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THE LOOMING 2010 CENSUS: A PROPOSED JUDICIALLY MANAGEABLE STANDARD AND OTHER REFORM OPTIONS FOR PARTISAN GERRYMANDERING

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Gerrymandering hinders voters from protecting their rights and voicing their interests through their votes, and the coming 2010 census and attendant redistricting underscore the need for a consistently applied standard for claims of partisan gerrymandering. Redistricting plans have withstood legal challenges because courts have been unable to interpret the conflicting Supreme Court rulings on partisan gerrymandering claims. Nothing in the Constitution expressly prohibits gerrymandering, and until Baker v. Carr*, the Supreme Court had treated claims of unfair districting as nonjusticiable. This Article describes the Court's decisions in* Baker *and in* Davis v. Bandemer*, in which the Supreme Court finally held partisan gerrymandering claims to be justiciable. It analyzes the judiciary's struggle with the* Bandemer *standard that required plaintiffs to show that a districting plan had both a discriminatory purpose and a discriminatory effect in order to succeed on a claim of partisan gerrymandering. This Article highlights the Court's fractured opinions in partisan gerrymandering cases challenging legislative redistricting that took place in Pennsylvania, Texas, and Georgia after the 2000 census. Drawing on past Justices' views on partisan and racial gerrymandering, this Article proposes a three-part standard for adjudicating claims of partisan gerrymanders as well as other options for reform.*

I. INTRODUCTION

The 2010 census is almost upon us and will trigger redistricting at all levels of government—federal, state, and local—to comply with Article I, Section 2 of the U.S. Constitution and the "one person, one vote," or equal district population, standard of the Fourteenth Amendment.[1] And if the past is prelude to the future, the redistricting will be rife with partisan gerrymandering. Now is the time to formulate a workable standard for adjudicating

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[1] The phrase "one person, one vote" was first used by the Supreme Court in *Gray v. Sanders*, 372 U.S. 368, 381 (1963), which invalidated Georgia's county unit system, a method of nominating candidates for statewide office that gave 121 rural counties with a minority of the population sixty percent of the unit votes, and thus control of the nomination process. The county unit system was passionately defended by many white politicians as necessary to protect the state from "sinister and subversive elements in the form of Negroes, Yankee influence, labor unions, agents of the Soviet Union, etc." JOSEPH L. BERND, GRASS ROOTS POLITICS IN GEORGIA 16 (1960); *see also* LAUGHLIN MCDONALD, A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA 80–84 (2003).

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claims of partisan gerrymandering so that equality of voting power becomes a reality and not simply a lofty but unattainable goal.

The harm in political gerrymandering, as one court has put it, is that it is "an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good."[2] A group that is denied by partisan gerrymandering the effective exercise of its vote is necessarily deprived of the ability to protect its rights. Because elected officials are free to disregard its needs and concerns, that group is denied an effective voice in policy making decisions. As described by the Supreme Court, the right to vote is "preservative of all rights."[3]

Part II of this Article will discuss the origins of partisan gerrymandering. Part III discusses the Supreme Court's decision in *Davis v. Bandemer*[4] and the justiciability of claims of partisan gerrymandering. Part IV describes the difficulties courts have had in applying *Davis*. Part V discusses blatant partisan gerrymandering in Pennsylvania, Texas, and Georgia following the 2000 census.

Based on standards proposed by Justices in partisan and racial gerrymandering cases, Part VI proposes a judicially manageable, three-part standard for adjudicating claims of partisan gerrymandering: (1) a predominantly partisan purpose; (2) disproportionate electoral results; and (3) the existence of an acceptable alternative. Finally, Part VII explores legislative and administrative options for reform of the redistricting process.

II. The Origins of Partisan Gerrymandering

Gerrymandering gets its name from Elbridge Gerry, the former governor of Massachusetts, who in 1812 approved a redistricting plan containing a bizarre, salamander-shaped district designed to enhance the political fortunes of his own political party.[5] Critics, combining Gerry and salamander, derided the plan as a "gerrymander."[6] There was a strong backlash to Gerry's redistricting plan, and he lost in his bid for reelection.[7]

In drawing districts, jurisdictions generally apply "traditional redistricting principles," such as compactness, contiguity, keeping political subdivi-

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[2] LULAC v. Perry, 548 U.S. 399, 456 (2006) (citation and quotation omitted).

[3] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

[4] 478 U.S. 109 (1986).

[5] *See id.* at 164 n.3. Although Gerry was its namesake, partisan gerrymandering predated Gerry. Patrick Henry has been credited with an earlier attempt to gerrymander a congressional district containing James Madison's home to prevent his election to Congress. *See* Robert Luce, Legislative Principles 396 (1930).

[6] *See id.*

[7] *See* George Athan Billias, Elbridge Gerry: Founding Father and Republican Statesman 323 (1976). However, he ran for Vice President of the United States that same year and in a reversal of fortune, was elected to office with James Madison as President. *See id.* at 324.

sions intact, preservation of the cores of existing districts, and maintenance of communities of interest.[8] Another redistricting principle, population equality, is determined by calculating a district's deviation from an ideal district size. Ideal district size is determined by dividing the total population by the number of seats involved. Districting plans with a total population deviation (the sum of the largest plus and minus deviations) below 10% are generally regarded as complying with "one person, one vote."[9]

In addition to "one person, one vote," jurisdictions are required to comply in redistricting with Section 2 of the Voting Rights Act, which prohibits minority vote dilution.[10] Section 2 provides that a voting practice is unlawful if it "results" in discrimination—if, based on the totality of circumstances, it provides minorities with "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[11]

Compliance with "one person, one vote," however, does not insulate a plan from partisan bias. As Robert G. Dixon has said: "A mathematically equal vote which is politically worthless because of gerrymandering or winner-take-all districting is as deceiving as 'emperor's clothes.'"[12] Some observers have noted that all line-drawing is designed to advance the interests of particular voters or groups, whether Republicans, Democrats, incumbents, farmers, coastal residents, African Americans, whites, or any other group.[13]

Since Gerry's time, "gerrymandering" has traditionally been used to refer to election districts drawn to give an unfair or disproportionate advantage to a particular political group or party.[14] According to Justice Abe Fortas, gerrymandering is "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes."[15] Partisan gerrymandering, which uses techniques similar to those which can dilute minority voting strength,[16] has been described as "any redistricting

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[8] DeWitt v. Wilson, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994); *see also* Mahan v. Howell, 410 U.S. 315, 325 (1973) (stating that districts have a "tradition of respecting the integrity of the boundaries of cities and counties in drawing district lines").

[9] White v. Regester, 412 U.S. 755, 764 (1973) (finding that a population variation between two districts of 9.9% was not an equal protection violation when the average deviation of all districts was 1.82%); Brown v. Thomson, 462 U.S. 835, 842–43 (1983) (finding that population deviations under 10% are minor deviations and insufficient to make out a prima facie case for an equal protection violation).

[10] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. § 1973 (2000)).

[11] 42 U.S.C. § 1973(b); *see also* Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986).

[12] ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 22 (1968).

[13] For example, Justice White observed that "districting is itself a gerrymandering in the sense that it represents a complex blend of political, economic, regional, and historical considerations." Wells v. Rockefeller, 394 U.S. 542, 554–55 (1969) (White, J., dissenting); *see also* DIXON, *supra* note 12, at 462 (stating that "[a]ll districting is 'gerrymandering.'").

[14] WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 515 (1983).

[15] Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969) (Fortas, J., concurring).

[16] Three techniques are frequently used in racial gerrymandering to dilute minority voting strength: "cracking," "stacking," and "packing." *See* Frank R. Parker, *Racial Gerrymander-*

practice which maximizes the political advantage or votes of one group, and minimizes the political advantage or votes of another."[17]

Even without its namesake, gerrymandering has continued. A notorious and illustrative example comes from South Carolina, which adopted a congressional redistricting plan in 1882 that has been described as "one of the most complete gerrymanders ever drawn by a legislative body."[18] At that time, in the aftermath of Reconstruction, registered black voters outnumbered white voters 116,969 to 86,900.[19] To counter this imbalance, the white Democrat-controlled legislature drew the state's seven congressional districts so that only one, the seventh, contained a significant majority of black, and thus Republican, voters.[20] Described as the "boa constrictor" district, it ran from Columbia almost to Savannah, a distance of 150 miles.[21] It split six counties and, at one point, extended into the Atlantic Ocean to exclude some Democratic precincts.[22]

III. The Justiciability of Partisan Gerrymandering

There is nothing in the federal constitution that expressly prohibits gerrymandering, and prior to *Baker v. Carr*,[23] the Supreme Court had treated claims of unfairness in districting as "political questions" that could not be considered by the federal courts. The traditional view was expressed in a 1946 opinion by Justice Felix Frankfurter, who said "[i]t is hostile to a democratic system to involve the judiciary in the politics of the people."[24] Courts, he said, "ought not to enter this political thicket."[25] But in *Baker*, the Court found that the political question doctrine involved "the relationship between the judiciary and the coordinate branches of the Federal Govern-

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ing and Legislative Reapportionment, *in* Minority Vote Dilution 89, 89–96 (Chandler Davidson ed., 1989). Cracking refers to fragmenting concentrations of a minority population and dispersing them among other districts to ensure that all districts contain white voting majorities. *See id.* at 89. Stacking refers to combining concentrations of a minority population with greater concentrations of a white population to ensure that districts contain white voting majorities. *See id.* at 92. Packing refers to concentrating as many minorities as possible in as few districts as possible to minimize the number of majority-minority districts. *See id.* at 96.

[17] *Id.* at 85.

[18] Donald Norton Brown, Southern Attitudes Toward Negro Voting in the Bourbon Period, 1877-1890, at 150 (1960) (unpublished Ph.D. dissertation, University of Oklahoma) (on microform file with Sterling Memorial Library, Yale University).

[19] *See id.* (citing 7 Appleton's Annual Cyclopedia and Register of Important Events 748 (D. Appleton and Co. 1876–1891)).

[20] *See id.*; *see also* J. Morgan Kousser, Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction 27 (1999); J.W.B., *Flaws in the Solid South*, N.Y. Times, July 13, 1882 at 5.

[21] *See id.* (citing James W. Patton, *The Republican Party in South Carolina, 1876–1895*, *in* Essays in Southern History (Fletcher M. Green ed., 1914).

[22] *See id.* (citing Patton, *supra* note 21).

[23] 369 U.S. 186 (1962).

[24] Colegrove v. Green, 328 U.S. 549, 553–54 (1946) (holding that a complaint about congressional districting was nonjusticiable).

[25] *Id.* at 556.

ment, and not the federal judiciary's relationship to the States."[26] The doctrine was thus no bar to a court's remedying the gross inequities in voting power among rural and urban voters produced by severely malapportioned legislatures and congressional delegations.[27] Legislative districting, generally, was held justiciable.

However, it was not until 1986 that the Supreme Court held in *Davis v. Bandemer*[28] that partisan gerrymandering was justiciable and could violate the Equal Protection Clause of the Fourteenth Amendment. The district court had found that Indiana's state apportionment plan, challenged by Democrats, contained "a built-in bias favoring the majority party, the Republicans."[29] Districts had been drawn with irregular shapes, the plan used a "peculiar mix of single-member and multimember districts," and lines failed "to adhere consistently to political subdivision boundaries . . . ."[30] Democrats were "stacked" into some districts with large Democratic majorities to minimize the number of Democratic controlled districts, and "split" in others to create safe Republican majorities.[31] The district court had invalidated the plan because it deprived Democrats of "proportional representation."[32]

A majority of the Court (White, Brennan, Marshall, Blackmun, Powell, and Stevens), relying in part on *Baker*, held that claims that a political group "should have the same chance to elect representatives of its choice as any other political group" were justiciable.[33] The majority further held that its racial gerrymandering cases "support a conclusion that this case is justiciable."[34] While acknowledging that the claims were different, it concluded that "these differences do not justify a refusal to entertain such a case."[35] Three justices (Burger, O'Connor, and Rehnquist) opined that claims of political gerrymandering were not justiciable.[36]

The majority agreed with the district court that in order to succeed on a claim of partisan gerrymandering plaintiffs were "required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."[37] A plurality of the Court recognized that, "[a]s long as redistricting is done by a legislature, it should not

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[26] 369 U.S. at 210 (holding that legislative apportionment cases are justiciable and finding that the District Court in *Baker* had misinterpreted *Colegrove*).

[27] In his dissent, Justice Frankfurter described the majority opinion as "a massive repudiation of the experience of our whole past in asserting destructively novel judicial power." *Id.* at 267 (Frankfurter, J., dissenting).

[28] 478 U.S. 109 (1986).

[29] *Id.* at 116.

[30] *Id.*

[31] *Id.* at 116–17.

[32] *Id.* at 117.

[33] *Id.* at 124.

[34] *Id.* at 125.

[35] *Id.*

[36] *See id.* at 143–44 (Burger, J., concurring in the judgment); *id.* at 144 (O'Connor, J., concurring in the judgment).

[37] *Id.* at 127*; see also id.* at 161 (Powell, J., concurring in part and dissenting in part).

be very difficult to prove that the likely political consequences of the reapportionment were intended."[38]

In addition to a discriminatory purpose, plaintiffs must show that the legislative districting has a discriminatory effect. While declining to overturn the district court's finding of discriminatory intent, a plurality of the Court (White, Brennan, Marshall, and Blackmun) concluded that "the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination"[39] and reversed the lower court, which had relied on the "lack of proportionate results in one election."[40] "Rather," the plurality said, "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[41] The plurality's discriminatory effects standard was thus two-pronged: (1) lack of proportional representation as shown by "a history (actual or projected) of disproportionate results" and (2) consistently degraded influence on the political process, meaning "strong indicia of lack of political power and the denial of fair representation."[42] The plurality conceded its standard involved "a difficult inquiry" but believed it recognized "the delicacy of intruding on this most political of legislative functions" while maintaining consistency with the Court's "one person, one vote" and racial vote dilution cases.[43]

In dissent, Justice Powell, joined by Justice Stevens, was of the opinion that the finding of partisan gerrymandering should be affirmed.[44] The standard he proposed for proof of a constitutional violation, in addition to showing that a challenged plan had a discriminatory purpose and diluted voting strength, included factors bearing on the fairness of the plan: "the shapes of voting districts[,] . . . adherence to established political subdivision boundaries," "the nature of the legislative procedures by which the apportionment law was adopted[,] and legislative history reflecting contemporaneous legislative goals."[45]

IV. The Difficulties in Applying *Davis v. Bandemer*

The lower federal courts have been significantly divided over the meaning of the "consistently degrade" standard of *Davis v. Bandemer*. More importantly, they have applied it in such a draconian fashion that it has become essentially dead letter law. Only one reported decision, discussed below, has ever invalidated a districting plan on the ground that it was a partisan gerry-

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[38] *Id.* at 129 (plurality opinion).
[39] *Id.* at 132.
[40] *Id.* at 139.
[41] *Id.* at 132 (emphasis added).
[42] *Id.* at 139.
[43] *Id.* at 143.
[44] *Id.* at 185 (Powell, J., concurring in part and dissenting in part).
[45] *Id.* at 173.

mander, and that decision was subsequently rendered moot by action of the state legislature adopting a new method of elections.[46]

A. Cases Dismissing Claims of Partisan Gerrymandering

One of the first post-*Bandemer* partisan gerrymandering cases was *Badham v. Eu*,[47] in which the lower court dismissed Republicans' claim challenging congressional redistricting in California. The court applied the *Bandemer* test stating that in order to succeed on a partisan gerrymander claim, plaintiffs must prove "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."[48] The court assumed there were sufficient allegations of intent, and applied *Bandemer*'s bifurcated effects test.[49] The first effects inquiry, according to the court, "concerns the 'history (actual or projected) of disproportionate [election] results.'"[50] The court did not resolve this issue because it held plaintiffs did not satisfy the second prong of the results standard, for failing to show "strong indicia of lack of political power and the denial of fair representation."[51] According to the court, the Republicans did not allege that they had been "shut out" of the political process as a whole, that anyone had "interfered with Republican registration, organizing, voting, fund-raising, . . . [or] campaigning," or that Republicans were not "free to speak out on issues of public concern."[52]

The court said that, under the circumstances, "[i]t simply would be ludicrous for plaintiffs to allege that their interests are being 'entirely ignore[d]' in Congress . . . ."[53] The court took judicial notice that forty percent of California's congressional seats were held by Republicans, the state had a Republican governor and a Republican U.S. Senator, and a recent Republican governor (Ronald Reagan) was President of the United States.[54] The Supreme Court summarily affirmed by a vote of 6 to 3.[55] Under this analysis in *Badham v. Eu*, no major political party—assuming its members could vote, raise money, campaign, and speak out on issues—would ever be able to prove partisan gerrymandering, no matter how deliberately discriminatory the redistricting plan.

Other post-*Bandemer* challenges were disposed of in a similar manner. In *Terrazas v. Slagle*, the court dismissed Republicans' partisan gerryman-

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[46] *See* Ragan v. Vosburgh, No. 96-2621, 1997 WL 168292, at *6 (4th Cir. Apr. 10, 1997).
[47] 694 F. Supp. 664 (N.D. Cal. 1988).
[48] *Id.* at 669 (quoting *Bandemer*, 478 U.S. at 127).
[49] *See id.* at 669–70.
[50] *Id.* at 670 (quoting *Bandemer*, 478 U.S. at 139).
[51] *Id.* (quoting *Bandemer*, 478 U.S. at 139).
[52] *Id.*
[53] *Id.* at 672.
[54] *See id.*
[55] Badham v. Eu, 488 U.S. 1024 (1989).

dering claims against congressional and state senate redistricting in Texas.[56] The court applied the *Bandemer* standard that plaintiffs must show both a discriminatory purpose and effect.[57] In interpreting the second prong of the discriminatory effect test—which requires a showing that the system would "consistently degrade a voter's or a group of voters' influence on the political process as a whole"—the court interpreted the phrase "political process as a whole" to mean "all the structures of the state governmental system."[58] The Republicans claimed they carried half or more of the state in elections but never had a majority in the State House or Senate and thus had no influence over the redistricting process.[59] The court, however, noted that over the past 15 years in Texas a Republican governor had twice been elected who could veto legislation, which the house had the ability to sustain.[60] Under the circumstances, the court concluded plaintiffs failed to show that they would be "unable to effectively influence legislative outcomes."[61] Again, the standard applied by the court, the inability to influence any structure of the state governmental system, would make it virtually impossible for a political party to sustain a partisan gerrymandering claim. Other courts have applied a similarly broad definition of the political process in dismissing claims of partisan gerrymandering.[62]

In one case, *Martinez v. Bush*,[63] the court made it significantly more difficult for plaintiffs to succeed on a claim of partisan gerrymandering. In rejecting Democrats' claim of partisan gerrymandering of congressional districts in Florida, the court required the plaintiffs to establish three factors, first established in *Thornburg v. Gingles* as required for proof of racial vote dilution under Section 2 of the Voting Rights Act[64]: "(1) that the protected group is 'sufficiently large and geographically compact'; (2) that the protected group is 'politically cohesive'; and (3) that other voters—ordinarily the white majority—vote sufficiently as a bloc that they 'usually' defeat mi-

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[56] 821 F. Supp. 1162 (W.D. Tex. 1993). The redistricting plan has been described as the "shrewdest gerrymander of the 1990s," MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2002, at 1448 (2001), which used "incredibly convoluted lines" to create Democratic controlled districts and packing Republicans into just a few suburban areas. MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2004, at 1510 (2003).

[57] *See supra* note 37 and accompanying text.

[58] *Terrazas*, 821 F. Supp. at 1174.

[59] *See id.*

[60] *See id.*

[61] *Id.* at 1175.

[62] *See, e.g.*, Pope v. Blue, 809 F. Supp. 392, 397 (W.D.N.C. 1992) (rejecting a *Bandemer* claim because plaintiffs failed to "show that they have been or will be consistently degraded in their participation in the entire political process, not just in the process of redistricting"); O'Lear v. Miller, 222 F. Supp. 2d 850, 857 (E.D. Mich. 2002) (dismissing a claim of partisan gerrymandering where plaintiffs did not show "that victorious Republican candidates would be indifferent to the interests of their Democratic constituents or that [Democrats] have been completely shut-out of the political process").

[63] 234 F. Supp. 2d 1275 (S.D. Fla. 2002).

[64] Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986).

nority candidates of choice."[65] If plaintiffs met this initial burden, they would then be required to establish "the intent and actual effects elements expressly required under *Bandemer*."[66] The Democrats alleged that, though they were about fifty percent of the voting population in Florida, Republicans likely controlled eighteen (seventy-two percent) of the state's twenty-five congressional districts.[67] While conceding that the districts were drawn to favor Republicans,[68] the court dismissed the case because it found that the plaintiffs had failed to establish the three *Gingles* factors.[69] The added burden of the three *Gingles* factors would make it much harder to establish a claim of partisan gerrymandering.[70] The *Gingles*-then-*Bandemer* standard of *Martinez*, however, has not been applied by other courts.

B. The North Carolina Exception

One court, however, has given the phrase "the political process as a whole" used in *Bandemer* a narrower construction. In *Republican Party of North Carolina v. Martin*, the plaintiffs contended that the method of electing superior court judges in North Carolina was a political gerrymander intended to deprive Republicans of rights protected by the First and Fourteenth Amendments.[71] Under the challenged system, the judges were nominated in primaries held in local districts, with the successful candidates running against each other in a general statewide election.[72] Between 1900 and when the lawsuit began, no Republicans had ever been elected in hundreds of elections for superior court judges.[73] The district court dismissed the complaint, holding that it raised a nonjusticiable political question.[74] The court of ap-

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[65] *Martinez*, 234 F. Supp. 2d at 1326 (citing *Gingles*, 478 U.S. at 50–51).
[66] *Id.* at 1337.
[67] *Id.* at 1324.
[68] *Id.* at 1340.
[69] *Id.* at 1326.
[70] For other cases relying upon *Bandemer* in denying claims of partisan gerrymandering, see White v. Alabama, 867 F. Supp. 1571, 1576 (M.D. Ala. 1994) (rejecting Republicans' *Bandemer* claim that the statewide method of electing appellate court judges was discriminatory on the ground that Republicans had been successful in other statewide elections); Marylanders for Fair Representation, Inc. v. Schaefer, 849 F. Supp. 1022, 1038 (D. Md. 1994) (holding that plaintiff "cannot produce sufficient evidence to satisfy the demanding test established in *Bandemer* to demonstrate discriminatory effect"); Fund for Accurate and Informed Representation, Inc. v. Weprin, 796 F. Supp. 662, 669 (N.D.N.Y. 1992) (dismissing Republicans' claim that the plan for the New York Assembly denied them fair and effective representation because "Republicans hold a majority of the Senate seats . . . [and the party] therefore plays an active role in the state political process"); Ill. Legislative Redistricting Comm'n v. LaPaille, 782 F. Supp. 1272, 1276 (N.D. Ill. 1991) (dismissing Democrats' claim of partisan gerrymandering because the plaintiffs failed to show that "they will be unable to effectively influence legislative outcomes"); Anne Arundel County Republican Cent. Comm. v. Admin. Bd. of Election Laws, 781 F. Supp. 394, 401 (D. Md. 1991) ("[P]laintiffs fail to make a [*Bandemer*] showing of vote dilution.").
[71] 980 F.2d 943, 947 (4th Cir. 1992).
[72] *See id.*
[73] *See id.* at 948.
[74] *Id.* at 946.

peals reversed and remanded on the Fourteenth Amendment claim, holding that the Republicans' claim was justiciable under *Bandemer*,[75] and that the allegations of the complaint were sufficient to state a claim.[76] In reaching this conclusion, the court "[read] the phrase 'the political process as a whole' . . . to speak to the alleged unconstitutional effects of the challenged electoral scheme on the relevant political sphere" and "confine[d its] analysis to evaluation of the claimed effect of the method of electing superior court judges on the political process of election of superior court judges within North Carolina."[77]

The court acknowledged that Republicans had been elected governor, to the United States Senate, the United States House of Representatives, the North Carolina General Assembly, the state court of appeals, and the state supreme court, and that Republicans had not been excluded from participating in the affairs of their party or from the process from which candidates were nominated and elected.[78] But, the court held, to conclude that this would preclude a claim under *Bandemer* "would render nugatory its holding that political groups may bring claims of partisan gerrymandering."[79]

On remand, the district court found the state's plan unconstitutional,[80] but on appeal, the court remanded again with instructions that the district court consider the subsequent elections conducted in 1994, which it held "were directly at odds with the recent prediction by the district court that Republican electoral exclusion would continue unabated into the future: All eight of the Republican candidates vying for superior court judgeships prevailed at the state level."[81] These results, the court said, "cast significant doubt" on the findings and decision of the trial court.[82] The case was remanded for further proceedings.

The district court, on remand, once again found the state's system unconstitutional.[83] However, the state passed legislation providing that in the future all superior court judgeships would be elected by districts.[84] The court held that that the action of the legislature rendered the case moot,[85] and this holding was affirmed by the court of appeals.[86]

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[75] *Id.* at 951.
[76] *Id.* at 961.
[77] *Id.* at 956 n.24.
[78] *Id.* at 957.
[79] *Id.* at 958.
[80] Republican Party of N.C. v. Hunt, No. 94-2410, 1996 WL 60439, at *2 (4th Cir. Feb. 12, 1996).
[81] *Id.*
[82] *Id.* at *4.
[83] Ragan v. Vosburgh, Nos. 96-2621, 96-2687, 96-2739, 1997 WL 168292, at *4 (4th Cir. Apr. 10, 1997).
[84] *See id.*
[85] *Id.*
[86] *Id.* at *6. In *Smith v. Boyle*, 959 F. Supp. 982, 983 (C.D. Ill. 1997), however, the court refused to apply *Bandemer* to a claim of partisan gerrymandering in the election of judges, labeling it "a nonjusticiable political question."

V. Partisan Gerrymandering after the 2000 Census

In addition to the non-enforcement of *Bandemer*, two other developments have greatly facilitated partisan gerrymandering. One is the advances in computer technology, and the other is the Supreme Court's decision in *Easley v. Cromartie*.[87]

In earlier times, when redistricting was done by hand using paper maps and census tables, it would take days or weeks to draw a statewide plan. But now, with sophisticated redistricting software, and with population and voting age population furnished by the census down to the precinct and bloc levels, it is possible to draw a statewide plan in a matter of hours. And by downloading voter turnout and election results onto a computer, one can also calculate with a great deal of accuracy just how districts will perform—whether they will be safe for Democrats, safe for Republicans, help the incumbents stay in office, or likely throw them out.[88] New computer technology has been described as an "extraordinary change in the ability to slice thin the lines," and while it is a "welcome assistance" in redistricting, it has also been acknowledged as bringing with it "a high cost of creating much greater potential for abuse."[89]

In *Easley*, the Court rejected a claim by white voters that congressional districts in North Carolina had been impermissibly drawn on the basis of race.[90] Noting the "extraordinary caution" that district courts must use "to avoid treading upon legislative prerogatives," the Court concluded that no constitutional violation could be found if plaintiffs failed to show that race, rather than politics, predominately accounted for the redistricting results.[91] Moreover, the Court did not mention *Bandemer*, or suggest that there were constitutional limitations on politically driven redistricting.

A number of states, most notably Pennsylvania, Texas, and Georgia, apparently took the non-enforcement of *Bandemer*[92] and the decision in *Easley* to mean that as long as a plan was based on "political behavior,"[93] virtually anything was constitutionally permissible.

A. Pennsylvania Redistricting

Although the governor of Pennsylvania was a Republican and both state legislative chambers were controlled by Republicans, the state legislature was unable to agree upon and enact a congressional redistricting plan.[94]

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[87] 532 U.S. 234 (2001).

[88] *See* Micah Altman et al., *From Crayons to Computers: The Evolution of Computer Use in Redistricting*, 23 Soc. Sci. Computer Rev. 334, 334–35 (2005).

[89] Session v. Perry, 298 F. Supp. 2d 451, 457 (E.D. Tex. 2004).

[90] 532 U.S. 234 (2001).

[91] *Id.* at 257.

[92] *See supra* Part IV.A.

[93] *Cromartie*, 532 U.S. at 257.

[94] *See* Vieth v. Pennsylvania, 188 F. Supp. 2d 532, 535 (M.D. Pa. 2002).

Prominent Republican figures, including Karl Rove, a political consultant to President George W. Bush, began pressing the governor and Republican members of the legislature to adopt the state senate's proposed plan to counter the enactment of allegedly pro-Democratic plans in other states.[95] The Pennsylvania Republicans subsequently enacted a plan without involvement by the Democrats and which the governor signed into law in January 2002.[96] Although Democrats were a slight majority of registered and actual voters in the state, the Republican plan was designed to create Republican majorities in thirteen (or sixty-eight percent) of the state's nineteen congressional districts.[97]

The Pennsylvania plan was challenged by Democrats, and the court agreed it had been enacted intentionally to discriminate against Democrats and give Republicans a super-majority of congressional seats.[98] But it dismissed the claim of partisan gerrymandering on the ground that as long as the plaintiffs were not prevented from "registering to vote; organizing with other like-minded voters; raising funds on behalf of candidates; voting; campaigning; or speaking on matters of public concern," they were not "shut out of the political process," and, as a consequence, the challenged plan had no "actual discriminatory effect on them."[99] Again, such a stringent standard, as long as the United States remains a representative democracy, would make it virtually impossible for any political group ever to sustain a claim of partisan gerrymandering.[100]

The Supreme Court agreed to hear the Pennsylvania case, and, in a fractured opinion that lacked a clear majority, it affirmed the dismissal of the partisan gerrymander claim.[101] It is worth looking closely at the opinion to see what, if any, standard for partisan gerrymandering might attract a majority of votes on the present, or a future, Court.

The plurality opinion was written by Justice Scalia and joined by then Chief Justice Rehnquist, and Justices O'Connor and Thomas. It concluded that since no judicially manageable standards for political gerrymandering had emerged since *Bandemer*, "we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided."[102] Paradoxically, and adding to the judicial confusion surrounding the issue, the plurality conceded that "*excessive* injection of politics [in dis-

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[95] *Id.*
[96] *Id.*
[97] *Id.* at 536.
[98] *Id.* at 544.
[99] *Id.* at 547.
[100] The state subsequently enacted another plan to remedy a violation of "one person, one vote" that was also challenged as a partisan gerrymander. This claim was dismissed for the reasons discussed by the court in the earlier challenge. *See* Vieth v. Pennsylvania, 241 F. Supp. 2d 478, 484–85 (M.D. Pa. 2003).
[101] *See* Vieth v. Jubelirer, 541 U.S. 267, 306 (2004).
[102] *Id.* at 281.

tricting] is *un*lawful. So it is, and so does our opinion assume."[103] However, "[e]ighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application."[104]

Justice Kennedy concurred in the judgment, but concluded that claims of partisan gerrymandering were justiciable.[105] He did not, however, articulate a standard for adjudicating such claims but instead acknowledged that a standard, based on the Fourteenth Amendment and perhaps the First Amendment, might still "emerge in the future."[106]

Justice Stevens in dissent attempted to do what Justice Kennedy failed to do—articulate a standard for partisan gerrymandering.[107] But the standard he advocated—"when partisanship is the legislature's sole motivation–when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage"[108]—is so onerous that it would likely never be met.[109] It would be a simple matter for a legislature to enact a blatant partisan gerrymander and successfully defend it by articulating a nonpartisan motivation and incorporating one or more traditional districting criteria into its plan, such as contiguity, avoiding splitting precinct lines, or preserving communities of interest, however they might be defined. Justice Stevens himself concedes that his standard would cover "only a few meritorious claims."[110]

Justice Souter in dissent, joined by Justice Ginsburg, would require a plaintiff to establish a prima facie case of partisan gerrymandering consisting of five elements.[111] First, the plaintiff must be a member of a "cohesive political group, which would normally be a major party."[112] Second, the challenged plan must have "paid little or no heed to . . . traditional districting principles . . . [such as] contiguity, compactness, respect for political subdivisions, and conformity with geographic features."[113] Third, there must be "specific correlations between [departures] from traditional districting principles and the distribution of the population of [the plaintiff's] group."[114] Fourth, an alternative plan could be drawn that complied with traditional districting principles without diluting the voting strength of plaintiff's political group.[115] Fifth, "the defendants acted intentionally to manipulate the shape of the district" to dilute the voting strength of the plaintiff's political

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[103] *Id.* at 293.
[104] *Id.* at 306.
[105] *Id.* (Kennedy, J., concurring in the judgment).
[106] *Id.* at 311–14.
[107] *See id.* at 317 (Stevens, J., dissenting).
[108] *Id.* at 318.
[109] *Cf. supra* Part IV.A (describing cases in which courts interpreted the *Bandemer* standard so broadly that it was rarely met).
[110] *Vieth*, 541 U.S. at 339 (Stevens, J., dissenting).
[111] *See id.* at 347 (Souter, J., dissenting).
[112] *Id.*
[113] *Id.* at 347–48.
[114] *Id.* at 349.
[115] *See id.* at 349.

group.[116] Once the plaintiff established a prima facie case, the defendants would then have the burden of justifying their plan "by reference to objectives other than naked partisan advantage," such as complying with the Voting Rights Act or "one person, one vote."[117] Justice Souter acknowledged that his plan might not catch all partisan gerrymanders, but it would make it possible "for courts to identify at least the worst cases of gerrymandering, and to provide a remedy."[118]

Justice Breyer in dissent argued that partisan gerrymandering would violate the Fourteenth Amendment in at least one instance, similar to the one before the Court, "namely, the *unjustified* use of political factors to entrench a minority in power."[119] He proposed a continuum, that the more entrenched the minority hold on power becomes, "the less evidence courts will need that the minority engaged in gerrymandering to achieve the desired result."[120] But he conceded that such entrenchment, and the need for judicial intervention, would be rare since "a majority normally can work its political will."[121] The case before the Court, however, presented an appropriate one for judicial intervention given the fact that Democrats were a majority of voters in Pennsylvania, while the challenged plan created Republican majorities in thirteen (sixty-eight percent) of the state's nineteen congressional districts.[122] According to Justice Breyer, relevant factors in proving a partisan gerrymander under such circumstances included whether: the districting was done more than once in the decade; the plan departed radically from traditional redistricting criteria; the party with a minority of the votes had obtained, or likely would retain, a majority of the seats; the failure of the majority party to obtain a majority of the seats could not be explained by neutral factors such as the existence of multiple parties; and the plan could not be justified or explained other than as an effort to secure a partisan political advantage.[123]

B. Texas Redistricting

When the Republicans in Texas gained full control of the legislature in 2003, Democratic legislators fled the state in an effort to deprive the Republicans of a quorum necessary to adopt a new congressional districting plan.[124] The tactic ultimately failed, and the legislature enacted a mid-decade redistricting plan in October 2003,[125] designed to increase the number of Republi-

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[116] *Id.* at 350.
[117] *Id.* at 351.
[118] *Id.* at 354.
[119] *Id.* at 360 (Breyer, J., dissenting).
[120] *Id.* at 365.
[121] *Id.* at 362.
[122] *See id.* at 367.
[123] *See id. at* 366–67.
[124] *See* Session v. Perry, 298 F. Supp. 2d 451, 458 (E.D. Tex. 2004).
[125] *See id.*

cans in the state's thirty-two member congressional delegation from fifteen (forty-seven percent) to twenty-two (sixty-nine percent).[126] Democrats challenged the Texas congressional districting plan as a partisan gerrymander, but their claim was dismissed. The district court concluded: "[t]here is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage."[127] The court noted, however, that the Supreme Court in *Bandemer* was unable to formulate a "manageable standard for addressing such claims," and that in Texas "redistricting advantages can be overcome through the political process."[128]

The decision of the district court in the Texas congressional redistricting case was appealed, but the Supreme Court remanded it for further consideration in light of the opinion in *Vieth*.[129] Perhaps the Court was giving the district court an opportunity to do what it had itself been unable to do, articulate a manageable standard for adjudicating claims of partisan gerrymandering. At least that is how the district court interpreted the remand.[130] The district court, however, again rejected the gerrymander claim noting that the "Texas plan is not more partisan in motivation or result, including the impact on the number of competitive districts, than the Pennsylvania plan upheld in *Vieth*."[131] The Court agreed to hear the appeal of the Texas case but—in yet another fractured decision—the court failed to set a standard for adjudicating claims of partisan gerrymandering.[132]

The plaintiffs challenged the Texas congressional redistricting plan as an unconstitutional political gerrymander on the grounds that it was a mid-decennial redistricting solely motivated by partisan objectives.[133] A majority of the Court (Justices Kennedy, Stevens, Ginsburg, Souter, and Breyer) did not address the justiciability of partisan gerrymandering;[134] Chief Justice Roberts and Justice Alito explicitly took no position on the question.[135] Consistent with their positions in *Vieth*, Justices Scalia and Thomas argued that partisan gerrymandering claims were not justiciable.[136] Justice Kennedy found the claim of partisan gerrymandering "not convincing," because some of the lines were drawn based on "more mundane and local interests," while "a number of line-drawing requests by Democratic state legislators were

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[126] *Id.* at 471.

[127] *Id.* at 470.

[128] *Id.* at 474.

[129] *See* Jackson v. Perry, 543 U.S. 941 (2004).

[130] *See* Henderson v. Perry, 399 F. Supp. 2d 756, 762 (E.D. Tex. 2005) ("[W]e can only fairly read the remand to suggest that the Justice providing the fifth vote [i.e., Justice Kennedy] sees the possibility of a workable standard emerging from this case . . . .").

[131] *Id.* at 773.

[132] *See* LULAC v. Perry, 548 U.S. 399 (2006).

[133] *See id.* at 413.

[134] *See id.* at 414 ("We do not revisit the justiciability holding [in *Davis*] . . . .").

[135] *See id.* at 493 (Roberts, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[136] *See LULAC*, 548 U.S. at 511 (Scalia, J., concurring in the judgment in part and dissenting in part).

honored."[137] The plaintiffs' proposed sole-intent standard, focused on mid-decennial redistricting, was rejected for the further reason that it did not "show a burden, as measured by a reliable standard, on the complainants' representational rights."[138]

Justice Stevens, joined by Justice Breyer, dissented.[139] "Because a desire to minimize the strength of Texas Democrats was the sole motivation for the adoption of Plan 1374C," he wrote, "the plan cannot withstand constitutional scrutiny."[140] By taking action "for the sole purpose of advantaging Republicans and disadvantaging Democrats, the State of Texas violated its constitutional obligation to govern impartially."[141] Relying on expert testimony given in the case, Justice Stevens also concluded that the plan "clearly has a discriminatory impact on the opportunities that Democratic citizens have to elect candidates of their choice."[142] As for adjudicating partisan gerrymandering claims in general, Justice Stevens proposed a multi-part test.[143] First, a plaintiff would have to show that she was a resident of a district changed by a new districting plan.[144] Second, she would have to prove an improper purpose, "that redistricters subordinated neutral districting principles to political considerations and that their predominant motive was to maximize one party's power."[145] Third, a plaintiff would have to prove a discriminatory effect: "(1) her candidate of choice won . . . under the [pre-existing] plan; (2) her residence is now in a district that is a safe seat for the opposite party; and (3) her new district is less compact than the old district."[146]

Justice Souter, joined by Justice Ginsburg, concurred in that portion of Justice Kennedy's opinion holding claims of partisan gerrymandering to be justiciable, but concluded that nothing would be gained by applying the standard he would have applied in *Vieth* to the facts of the current case.[147] Justice Scalia, joined by Justice Thomas, lamented that the Court had again disposed

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[137] *Id.* at 417–18 (opinion of Kennedy, J.).
[138] *Id.* at 418–19.
[139] *See id.* at 447 (Stevens, J., concurring in part and dissenting in part).
[140] *Id.* at 448.
[141] *Id.* at 462.
[142] *Id.* at 467 (referring to an analysis by the state's expert Ronald Keith Gaddie, Ph.D.).
[143] *See id.* at 474–77.
[144] *See id.* at 475.
[145] *Id.* at 475–76.
[146] *Id.* at 476. In a footnote, Justice Stevens identifies "objective factors" that can be used in evaluating claims of partisan gerrymandering: "(1) the number of people who have been moved from one district to another, (2) the number of districts that are less compact than their predecessors, (3) the degree to which the new plan departs from other neutral districting criteria, including respect for communities of interest and compliance with the Voting Rights Act, (4) the number of districts that have been cracked in a manner that weakens an opposition party incumbent, (5) the number of districts that include two incumbents from the opposite party, (6) whether the adoption of the plan gave the opposition party, and other groups, a fair opportunity to have input in the redistricting process, (7) the number of seats that are likely to be safe seats for the dominant party, and (8) the size of the departure in the new plan from the symmetry standard." *Id.* at 473 n.11.
[147] *See id.* at 483 (Souter, J., concurring in part and dissenting in part).

of a claim of partisan gerrymandering "in a way that provides no guidance to lower-court judges and perpetuates a cause of action with no discernable content. We should simply dismiss appellants' claims as nonjusticiable."[148]

C. Georgia Redistricting

Long before the 2000 census, the Democratic Solid South had faded into history.[149] In Georgia, however, Democrats still controlled the legislature and the Governor's office. In an effort to stem the rising Republican tide, the legislature used almost every known device to maximize the opportunities for Democrats and minimize those for Republicans in its 2002 redistricting of state legislative and federal congressional districts. If a seat was required to be eliminated in an area because of a decline in population, the lost seat was one held by a Republican.[150]

Additionally, the most overpopulated districts were Republican-leaning districts while the most underpopulated were Democratic-leaning districts.[151] Republican incumbents were also paired together where possible to ensure that one or more would not return to the legislature following the 2002 elections. The House plan paired thirty-seven of the seventy-four Republican incumbents (fifty percent), but only nine of the 105 Democratic incumbents (less than nine percent).[152] The Senate plan paired ten (forty-two percent) of the twenty-four Republican incumbents, but only two (six percent) of the thirty-two Democratic incumbents.[153] Districts were frequently drawn totally without regard to compactness, but completely with regard to Democratic performance.[154]

The state reintroduced multi-member districts,[155] a device which had previously been successfully challenged under the Voting Rights Act because it had been used to dilute black voting strength.[156] For example, rather than drawing four single-member districts in an area where one of the districts might elect a Republican, a four-member Democratic performance district was drawn instead.[157] The black percentages in the majority black districts were also taken down as much as possible, without sacrificing the

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[148] *Id.* at 511–12 (Scalia, J., concurring in the judgment in part and dissenting in part).

[149] *See, e.g.*, DAN T. CARTER, FROM GEORGE WALLACE TO NEWT GINGRICH: RACE IN THE CONSERVATIVE COUNTERREVOLUTION, 1963-1994 (1999); FRED M. SHELLEY ET AL., POLITICAL GEOGRAPHY OF THE UNITED STATES 300 (1996); Charles S. Bullock III, *Creeping Realignment in the South*, *in* THE SOUTH'S NEW POLITICS: REALIGNMENT AND DEALIGNMENT 220 (Robert H. Swansbrough & David M. Brodsky eds., 1988).

[150] *See* Larios v. Cox, 300 F. Supp. 2d 1320, 1328–29 (N.D. Ga. 2004).

[151] *See id.* at 1326–27, 1329.

[152] *See id.* at 1326.

[153] *See id.* at 1327.

[154] *See id.* at 1325, 1331–34.

[155] *See id.* at 1325.

[156] *See* Georgia v. United States, 411 U.S. 526, 529–30, 535 (1973) (noting an objection by the Attorney General to Georgia's use of multi-member districts).

[157] Larios v. Cox, 300 F. Supp. 2d 1320, 1329, 1347, 1357 (N.D. Ga. 2004).

black Democratic incumbents, to create opportunities for white Democrats in adjoining districts.[158]

Although the Republican Party achieved some electoral success under the new maps, the party filed a challenge to the state's 2002 congressional and legislative plans, alleging that they were partisan gerrymanders that violated "one person, one vote."[159] The district court rejected the partisan gerrymander claims as failing to meet "the strict standard set by *Davis v. Bandemer*"[160] but held that the state House and Senate plans violated "one person, one vote" because "each deviates from population equality by a total of 9.98% of the ideal district population and there are no legitimate, consistently applied state policies which justify these population deviations."[161]

In fact, *Larios* was a departure from the Supreme Court's long-accepted rule that a total deviation among state legislative districts of less than ten percent was insufficient to make out a prima facie case of a violation of "one person, one vote" and did not need to be justified.[162] This *de minimis* rule had been consistently applied by the Court.[163] However, on appeal the Supreme Court summarily affirmed the decision of the trial court.[164]

It is impossible to read *Larios* without concluding that the real reason it invalidated Georgia's house and senate plans was because they were seen as partisan gerrymanders. As the district court repeatedly noted, the plans were designed "not only to aid Democratic incumbents in getting re-elected but also to oust many of their Republican incumbent counterparts."[165]

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[158] *See id.* at 1327; *see also* Georgia v. Ashcroft, 195 F. Supp. 2d 25, 77 (D.D.C. 2002) (discussing the reduction of black population in Georgia's legislative districts to "bare majorities of [black voting age population]"), *vacated*, 539 U.S. 461 (2003).

[159] *See Larios*, 300 F. Supp. 2d 1320.

[160] *Id.* at 1351.

[161] *Id.* at 1322.

[162] For example, in *White v. Regester*, the Court rejected a challenge to a state legislative plan with a total deviation of 9.9% and held that "appellees failed to carry their burden of proof insofar as they sought to establish a violation of the Equal Protection Clause from population variation alone." 412 U.S. 755, 764 (1973).

[163] *See, e.g.*, Voinovich v. Quilter, 507 U.S. 146, 161 (1993) ("population deviation under 10% falls within the category of minor deviation") (internal quotation marks omitted); Brown v. Thomson, 462 U.S. 835, 852 (1983) (same); Gaffney v. Cummings, 412 U.S. 735, 748 (1973) (same). Additionally, congressional redistricting plans, as well as court ordered remedial plans, are held to stricter standards of population equality. *See, e.g.*, Karcher v. Daggett, 462 U.S. 725, 740 (1983) (congressional districts must "come as nearly as practicable to population equality"); Chapman v. Meier, 420 U.S. 1, 26–27 (1975) (same).

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

[165] *Larios*, 300 F. Supp. 2d at 1330; *see also, e.g.*, *id.* at 1331 (the plans were designed to achieve "a significant overall partisan advantage for Democrats in the electoral maps"); *id.* at 1333 (the plan drawers "tried only to maintain the cores of Democratic-leaning districts"); *id.* at 1334 ("We cannot escape the conclusion that the population deviations were designed to allow Democrats to maintain or increase their representation in the House and Senate through the under-population of districts in Democratic-leaning rural and inner-city areas of the state and through the protection of Democratic incumbents and the impairment of the Republican incumbents' reelection prospects."); *id.* at 1347 (the redistricting was performed "in a blatantly partisan and discriminatory manner, taking pains to protect only Democratic incumbents").

A federal judiciary that dismisses claims of partisan gerrymandering brought by Democrats, as in *Vieth v. Jubelirer*[166] and *Session v. Perry*,[167] but reaches to find a way of granting relief in such challenges brought by Republicans, as in *Larios*,[168] inevitably exposes itself to charges of partisan bias. Such conflicting rulings also underscore the need for consistently applied standards in apportionment and redistricting.

VI. A Proposed Standard for Partisan Gerrymandering

It does not seem likely that a majority of the current Court, as deeply fractured and divided over the issue as it is, could ever agree on a standard for adjudicating claims of partisan gerrymanders. But it is possible, taking into account the Court's various concurring and dissenting opinions, to posit a workable standard for such claims. Drawing on past Justices' views on partisan and racial gerrymandering, this standard would contain three basic elements. Plaintiffs would be required to show: (1) a predominantly partisan purpose; (2) disproportionate electoral results; and (3) the existence of an acceptable alternative plan.

A. Partisan Purpose

First, a plaintiff would have to show that partisanship was the predominant purpose in adopting the challenged plan. All members of the Court have agreed that a discriminatory purpose is an essential element of a partisan gerrymander claim.[169] A plaintiff should not be required to show that partisanship was the sole or exclusive purpose, since such a requirement would effectively bar all or most claims. Members of a legislature can always advance a non-partisan purpose for drawing some portion of a plan, but that should not defeat a challenge where the predominant purpose of the plan was discriminatory. As Justice Stevens proposed, a plaintiff should only have to prove that the redistricters' "predominant motive was to maximize one party's power."[170]

This is the standard that has been applied in other districting cases. In cases involving racial gerrymandering, the Court has held that to trigger strict scrutiny "race must be '*the predominant* factor motivating the legislature's decision.'"[171] By the same token, partisanship need only be a predominate factor in establishing a claim of partisan gerrymandering.

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[166] *See supra* notes 94–123 and accompanying text.
[167] *See supra* notes 124–148 and accompanying text.
[168] *See supra* notes 149–165 and accompanying text.
[169] *See supra* notes 37, 45, 48, 57, 66, 98, 108, 116, 123, and 145 and accompanying text.
[170] LULAC v. Perry, 548 U.S. 399, 476 (2006).
[171] Bush v. Vera, 517 U.S. 952, 959 (1996) (quoting Miller v. Johnson, 515 U.S. 900, 916 (1995)).

1. Irregular Shapes Inconsistent with Traditional Redistricting Principles

In determining partisan purpose, a court should consider whether a challenged plan failed to follow traditional redistricting principles, such as contiguity, compactness, and respect for political subdivisions. The plurality in *Davis v. Bandemer* agreed that "deliberate drawing of district lines in accordance with accepted gerrymandering principles would be relevant to intent, and evidence of valid and invalid configuration would be relevant to whether the districting plan met legitimate state interests."[172] Justices Powell and Stevens likewise agreed that "the shapes of voting districts and adherence to established political subdivision boundaries" were relevant in considering claims of partisan gerrymandering.[173] In his dissenting opinion, Justice Breyer similarly considered whether the plan departed from "previous traditional boundary-drawing criteria . . . ."[174] In his dissenting opinion in *Vieth*, Justice Stevens reiterated that "irrational shape can serve as an objective indicator of an impermissible legislative purpose . . . ."[175] Similarly, Justices Souter and Ginsburg expressed the view that whether redistricters "paid little or no heed to those traditional districting principles whose disregard can be shown straightforwardly" was relevant in assessing a claim of partisan gerrymandering, and that "a test relying on these standards would fall within judicial competence."[176]

In the context of Section 2 litigation, the Supreme Court has said that a district need not be the winner "in endless 'beauty contests'" to be considered compact.[177] Instead, a district is compact if it "is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries."[178] There are various social science measures of compactness, such as the perimeter measure and the dispersion measure,[179] but most courts have applied an intuitive, "eyeball" test—if a district looks reasonably compact and similar in shape to other districts drawn by the jurisdiction it is deemed compact.[180]

The Court has had no difficulty in applying a standard based upon traditional redistricting principles to claims of vote dilution in other contexts. In *Gomillion v. Lightfoot* the Court held that a city's redistricting plan was sub-

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[172] Davis v. Bandemer, 478 U.S. 109, 141 (1986) (plurality opinion).
[173] *Id.* at 173 (Powell, J., concurring in part and dissenting in part).
[174] Vieth v. Jubelirer, 541 U.S. 267, 367 (2003) (Breyer, J., dissenting).
[175] *Id.* at 335 (Stevens, J., dissenting).
[176] *Id.* at 348 (Souter, J., dissenting).
[177] Bush v. Vera, 517 U.S. 952, 977 (1996).
[178] *Id.*
[179] *See, e.g.*, Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 554 & n.200, 555 & n.203 (1993).
[180] *See, e.g.*, Houston v. Lafayette County, 56 F.3d 606, 611 (5th Cir. 1995); Cuthair v. Montezuma-Cortez, Colo. Sch. Dist., 7 F. Supp. 2d 1152, 1167 (D. Colo. 1998).

ject to challenge under the Fourteenth and Fifteen Amendments as a racial gerrymander in part because the boundaries had been redrawn into "an uncouth twenty-eight-sided-figure . . . ."[181] And in *Miller v. Johnson*, the Court held that a district's irregular shape was evidence of its unconstitutionality under the Fourteenth Amendment.[182] However, where a plan was adopted with a discriminatory purpose, the fact that the districts were compact and contiguous should not defeat a partisan gerrymandering claim. As *Miller v. Johnson* explained:

> Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but 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 in drawing its district lines.[183]

Thus, a bizarre shape may be relevant evidence of partisan bias, but is not a prerequisite for such a finding.

2. Participation in the Redistricting Plan's Adoption

Another factor relevant to the issue of discriminatory purpose is the extent to which a party was allowed to participate in the process by which a challenged plan was adopted. In *Bandemer*, Justice Powell noted that a relevant consideration in making out a case of unconstitutional partisan gerrymandering was "the nature of the legislative procedures by which the apportionment law was adopted . . . ."[184] Similarly, in his dissenting opinion in *LULAC*, Justice Stevens concluded that one of the factors in evaluating a claim of partisan gerrymandering was "whether the adoption of the plan gave the opposition party, and other groups, a fair opportunity to have input in the redistricting process . . . ."[185]

B. Disproportionate Electoral Results

Second, a plaintiff would have to show an actual history or a projection of disproportionate electoral results under the challenged plan. In *Bandemer*—while discussing race based challenges to multi-member districts—the plurality concluded that "[i]n the statewide political gerrymandering context, these prior cases lead to the analogous conclusion that equal protection violations may be found only where a history (actual or projected)

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[181] 364 U.S. 339, 340–41 (1960).
[182] *See* 515 U.S. 900, 913 (1995).
[183] *Id.*
[184] Davis v. Bandemer, 478 U.S. 109, 173 (1986) (Powell, J., concurring in part and dissenting in part).
[185] LULAC v. Perry, 548 U.S. 399, 473 n.11 (2006) (Stevens, J., dissenting).

of disproportionate results appear in conjunction with similar indicia."[186] In addition, Justice Powell, joined by Justice Stevens, agreed that while "effects on election results do not suffice to establish an unconstitutional gerrymander, they certainly are relevant to such a claim, and they may suffice to show that the claimants have been injured by the redistricting they challenge."[187]

A disproportionate-electoral-results standard has proven to be entirely manageable in other kinds of voting cases, and is consistent with the proposition that proportionality is not required. Section 2 of the Voting Rights Act provides that the statute does not establish "a right to have members of a protected class elected in numbers equal to their proportion in the population."[188] A violation of the statute can also be established by evidence that minorities "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[189] In addition, the legislative history, and the decisions of the Court, provide that "the extent to which members of the minority group have been elected to public office in the jurisdiction" is one of the most important factors in establishing a Section 2 violation.[190] In *Thornburg v. Gingles*, for example, the Court affirmed the findings by the lower court of Section 2 violations involving four multi-member districts because "the success a few black candidates have enjoyed in these districts is too recent, too limited, and . . . perhaps too aberrational, to disprove its conclusion."[191] A disproportionate-electoral-results standard has not only proven to be manageable in minority vote dilution cases, but would be equally manageable in adjudicating claims of partisan gerrymandering. And as the Court concluded in *Bandemer*, while the characteristics of a political group "are not immutable," and while "the group has not been subject to the same historical stigma" as a racial group, those differences did not justify a refusal to entertain a claim of partisan gerrymandering.[192]

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[186] *Bandemer*, 478 U.S. at 139.

[187] *Id.* at 170 n.7 (Powell, J., concurring in part and dissenting in part). Justice Stevens reiterated this view in *LULAC*, 548 U.S. at 476 (Stevens, J., dissenting) ("[T]his effects inquiry would be designed to measure whether or not the plaintiff has been harmed.").

[188] 42 U.S.C. § 1973(b) (2000).

[189] *Id.*

[190] Thornburg v. Gingles, 478 U.S. 30, 48 n.15 (1986) (citing S. REP. NO. 97-417, at 29 (1982)).

[191] *Id.* at 80; *see also* Johnson v. De Grandy, 512 U.S. 997, 1011 (1994) ("[L]ack of electoral success is evidence of vote dilution . . . ."); United States v. Charleston County, 365 F.3d 341, 349–50 (4th Cir. 2004) (affirming a § 2 violation and citing *Gingles*). As to the fifth challenged district, however, the Court found no Section 2 violation based on the "sustained success black voters have enjoyed" in electing candidates of their choice. *Gingles*, 478 U.S. at 77.

[192] *Gingles*, 478 U.S. at 125. While the associational rights of political parties have consistently been held to be protected by the First Amendment, *see, e.g.*, N.Y. State Bd. of Elections v. Lopez Torres, 128 S. Ct. 791, 797 (2008), racial minorities are deemed entitled to special and heightened protection by the specific guarantees of the Fourteenth and Fifteenth Amendments, *see* Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976) (Congress, "acting under the Civil War Amendments," may intrude into "spheres of autonomy previously reserved to the States").

Relevant to the issue of projected disproportionate electoral results would be the extent to which a plan maximized the number of districts controlled by one party while minimizing the number of districts controlled by the other party. As Justices Souter and Ginsberg noted in their dissent in *Vieth*, a relevant factor would be "the distribution of the plaintiff's group" in the various districts in a plan, whether a "uselessly high number" or a "fatally few" were drawn into districts.[193] Justice Breyer would also consider the number of seats each party would likely obtain under a challenged plan,[194] and Justice Stevens would consider the number of safe seats for the dominant party.[195]

Another method of measuring disproportionate electoral results, or the effects of partisan gerrymandering, is whether a plan achieves partisan symmetry. In his dissenting opinion in *LULAC*, Justice Stevens described the symmetry standard as "widely accepted by scholars as providing a measure of partisan fairness in electoral systems."[196] The symmetry standard "requires that the electoral system treat similarly-situated parties equally, so that each receives the same fraction of legislative seats for a particular vote percentage as the other party would receive if it had received the same percentage."[197] The symmetry standard relies upon statistical methods of measurement and was used by experts for the plaintiffs and the state in *LULAC*.[198] The size of the departure in a challenged plan from the symmetry standard was one of eight factors Justice Stevens would consider in evaluating a claim of partisan gerrymandering.[199] Justices Souter and Ginsburg indicated they "do not rule out the utility of a criterion of symmetry as a test,"[200] while Justice Stevens characterized Justice Kennedy as "leaving the door open to the use of the standard in future cases."[201]

C. An Acceptable Alternative Plan

Third, the plaintiff would have to show that alternative plans could be drawn which complied with traditional redistricting principles and remedied

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[193] Vieth v. Jubelirer, 541 U.S. 267, 349 (2004) (Souter, J., dissenting).

[194] *See id.* at 367 (Breyer, J., dissenting).

[195] *See* LULAC v. Perry, 548 U.S. 399, 473 n.11 (2006) (Stevens, J., concurring in part and dissenting in part).

[196] *Id.* at 466; *see also* Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after* LULAC v. Perry, 6 ELECTION L.J. 2, 6 (2007) ("Social scientists have long recognized *partisan symmetry* as the appropriate way to define partisan fairness in the American system of plurality-based elections . . . .").

[197] *LULAC*, 548 U.S. at 466 (Stevens, J., concurring in part and dissenting in part) (citing Brief of Professors Gary King et al. as Amici Curiae Supporting Neither Party 4–5, LULAC v. Perry, 548 U.S. 399 (2006) (Nos. 05-204, 05-254, 05-276, 05-439)).

[198] *See* Grofman & King, *supra* note 196, at 6–13 (explaining the statistical methodology and its development).

[199] *See LULAC*, 548 U.S. at 473 n.11 (Stevens, J., concurring in part and dissenting in part).

[200] *Id.* at 483 (Souter, J., concurring in part and dissenting in part).

[201] *Id.* at 468 n.9 (Stevens, J., concurring in part and dissenting in part).

the dilution of the party's voting strength. As Justice Souter expressed in *Vieth*, a plaintiff's hypothetical plan would have show that "his State acted to dilute his vote, having ignored reasonable alternatives consistent with traditional districting principles."[202] Racial vote dilution cases have relied upon a similar standard of hypothetical alternative plans. In *Thornburg v. Gingles*, for example, the Court held that a factor in proving a violation of Section 2 in a challenge to multi-member districts was whether the minority could constitute a majority in an alternative plan consisting of single member districts.[203] This standard has clearly proven to be judicially manageable.[204]

Unless a defendant could show that a challenged plan was necessary to comply with "one person, one vote" or the Voting Rights Act, upon proof of the above factors a plaintiff should be deemed to have established a claim of unconstitutional partisan gerrymandering. Aside from potentially invalidating current districting plans, this proposed standard would have a deterrent effect. Just as the decision in *Easley v. Cromartie* served as an incentive, the adoption by the Court of a manageable standard for partisan gerrymandering would likely prevent many such plans from being enacted in the first instance.[205]

VII. Options for Reform

Regardless of whether the Supreme Court ultimately adopts a manageable standard for partisan gerrymandering, there are other options for reform, including limiting redistricting to once in a decade and putting redistricting in the hands of a non-partisan redistricting commission.

A. Limiting Redistricting

Redistricting is generally done by the governing body of the jurisdiction involved.[206] In the event a jurisdiction fails to redistrict after having

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[202] Vieth v. Jubelirer, 541 U.S. 267, 351 (2004) (Souter, J., dissenting).

[203] *See* Thornburg v. Gingles, 478 U.S. 30, 50 (1986).

[204] *See, e.g.*, *LULAC*, 548 U.S. at 428 (finding a congressional district in violation of Section 2 because, *inter alia*, Latinos "could have constituted a majority of the citizen voting-age population" in an alternative district); Abrams v. Johnson, 521 U.S. 74, 92 (1997) (stating that an inquiry into alternative plans is required in Section 2 and racial gerrymandering cases); Johnson v. De Grandy, 512 U.S. 997, 1008 (1994) (finding that the possibility of creating "reasonably compact districts" is a relevant inquiry under Section 2).

[205] In its recent extension of Section 5 of the Voting Rights Act, Congress concluded that the enforcement of Section 5 "prevented election practices, such as annexation, at-large voting, and the use of multi-member districts, from being enacted to dilute minority voting strength." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(4), 120 Stat. 577. The existence and enforcement of a standard for partisan gerrymandering would have a similar deterrent effect.

[206] Some states have delegated that function to special redistricting commissions. *See infra* Part VII.B.

been given an opportunity to do so, courts are required to implement remedial plans to remedy any constitutional violation.[207]

As a matter of federal law, redistricting is required only once a decade, and only then if districts are malapportioned.[208] The duty to reapportion Congress is imposed by Article I, Section 2 of the Constitution, rather than the Fourteenth Amendment.[209] The Court has interpreted Article I as imposing a much stricter population equality standard in congressional redistricting than in state and local redistricting.[210] Congressional districts must be "as mathematically equal as reasonably possible."[211]

Congress has the authority under Article I, Section 4 of the U.S. Constitution to limit congressional redistricting to once per decade to curb some of the excesses of partisan gerrymandering.[212] Congress also has the authority under the same constitutional provision to "make or alter" districts drawn by states for congressional elections.[213] Whether Congress would ever exercise this power to correct a state's partisan gerrymandering, and whether—given the deep partisan divide that exists in the Congress—it could be trusted to do so in a fair and equitable manner is debatable.

States, on the other hand, are free to redistrict more often if they wish. For state and local offices, the Fourteenth Amendment requires a jurisdiction to make "an honest and good faith effort" to construct districts of as nearly equal population as is practicable.[214]

To reduce gerrymandering, states, too, could limit redistricting at all levels to once in a decade.[215] A number of states, including South Dakota, have done that, giving the legislature a year after release of the census to adopt plans. If it fails to do so, the state supreme court draws the plans.[216]

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[207] Chapman v. Meier, 420 U.S. 1, 27 (1975).

[208] Reynolds v. Sims, 377 U.S. 533, 583–84 (1964).

[209] *Compare* U.S. CONST. art. I, § 2 (stating in relevant part that "Representatives . . . shall be apportioned among the several states . . . according to their respective Numbers.") *with* U.S. CONST. amend. XIV, § 2 (which merely modifies this provision regarding the apportionment to exclude the 3/5 count of slaves).

[210] *See, e.g.*, Karcher v. Daggett, 462 U.S. 725, 739 (1983) (requiring "a good-faith effort to achieve precise mathematical equality"); White v. Weiser, 412 U.S. 783 (1973) (rejecting a state redistricting bill that had an average deviation from the ideal district of 0.745%).

[211] *White*, 412 U.S. at 790.

[212] *See* U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators."). In an exercise of that power, Congress has required that members of the House of Representatives be elected from single-member districts. *See* 2 U.S.C. § 2c (2006).

[213] *See* U.S. CONST. art. I, § 4; *see also* Vieth v. Jubelirer, 541 U.S. 267, 275 (2004) ("Article I, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished.").

[214] Brown v. Thomson, 462 U.S. 835, 842 (1983); Reynolds v. Sims, 377 U.S. 533, 577 (1964).

[215] See Chapman v. Meier, 420 U.S. 1, 27 (1975) ("reapportionment is primarily the duty and responsibility of the State through its legislature or other body").

[216] *See* S.D. CONST. art. III, § 5.

Thereafter, the South Dakota constitution prohibits additional redistricting until the next decade.[217] Other states, including Nebraska, California, and Colorado, have similar constitutional provisions,[218] and courts have interpreted them in the same way.[219] Limiting redistricting to once a decade could keep factions who gain the upper hand politically from churning and abusing the redistricting process. And the less legislators are allowed to do that, the more time they will have to attend to the larger business of the public they represent.

B. Redistricting Commissions

States could also take redistricting out of the hands of the legislature and give it to special redistricting commissions. Twelve states—Alaska, Arizona, Arkansas, Colorado, Hawaii, Idaho, Missouri, Montana, New Jersey, Ohio, Pennsylvania, and Washington—currently do so for their legislative plans.[220] These commissions may not be entirely independent, however, since they are composed of elected officials or are appointed by elected officials. In Arkansas, for example, the Commission consists of the Governor, the Secretary of State, and the Attorney General.[221] In Ohio, the Commission consists of the Governor, Auditor, Secretary of State, and two people selected by the legislative leaders of each major political party.[222] In Montana, Pennsylvania, and Washington, the majority and minority leaders of both houses of the legislature each select one member. Those four members then select a fifth member to serve as chair. If they fail to do so, the fifth member is selected by the state supreme court.[223] Partisanship inevitably plays an important role in the formation and operation of the commissions. However, having redistricting performed by a commission generally lessens the level

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[217] *See, e.g.*, Emery v. Hunt, 615 N.W.2d 590, 592–93 (S.D. 2000) (holding that exceptions should lie where a plan was found unconstitutional and a remedial plan was required, or where a mid-decade plan was drawn to remedy the likely dilution of minority voting strength); *In re* Legislative Reapportionment, 246 N.W. 295, 297 (S.D. 1933).

[218] *See, e.g.*, CAL. CONST. art. XXI, § 1; COLO. CONST. art. V, § 48; NEB. CONST. art. III, § 5.

[219] *See, e.g.*, Exon v. Tiemann, 279 F. Supp. 603, 608 (D. Neb. 1967) (per curiam); Legislature v. Deukmejian, 669 P.2d 17, 18 (Cal. 1983) (per curiam); In re Interrogatories Propounded by the Senate Concerning House Bill 1078, 536 P.2d 308, 311–12, 319–20 (Colo. 1975).

[220] *See* Vieth v. Jubelirer, 541 U.S. 267, 362–63 (2004) (Breyer, J., dissenting) (citing NAT'L CONFERENCE OF STATE LEGISLATURES, REDISTRICTING COMMISSIONS AND ALTERNATIVES TO THE LEGISLATURE CONDUCTING REDISTRICTING (2004)); *accord id.* at 363 (noting that both Canada and Great Britain also use independent boundary commissions to draw districts for their national legislatures).

[221] *See* ARK. CONST. art. VIII, § 1.

[222] *See* OHIO CONST. art XI.

[223] *See* MONT. CONST. art. V, § 14; PA. CONST. art II, § 17; WASH. CONST. Art II, § 43.

and extent of bickering that inevitably takes place when redistricting is performed by the legislature as a whole.[224]

Under various statutes, state redistricting commissions have the power to adopt rules and regulations ensuring the fairness of redistricting, including complying with "one person, one vote," complying with the Voting Rights Act, drawing reasonably compact and contiguous districts, keeping political subdivisions intact, insuring partisan fairness, and ignoring incumbency protection. States can also enact legislative standards to ensure partisan equity or competitiveness. Arizona, for example, has enacted standards for redistricting, including that "[t]o the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals."[225] The other redistricting goals, which take precedence over competitiveness, include compliance with "one person, one vote," the Voting Rights Act, and various traditional redistricting principles. Arizona's redistricting standards have been upheld and applied by the state court.[226] Washington State has similarly adopted rules directing its redistricting commission, in so far as practical, "to provide fair and effective representation and to encourage electoral competition."[227] The commission is also directed not to draw a plan "purposely to favor or discriminate against any political party of group."[228]

C. The Iowa Model

Iowa uses another method of redistricting. Plans are drawn by technicians in the state's Legislative Service Bureau. By statute, they are prohibited from drawing districts for the purpose of favoring a political party, an incumbent legislator, a member of Congress, or other person or group.[229] They are also prohibited from taking into account previous election results, the political affiliation of registered voters, or "demographic information, other than population head counts, except as required by the Constitution and the laws of the United States."[230] The criteria the line drawers must use are population equality, respect for political subdivisions, contiguity, and compactness.[231] The Legislative Service Bureau is not, however, exempt from political oversight or influence. It is provided advice and guidance by a

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[224] That is apparent from the fact that there are far fewer commission members to disagree among themselves than legislators. More importantly, commission members do not have the personal stake in the outcome of redistricting that individual legislators do, which inevitably leads to disagreements and division.

[225] ARIZ. CONST. art. 1, pt. 2, § 1(14).

[226] *See* Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 121 P.3d 843, 859 n.2 (Ariz. Ct. App. 2005).

[227] WASH. REV. CODE § 44.05.090(5) (2007).

[228] *Id.*

[229] *See* IOWA CODE ANN. § 42.4(5) (1997).

[230] *Id.*

[231] *See id.* § 42.4(2–4).

Temporary Redistricting Advisory Commission selected by the political leadership of the state house and senate.[232] The state legislature also has the power to reject up to three plans drawn and submitted by the Bureau, while the third plan is subject to amendment by the legislature in the same manner as any other bill.[233]

The Iowa model, while it does not exclude it, diminishes the importance of partisanship, at least at the initial district boundary-drawing stage.[234] Its race-blind approach to redistricting, however, would be highly problematic in jurisdictions with substantial minority populations. Ignoring demographic information other than population head counts may work in Iowa because there are few minorities in the state. Only 2.5% of the population is African American, only 0.4% is American Indian, and 3.8% is Hispanic.[235] No matter how lines are drawn, all of the districts would be majority white.[236] But that is not the case in states with substantial minority populations. Race-blind redistricting in those states would inevitably reduce the number of majority minority districts, which would be inconsistent with the Voting Rights Act.[237] Moreover, states covered by the preclearance provisions of Section 5 of the Voting Rights Act, must take race into account to ensure that their redistricting plans do not cause retrogression of minority voting strength.[238]

D. The Montana Districting and Apportionment Commission

Montana is an example of the way in which a redistricting commission can be both subjected to and shielded from partisan influence. The Montana Constitution was amended in 1972 giving the exclusive power of redistricting to a five member Districting and Apportionment Commission, four of whose members are selected by the legislature preceding each federal census.[239] The fifth member is chosen by the four appointed members, but if they fail to agree the fifth member is appointed by the state supreme court.[240] The legislature is given an opportunity to comment on the plan proposed by the commission and make recommendations,[241] but it has no power to alter

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[232] *See id.* § 42.5(1).

[233] *See id.* § 42.3(3).

[234] As the chair of the Iowa state Democratic party has said, "there's still politics in the process." Joanne Davis, *Safe But Sorry: The Way We Redistrict Destroys the Middle Ground*, WASH. POST, Dec. 2, 2001, at B3.

[235] U.S. CENSUS BUREAU, STATE & COUNTY QUICK FACTS, ESTIMATE (2006).

[236] The Legislative Service Bureau has acknowledged that it "would be difficult" to draw a majority minority congressional or legislative district in Iowa. IOWA GEN. ASSEMBLY, LEGISLATIVE SERVICE BUREAU, LEGISLATIVE GUIDE TO REDISTRICTING 7–8 (2000).

[237] Section 2 of the Voting Rights Act prohibits voting practices that dilute minority voting strength. *See* 42 U.S.C. § 1973(b) (2000).

[238] 42 U.S.C. § 1973c (2000).

[239] MONT. CONST. art. V, § 14.

[240] *See id.*

[241] *See id.*

or veto the plan. After receiving any recommendations from the legislature, the commission files its plan with the Secretary of State, whereupon the plan becomes law, and the commission is dissolved.[242]

The commission appointed after the 1990 census adopted population equality, compactness and contiguity, and protection of racial or language minorities as mandatory redistricting criteria.[243] The commission also adopted discretionary guidelines, which favored consideration of local government boundaries (including Indian reservations) and recommended against districts being drawn to favor a political party or to protect or defeat an incumbent.[244] Despite that, the commission initially rejected a proposal that would have combined the Rocky Boy's and Fort Belknap Indian Reservations in a single majority Indian house district because it would negatively impact a Democratic incumbent. Commissioner Pasma, who was a Democratic Party county chairman, said the proposed district was "a bunch of crap." As he explained:

> . . . I'm going to say something here that sounds really prejudicial, and it is. . . . I won't bring this up tonight and embarrass you folks and embarrass myself, it makes it impossible for one of our incumbent legislators to run. Mr. Peck is out the second this passes. And I'm a County Chairman, I'm not going to stand here and twiddle my thumbs and let that happen when there's no good reason for it.[245]

Commissioner Pasma also stated the he had to "take off the hat of the Commissioner of Reapportionment and put on the hat of the County Chairman. . . . It is going to completely dilute the strongly Democratic district of northern Havre . . . ."[246] In the commission's decision rejecting the plan, partisanship trumped both the mandatory criteria of protecting racial and language minorities, as well as the discretionary criteria of not drawing districts to favor a political party or to protect an incumbent. Subsequently, however, the commission adopted the proposed district combining the two Indian Reservations because they feared they would be sued if they did not, and as Commissioner Pasma put it, "if we got into a Court. . . I think we'd

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[242] *See id.*

[243] *See* TOM GOMEZ, GUIDELINES AND CRITERIA FOR LEGISLATIVE REDISTRICTING, PREPARED FOR THE MONTANA DISTRICTING AND APPORTIONMENT COMMISSION, MONTANA LEGISLATIVE COUNCIL 1 (1991) (on file with Harvard Law School Library).

[244] *See id.* at 2.

[245] Transcript of Commission Meeting at 5–6 , Montana District and Apportionment Commission (June 24, 1992) (transcribed for the American Civil Liberties Union) (pages on file with Harvard Law School Library).

[246] Minutes of Commission Meeting at 4, 6, Montana Districting and Apportionment Commission (July 22, 1992) (pages on file with Harvard Law School Library).

lose."[247] "We're being had here," he said, "and," Commissioner Rehberg added, "we can't do anything about it."[248]

The Districting and Apportionment Commission appointed after the 2000 census was the object of direct partisan attack by the legislature, from which it was able to shield itself. The 1990 plan contained five majority Indian house districts and one majority Indian senate district. The plan adopted by the new commission kept the existing majority Indian districts and added another majority Indian house district and two majority Indian Senate districts.[249] Since Indians in Montana largely vote Democratic,[250] the new majority Indian districts would likely elect Democrats. The House and Senate, which were majority Republican, immediately passed resolutions condemning the plan as "mean-spirited," "unacceptable," and enacted "for partisan gain," and concluded that "the legislative redistricting plan must be redone."[251] The legislature also condemned the majority Indian districts as "blatant" racial gerrymanders.[252]

The House and Senate then enacted a bill, HB 309, which Governor Judy Martz, a Republican, signed into law.[253] The bill sought to invalidate the plan by imposing a *de minimis* population deviation of plus or minus 1% from ideal district size.[254] The commission's plan for the house contained a total deviation of 9.85% and would have violated the legislature's deviation standard.[255] The Secretary of State refused to accept the commission's plan, and filed a complaint against the commission in state court seeking a declaration that the plan was unconstitutional and in violation of HB 309.[256] The state court, however, ruled that HB 309 was in violation of the state constitution, which gave the commission the sole power to redistrict, and directed the Secretary of State to accept and file the commission's plan.[257] The Secre-

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[247] Minutes of Commission Meeting at 2, Montana Districting and Apportionment Commission (July 23, 1992) (transcribed for the American Civil Liberties Union) (pages on file with Harvard Law School Library).

[248] *Id*. at 2, 5.

[249] *See* MONTANA DISTRICTING AND APPORTIONMENT COMMISSION, FINAL LEGISLATIVE REDISTRICTING PLAN 17–18 (2003) (on file with Harvard Law School Library).

[250] *See* Sam Hoe Verhovek, *Going Native in State Capitals*, L.A. TIMES, Apr. 8, 2007, at A26 (describing the Indian vote in Montana as "solidly Democratic" and stating "all 10 Indian members of the Montana Legislature belong to the party"); *Montana Primary: What to Expect Tonight*, THE HUFFINGTON POST, June 3, 2008, http://www.huffingtonpost.com/2008/06/03/montana-primary-what-to-e_n_104863.html (noting that Montana's seven Indian reservations are home to 8% of the population but typically produce 20% of the vote in Democratic primaries).

[251] H.R. Res. 3, 58th Cong. (Mont. 2003); *see also* S. Res. 2, 58th Cong. (Mont. 2003).

[252] *Id.*

[253] H.R. 309, 58th Cong. (Mont. 2003).

[254] See id. § 1.

[255] *See* MONTANA DISTRICTING AND APPORTIONMENT COMMISSION, FINAL LEGISLATIVE REDISTRICTING PLAN 19 (2003) (on file with Harvard Law School Library).

[256] *See* Brown v. Montana Districting and Reapportionment Comm'n, No. ADV-2003-72 (Mont. 1st Jud. Dist. Ct. Lewis & Clark County July 2, 2003).

[257] *See id*.

tary of State filed the commission's plan and did not appeal the decision of the state court.

The commission's plan could not accurately be described as a partisan gerrymander. Secretary of State Brad Johnson, a Republican, has said that the political parties are "very closely matched at this point in Montana history."[258] The commission's plan mirrored that closeness in voting patterns. In 2008, the legislature elected under the plan was almost evenly divided along partisan lines, with fifty Republicans, forty-nine Democrats, and one member of the Constitution Party in the house, and twenty-four Republicans and twenty-six Democrats in the senate.[259] The votes for statewide offices reflect a similar partisan divide. The Governor, Brian Schweitzer, is a Democrat, as are Senators, Max Baucus (D-Mont.) and Jon Tester (D-Mont.). Montana's member of Congress, Dennis Rehberg (R-Mont.), is a Republican. But, had redistricting been done by the legislature, there is little doubt that partisan bias would have been injected into the plan.

VIII. CONCLUSION

Partisan gerrymandering was not held to be justiciable by the Supreme Court until 1986 in *Davis v. Bandemer*. But since then—with the sole exception of a case from North Carolina that was ultimately rendered moot—no redistricting plan has ever been held to be unconstitutional as a partisan gerrymander. Lower courts have been deeply divided over the meaning of *Bandemer*, and some have adopted a standard of exclusion from "all structures of the state governmental system" that makes it virtually impossible for a plaintiff ever to succeed on a claim of partisan gerrymandering.

Bob Holmes, a longtime member of the Georgia legislature and a political science professor at Clark-Atlanta University, has said that redistricting is "a struggle for political survival" in which "everyone seeks to maximize his or her own position."[260] The redistricting following the 2000 census confirms the accuracy of that statement and dramatically illustrates that partisan gerrymandering remains a serious and chronic problem.

The courts need to adopt a judicially manageable standard to adjudicate such claims, and could do so by adopting the three-part standard argued for in this Article. But whether or not the Court adopts such a standard, Congress and the states could address the problem of partisan gerrymandering by limiting redistricting to once in a decade, except when necessary to remedy a constitutional or other violation. States could also place redistricting in the

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[258] Office of the Montana Secretary of State, About Brad Johnson, http://sos.mt.gov/About_Office/About_Brad.asp (last accessed Oct. 19, 2008).

[259] Montana Legislature, Senate Roster, http://leg.mt.gov/content/sessions/60th/2007SenateMembers.txt (last accessed Oct. 19, 2008); Montana Legislature, House Roster, http://leg.mt.gov/content/sessions/60th/2007HouseMembers.txt (last accessed Oct. 19, 2008).

[260] Robert A. Holmes, *Reapportionment Strategies in the 1990s: The Case of Georgia*, *in* RACE AND REDISTRICTING IN THE 1990s 191, 207 (Bernard Grofman ed., 1998).

hands of non-partisan commissions. Non-partisan commissions, as the experience in Montana shows, are not free from partisan influence, but they would be better options than the legislative redistricting that took place in Pennsylvania, Texas, and Georgia following the 2000 census. In any event, both the courts and state legislatures have an obligation to ensure that the public good is not sacrificed to the self-interest of incumbent politicians or political parties.