new plan); Ohio A. Philip Randolph Inst. v. Householder, 373 F. Supp. 3d 978, 1137 (S.D. Ohio 2019) (noting the prior map "contained competitive districts and was responsive to shifts in voter preference and turnout over the years," while challenged map was "a 12–4 map through and through," minimizing "responsiveness to changes in voter preferences").

legislature during the mapmaking process may reinforce other indicia of legislative intent.[398] Such evidence must be retrospective: as demonstrated by the failure of the *Bandemer* "consistent degradation" test, predictions of a map's *future* impact are too uncertain to reliably contribute to this analysis.[399]

D. Rebuttal Evidence: State Interests to Defend Against Gerrymandering Claims

This is not the end of the road for legislative defendants. All of the evidence catalogued above would serve only to create the presumption of a predominant suppressive motive.[400] Consistent with *Arlington Heights* and established redistricting jurisprudence, the burden would shift to the state to rebut this presumption by a preponderance of the evidence.[401] As discussed *supra*, compliance with the traditional redistricting criteria would be a compelling explanation, particularly when those criteria are mandated by the state constitution.[402] Similarly, alignment with a state's geographical features, compliance with the *Reynolds* equal population requirement, and conformity with the provisions of the Voting Rights Act would be reasonable justifications for unusual shapes,[403] provided the plaintiff's evidence does not neutralize these explanations.[404] These forms of rebuttal evidence reflect compelling state interests that maintain their vitality under an intent-based standard.

Additionally, neutral political considerations would provide a valid defense if they are applied evenhandedly.[405] As long as legitimate, neutral considerations

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[398] *See supra* text accompanying notes 325–28 (discussing use of voter data and selective incumbent targeting); *e.g.*, *supra* note 40 and accompanying text (reviewing how Maryland Democratic lawmakers successfully targeted Republican voters to flip the Sixth District).

[399] *See* Vieth v. Jubelirer, 541 U.S. 267, 282–84 (2004).

[400] *See Whitford*, 218 F. Supp. 3d at 911 (noting that a burden-shifting framework is consistent with the Court's established racial gerrymandering and malapportionment jurisprudence).

[401] *See supra* note 314 and accompanying text.

[402] Harper v. Hall, 380 N.C. 317, 388 (2022) ("Other widely recognized traditional neutral redistricting criteria, such as compactness of districts and respect for other political subdivisions, may also be compelling governmental interests."); *see supra* notes 313, 353 and accompanying text (discussing the relevance of these criteria as anti-gerrymandering standards).

[403] *See supra* note 171 and accompanying text (discussing Voting Rights Act compliance); *supra* note 218 and accompanying text (discussing overriding importance of equal population).

[404] *E.g.*, League of Women Voters v. Commonwealth, 178 A.3d 737, 818 (Pa. 2018) (finding that plaintiff's expert testimony demonstrates "that the Plan cannot plausibly be directed at drawing equally populous, compact, and contiguous districts which divide political subdivisions only as necessary to ensure equal population"); *Whitford*, 218 F. Supp. 3d at 921–22 (finding "Wisconsin's political geography . . . affords the Republican Party a natural, but modest, advantage in the redistricting process"; nevertheless holding that "this inherent advantage" was insufficient to explain the challenged map's extreme partisan lean).

[405] Gaffney v. Cummings, 412 U.S. 735, 752 (1973) ("It would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is enough to invalidate it.").

predominate, a legislature can configure its map to avoid conflicts between incumbents.[406] However, pure incumbency protection—drawing a map to maximize each incumbent's chances of reelection—implicates similar concerns as partisan gerrymandering by obstructing "the channels of political change,"[407] particularly when this protection is offered only to the members of the dominant party.[408] Similarly, many states configure their districts to preserve communities of interest.[409] However, courts should be wary of this consideration, as it is inconsistently defined and erratically applied.[410] When the claimed interests reflect tangible and nonpartisan community needs, such as a unified urban or rural culture, common logistical concerns, or a shared community identity,[411] a map that protects communities of interest reflects valid majoritarian concerns that "inure to no political party's benefit or detriment."[412] Comparatively, when the interests protected are political in nature, this consideration could be a proxy for partisan objectives.[413]

Finally, while this framework borrows from racial gerrymandering cases, partisan considerations do not cause the same pervasive harms as invidious racial

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[406] *In re* Reapportionment of Hartland, Windsor & West Windsor, 624 A.2d 323, 337 (Vt. 1993) (citing Karcher v. Daggett, 462 U.S. 725, 740 (1983)).

[407] ELY, *supra* note 93, at 105; *e.g.*, Ohio A. Philip Randolph Inst. v. Householder, 373 F. Supp. 3d 978, 1136 (S.D. Ohio 2019) (finding map "aimed at trying to justify entrenchment and incumbent insulation from political challenges" impermissible (emphasis in original)).

[408] *See supra* note 327 and accompanying text.

[409] *See* Wang et al., *supra* note 215, at 244 (observing that this consideration is "of central conceptual importance" in many state constitutions); *e.g.*, *Whitford*, 218 F. Supp. 3d at 845–46 (discussing importance of "communities of interest" in the development of Wisconsin's 1990 and 2000 plans).

[410] *See* Wang et al., *supra* note 215, at 244–45 (calling communities of interest "the most malleable and least quantifiable" of all criteria traditionally considered by the states; listing various state constitutional definitions); *accord* Common Cause v. Lewis, 18 CVS 014001, 2019 N.C. Super. LEXIS 56, at *113 (N.C. Super. Ct. Sept. 3, 2019) (recounting how redistricting committee declined to adopt communities of interest as a criterion because it "couldn't find a concise definition" of the term).

[411] *E.g.*, Bandemer v. Davis, 603 F. Supp. 1479, 1486 (S.D. Ind. 1984) (defining "communities of interest" as "citizens in a given legislative district who share a geographic area, with similar concerns and needs to be met by their state legislators"); *In re* Reapportionment of Towns of Hartland, Windsor & W. Windsor, 624 A.2d 323, 331 (Vt. 1993) (defining term as requiring "maintenance of patterns of geography, social interaction, trade, political ties and common interests").

[412] League of Women Voters v. Commonwealth, 178 A.3d 737, 816 (Pa. 2018); *accord* Maestas v. Hall, 274 P.3d 66, 78 (N.M. 2012) ("The rationale for giving due weight to clear communities of interest is that to be an effective representative, a legislator must represent a district that has a reasonable homogeneity of needs and interests; otherwise the policies he supports will not represent the preferences of most of his constituents.").

[413] *Cf.* Miller v. Johnson, 515 U.S. 900, 920 (1995) (contrasting a map that happens to group voters based on race because they are members of a shared community with a map that assumes voters of a certain race share identical interests).

classifications. Accordingly, distinct from racial gerrymandering doctrine, partisan districting may be justified in appropriate circumstances. Districts that are drawn to maximize political fairness and competitive elections, such as those in *Gaffney v. Cummings*, do not reflect a suppressive partisan intent.[414] Additionally, a legislature's attempt to correct prior partisan gerrymanders would plausibly justify the predominance of partisan considerations.[415] Remedial redistricting would require firm proof of the prior gerrymander—and the legislature's solution must mark a return to the norm, not a swing of the pendulum to another extreme.[416] In *Henderson v. Perry*, the District Court rejected a claim that a proposed map was gerrymandered for Republican advantage by noting that the legislature drafted it to correct the Democratic gerrymander that had frustrated the representation of Texas' growing conservative majority throughout the 1990s.[417] In cases like *Henderson*, what appears to be partisan entrenchment is nothing more than what Professor Ely endorses: an effort to "clear the channels of political change," and ensure the salient operation of the democratic process.[418]

CONCLUSION

The collapse of federal partisan gerrymandering doctrine[419] was the predictable endpoint of decades of judicial confusion over the justiciability of partisan gerrymandering claims.[420] But it was also the natural consequence of the Supreme Court's decision to hold that "jurisdictions may engage in constitutional political gerrymandering," and to measure the constitutionality of a gerrymander based on the effects of the map, rather than the intent of the mapmakers.[421] Instead of perpetuating this framing, the Court should have held that a map drawn with the predominant intent to "subordinate adherents of one political party and entrench a rival party in power" is a violation of the Equal Protection Clause—deleterious to "the channels of political change" and damaging to the foundations of our democracy.[422]

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[414] *See supra* text accompanying note 180. This interpretation of *Gaffney* is in stronger alignment with the reasoning in that case: *Gaffney* is best read as supporting a benign classification principle, rather than a threshold of permissible entrenchment. *See supra* notes 183–85, 248–51 and accompanying text (challenging broad reading of *Gaffney* and resulting bifurcation).

[415] *See supra* text accompanying note 171 (parallel principle in racial gerrymandering doctrine).

[416] Henderson v. Perry, 399 F. Supp. 2d 756, 768–69 (E.D. Tex. 2005) (recognizing that "undoing the work of one political party for the benefit of another" would undermine judicial impartiality, and observing with approval that "the size of the swing" produced by the challenged map "only reflected the distortion caused by the gerrymandered plan it replaced").

[417] *See supra* notes 390–92 and accompanying text.

[418] ELY, *supra* note 93, at 105; *see supra* Section III.A.

[419] *See supra* Section I.A.

[420] *See supra* Section II.B.

[421] *See supra* Part II.

[422] *See supra* note 1 and accompanying text; ELY, *supra* note 93, at 105; *see supra* Part I.

As this Article demonstrates, an intent-based doctrine is viable, discoverable, and manageable. Across the quintessential state and federal gerrymandering cases, parties have used similar playbooks and similar suppressive techniques, producing parallel patterns of evidence.[423] The Supreme Court has an established framework that is well-suited to evaluate these patterns: *Arlington Heights* has been used to adjudicate legislative intent in discrimination cases for years, and has already been adapted in racial gerrymandering cases.[424] Synthesizing the most prominent evidentiary patterns into a framework to evaluate partisan suppressive intent yields a manageable standard that would enable the judiciary to address partisan gerrymandering in a consistent, evenhanded manner.[425] Such a doctrine could easily be balanced by a predominance threshold that is well-calibrated to constrain judicial intervention and preserve separation of powers.[426] And it would provide an answer to the difficult question that hounded the Supreme Court for decades. When asked "how much" partisan entrenchment it is willing to tolerate, the Court could simply declare: "None at all."[427]

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[423] *See supra* Part III.
[424] *See supra* Section III.A.
[425] *See supra* Sections III.B–C.
[426] *See supra* Section III.C.
[427] Rucho v. Common Cause, 139 S. Ct. 2484, 2523 (2019) (Kagan, J., dissenting).