GERRYMANDERING AND ASSOCIATION

DANIEL P. TOKAJI*

TABLE OF CONTENTS

* Charles W. Ebersold and Florence Whitcomb Ebersold Professor of Constitutional Law, The Ohio State University, Moritz College of Law. The author thanks Alex Szaruga, Rebecca Barnard, and Katy Shanahan for their excellent research assistance and the participants at the William & Mary Symposium at which this Article was originally presented for their helpful comments.

INTRODUCTION

A legal standard for partisan gerrymandering is the holy grail of election law.[1] For decades, jurists and commentators have struggled to articulate a manageable standard that will avoid entangling courts in the political thicket. The pressure for courts to put some limits on partisan gerrymandering has intensified over the past decade as mapmakers have drawn lines with increasingly deadly precision, maximizing their own party's power while minimizing that of the other major party.[2] The enhanced technological tools at their disposal can allow the dominant party to retain its dominance throughout the decade, even in strong years for the other major party.[3] This effectively allows the party that holds the pen at the start of the decade to retain power for the next ten years, even when more voters would prefer a different outcome.

Still, a fierce debate rages over whether partisan gerrymandering claims are nonjusticiable political questions, as four Justices in *Vieth v. Jubelirer* believed.[4] There can be no denying the difficulty or gravity of the problem. On one level, partisan gerrymandering is a problem that cries out for judicial intervention. The sophisticated means through which the dominant party can entrench itself in power deny the accountability to voters upon which democracy depends while relegating its opponent to semi-permanent minority status.[5] This is not a problem that will self-correct. So long as the dominant party knows it can retain its legislative branch dominance—and its control over the redistricting process in the next cycle—it has no incentive to make a change. If one views judicial

---

1. *See* Adam Liptak, *When Does Political Gerrymandering Cross a Constitutional Line?*, N.Y. TIMES (May 15, 2017), https://www.nytimes.com/2017/05/15/us/politics/when-does-political-gerrymandering-cross-a-constitutional-line.html [https://perma.cc/KW8H-QL6T]; Daniel Tokaji, *Symposium: A Path Through the Thicket—the First Amendment Right of Association*, SCOTUSBLOG (Aug. 10, 2017, 2:12 PM), http://www.scotusblog.com/2017/08/symposium-path-thicket-first-amendment-right-association/ [https://perma.cc/Y9D6-5D6H].

2. *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 867-76 (2015).

3. *See infra* Part I.

4. 541 U.S. 267, 271, 281 (2004) (plurality opinion).

5. *See generally* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

review as a means by which to check incumbent self-entrenchment and protect political minorities, thus making democracy work better, then there is a strong case for judicial intervention.[6] That is particularly true in the era of hyperpolarization that we inhabit, which makes it extremely unlikely that the major parties will negotiate a political solution.

At the same time, there are good reasons to worry about the feasibility of a legal standard for partisan gerrymandering claims, particularly under the Equal Protection Clause. However noxious the problem of partisan gerrymandering may be, it has a long pedigree.[7] The idea that partisan gerrymandering violates the Constitution is therefore a hard sell for originalists.[8] Nor is there an established body of equal protection doctrine upon which those challenging partisan gerrymandering can rely. There is certainly some helpful language to be found in Supreme Court precedent, most notably the Court's statement in *Reynolds v. Sims* that the Equal Protection Clause guarantees "fair and effective representation."[9] But equal protection jurisprudence is an imperfect fit for the problem of partisan gerrymandering, given its usual requirement that either facial or intentional discrimination be established.[10] The one-person, one-vote cases were an exception, allowing an equal protection claim to be made without proof of discriminatory intent, but this one-off was justified by the relatively bright line that the Court developed through the equal population requirement.[11] Partisan gerrymandering does not lend itself to a comparably simple solution. Any standard the Court creates will involve difficult judgment calls. There are good reasons to worry about opening Pandora's box.

While most constitutional partisan gerrymandering litigation has focused on the Equal Protection Clause of the Fourteenth Amendment, Justice Anthony Kennedy's *Vieth* concurrence suggested that the First Amendment might provide a more promising basis for

6. *See, e.g.*, *Vieth*, 541 U.S. at 360-65 (Breyer, J., dissenting).
7. *See, e.g.*, *id.* at 274-75 (plurality opinion).
8. *See id.* at 275-77.
9. 377 U.S. 533, 565-66 (1964).
10. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 642-44 (1993).
11. *See, e.g.*, *Reynolds*, 377 U.S. at 568.

challenges.[12] Although his three paragraphs on the subject were more suggestive than directive, the four cases he cited all involve associational rights.[13] Yet the scholarly commentary on the subject—most of it negative—has focused more on freedom of speech than freedom of association.[14] Two three-judge district courts—both of whose decisions will be considered by the Court this term—have looked more favorably on First Amendment association as a basis for challenging partisan gerrymandering.[15]

This Article argues that the First Amendment expressive right of association should be understood to prohibit excessive partisan gerrymanders. The right of association has long been understood to limit the dominant political group's ability to discriminate against its rivals.[16] And the ballot is one of the primary loci at which voters, candidates, and political parties associate.[17] Accordingly, the Supreme Court has understood voting as First-Amendment-protected association in certain contexts, including ballot access and primaries.

Expressive association provides the strongest constitutional basis for challenging partisan gerrymandering for three reasons. The first is that it best captures the character of the injury, which inheres in *party-based discrimination*—more specifically, the dominant political party's entrenchment of itself at the expense of the rival major party and its supporters. Voting is not just an individual right but also a collective activity.[18] It is the means through which we join our voices with like-minded others for the shared purpose of electing our leaders. And political parties are the main entity through which this aggregation occurs.[19] It requires no great doctrinal innovation

12. *See* 541 U.S. at 314-16 (Kennedy, J., concurring in the judgment).

13. *See id.* (citing Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000); Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214 (1989); Anderson v. Celebrezze, 460 U.S. 780 (1983); Elrod v. Burns, 427 U.S. 347 (1976) (plurality opinion)).

14. *See infra* notes 113-16 and accompanying text.

15. *See* Whitford v. Gill, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (three-judge court), *argued*, No. 16-1161 (U.S. Oct. 3, 2017); Shapiro v. McManus, 203 F. Supp. 3d 579 (D. Md. 2016) (three-judge court).

16. *See* Daniel P. Tokaji, *Voting Is Association*, 43 FLA. ST. U. L. REV. 763, 767 (2016).

17. *See id.* at 774, 776.

18. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 787 (1983).

19. *See* Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 249 (identifying aggregation as a component of the right to vote).

to recognize this reality, nor to understand voting as associational activity deserving of protection under the First Amendment. The Supreme Court has long understood elections as a locus for association among voters, candidates, and parties.[20] It has therefore cast a skeptical eye on laws that unduly burden elective association, including restrictions on parties' and candidates' ballot access.[21] Because existing First Amendment jurisprudence already accords special attention to political parties as a group through which voters associate, it provides a firmer legal basis for partisan gerrymandering claims than the Equal Protection Clause does. While equal protection has long been the go-to basis for challenging burdens on voting, it is less well suited to address party-based discrimination. There is, by contrast, a rich body of First Amendment law involving discrimination based on party affiliation, on which courts might draw in developing an association-based doctrine of partisan gerrymandering.[22]

The second reason for viewing partisan gerrymandering through the lens of expressive association is that its legal test properly focuses on *effect* rather than *intent*. The Supreme Court's associational rights cases have long employed effect-based legal standards.[23] Among the practices to which such standards have been employed are ballot access, blanket primaries, and restrictions on party endorsements.[24] In the equal protection realm, by contrast, the Court has usually required a showing of discriminatory intent[25]—with the important exception of malapportionment cases, although even in this context the legislature's reasons for departing from the one-person, one-vote rule are still relevant.[26] There are formidable reasons to prefer a legal standard that is based on effect rather than intent in redistricting cases. When a legislature or other multimember body adopts a plan, it always has multiple purposes, including partisan advantage. The racial gerrymandering cases

20. *See infra* Part II.
21. *See infra* Part II.
22. *See infra* Part II.A.
23. *See infra* Part II.B.
24. *See infra* Part II.B.
25. *See* Karcher v. Daggett, 462 U.S. 725, 744-54 (1983) (Stevens, J., concurring).
26. *See, e.g.*, Harris v. Ariz. Indep. Redistricting Comm'n, 136 S. Ct. 1301, 1307 (2016).

demonstrate the practical difficulties of discerning the "predominant" intent of line-drawers.[27] Unless the Court is prepared to declare even the slightest partisan motivation impermissible—a standard that could well render every existing district unconstitutional—it will find itself in a similar conundrum on partisan gerrymandering. An effects-based test is therefore preferable, and the First Amendment right of association provides the strongest doctrinal basis for embracing such a standard.

The third reason why expressive association provides a suitable vehicle for partisan gerrymandering claims is that it provides an appropriately *nuanced* standard. For very good reasons, the Court—including Justice Kennedy—has been unwilling to lay down a rule that would categorically prohibit any partisan considerations in redistricting.[28] Such a rule would render virtually every existing plan unconstitutional. It is, moreover, unrealistic to believe that partisan considerations can be wholly extirpated from the process. Attempting to do so would simply drive those considerations underground, encouraging even greater subterfuge than redistricting already inspires. There may also be good reasons for drawing districts in a manner that disproportionately benefits one major party or the other. An emphasis on compact districts might advantage Republicans, for example, while an emphasis on preserving communities of interest might benefit Democrats. Any viable redistricting standard should account for the good reasons that a state might have for drawing a plan that, in the aggregate, gives one party more seats than another with a comparable share of the vote. This turns out to be a major advantage of the balancing standard that the Court has adopted in its voting-as-association cases. It allows fair consideration of both the burdens that the challenged practice has on the nondominant party and the state interests that might justify these burdens.

Before proceeding further, I should clarify the boundaries of my argument. My goal is to work within the framework of existing case law to develop a legal argument for striking down excessively partisan gerrymandering based on the First Amendment right of

27. *See, e.g.*, Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 799 (2017).

28. *See* Vieth v. Jubelirer, 541 U.S. 267, 292-93 (2004) (plurality opinion); *id.* at 316 (Kennedy, J., concurring in the judgment).

association. The focus here is on legal doctrine rather than political theory or empirical research. Accordingly, it does not delve into the theoretical arguments for and against judicial intervention in gerrymandering, which other scholars have explored at length.[29] So too, my focus is not on the empirical metrics that courts might use to determine whether a redistricting plan is unconstitutional.[30] There is a lively debate over how best to measure partisan fairness, including symmetry.[31] This Article may inform this debate, but it does not offer any particular metric as the exclusive means by which to assess constitutionality. Rather, its aim is to define the legal standard courts should apply in assessing whether a redistricting plan

29. There is an abundance of academic commentary on the subject. For some leading examples, see generally Larry Alexander & Saikrishna B. Prakash, *Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering*, 50 WM. & MARY L. REV. 1 (2008); Adam Cox, Commentary, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751 (2004); Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503 (2004); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002); Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1 (1985); and Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325 (1987).

30. For some exemplary attempts to measure partisan gerrymandering, see generally Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239 (2013); Wendy K. Tam Cho & Yan Y. Liu, *Toward a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 ELECTION L.J. 351 (2016); Cox, *supra* note 29; 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 (2007); Gary King & Robert X. Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 AM. POL. SCI. REV. 1251 (1987); Michael D. McDonald & Robin E. Best, *Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases*, 14 ELECTION L.J. 312 (2015); Eric McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 LEGIS. STUD. Q. 55 (2014); Stephanopoulos & McGhee, *supra* note 2; Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263 (2016); and Gregory S. Warrington, Quantifying Gerrymandering Using the Vote Distribution (May 15, 2017) (unpublished manuscript), https://arxiv.org/pdf/1705.09393.pdf [https://perma.cc/A9PC-TPRY].

31. *See generally* Cox, *supra* note 29 (claiming that asymmetry identifies unfair partisan advantage); Grofman & King, *supra* note 30 (arguing for a metric of partisan symmetry); King & Browning, *supra* note 30 (arguing that asymmetry indicates partisan bias); McDonald & Best, *supra* note 30 (arguing for an equal vote weight standard that uses symmetry to diagnose entrenchment); McGhee, *supra* note 30 (arguing for a metric of efficiency rather than symmetry or responsiveness); Stephanopoulos & McGhee, *supra* note 2 (arguing for the efficiency gap as a measure of partisan symmetry); Wang, *supra* note 30 (arguing for a partisan bias standard that relies on partisan symmetry); Warrington, *supra* note 30 (critiquing various metrics and arguing for a measure of declination to measure asymmetry).

violates the right of association. The focus is not on the high-level question of constitutional theory or the ground-level question of empirical measurement, but rather on the mid-level question of legal doctrine.

The remainder of this Article develops an argument to challenge partisan gerrymanders as a violation of the First Amendment right of association, focusing on the party-based character of the harm and an administrable effects-based legal standard. Part I provides background on the problem of partisan gerrymandering, explaining why it has proven so intractable, especially when viewed exclusively as an equal protection issue. Part II analyzes existing First Amendment doctrine, showing that the Supreme Court has already recognized voting as a form of association. Part III argues that this body of doctrine should be applied to the problem of partisan gerrymandering, explaining how the legal standard developed in other voting contexts might be adopted. It then traces how this standard might be applied to past, pending, and potential legal challenges.

I. THE QUEST FOR A STANDARD

There are good reasons why it has been so difficult to come up with a manageable standard for partisan gerrymandering. The roots of the problem may be traced to *Reynolds v. Sims*, the Supreme Court's seminal one-person, one-vote decision.[32] *Reynolds* imposed an equal population requirement for state legislative districts, effectively requiring decennial redistricting in every state.[33] Part of the genius of the Court's opinion was to define the "one-person, one-vote" requirement in individualized terms, asserting that malapportioned districts have the effect of denying equal representation to everyone within them. The Court explained: "Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators."[34] The suggestion that "fair and effective representation" is a component of equal

32. 377 U.S. 533 (1964).
33. *See id.* at 568.
34. *Id.* at 565-66.

protection invited comparisons between malapportionment and the gerrymandered plans that were subsequently imposed.[35] If *quantitative* vote dilution (in the form of malapportioned districts) unconstitutionally denies "fair and effective representation," then why does *qualitative* vote dilution (in the form of districts that systematically weaken an identifiable political group) not do the same?

The difference is that while malapportioned legislative districts lent themselves to a straightforward legal standard—one person, one vote—a comparable standard for partisan gerrymandering was impracticable. The equipopulation standard was one that the Court could effectively set and then forget. Though subsequent cases have refined *Reynolds*'s one-person, one-vote requirement,[36] its basic contours were clear from the beginning. Partisan gerrymandering presents a more complicated problem that is less susceptible to a simple legal standard. The Court could prohibit any partisan considerations from entering the redistricting process, but almost no one takes this position seriously because it would render almost every redistricting plan invalid.

The Court's first attempt to grapple with this problem came in the first redistricting cycle following *Reynolds*. In *Gaffney v. Cummings*, the Court rejected a constitutional challenge to a Connecticut state legislative redistricting plan that allegedly attempted to replicate the two parties' support in the statewide electorate.[37] The Court reasoned that legislators need not blind themselves to the political consequences of the districts they draw.[38] It also stated that the justification for judicial intervention is at its "lowest ebb" when the state attempts to allocate political power in accordance with the political strength of the parties.[39] But this left open the question whether a plan that systematically disadvantages one of the major parties violates the Constitution.

The Court's next encounter with the problem of partisan gerrymandering occurred the next decade. In *Karcher v. Daggett*, decided

35. *See id.*

36. *See, e.g.*, Harris v. Ariz. Indep. Redistricting Comm'n, 136 S. Ct. 1301 (2016); Evenwel v. Abbott, 136 S. Ct. 1120 (2016); Karcher v. Daggett, 462 U.S. 725 (1983); Gaffney v. Cummings, 412 U.S. 735 (1973).

37. 412 U.S. at 735-36, 743.

38. *See id.* at 752-53.

39. *Id.* at 754.

in 1983, the Court considered a challenge to New Jersey's congressional redistricting plan.[40] The majority concluded that the plan violated the one-person, one-vote rule, despite the districts' minuscule deviation from absolute equality.[41] It held that Article I, Section 2—which forms the constitutional basis for the one-person, one-vote rule in the context of congressional redistricting—imposes a more stringent equality requirement than the Equal Protection Clause does.[42] Justice John Paul Stevens's concurring opinion, however, suggested that the real problem was partisan gerrymandering.[43] Rather than looking exclusively to deviations from population equality, he argued that courts should consider: "[1] whether the plan has a significant adverse impact on an identifiable political group, [2] whether the plan has objective indicia of irregularity, and then, [3] whether the State is able to produce convincing evidence that the plan nevertheless serves neutral, legitimate interests of the community as a whole."[44] This marked the first serious attempt by a Supreme Court Justice to articulate a constitutional standard for partisan gerrymanders.

The full Court addressed the question more directly three years later in *Davis v. Bandemer*.[45] Plaintiffs in *Bandemer* challenged an Indiana state legislative redistricting plan that allegedly disadvantaged Democrats.[46] Although a majority of the Justices agreed that partisan gerrymandering presented a justiciable claim,[47] there was no majority opinion on the applicable standard. Justice Byron White wrote for the majority on the question of justiciability, but only for a four-Justice plurality on the merits.[48] The plurality would have required "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group" for the plaintiffs to succeed.[49] On the intent prong, the plurality noted

40. 462 U.S. at 727.
41. *See id.* at 727, 738, 744.
42. *Id.* at 730.
43. *See id.* at 751-53 (Stevens, J., concurring).
44. *Id.* at 751.
45. 478 U.S. 109 (1986).
46. *See id.* at 113.
47. *See id.* at 113, 118, 125.
48. *See id.* at 113, 118; *id.* at 113, 143 (plurality opinion).
49. *Id.* at 127 (plurality opinion) (citing City of Mobile v. Bolden, 446 U.S. 55, 67-68 (1980)).

that it generally should not be difficult to show that legislators intended the consequences of the plan.[50] This decision effectively placed all the weight on the effect prong. On effect, the plurality thought it insufficient for plaintiffs to show that it was more difficult for members of one party to elect their preferred representatives.[51] Rather, they believed that the plan must "consistently degrade" their influence to violate the Equal Protection Clause.[52] The plurality concluded that Indiana Democrats had failed to meet this high standard and thus rejected their claim.[53]

Two Justices in *Bandemer*—Justice Lewis Powell, joined by Justice Stevens—agreed that partisan gerrymandering claims were justiciable, but dissented from the rejection of Indiana Democrats' claim.[54] Justice Powell suggested a multifactor test, drawn in part from Justice Stevens's *Karcher* concurrence, that focused on the shape of districts, their adherence to political subdivisions, the procedures used in adopting the plan, and the legislature's goals.[55] Justices Powell and Stevens found that plaintiffs had shown sufficient indicia of partisan gerrymandering to sustain their claims.[56]

Justice Sandra Day O'Connor wrote for the three remaining Justices in *Bandemer*.[57] They agreed with the plurality that plaintiffs' claims should be rejected, but would have done so on the ground that partisan gerrymandering presented a nonjusticiable political question.[58] The upshot was that there was a six-Justice majority for the proposition that partisan gerrymandering claims were justiciable, but no majority agreement on the appropriate legal standard.

The result of *Bandemer* was an abundance of futility. As one of the leading casebooks put it, *Bandemer* offered "an invitation to litigation without much prospect of redress."[59] Proving the consistent

---

50. *Id.* at 129.

51. *See id.* at 131.

52. *Id.* at 132.

53. *Id.* at 143.

54. *Id.* at 161-62 (Powell, J., concurring in part and dissenting in part).

55. *Id.* at 173 (citing Karcher v. Daggett, 462 U.S. 725, 753-61 (1983) (Stevens, J., concurring)).

56. *See id.* at 174, 185.

57. *Id.* at 144 (O'Connor, J., concurring in the judgment).

58. *Id.*

59. SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 886 (rev. 2d ed. 2002).

degradation of political power upon which the *Bandemer* plurality insisted proved a virtually insurmountable hurdle.

Almost two decades later, the Court returned to the issue—but again, without a majority opinion. Plaintiffs in *Vieth v. Jubelirer* challenged a Republican-drawn congressional redistricting plan that allegedly disadvantaged Democrats.[60] This time, Justice Antonin Scalia wrote for a four-Justice plurality that would have held partisan gerrymandering claims nonjusticiable.[61] The plurality did not disagree with the view that extreme partisan gerrymanders are "incompatib[le] ... with democratic principles," or even that they might be unconstitutional.[62] It instead concluded that it was not for the courts to say because there were no judicially discoverable and manageable standards to govern partisan gerrymandering claims.[63]

On the other side of the Court, four Justices thought that partisan gerrymandering claims were justiciable. Justice Stevens, Justice David Souter (joined by Justice Ruth Bader Ginsburg), and Justice Stephen Breyer each wrote dissenting opinions offering an equal protection standard by which partisan gerrymandering might be judged. Justice Stevens suggested a district-by-district approach drawn from the Court's racial gerrymandering cases, under which the predominance of partisanship would render a district constitutionally suspect.[64] Justice Souter also proposed a district-based approach, one that would consider multiple factors including the intentional manipulation of lines to pack or crack the nondominant party, drawing mostly from the Court's equal protection cases.[65] Justice Breyer, on the other hand, would have looked to the plan as a whole, considering whether it amounted to "the *unjustified* use of political factors to entrench a minority in power."[66] Justice Scalia's plurality opinion saw the three different legal standards offered by the dissenters as evidence that there was no judicially discernable

60. 541 U.S. 267 (2004) (plurality opinion).
61. *Id.* at 281.
62. *Id.* at 292.
63. *Id.* at 281.
64. *Id.* at 336 (Stevens, J., dissenting).
65. *Id.* at 343, 347-51 (Souter, J., dissenting).
66. *Id.* at 355, 360 (Breyer, J., dissenting).

and manageable standard, and thus that partisan gerrymandering claims were nonjusticiable political questions.[67]

In the middle of the *Vieth* Court was Justice Kennedy, who agreed with dissenters that the claim was justiciable but would have rejected it on the merits, without offering a clear standard for how those claims should be evaluated.[68] While saying that there were "weighty arguments" for finding partisan gerrymandering claims nonjusticiable, Justice Kennedy left the door open for them, saying that "a standard might emerge" in some future case.[69] Justice Kennedy also suggested that the First Amendment might provide a more satisfactory textual basis for partisan gerrymandering claims than the Equal Protection Clause.[70] Although he did not offer much detail on the contours of such a claim, he identified a "First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views."[71] I address this portion of Justice Kennedy's opinion at greater length in Part III.A. For now, what is most significant is that all the First Amendment cases involve the right of expressive association.

The stalemate continued in the next partisan gerrymandering case, *League of United Latin American Citizens* (*LULAC*) *v. Perry*, which arose from Texas Republicans' mid-decade congressional redistricting plan.[72] This time, the Court was even more splintered. Justice Kennedy wrote the lead opinion.[73] In a brief section for which he had a majority, Justice Kennedy declined to revisit the majority views in *Bandemer* and *Vieth* that partisan gerrymandering claims are justiciable.[74] Writing only for himself, Justice Kennedy then rejected the various standards that plaintiffs had proposed.[75] He also considered the symmetry standard proposed by

67. *Id.* at 292 (plurality opinion).
68. *See id.* at 306 (Kennedy, J., concurring in the judgment).
69. *Id.* at 309, 312.
70. *Id.* at 314-15.
71. *Id.* at 314 (citing Elrod v. Burns, 427 U.S. 347 (1976) (plurality opinion)).
72. 548 U.S. 399 (2006).
73. *Id.* at 408-09 (Kennedy, J.).
74. *Id.* at 413-14 (majority opinion).
75. *Id.* at 416-19 (Kennedy, J.).

amici political scientists, which compared how each of the parties would have hypothetically fared with a given percentage of the vote.[76] While Justice Kennedy stated that he would not "altogether discount[ ] its utility in redistricting planning and litigation," he thought that "asymmetry alone is not a reliable measure of unconstitutional partisanship."[77] Absent any other test, Justice Kennedy felt compelled to reject plaintiffs' claims.[78] The two newest members of the Court at that time, Chief Justice John Roberts and Justice Samuel Alito, agreed with Justice Kennedy that the plaintiffs' claims should be rejected due to their failure to identify a reliable standard, but did not opine on whether partisan gerrymandering claims were unconstitutional.[79]

The remaining Justices more or less adhered to the positions they had staked in *Vieth*. Justices Stevens, Souter, Ginsburg, and Breyer all maintained that partisan gerrymandering claims under the Equal Protection Clause were justiciable,[80] while Justices Scalia and Thomas disagreed.[81] The main difference was that Justices Stevens and Breyer this time agreed on a standard, viewing the legislature's *sole* purpose in drawing the new map to be the maximization of partisan advantage.[82] Justice Breyer joined Justice Stevens's partial dissent, which argued that "to rely exclusively on partisan preferences in drawing district lines" violates both the Equal Protection Clause and the First Amendment.[83] Yet they offered little elaboration of their First Amendment theory beyond the idea that it reflects the "duty of the sovereign to govern impartially."[84]

---

76. *Id.* at 419-20.

77. *Id.* at 420.

78. *See id.* at 423 (pluralilty opinion).

79. *See id.* at 492-93 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

80. *See id.* at 447 (Stevens, J., concurring in part and dissenting in part); *id.* at 483 (Souter, J., concurring in part and dissenting in part); *id.* at 491 (Breyer, J., concurring in part and dissenting in part).

81. *Id.* at 511-12 (Scalia, J., concurring in the judgment in part and dissenting in part).

82. *See id.* at 447, 458 (Stevens, J., concurring in part and dissenting in part); *id.* at 491 (Breyer, J., concurring in part and dissenting in part).

83. *Id.* at 461 (Stevens, J., concurring in part and dissenting in part).

84. *Id.* at 462.

These precedents have left lower courts in a quandary. There can be no doubt that partisan gerrymandering claims are justiciable under existing Supreme Court precedent. To the extent there was any doubt on that question after *Vieth*, *LULAC* dispelled it. Yet it is equally clear that there is no agreement on the legal standard that should govern partisan gerrymandering claims or even on the textual basis for such claims. The result has been for lower courts to do their best to piece together a legal standard from the fragments the Supreme Court has offered, as exemplified in recent cases arising from Maryland and Wisconsin, both of which rest in part on a First Amendment theory.[85]

While the courthouse doors remain open to partisan gerrymandering claims, there can be doubt as to the message that state legislators have received from the Supreme Court's inability to agree on a legal standard. The redistricting cycle that followed *Vieth* and *LULAC* witnessed some of the most extreme partisan gerrymanders ever.[86] Republicans were particularly adept in drawing favorable maps in the many states—thanks to their success in the 2010 election—where they held the pen.[87] These maps were the consequences of a concerted effort led by the Republican State Legislative Committee's Redistricting Majority Project (REDMAP) to draw plans that would systematically advantage Republicans, increasing their total number of seats while giving them enough safe seats to preserve legislative majorities even in an exceptionally strong

85. *See* Whitford v. Gill, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (three-judge court), *argued*, No. 16-1161 (U.S. Oct. 3, 2017); Shapiro v. McManus, 203 F. Supp. 3d 579 (D. Md. 2016) (three-judge court). These cases are discussed in Part III.

86. *See* Stephanopoulos & McGhee, *supra* note 2, at 836, 867-76; *see also* LAURA ROYDEN & MICHAEL LI, EXTREME MAPS 1-2 (2017), https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16.pdf [https://perma.cc/E6TG-R9MY]; Wang, *supra* note 30, at 1282, 1294-99; Jeffrey S. Buzas & Gregory S. Warrington, Gerrymandering and the Net Number of US House Seats Won Due to Vote-Distribution Asymmetries (July 20, 2017) (unpublished manuscript), https://arxiv.org/pdf/1707.08681.pdf [https://perma.cc/3Q3Y-KE45]. *But see* Jowei Chen & David Cottrell, *Evaluating Partisan Gains from Congressional Gerrymandering: Using Computer Simulations to Estimate the Effect of Gerrymandering in the U.S. House*, 44 ELECTORAL STUD. 329, 338 (2016) (estimating that partisan gerrymandering resulted in only one net U.S. House seat for Republicans).

87. *See* Stephanopoulos & McGhee, *supra* note 2, at 872; Wang, *supra* note 30, at 1291-92; *see also* Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 WM. & MARY L. REV. 2115, 2135 (2018).

Democratic year.[88] The Court's inability to agree upon a standard has effectively green-lighted red and blue maps.

A striking example is the gerrymandering of Ohio after the last census. Although a consummate purple state in presidential elections, Ohio's congressional and state legislative redistricting plans overwhelmingly favor the Republican Party.[89] To ensure secrecy, the maps were drawn in a hotel room close to the Ohio Statehouse, which Republican operatives referred to as "[t]he Bunker."[90] The state legislature ultimately adopted a congressional plan in which eleven of Ohio's sixteen districts had safe Republican majorities, plus one district with a slightly smaller Republican majority.[91] Democrats were concentrated into the remaining four districts.[92] This cracking and packing of Democrats has achieved its intended purpose marvelously. REDMAP boasted that the redrawn congressional map gave Republicans twelve of sixteen seats in 2012, "despite voters casting only 52 percent of their vote for Republican congressional candidates."[93] Republicans maintained all of these seats through the first three elections of the current decade.[94] In 2016, in the *closest* congressional contest—for Ohio's First District—the

88. For a detailed description of these efforts, see generally DAVID DALEY, RATF**KED: THE TRUE STORY BEHIND THE SECRET PLAN TO STEAL AMERICA'S DEMOCRACY (2016). *See also* Tim Dickinson, *How Republicans Rig the Game*, ROLLING STONE (Nov. 11, 2013), http://www.rollingstone.com/politics/news/how-republicans-rig-the-game-20131111 [https://perma.cc/N4AJ-NYWM].

89. Under Ohio's Constitution, the state legislature draws congressional plans and a seven-person commission draws state legislative plans. OHIO CONST. art. XI, § 1. Republicans controlled both chambers of the state legislature and held the Governor's office in 2011, and therefore controlled the congressional redistricting process. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, STATE VOTE: 2011 STATE AND LEGISLATIVE PARTISAN COMPOSITION (2011), http://www.ncsl.org/documents/statevote/2010_Legis_and_State_post.pdf [https://perma.cc/AAN9-YK2H]. They also held all three of the statewide offices—Governor, Secretary of State, and Auditor—with seats on the apportionment board, therefore giving them control of state-legislative redistricting as well. *See* JIM SLAGLE, OHIO CAMPAIGN FOR ACCOUNTABLE REDISTRICTING, OHIO REDISTRICTING TRANSPARENCY REPORT: THE ELEPHANT IN THE ROOM 5 (2011), http://www.lwvohio.org/assets/attachments/file/The%20Elephant%20in%20the%20Room%20-%20Transparency%20Report.pdf [https://perma.cc/PT82-PXMH].

90. DALEY, *supra* note 88, at 88-89.

91. *See id.* at 90.

92. *See id.*

93. *Id.* at 86-87.

94. *See Party Control of Ohio State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Ohio_state_government [https://perma.cc/H832-4ENM].

winner prevailed by a margin of over 18 percent.[95] Ohio's partisan-reapportionment board, which was also controlled by Republicans, drew plans that assured Republicans a supermajority in both chambers of the state legislature.[96] In fact, Republicans were able to win sixty of the state's ninety-nine state house seats in 2012, even though the Republican candidates received fewer overall votes.[97] The state senate map even more strongly favored Republicans, giving them twenty-three of thirty-three seats,[98] a margin they have since expanded to twenty-four of thirty-three (72.7 percent).[99] Neither the congressional nor the state legislative maps can plausibly be explained by an adherence to neutral criteria such as compactness and the preservation of political subdivisions.[100] Nor was the partisan bias of the plans accidental. Documents obtained by a nonpartisan watchdog group after the process had concluded demonstrated that the mapmakers created an index that would maximize Republican advantage, not only by giving them a supermajority of seats but also by creating a sufficient cushion so that Republicans would maintain a majority even in strong Democratic years.[101]

The Court's redistricting cases also reveal the challenge in trying to ground partisan gerrymandering claims in the Equal Protection Clause. The prototypical equal protection claim relies on proof of discriminatory intent. The racial gerrymandering cases have adapted this requirement to redistricting, applying strict scrutiny if plaintiffs can show that race is the predominant factor in drawing district lines.[102] In slightly different ways, the *Vieth* and *LULAC* dissenters all tried to adapt an intent-based requirement to the problem of partisan gerrymandering.[103] There are reasons to doubt

95. *See 2016 Official Election Results*, OHIO SECRETARY ST., https://www.sos.state.oh.us/elections/election-results-and-data/2016-official-elections-results/ [https://perma.cc/82ED-5BW8] (showing that Steve Chabot (R) received 59.19 percent of the vote, while Michelle Young (D) received 40.77 percent).

96. *Cf.* SLAGLE, *supra* note 89, at 2, 5; *Ohio*, ALL ABOUT REDISTRICTING, http://redistricting.lls.edu/states-OH.php [https://perma.cc/Q2B8-3EVR].

97. *See* DALEY, *supra* note 88, at 86.

98. *Id.*

99. *Ohio State Senate Elections, 2016*, BALLOTPEDIA, https://ballotpedia.org/Ohio_State_Senate_elections,_2016 [https://perma.cc/94XR-MLWE].

100. *See* SLAGLE, *supra* note 89, at 9-12.

101. *See id.* at 18-19.

102. *See, e.g.*, Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 800 (2017).

103. *See* LULAC v. Perry, 548 U.S. 399, 447 (2006) (Stevens, J., concurring in part and

the viability of this approach, even aside from its failure to garner five votes.

The Court's racial gerrymandering cases demonstrate the difficulty of coming up with a manageable standard grounded in discriminatory intent. It is hard enough to ascertain the intent of a single person, all the more difficult with a multimember body such as a legislature. These concerns are at their apex in redistricting, where there are always multiple motivations—including but not limited to race and partisanship—that underlie the lines drawn. The Court's persistent disagreement over the legal standard in racial gerrymandering cases, almost a quarter century after its seminal decision in *Shaw v. Reno*, should provoke hesitation in exporting a comparable standard to partisan gerrymandering.[104] If anything, an intent-based standard is even more problematic in the context of partisan gerrymandering. That is not only because partisan considerations almost invariably play a role in districting, but also because the partisanship can only fairly be evaluated in the context of the plan as a whole—not merely by looking at a particular district, as the racial gerrymandering standard does.[105] After all, the whole point of partisan gerrymandering is to advantage the dominant party by maximizing its share of seats and ensuring that this advantage will endure even in a strong year for the nondominant major party. All of this suggests that we should be skeptical of using the Equal Protection Clause, at least as traditionally applied, as the primary source of partisan gerrymandering claims. As Justice Kennedy has suggested, First Amendment precedent suggests a more promising route.[106]

---

dissenting in part); *id.* at 483 (Souter, J., concurring in part and dissenting in part); *id.* at 491 (Breyer, J, concurring in part and dissenting in part); Vieth v. Jubelirer, 541 U.S. 267, 317 (2004) (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting).

104. *See* 509 U.S. 630 (1993). For a discussion of the problems with the *Shaw* racial gerrymandering standard, see generally Daniel Hays Lowenstein, *You Don't Have to Be a Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779 (1998).

105. *See, e.g.*, Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1265 (2015).

106. *See Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment).

II. AN ALTERNATIVE PATH

The Supreme Court has never accepted the idea that voting is a form of *speech* deserving of protection under the First Amendment. But it has recognized voting as a form of protected association, at least in certain contexts.[107] From its earliest cases involving the right of association, the Court has demonstrated special concern for the interests of nondominant political factions, including political parties.[108] There are good reasons for this concern, arising from the idea that the First Amendment is essential to self-government.[109] A core component of this vision is that the dominant political group may not misuse its power to diminish the voice of those with competing political views.[110] Although the Court has not understood voting as a protected form of speech, it has understood certain restrictions on voting as violative of the First Amendment right of association.[111] The idea is that the ballot is one of the central loci for voters, candidates, and parties to associate politically.[112] This line of reasoning can and should be understood to apply to redistricting plans that entrench the dominant party in power. This Part traces the roots of First Amendment cases linking voting and association, explaining how they furnish a doctrinal basis for judicial intervention in partisan gerrymandering.

A. The Right of Expressive Association

For all the scholarly commentary on the subject of partisan gerrymandering, the relevance of expressive association has mostly been overlooked. A handful of articles address the link between

107. Tokaji, *supra* note 16, at 771-84.

108. *See id.* at 766-69.

109. This idea is most closely associated with the work of Alexander Meiklejohn. *See* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 263; *see also* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 25-28 (1960); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1407 (1986).

110. *See* Tokaji, *supra* note 16, at 782-86.

111. *See id.* at 771-84.

112. *See id.* at 774, 776, 789.

voting and free speech outside the context of redistricting.[113] Guy Charles analyzed the relationship between association and redistricting in an article published before *Vieth* and *LULAC*, though he focused on racial equality rather than partisan gerrymandering.[114] Writing after these cases, David Schultz articulated the most elaborate scholarly defense of the idea that the First Amendment reaches partisan gerrymandering. His analysis relies primarily on liberal political theory and the patronage cases, rather than on the body of cases recognizing voting as a protected form of political association.[115] Other prominent scholars, however, have criticized the idea that the First Amendment might limit partisan gerrymanders.[116]

What most of this scholarship misses is the fact that the Supreme Court has long recognized voting as a protected form of association, at least in certain contexts. To understand these cases, it is necessary to go back to the origins of the right of expressive association,

---

113. Leading examples include Abner S. Greene, *Is There a First Amendment Defense for* Bush v. Gore*?*, 80 NOTRE DAME L. REV. 1643 (2005) (arguing that First Amendment doctrine should have been applied in *Bush v. Gore* to invalidate "voter intent" instruction for recounting ballots by hand); Janai S. Nelson, *The First Amendment, Equal Protection, and Felon Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111 (2013) (arguing that viewpoint discrimination doctrine should be used to evaluate restrictive voter participation laws); and Lori A. Ringhand, *Voter Viewpoint Discrimination: A First Amendment Challenge to Voter Participation Restrictions*, 13 ELECTION L.J. 288 (2014) (advancing a "First Amendment Equal Protection" theory to address the equality concerns in the electoral sphere). I briefly addressed the relevance of free speech to redistricting in a previous article. *See* Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2515-19 (2003).

114. *See* Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CALIF. L. REV. 1209 (2003).

115. *See* David Schultz, *The Party's Over: Partisan Gerrymandering and the First Amendment*, 36 CAP. U. L. REV. 1, 30 (2007). In a similar vein, Terry Smith argued that First Amendment retaliation cases provide a basis for challenging partisan gerrymanders. Terry Smith, Bond v. Floyd *and Expressive Proscriptions on the Partisan Gerrymander*, 2016 WIS. L. REV. FORWARD 122, 124-25. For another sympathetic commentary on the relationship between free speech and gerrymandering, see JoAnn D. Kamuf, Note, *"Should I Stay or Should I Go?": The Current State of Partisan Gerrymandering Adjudication and a Proposal for the Future*, 74 FORDHAM L. REV. 163, 166-67 (2005).

116. Alexander & Prakash, *supra* note 29, at 45-46; Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 397, 407-09 (2005); Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims after* Vieth, 3 ELECTION L.J. 626, 636-37 (2004); Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 563-64 (2004); Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 58-59 (2004).

focusing particularly on its protection for political parties.[117] The Constitution, of course, does not expressly mention political parties.[118] The Framers took steps to curb what James Madison famously referred to as "the mischiefs of faction,"[119] a category in which they would likely have placed political parties.[120] Yet political parties quickly developed in the United States. As Justice Stanley Reed observed, this was out of necessity, given the need to organize the scattered and rapidly growing population of the new nation.[121]

So, too, the right of association is not expressly mentioned in the Constitution, though the "right of political association" was recognized and celebrated as early as the time of Alexis de Tocqueville.[122] The Supreme Court first affirmed the right of association in *NAACP v. Alabama ex rel. Patterson*.[123] That case involved a state court order requiring the NAACP to disclose its membership lists, a mandate that would have subjected those listed to grave harms and stymied its ability to attract any new members.[124] Justice John Harlan's opinion for the Court cited the harm to the group and its members' ability to join together for expressive purposes.[125] Noting that the ability to speak effectively is enhanced by group association, the Court wrote: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[126] In other words, the right of association is a necessary corollary of free speech. A few years later, in *NAACP v. Button*, the Court held that the NAACP had a right to solicit prospective clients, recognizing its party-like status in public discourse.[127] Though it was "not a

117. These cases are addressed in greater detail in Tokaji, *supra* note 16, at 766-71.

118. DANIEL HAYS LOWENSTEIN ET AL., ELECTION LAW 546 (6th ed. 2017).

119. THE FEDERALIST NO. 10 (James Madison).

120. *See* RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840, at 53-54 (1969).

121. Ray v. Blair, 343 U.S. 214, 220-21 (1952).

122. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 180-85 (Harvey C. Mansfield & Delba Winthrop eds., 2000).

123. *See* 357 U.S. 449, 466 (1958).

124. *Id.* at 451, 462-63.

125. *Id.* at 462-63.

126. *Id.* at 460.

127. *See* 371 U.S. 415, 431, 434, 444 (1963).

conventional political party," its advocacy activities sought to advance the common interests of southern Blacks and thus warranted protection.[128]

Other early association cases extended protection not only to civil rights groups, but also to the Communist Party and other "subversive" groups.[129] In *Noto v. United States*, for example, the Court reversed the conviction of a party member where the specific intent to further unlawful activities had not been proven.[130] The original association cases were thus focused on the rights of dissident political parties and other groups, engaging in expressive activities that the powers-that-be looked at with disfavor. The idea was that democratic discourse would be impoverished if their voices were diminished. From the beginning, then, First Amendment association was rooted in the *systemic* importance to democratic debate, not just the individual's interest in associating with like-minded others. The core concern is that the dominant faction would abuse its power to suppress collective expression of ideas that might weaken its grip on power. Largely on this rationale, the freedom of association was later extended to other areas such as compelled association,[131] campaign finance regulation,[132] and patronage.[133]

The right of expressive association is closely linked to the First Amendment's prohibition on content and viewpoint discrimination. As Justice Thurgood Marshall wrote in *Police Department of the City of Chicago v. Mosley*, it "means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[134] Or as Justice Scalia aptly put it in one of his last dissents, "[T]he First Amendment is a kind of Equal

128. *Id.* at 431.

129. *See, e.g.*, Keyishian v. Bd. of Regents of the Univ. of N.Y., 385 U.S. 589, 609-10 (1967); Elfbrandt v. Russell, 384 U.S. 11, 19 (1966).

130. 367 U.S. 290, 298-300 (1961). Later cases extended this protection to public employment, *see, e.g.*, United States v. Robel, 389 U.S. 258, 259-62 (1967); *Keyishian*, 385 U.S. at 609-10; *Elfbrandt*, 384 U.S. at 19, and bar membership, *see, e.g.*, *In re* Stolar, 401 U.S. 23, 30-31 (1971) (plurality opinion); Baird v. State Bar of Ariz., 401 U.S. 1, 7-8 (1971) (plurality opinion).

131. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 656-59 (2000); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233-35 (1977).

132. *See* Buckley v. Valeo, 424 U.S. 1, 24-25, 64 (1976) (per curiam).

133. *See* Elrod v. Burns, 427 U.S. 347, 359-60 (1976) (plurality opinion).

134. 408 U.S. 92, 95 (1972).

Protection Clause for ideas."[135] This applies with special force when *political* speech is concerned. The concern is that government officials will misuse their authority to suppress the views of those who might challenge their authority. Most important, it prevents the dominant political group from trying to diminish the collective voice of their opponents. In accordance with this ideal, the first generation of expressive association cases restrict the government's ability to discourage or punish people for joining disfavored groups like the NAACP or Communist Party.[136]

These decisions are partly about the infringement on the individual liberty interest in determining what groups one does and does not wish to associate with. But they also implicate the functioning of the political system—most notably, the harm that would flow from allowing the dominant faction to suppress nondominant groups. An example is *Elrod v. Burns*, the seminal patronage decision in which the Court invalidated party membership requirements for certain government jobs.[137] After describing the harm to the liberty of individual employees arising from such requirements, the plurality wrote:

> It is not only belief and association which are restricted where political patronage is the practice. The free functioning of the electoral process also suffers. Conditioning public employment on partisan support prevents support of competing political interests. Existing employees are deterred from such support, as well as the multitude seeking jobs. As government employment, state or federal, becomes more pervasive, the greater the dependence on it becomes, and therefore the greater becomes the power to starve political opposition by commanding partisan support, financial and otherwise. Patronage thus tips the electoral process in favor of the incumbent party, and where the

135. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1680 (2015) (Scalia, J., dissenting). For other expressions of this idea, see Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 26-29 (1975); Ringhand, *supra* note 113, at 293-94; Schultz, *supra* note 115, at 51; and Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 201-02 (1983).

136. *See, e.g.*, Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

137. 427 U.S. at 359-60, 373 (plurality opinion).

> practice's scope is substantial relative to the size of the electorate, the impact on the process can be significant.[138]

Elrod thus clarified that the right of association implicates the proper functioning of the democratic process as well as individual liberty.[139] A central concern was that patronage would allow the incumbent party to entrench itself while decimating its opposition.[140] *Elrod* also exemplified the important status of political parties in association jurisprudence.[141] Because parties are the main entity through which individuals and candidates join for electoral purposes, practices that inhibit fair competition among the parties are especially noxious. In this respect, associational rights under the First Amendment are quite different from equal protection rights under the Fourteenth Amendment, where parties have generally played a peripheral role.[142]

In one sense, *Elrod*'s concern with entrenchment is directly relevant to partisan gerrymandering. Both patronage and gerrymandering are means by which the dominant party can preserve its grip on power, thwarting the accountability upon which democracy depends. Yet there is no denying that the mechanism by which that self-entrenchment occurs is much different. Firing someone because of her political affiliations works a concrete and individualized harm, in a way that gerrymandering—however severe—does not. Moreover, the patronage cases do not directly involve voting. It is one thing to say that the First Amendment protects the right to political association, including affiliation with nondominant political parties. But it would require another step—some might even claim a leap—to say that the First Amendment protects association among voters, candidates, and parties *in the electoral process*.

---

138. *Id.* at 356. For a discussion of this passage, see Schultz, *supra* note 115, at 45-46.

139. *See Elrod*, 427 U.S. at 356.

140. *See id.*

141. *See id.* at 372.

142. An important exception is the White Primary line of cases, in which the Court struck down laws that effectively excluded African Americans from electoral politics by keeping them out of the Democratic Party, which was the only game in town in southern states such as Texas at the time. *See* Terry v. Adams, 345 U.S. 461, 462, 469-70 (1953); Nixon v. Condon, 286 U.S. 73, 81, 89 (1932); Nixon v. Herndon, 273 U.S. 536, 541 (1927).

B. Voting as Association

As it turns out, however, the Supreme Court took this step almost a half century ago, just a few years after its articulation of the one-person, one-vote rule. In *Williams v. Rhodes*, the Supreme Court considered a challenge to Ohio's restrictions on new political parties' access to the ballot.[143] The State required new parties to file petition signatures equal to 15 percent of the ballots cast in the preceding gubernatorial election, a requirement that was challenged by George Wallace's American Independent Party and the Socialist Labor Party.[144] In an opinion by Justice Hugo Black, the Supreme Court invalidated Ohio's ballot-access rule, relying on both the First Amendment right of association and the Equal Protection Clause.[145] It reasoned that the State's restriction "g[a]ve the two old, established parties a decided advantage ... plac[ing] substantially unequal burdens on both the right to vote and the right to associate."[146] The Court thus stressed the risk of dominant parties using voting rules to entrench themselves in power, giving them a "complete monopoly" on power while harming nondominant parties and their supporters.[147] It thus imposed an impermissible burden on voting and associational rights.[148] *Williams* went beyond prior cases in establishing the ballot as a locus for association between voters, candidates, and parties. Moreover, it relied on the practical effect that the State's restrictions had on minor political parties and their supporters.

In cases following *Williams*, the Court would consider a number of other ballot-access requirements, upholding some[149] while striking down others.[150] It also extended the right of association to other

143. 393 U.S. 23, 24 (1968).

144. *Id.* at 24-26.

145. *Id.* at 31, 34.

146. *Id.* at 31.

147. *See id.* at 32.

148. *See id.* at 34.

149. *See, e.g.*, Storer v. Brown, 415 U.S. 724, 726, 736 (1974) (upholding a requirement that candidates disaffiliate from political parties one year before running as independent candidates); Jenness v. Fortson, 403 U.S. 431, 432, 441-42 (1971) (upholding a requirement that minor-party and independent candidates obtain signatures from at least 5 percent of registered voters to obtain access to the ballot).

150. *See, e.g.*, Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 187 (1979) (invalidating a requirement that new parties and independent candidates obtain at least

aspects of voting. An example is *Kusper v. Pontikes*, challenging an Illinois law that kept voters from voting in a party primary if they had cast a ballot in another party's primary within the previous twenty-three months.[151] In striking down this voting restriction, the Court relied on the right of association, reasoning that the law impaired the plaintiff's "ability to associate effectively with the party of her choice."[152] Though the law did not completely bar voters from associating with their preferred parties, it imposed a "substantial restraint" on the voter's participation in the political party's "basic function" of choosing a candidate, and was therefore invalid.[153] Other cases from this era extended the right of association to voters banding together to support ballot measures or candidates of their choice.[154]

The next major development in the link between the right of association and the right to vote was the Court's decision in *Anderson v. Celebrezze*, in which the Court articulated a constitutional standard for evaluating restrictions on access to the ballot.[155] *Anderson* arose from independent candidate John Anderson's attempt to obtain access to Ohio's ballot in the 1980 presidential election.[156] The State required independent candidates to file papers in late March, long before the major parties' primary processes had concluded.[157] In an opinion by Justice Stevens, the Court struck down Ohio's requirement.[158] The Court's opinion relied on the "overlapping" First Amendment right of association and the right to vote under the Equal Protection Clause.[159] It is therefore a sort of hybrid right.[160] Recognizing that states must of necessity impose some limits on

---

twenty-five thousand signatures to get on the ballot); Lubin v. Panish, 415 U.S. 709, 711, 718 (1974) (striking down a $701.60 filing fee).

151. 414 U.S. 51, 52, 61 (1973).

152. *Id.* at 58.

153. *Id.* (quoting NAACP v. Alabama, 357 U.S. 449, 462 (1958)).

154. *See, e.g.*, Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, 454 U.S. 290, 294, 296 (1981); Buckley v. Valeo, 424 U.S. 1, 24-25 (1976) (per curiam).

155. 460 U.S. 780 (1983).

156. *Id.* at 782.

157. *See id.* at 782-83, 783 n.1.

158. *See id.* at 782, 806.

159. *Id.* at 786-87, 786 n.7 (quoting Williams v. Rhodes, 393 U.S. 23, 30-31 (1968)).

160. *See* Tokaji, *supra* note 16, at 776. *But see* Charles, *supra* note 114, at 1212-13 (understanding the Court to be relying on the Equal Protection Clause instead of the First Amendment).

access to the ballot, the Court proceeded to articulate a balancing test for assessing such claims.[161] Under this standard, courts should first consider the "character and magnitude of the asserted injury" to associational and voting rights.[162] It should then "identify and evaluate the precise interests put forward by the [s]tate," including the extent to which the state's "interests make it necessary to burden the plaintiff's rights."[163] It should then "weigh[ ]" the injuries imposed against the state's interests.[164] The Court emphasized that there is no "litmus-paper test" to separate permissible and impermissible restrictions, nor any way of avoiding the "hard judgments" that courts must make.[165]

Anderson noted that "the state's important regulatory interests" could generally "justify reasonable, nondiscriminatory restrictions."[166] Though it did not provide much explicit guidance on the meaning of these terms, some clues may be found in the application of this standard to the facts before it. The Court struck down Ohio's ballot-access restriction on the ground that the State's very early filing deadline for independent candidates imposed too onerous a burden on independent candidates and the voters who support them.[167] It noted that such "[a]n early ... deadline may have a substantial impact on independent-minded voters."[168] An independent candidate may serve as a rallying point for "disaffected" voters who are dissatisfied with the choices offered by both major parties.[169] Because Ohio's filing deadline passed long before the parties' primary processes were complete, it would substantially impede disaffected voters from associating in this way. To deny them access would conflict with the fundamental First Amendment value in "uninhibited, robust, and wide-open" public debate.[170]

Three points from the Court's analysis are especially salient. First, there was an *identifiable class of voters* who were impeded

161. *Anderson*, 460 U.S. at 788-90.
162. *Id.* at 789.
163. *Id.*
164. *Id.*
165. *Id.* at 789-90 (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).
166. *Id.* at 788.
167. *Id.* at 790.
168. *Id.*
169. *See id.* at 792 (quoting Williams v. Rhodes, 393 U.S. 23, 33 (1968)).
170. *See id.* at 794 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

from associating with one another—Justice Stevens described them as the "disaffected."[171] Second, this class of voters *was not completely barred* from associating with another. Rather, the ability of disaffected voters to associate was impeded by Ohio's early filing deadline, which made it more difficult for them to rally around an independent candidate emerging in response to the two major parties' presidential nominees.[172] Third, the Court focused on the *burden* that the law imposed on disaffected voters and their preferred candidate.[173] In light of this burden, the Court concluded that Ohio's law "discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties."[174] Critically, the Court did not require plaintiffs to prove that the state law was enacted or applied with the *intent* to discriminate against them on this ground. This sheds light on the Court's prior remark that "reasonable, nondiscriminatory restrictions" may generally be justified by the state's "important regulatory interests."[175] Neither intent nor a traditionally suspect classification was required to find that the law was "discriminatory." Rather, it was sufficient that the law substantially burdened an identifiable group of voters' ability to associate with one another.[176]

Three years later, the Court extended *Anderson*'s standard to *major parties* and their supporters. In *Tashjian v. Republican Party of Connecticut*, the Court struck down Connecticut's prohibition on independent voters participating in party primaries, as applied to the State's Republican Party that had adopted a rule allowing independents to participate in its primary.[177] Democrats controlled the state legislature which, "substantially along party lines," had rejected the Republican Party's attempt to modify state law to allow independents to vote in its primary.[178] This time, the Court relied exclusively on the First Amendment right of association, not on the

171. *See id.* at 792 (quoting *Williams*, 393 U.S. at 33).
172. *See id.*
173. *See id.* at 793-94.
174. *Id.* at 794.
175. *See id.* at 788.
176. *See id.* at 806.
177. 479 U.S. 208, 210, 225 (1986).
178. *See id.* at 212-13.

Equal Protection Clause.[179] Applying *Anderson*'s balancing test, Justice Marshall's opinion for the Court noted that the state rule limited participation in the party's "basic function" of selecting a candidate, even though the party had "invite[d]" them to participate.[180] The State thus "limit[ed] the Party's associational opportunities at the critical juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community."[181] Applying strict scrutiny, the Court struck down Connecticut's restriction, finding the State's claimed interests in avoiding administrative burdens, party raiding, and voter confusion and in preserving the two-party system inadequate.[182]

Two aspects of *Tashjian*'s analysis bear emphasis. First, it was critical that the Republican Party had invited independents to participate in its primary, but were prevented from doing so by the Democratic-controlled legislature.[183] Second, the Court's ultimate concern was that this restriction on association would unfairly limit the nondominant party's "political power."[184] In this sense, *Tashjian*'s analysis of the associational interest is similar to that which appeared in *Elrod*. In both cases, the central concern was that the dominant party would misuse its authority to limit its chief rival's power and thereby entrench itself.[185] Subsequent decisions follow *Tashjian* in assessing claimed violations of major parties' associational rights, sometimes finding that those rights were violated[186] and sometimes finding no violation.[187] The key point is that the Court continued to apply the balancing test articulated in

179. *See id.* at 213-17.

180. *Id.* at 215-16 (quoting Kusper v. Pontikes, 414 U.S. 51, 58 (1973)).

181. *Id.* at 216.

182. *Id.* at 217-25.

183. *See id.* at 219-25.

184. *Id.* at 216.

185. *See id.*; Elrod v. Burns, 427 U.S. 347, 369-70 (1976) (plurality opinion).

186. *See, e.g.*, Cal. Democratic Party v. Jones, 530 U.S. 567, 586 (2000); Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 233 (1989). For criticism of these cases, see Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1742 (1993).

187. *See, e.g.*, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 459 (2008); Clingman v. Beaver, 544 U.S. 581, 597 (2005).

Anderson to major parties' claims that their associational rights had been violated.[188]

Since then, the Court has continued to apply the *Anderson* balancing standard to alleged burdens on the associational rights of both major and minor political parties. The most important refinement of *Anderson*'s standard occurred in *Burdick v. Takushi*, which upheld Hawaii's ban on write-in voting.[189] *Burdick* reaffirmed *Anderson*'s "flexible standard,"[190] while clarifying that strict scrutiny applies only if the challenged law imposes a "severe" burden on association or voting.[191] *Burdick* contrasted "severe" burdens with "reasonable, nondiscriminatory restrictions," but otherwise offered little guidance on how courts should judge the severity of the burden, beyond characterizing Hawaii's law as "politically neutral."[192] Its explicit affirmation of *Anderson*, however, suggests that severity should be judged in the manner that the Court suggested in that case—namely, by assessing the "character and magnitude" of the burden and specifically whether it disproportionately affects an identifiable political group.[193] This refined version is often referred to as the *Anderson-Burdick* standard.[194]

In the years since *Burdick*, the Court has continued to apply its refined balancing standard to a wide variety of electoral rules, including those governing ballot access and primary elections. The most significant doctrinal development is the extension of *Anderson-Burdick* to lawsuits challenging voter identification and other alleged barriers to participation, including those based solely on equal protection.

In *Crawford v. Marion County Election Board*, a divided Supreme Court rejected a facial challenge to an Indiana statute requiring most voters to present photo identification.[195] Though there was no

188. *See, e.g.*, *Wash. State Grange*, 552 U.S. at 451-52.

189. 504 U.S. 428, 441-42 (1992).

190. *See id.* at 434.

191. *Id.* (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)).

192. *Id.* at 434, 438 (first quoting *Norman*, 502 U.S. at 289; and then quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1973)).

193. *Id.* at 434 (quoting *Anderson*, 460 U.S. at 789).

194. *See, e.g.*, LOWENSTEIN ET AL., *supra* note 118, at 636. For other cases in the *Anderson* line applying its balancing test to uphold ballot-access restrictions challenged by minor parties, see *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); and *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986).

195. 553 U.S. 181, 203-04 (2008) (Stevens, J.).

majority opinion, all of the Justices applied some version of the *Anderson-Burdick* balancing standard.[196] Justice Stevens wrote the lead opinion, joined by Chief Justice Roberts and Justice Kennedy, which held that the law "impose[d] only a limited burden" on voters that was outweighed by the State's interests in fraud prevention, voter confidence, and election modernization.[197] Tellingly, the Stevens group noted that there was some evidence of partisan motivation—Indiana's law was enacted on a party-line vote, supported by Republicans and opposed by Democrats—but held that this was insufficient to invalidate it on its face: "[I]f a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators."[198] This framing indicates that the presence or absence of partisan motivation is not dispositive in assessing whether a law is discriminatory. Instead, consistent with prior iterations of *Anderson*'s balancing test, the critical question is the law's effect. Justice Scalia, joined by Justices Thomas and Alito, concurred.[199] The Scalia group would have rejected the facial challenge on more categorical grounds, avoiding an inquiry into the impact on individual voters.[200] Justice Souter, joined by Justice Ginsburg, and Justice Breyer each wrote dissenting opinions.[201] While the dissenters agreed with the Stevens group that a balancing test should be applied, they believed that the law imposed a disparate burden on the less affluent that was not justified by the State's asserted interests.[202]

Since *Crawford*, lower courts have applied the *Anderson-Burdick* standard in constitutional challenges to a wide variety of voting laws, including those governing other identification laws, early voting, and provisional voting.[203] Most of these cases have been

196. *See id.* at 189-91; *id.* at 204-05 (Scalia, J., concurring in the judgment); *id.* at 209 (Souter, J., dissenting); *id.* at 237 (Breyer, J., dissenting).

197. *Id.* at 193, 197, 203 (Stevens, J.) (quoting Burdick v. Takushi, 504 U.S. 428, 439 (1992)).

198. *Id.* at 204.

199. *Id.* (Scalia, J., concurring in the judgment).

200. *Id.* at 204-05.

201. *See id.* at 209 (Souter, J., dissenting); *id.* at 237 (Breyer, J., dissenting).

202. *See id.* at 211, 223-24 (Souter, J., dissenting); *id.* at 237-41 (Breyer, J., dissenting).

203. *See, e.g.*, Frank v. Walker, 768 F.3d 744, 755 (7th Cir. 2014); Ne. Ohio Coal. for the

brought solely under the Equal Protection Clause, not the First Amendment—a significant exception being the challenge to Texas's voter identification law.[204] Some of the challenged laws have been invalidated, others upheld, yet the standard has proven manageable in all of these cases.[205] The standard focuses courts on the right questions, requiring that they weigh the laws' burdens—particularly their burdens on different groups of voters—against the state's asserted interests.[206]

Four key points about the right to association can be drawn from the preceding discussion. The first is that, from its origins, the emphasis of associational rights has been on the *dominant group's self-entrenchment* at the expense of disfavored groups, including nondominant political parties. Second, the right of association is grounded not only in individual liberty, but also in concerns about the *systemic impact* on nondominant political groups. Third, the right of association has been understood to include voters', candidates', and parties' association *through the ballot*. Fourth, in cases involving voting as association, the Court has adopted a balancing test that focuses on the *effects rather than the intent*. It has applied this standard in cases involving both the right to association under the First Amendment and the right to vote under the Fourteenth Amendment.

What the Court has not yet done is to apply this established balancing standard to redistricting. In Part III, I explain why it should.

III. THROUGH THE THICKET

The Court's established line of voting-as-association precedent provides a firm constitutional basis for challenging excessive partisan gerrymanders. The First Amendment right of association best captures the nature of the injury in partisan gerrymandering

---

Homeless v. Husted, 696 F.3d 580, 592-93 (6th Cir. 2012) (per curiam); Obama for Am. v. Husted, 697 F.3d 423, 429, 431-32 (6th Cir. 2012).

204. *See* Veasey v. Perry, 71 F. Supp. 3d 627, 684-85 (S.D. Tex. 2014), *aff'd in part, vacated in part sub nom.* Veasey v. Abbott, 796 F.3d 487 (5th Cir. 2015), *rev'd in part*, *aff'd in part*, *vacated in part en banc*, 830 F.3d 216 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017).

205. *See* Tokaji, *supra* note 16, at 783 & nn.128-29.

206. *See id.* at 782-90 (describing lower court cases and recommending that the *Anderson-Burdick* standard be refined to focus on the partisan impact of the challenged laws).

claims, which arises from the dominant party's entrenching itself in power at the expense of the other major party and its supporters. Although the Court has not yet applied the associational-rights frame to partisan gerrymandering, the *Anderson-Burdick* standard can be extended and refined to deal with this problem. In this Part, I argue that partisan gerrymandering should be viewed as a violation of associational rights, explain how the voting-as-association standard should be adapted and applied to these claims, and answer objections to the association-based argument against partisan gerrymandering.

A. Gerrymandering as an Associational Injury

To understand why the right of association should be understood to prohibit excessive partisan gerrymanders, it is helpful to return to Justice Kennedy's *Vieth* concurrence.[207] The voting-as-association cases discussed in Part II.B help us understand the insight at the heart of this suggestion that partisan gerrymandering be examined through the lens of the First Amendment.

Recall that Justice Kennedy remarked on the parties' failure to identify equal protection principles that would both justify and confine judicial intervention.[208] At the same time, he recognized that there were compelling arguments for entering the political thicket, as the Court had previously done with respect to the problem of malapportionment.[209] Quoting *Carolene Products* footnote four, he observed that the right to vote is among the "political processes ordinarily to be relied upon to protect minorities."[210] The suggestion is that "minorities" should be understood to include nondominant political parties and their adherents, who are systematically excluded from power by excessively partisan redistricting plans.[211] Given this concern, Justice Kennedy—unlike the plurality—was unwilling to give up the search for a "workable standard."[212] But he

207. *See* Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in the judgment).

208. *See id.* at 307-08.

209. *Id.* at 309-10.

210. *Id.* at 312 (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)).

211. *See id.*

212. *Id.* at 311.

suggested that the parties in *Vieth* might be looking in the wrong place by relying primarily on the Equal Protection Clause.[213] His full discussion of the First Amendment question, including the authorities he cited, deserves extended quotation:

> Though in the briefs and at argument the appellants relied on the Equal Protection Clause as the source of their substantive right and as the basis for relief, I note that the complaint in this case also alleged a violation of First Amendment rights. The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views. See *Elrod* v. *Burns*, 427 U.S. 347 (1976) (plurality opinion). Under general First Amendment principles those burdens in other contexts are unconstitutional absent a compelling government interest. See *id.*, at 362. "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). As these precedents show, First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights.
>
> The plurality suggests there is no place for the First Amendment in this area. The implication is that under the First Amendment any and all consideration of political interests in an apportionment would be invalid. That misrepresents the First Amendment analysis. The inquiry is not whether political classifications were used. The inquiry instead is whether political classifications were used to burden a group's representational rights. If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless

213. *See id.* at 314.

> the State shows some compelling interest. Of course, all this depends first on courts' having available a manageable standard by which to measure the effect of the apportionment and so to conclude that the State did impose a burden or restriction on the rights of a party's voters.
>
> Where it is alleged that a gerrymander had the purpose and effect of imposing burdens on a disfavored party and its voters, the First Amendment may offer a sounder and more prudential basis for intervention than does the Equal Protection Clause.... The First Amendment analysis concentrates on whether the legislation burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association. The analysis allows a pragmatic or functional assessment that accords some latitude to the States. See *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989); *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983).[214]

The voting-as-association line of cases brings Justice Kennedy's insight into clearer focus. At its core is the idea that the First Amendment does more than protect individual liberty; it also ensures a fair political process. More specifically, it guards against the dominant faction entrenching itself in power.

The citation to *Elrod* captures this concern. Recall that the plurality in that case grounded its reasoning not just on individual liberty, but also on the systemic concern with the incumbent party entrenching itself by "starv[ing] political opposition."[215] To be sure, patronage accomplishes this objective through a different mechanism than gerrymandering. But Justice Kennedy was right to see a common concern with the dominant faction burdening a rival faction and its adherents, diminishing their ability to compete through the electoral process.[216] At the heart of this concern is the pluralist focus on *groups* as integral to the proper functioning of democratic self-government.[217] As political scientist Robert A. Horn wrote, even

---

214. *Id.* at 314-16 (partial citations omitted).

215. Elrod v. Burns, 427 U.S. 347, 356 (1976) (plurality opnion).

216. *See Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment).

217. For enlightening discussions of pluralism, see ROBERT A. HORN, GROUPS AND THE CONSTITUTION 10-13 (1956); and Richard J. Ellis, *Pluralism*, *in* LOWENSTEIN ET AL., *supra* note 118, at 16, 16-20. For a recent argument in favor of a pluralist approach to electoral reform, see BRUCE E. CAIN, DEMOCRACY MORE OR LESS: AMERICA'S POLITICAL REFORM QUANDARY 25 (2015) ("[P]luralism[ ] openly acknowledges the need for intermediary agents such as political

before freedom of association became a staple of our First Amendment jurisprudence: "Freedom of association is important to realization of the good society; it is essential to maintenance of modern democratic government."[218] The sustenance of self-government thus depends on judicial intervention to protect those groups that are disfavored by the governing majority. In our era of highly competitive and hyperpolarized politics, the dominant party's incentive to entrench itself in power has never been stronger.[219] Nor have the stakes ever been higher.

Justice Kennedy was also right to identify "association with a political party" as a central concern under the First Amendment, though not the Equal Protection Clause.[220] That idea is also implicit in his citations to *California Democratic Party* and *Eu*.[221] While these cases seem far afield from the subject of gerrymandering,[222] they both involved claims that major political parties' associational rights were violated.[223] These and the other voting-as-association cases discussed in Part II.B put political parties at the center of their analysis, and properly so. For electoral politics is organized around political parties, more so than any other kind of group. That has been true throughout the history of the United States, as in other democratic countries.[224] That is not to deny that parties are

---

parties, interest groups, and lobbyists.").

218. HORN, *supra* note 217, at 11; *see also* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 710 (1990) (Kennedy, J., dissenting) ("It is a distinctive part of the American character for individuals to join associations to enrich the public dialogue." (citing HORN, *supra* note 217, at 13-18)).

219. For a sampling of the literature on partisan polarization, see generally ALAN I. ABRAMOWITZ, THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY (2010); PEW RESEARCH CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC: HOW INCREASING IDEOLOGICAL UNIFORMITY AND PARTISAN ANTIPATHY AFFECT POLITICS, COMPROMISE AND EVERYDAY LIFE 18 (2014), http://www.people-press.org/files/2014/06/6-12-2014-Political-Polarization-Release.pdf [https://perma.cc/5RD9-DT5T]; SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA (Nathaniel Persily ed., 2015); SEAN M. THERIAULT, PARTY POLARIZATION IN CONGRESS (2008); and Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 276-81 (2011).

220. *See Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment).

221. *See id.* at 314-16 (citing Cal. Democratic Party v. Jones, 530 U.S. 567 (2000); Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214 (1989)).

222. *See* Hasen, *supra* note 116, at 636 (noting that *California Democratic Party v. Jones* was about compelled association, not disfavored treatment based on political viewpoint).

223. *See* Cal. Democratic Party v. Jones, 530 U.S. 567, 571 (2004); Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 216 (1989).

224. LOWENSTEIN ET AL., *supra* note 118, at 545.

dynamic, multifarious, and amorphous entities.[225] The key point is that political parties have played a central role in the development of the right of association, including voting-as-association cases, because they are instrumental to the proper functioning of democratic government. They are also unique among associations, as Professor Horn recognized, in that "[t]hey seek to gain and keep control of the machinery of government and thus to direct the great involuntary association, the state."[226] This makes it especially critical that courts guard against the dominant political party attempting to entrench itself in power by squeezing out its rivals.

Finally, Justice Kennedy's discussion of the First Amendment properly focused on the "burdens" placed upon nondominant political parties and their adherents—in particular, whether burdens were placed "on groups or persons by reason of their views."[227] This is consistent with the voting-as-association line of cases, including *Anderson*, which he cited at the conclusion of his First Amendment discussion that balanced the burdens against the State's interest.[228] Justice Kennedy also suggested that a flat prohibition on partisan considerations in redistricting would be a nonstarter.[229] Contrasting racial gerrymandering and partisan gerrymandering, he noted that the latter "presents a more complicated question" because it demands inquiry into "whether a generally permissible classification has been used for an impermissible purpose."[230] The implication is that *some* partisanship in redistricting is allowable—perhaps even inevitable—but that too much of a burden on the nondominant major party might cross a constitutional line.[231] The *Anderson-Burdick* standard is also consistent with Justice Kennedy's desire for "a pragmatic or functional assessment that accords some latitude to

225. Tokaji, *supra* note 16, at 785-86; *see also* V.O. KEY, JR., POLITICS, PARTIES, AND PRESSURE GROUPS 224-25 (4th ed. 1958) (identifying three components of political parties: the party-in-government, party leadership, and party-in-the-electorate); Joseph Fishkin & Heather K. Gerken, *The Party's Over:* McCutcheon, *Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. 175, 187 (understanding parties "as a loose coalition of diverse entities ... organized around a popular national brand").

226. HORN, *supra* note 217, at 99.

227. *See* Vieth v. Jubelirer, 541 U.S. 267, 315 (2004) (Kennedy, J., concurring in the judgment).

228. *See id.* at 315-16.

229. *See id.* at 313.

230. *Id.* at 315.

231. *See id.* at 316.

the States."[232] It avoids striking down plans merely because partisanship may have played some role in their formulation, while allowing for consideration of the legitimate justifications—such as promoting compactness, keeping together political subdivisions, and protecting communities of interest—that might justify plans that tend to favor one major party over the other.

As explained in Part II.B, the voting-as-association cases focused on the effects of the challenged practice and did not require plaintiffs to prove an intent to discriminate. This might seem at odds with Justice Kennedy's statement that both "purpose and effect" are relevant in assessing whether a partisan gerrymander violates the First Amendment.[233] It is one thing to say (as Justice Kennedy did) that "First Amendment concerns" arise when a plan has the purpose and effect of burdening a group of voters.[234] But, as he recognized, it is quite another to define the legal standard that will govern such claims.[235] And it is no great innovation to have an effects-based standard designed to get at the problem of purposeful discrimination. Both Title VII of the Civil Rights Act and section 2 of the Voting Rights Act, for example, employ effects-based standards that are aimed to stop purposeful race discrimination.[236] So too, one can define partisan gerrymandering as the intentional manipulation of district lines to entrench one party and subordinate the other,[237] while believing that an effects-based standard is best-suited to address this harm. And that is exactly what the *Anderson* line of voting-as-association cases does.

Still, it is reasonable to ask what association adds to the mix. After all, the *Crawford* Court incorporated the *Anderson-Burdick* standard into equal protection law—albeit without a majority opinion—and lower courts now routinely apply that standard to various

232. *Id.* at 315.

233. *See id.* at 314.

234. *See id.*

235. *See id.* at 309.

236. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at § 10301(a) (Supp. III 2016)); Civil Rights Act of 1964 § 103, 42 U.S.C. § 2000e-2(a) (2012).

237. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015) (defining partisan gerrymandering as "drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power").

burdens on voting.[238] Given that development, it might be argued, the Court could simply apply the Equal Protection Clause to partisan gerrymandering, without needing to rely on the First Amendment right of association.

While the Court certainly could apply the *Anderson-Burdick* balancing standard under the Equal Protection Clause given *Crawford*, there are good reasons for understanding partisan gerrymandering as an associational injury. As explained in Part II.B, there is a venerable First Amendment tradition of looking with disfavor on the dominant political group's efforts to entrench itself in power by weakening its rival. This tradition, moreover, recognizes the special role that *political parties* play in constitutional democracy—which includes both their key role in organizing politics, as well as the special dangers that exist by virtue of parties' unique status as entities that "seek to gain and keep control of the machinery of government."[239] This makes political parties both especially important and especially dangerous, as the Court has long recognized in its First Amendment association cases—including those which see the ballot as a locus for association.[240] There is, by contrast, no equal protection tradition of looking with disfavor on laws that are designed to entrench the dominant political party. The Court could certainly create one out of whole cloth, but it would be preferable to develop a standard from the existing voting-as-association line of cases.

B. Applying the Voting-as-Association Standard

The *Anderson-Burdick* standard requires courts to balance the burden on associational and voting rights against the state's interests.[241] So stated, this is about as open-ended as legal standards come. Greater precision is therefore required in order for this standard to apply to partisan gerrymandering in a way that courts will find manageable. Accordingly, this Section explains how the established voting-as-association standard might be adapted to the problem of partisan gerrymandering. It also sketches out how it

238. *See supra* notes 195-202 and accompanying text.
239. *See* HORN, *supra* note 217, at 99.
240. *See supra* Part II.A.
241. *See, e.g.*, Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 190 (2008) (Stevens, J.).

might be applied, explaining how the analysis might differ from that which was applied by the courts in past and ongoing cases.

To recap, *Anderson* said courts should consider the "character and magnitude of the asserted injury" to associational and voting rights, then "identify and evaluate the precise interests" advanced by the state, and weigh the burdens against the state's interests.[242] *Burdick* clarified that only "severe" burdens—which it contrasted with "reasonable, nondiscriminatory" ones—warranted strict scrutiny.[243] Less-than-severe burdens may be justified by "the [s]tate's important regulatory interests."[244]

The first question is what courts should consider in assessing the "character and magnitude" of the burden arising from an alleged partisan gerrymander. To answer this question, we may look both to the Court's associational rights cases and to its definition of partisan gerrymander. Recall that in its associational rights cases, the Court focused on the *impact* that the challenged practice has on nondominant political factions. In the NAACP cases, for example, the Court focused on how compelled disclosure and anti-barratry laws would affect dissident political groups.[245] In *Williams*, it considered how a petition signature requirement would affect new political parties and their adherents.[246] In *Anderson*, it scrutinized the early filing deadline's impact on "disaffected" voters.[247] In *Tashjian*, it looked to how the prohibition on independents voting in party primaries affected the nondominant major party.[248]

While the Court has not yet applied this standard to redistricting, it has recently offered a definition of partisan gerrymandering: "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power."[249] This definition helps clarify what courts should consider in assessing the "character and magnitude" of the burden on association and voting.

---

242. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

243. *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992) (first quoting Norman v. Reed, 502 U.S. 279, 289 (1992); and then quoting *Anderson*, 460 U.S. at 788).

244. *See id.* (quoting *Anderson*, 480 U.S. at 788).

245. *See*, *e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 451 (1958).

246. Williams v. Rhodes, 393 U.S. 23, 24-26 (1968).

247. *Anderson*, 460 U.S. at 792.

248. Tashjian v. Republican Party of Conn., 479 U.S. 208, 212-13 (1986).

249. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015).

The character of the burden should be *enduring*, not simply giving the dominant party control for one election cycle, but lasting—or at least expected to last—throughout the decade. In terms of magnitude, the advantage granted to the dominant party should be *substantial*. Whatever the legislature's purpose, a plan that only slightly advantages the dominant party cannot qualify as a partisan gerrymander. Only redistricting plans that give the dominant party a large and lasting advantage should be considered partisan gerrymanders.

To say that a gerrymander must be large and lasting does not tell us how these attributes should be measured. In this respect, partisan gerrymandering claims are quite different from one-person, one-vote claims, as to which the nature of the injury (malapportionment) defines the metric (population).[250] There are multiple ways by which to measure the burden that a redistricting plan imposes on the nondominant party. Perhaps the simplest is proportionality, comparing the seats that a party wins to the votes its candidates received. Another is symmetry, comparing how each of the major parties would fare if their candidates received a given percentage of the vote.[251] And there are varying ways of assessing symmetry, including the efficiency gap,[252] seats-to-vote curve,[253] and mean-median vote share difference.[254] The goal of this Article is not to endorse or reject any of these proposed metrics as the one that courts should apply. An advantage of the flexible standard that the Court has adopted in its voting-as-association cases is that it would allow

250. There is a caveat: as originally articulated, the one-person, one-vote rule did not specify the denominator that should be used in determining whether districts were equally populated—for example, total population, citizen population, registered voter population. Only recently did the Court clarify that it is constitutional for states to use total population as the denominator. Evenwel v. Abbott, 136 S. Ct. 1120, 1123 (2016).

251. Some of the Justices in *LULAC* spoke favorably of symmetry as a way of measuring partisanship. *See* LULAC v. Perry, 548 U.S. 399, 466 (2006) (Stevens, J., concurring in part and dissenting in part); *id.* at 483 (Souter, J., concurring in part and dissenting in part). While Justice Kennedy thought that symmetry might be useful, he believed it was insufficient to show the unconstitutionality of Texas's congressional plan. *See id.* at 420 (Kennedy, J.); *see also* Stephanopoulos & McGhee, *supra* note 2, at 833 & nn.8-10.

252. *See* Stephanopoulos & McGhee, *supra* note 2, at 834.

253. *See* Cho & Liu, *supra* note 30, at 360; Richard G. Niemi & Patrick Fett, *The Swing Ratio: An Explanation and an Assessment*, 11 LEGIS. STUD. Q. 75, 75-76 (1986); Wang, *supra* note 30, at 1306.

254. *See* ROYDEN & LI, *supra* note 86, at 4.

consideration of multiple methods, including ones that have yet to be developed.

In this respect, an association-based standard for partisan gerrymandering would bear a closer resemblance to the standard used for assessing minority-vote dilution under the Voting Rights Act than it would to the standard for assessing malapportionment under the Equal Protection Clause.[255] Just as the means by which racial polarization is measured have evolved over time, along with advancement in empirical methods, so too the methods of measuring partisan effects can be expected to evolve over time. A manageable standard should allow courts to consider new methods of measuring partisan gerrymandering as they develop, rather than locking them into a particular metric that may prove outmoded in a few years.

To sketch out how this would work in practice, it may help to consider how an adapted version of the voting-as-association standard compares to the analyses that three-judge district courts have applied in pending cases arising from Maryland and Wisconsin, both of which involve First Amendment claims. The first, *Shapiro v. McManus*, was a challenge to Maryland's Democrat-drawn plan.[256] Plaintiffs' challenge focused on the Sixth Congressional District, which covered western and part of north-central Maryland and was considerably altered after the 2010 census.[257] This reshuffling was allegedly designed to flip the District from Republican to Democratic control, and it achieved its desired objective, allowing a Democratic challenger to defeat the incumbent Republican.[258] Plaintiffs alleged that the plan "crack[ed]" Republicans who formerly resided in the district, with the purpose of diluting Republican votes, in violation of the First Amendment.[259] A single district judge originally dismissed the case, which the Fourth Circuit summarily affirmed,[260] but which the Supreme Court reversed on the ground

255. For discussion of different means of measuring racial polarization, see Christopher S. Elmendorf et al., *Racially Polarized Voting*, 83 U. CHI. L. REV. 587, 607-25 (2016); and Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1355-56 (2016).

256. 203 F. Supp. 3d 579, 585-86 (D. Md. 2016) (three-judge court).

257. *Id.* at 585-87.

258. *Id.* at 588.

259. *Id.* at 589.

260. Benisek v. Mack, 11 F. Supp. 3d 516 (D. Md. 2014), *aff'd*, 584 F. App'x 140, 141 (4th Cir. 2014), *rev'd sub nom.* Shapiro v. McManus, 136 S. Ct. 450 (2015).

that the First Amendment claim was not "wholly insubstantial" and therefore remanded to a three-judge court below.[261]

On remand, the three-judge district court in *Shapiro* denied a motion to dismiss the challenge to Maryland's Sixth Congressional District.[262] The court's analysis started out at the right place, recognizing that political association lies at the core of the First Amendment and that it protects "[t]he right of qualified voters, regardless of their political persuasion, to cast their votes effectively."[263] From that point, however, the district court's opinion went off the rails. The court compared the injury arising from partisan gerrymandering to retaliation for the exercise of one's First Amendment rights, emphasizing that these cases require a motivation to take adverse action because of speech or other protected conduct.[264] The fundamental problem with the *Shapiro* court's analysis is that retaliation is the wrong frame through which to understand partisan gerrymandering. Retaliation involves a tangible harm to a particular individual, while partisan gerrymanders by their nature inflict a systemic harm on a group of voters.[265] Patronage cases like *Elrod* are helpful as a matter of principle, insofar as they reveal that the risk of the dominant faction entrenching itself lies at the core of the right of association. But it is simply wrong to characterize the group-based injury inflicted upon the nondominant party and its members as retaliation.

The court proceeded to articulate a three-part test, requiring plaintiffs to show (1) specific intent to impose a burden on plaintiffs because of their votes or party affiliation, (2) a sufficient degree of vote dilution, and (3) causation, in the sense that the injury would not have occurred but for the mapmaker's intent.[266] This test provides a semblance of objectivity but in reality does nothing to focus or narrow the inquiry. In virtually any case where one party controls the redistricting process, it will be possible to show a "specific intent" to burden voters affiliated with the nondominant party, in

261. Shapiro v. McManus, 136 S. Ct. 450, 455-56 (2015) (quoting Bell v. Hood, 327 U.S. 678, 682-83 (1946)).

262. *Shapiro*, 203 F. Supp. 3d at 600.

263. *Id.* at 594 (alteration in original) (emphasis omitted) (quoting Anderson v. Celebrezze, 460 U.S. 780, 787 (1983)).

264. *See id.* at 595-96.

265. *See* Hasen, *supra* note 116, at 635.

266. *Shapiro*, 203 F. Supp. 3d at 596-97.

the sense of making it more difficult for them to elect their preferred candidates. While the second prong of the *Shapiro* court's test gestures in the right direction—in the limited sense of understanding the injury as a form of vote dilution—it provides virtually no guidance on how much of a dilutive effect must be shown. Furthermore, the effect of a plan can only be judged by assessing its entire impact, not by examining a particular district as the plaintiffs' challenge invited the court to do.[267] *Shapiro*'s "causation" prong is entirely vacuous. It is hard to imagine any case in which both intent and a sufficient effect will be shown, yet but-for causation cannot be shown. As the *Bandemer* plurality recognized three decades ago, it can generally be presumed that mapmakers intend the partisan consequences of their actions.[268] Finally, the *Shapiro* court's test leaves no room for the state to come forward with interests that might provide a justification for the lines drawn.

In fairness to the court, the problems with its analysis were of the plaintiffs' making. Instead of challenging the plan as a whole, showing that it systematically discriminated against the Republican Party and its adherents, plaintiffs chose to challenge a single congressional district.[269] Moreover, plaintiffs chose to frame their association claim in terms of retaliation,[270] a square peg in a round hole if there ever was one. Had plaintiffs mounted a systemic challenge to the plan as a whole, relying on the voting-as-association cases, it is conceivable that they might have been able to establish that the plan imposed a substantial and enduring burden on Republicans.[271] But the district court was wrong to allow the plaintiffs' claim to proceed on the theory that they presented.[272]

---

267. *See id.* at 599.

268. Davis v. Bandemer, 478 U.S. 109, 129 (1986) (plurality opinion) ("As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.").

269. *See Shapiro*, 203 F. Supp. 3d at 585-86.

270. *See id.* at 585.

271. *See* ROYDEN & LI, *supra* note 86, at 7, 9-10, 13 (finding some evidence of a pro-Democratic skew in Maryland's congressional plan).

272. In subsequently denying plaintiffs' motion for a preliminary injunction, the three-judge district court persisted in its square-peg approach to gerrymandering. Benisek v. Lamone, 266 F. Supp. 3d 799, 808-15 (D. Md. 2017) (three-judge court) (finding that plaintiffs failed adequately to show a sufficient likelihood of success). The Supreme Court heard oral argument on the case in the spring of 2018. *See* Benisek v. Lamone,138 S. Ct. 543 (2017) (mem.), *argued*, No. 17-333 (U.S. Mar. 28, 2018); *Benisek v. Lamone*, SCOTUSBLOG, http://

The analysis applied in the Wisconsin case is much more persuasive. In *Whitford v. Gill*, a majority of the three-judge court held that Wisconsin's Republican-drawn state legislative redistricting plan was an unconstitutional partisan gerrymander, in violation of both the First Amendment and the Equal Protection Clause.[273] In contrast to the Maryland case, plaintiffs in *Whitford* properly focused on the effect of the plan as a whole, rather than on a particular district.[274] That makes sense, given that the gravamen of a partisan gerrymandering claim is the systemic injury to the nondominant major party and its adherents, which can only be judged by examining the entire plan. Plaintiffs presented copious evidence that the plan was adopted with the intent to benefit Republicans and that it had precisely the intended effect.[275] Prominent among the evidence of the plan's discriminatory effect was evidence of its large efficiency gap, showing that the plan resulted in many more "wasted" Democratic than Republican votes.[276]

Based on this evidence, two of the three judges on the *Whitford* district court found a constitutional violation.[277] Writing for the majority, Judge Kenneth Ripple drew on both the right-to-vote cases decided under the Fourteenth Amendment and the right-of-association cases under the First Amendment.[278] With respect to the latter, the court properly grounded its analysis in the balancing test adopted in the *Anderson* line of cases.[279] In justifying this approach, the majority explained that associational rights provided an especially valuable frame in light of the evidence that Wisconsin's redistricting process was entirely controlled by the majority caucus, in this case the Republicans.[280] In these circumstances, voters aligned with the nondominant party were denied a fair opportunity to form a legislative majority, effectively diminishing the weight of their votes in

---

www.scotusblog.com/case-files/cases/benisek-v-lamone/ [https://perma.cc/4WV5-XHK3].

273. 218 F. Supp. 3d 837, 926 (W.D. Wis. 2016) (three-judge court), *argued*, No. 16-1161 (U.S. Oct. 3, 2017).

274. *See id.* at 843.

275. *Id.* at 846-53, 857-62.

276. *Id.* at 854-55, 859-61.

277. *See id.* at 926.

278. *See id.* at 864-83.

279. *See id.* at 880-83.

280. *See id.* at 882.

comparison with voters aligned with the dominant party.[281] The majority proceeded to articulate its own three-prong test, which it said should govern under both the Equal Protection Clause and the First Amendment, requiring: (1) an intent "to place a severe impediment" on voters based on their political affiliation, (2) the effect of doing so, and (3) the absence of an alternative, legitimate justification.[282]

While this three-part test has much to recommend it, there is one glaring problem: the voting-as-association cases decided under the First Amendment did not require plaintiffs to prove an intent to discriminate.[283] In support of this requirement, the *Whitford* majority relied primarily on equal protection cases, although it also cited language derived from *Anderson* and *Burdick*, contrasting severe restrictions with "reasonable, nondiscriminatory" ones.[284] This overlooks the fact that the *Anderson-Burdick* standard does not require plaintiffs to prove defendants' discriminatory intent to establish a violation.[285] An intent to discriminate against the nondominant party may well be a "factor" in the analysis, as the *Whitford* majority noted, particularly in establishing that the state's asserted interests are pretextual.[286] The *Anderson-Burdick* standard, however, does not require proof of discriminatory intent to establish that the challenged law imposes a severe burden on associational rights.[287] There is a strong argument for demanding proof of intent under the Equal Protection Clause—especially because the *Bandemer* plurality required it[288]—but the court should have bifurcated that analysis from its First Amendment association analysis, rather than requiring intent to prevail on both claims.[289] An intent-based inquiry is

281. *Id.* at 882-83.

282. *Id.* at 884.

283. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 806 (1983).

284. *See Whitford*, 218 F. Supp. 3d at 884 (emphasis omitted) (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358-59 (1997)).

285. *See supra* Part II.B.

286. *Whitford*, 218 F. Supp. 3d at 884.

287. In support of the proposition that the First Amendment requires plaintiffs to prove discriminatory intent, the *Whitford* majority also cited *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Whitford*, 218 F. Supp. 3d at 884. While *Iqbal* imposed such a requirement in the circumstances presented there—a noncitizen's claim that he was detained because of his political views—intentional discrimination is not required in all First Amendment contexts, and certainly not for voting-as-association claims. *See supra* Part II.B.

288. *See* Davis v. Bandemer, 478 U.S. 109, 129 (1986) (plurality opinion).

289. *See Whitford*, 218 F. Supp. 3d at 884.

particularly undesirable for partisan gerrymandering claims, given the difficulty of discerning the intent of a multimember body, like the state legislatures, as well as the reality that the intent to benefit the dominant party will almost always be present when the legislature draws the lines.

Aside from its misguided requirement that plaintiffs prove intent on their First Amendment claim, the *Whitford* majority's articulation and application of the standard was compelling. The court thoroughly addressed the evidence that Wisconsin's plan systematically disadvantaged Democrats while securing a lasting legislative majority for Republicans.[290] In finding the requisite effect, the court emphasized expert evidence regarding the plan's asymmetry, including the seats-vote curve and the efficiency gap.[291] This showed not only that the plan gave Republicans a much larger percentage of seats than Democrats, but also that this advantage had persisted through two elections and was expected to persist through the remainder of the plan's life.[292] The court then turned to the State's asserted interests.[293] While recognizing the State's "political geography" as a permissible consideration that "naturally favors" Republicans to some degree, the majority concluded that it could not explain the large and lasting advantage that the plan gave to the dominant party.[294]

While there are some problems with the district court opinions in both *Shapiro* and *Whitford*, the latter does a much better job of articulating and applying the voting-as-association standard that this Article advocates. Both courts rightly began with the recognition that voting laws disadvantaging the nondominant political party may violate the right of association.[295] Both courts, however,

---

290. *See id.* at 898-910.

291. *See id.* at 903-05.

292. *See id.*

293. *See id.* at 910-27.

294. *Id.* The third judge on the Wisconsin district court, Judge William Griesbach, dissented. *Id.* at 932 (Griesbach, J., dissenting). Judge Griesbach persuasively questioned the viability of an intent-based analysis, noting that such an intent is almost always likely to exist when the state legislature draws the map. *See id.* at 933. Yet his analysis suffers from its failure to apply the standard adopted in the voting-as-association cases, under which the burdens on the nondominant party and its adherents should be balanced against the state's asserted interests. *Cf. id.* at 932-65.

295. *See id.* at 880 (majority opinion); Shapiro v. McManus, 203 F. Supp. 3d 579, 594 (D. Md. 2016) (three-judge court).

wrongly grafted an intent requirement onto the voting-as-association standard.[296] The *Shapiro* court also made serious errors in its inapt comparison of partisan gerrymandering to retaliation and its focus on a single district instead of the plan as a whole.[297] By contrast, the *Whitford* court's analysis—particularly its consideration of the plan's effects and the State's asserted interests[298]—is consistent with the adapted version of the voting-as-association standard that I recommend.

C. Answering Objections

There are several objections that one might make to the application of the voting-as-association standard to partisan gerrymandering claims. While some are more weighty than others, none of them are ultimately persuasive.

One argument is that partisan gerrymandering does not actually prevent voters from associating with one another, at least not in the same manner as the other burdens on voting to which the Court has previously applied the First Amendment.[299] That is certainly true in one sense. Gerrymandering does not stop people from voting for their preferred candidate or party in the manner that a third-party or independent candidate's exclusion from the ballot would. Nor does it inflict a tangible injury on an individual, as patronage does.[300] The problem with this objection is that it overlooks the systemic harm to the disfavored political faction that underlies the right of association. While the infringement of individual liberty is surely part of the rationale for the right of association, its primary and most persuasive justification is that it prevents the dominant party from entrenching itself in power at the expense of those who favor its chief rival.[301] That justification applies with at least the same force to partisan gerrymandering as to any of the other practices upon which the right of association has focused in prior cases.

296. *See Whitford*, 218 F. Supp. 3d at 884; *Shapiro*, 203 F. Supp. 3d at 596.
297. *See Shapiro*, 203 F. Supp. 3d at 595-96, 599-600.
298. *See Whitford*, 218 F. Supp. 3d at 911.
299. *See* Alexander & Prakash, *supra* note 29, at 46.
300. Hasen, *supra* note 116, at 635.
301. *See supra* Part III.A.

A second possible objection is that using the First Amendment to challenge partisan gerrymandering would necessarily erect an absolute prohibition on any legislative consideration of the partisan impact of a plan, something that is both unrealistic and undesirable.[302] I agree that such a standard would be imprudent—and, partly for this reason, do not favor intent-based inquiries of the sort in which the *Shapiro* and *Whitford* courts engaged. As the *Whitford* dissent noted, partisan considerations cannot plausibly be removed from redistricting unless the process is taken from the legislature and entrusted to a politically independent commission.[303] While some might view this as preferable from a policy perspective, it is hard to see how this is required as a matter of constitutional law. Fortunately, the balancing standard adopted in the voting-as-association cases does not require the extirpation of all partisan considerations from the redistricting process. It instead embraces a more nuanced and calibrated approach, one that would invalidate plans with the most extreme partisan effects while taking into consideration the good reasons a state might have for adopting a plan that may give one party some degree of advantage over the other.

A third objection is that the First Amendment does not offer an adequate theory of representation as justification for judicial intervention in partisan gerrymandering. Sam Issacharoff and Pam Karlan are among those who have levelled this criticism at Justice Kennedy's discussion of the First Amendment in his *Vieth* concurrence.[304] It is an understandable reaction, given that Justice Kennedy's opinion does not connect the dots between the associational rights cases he cited. Yet there is a theory of representative democracy embodied in these cases, one that Professor Issacharoff himself has endorsed in prior scholarship.[305] The principle is that courts should intervene to prevent electoral practices through which the dominant political party entrenches itself while subordinating its chief rival.[306] Although this principle is not expressly stated as such,

302. *See* Alexander & Prakash, *supra* note 29, at 45-46; Briffault, *supra* note 116, at 408-09.

303. *See Whitford*, 218 F. Supp. 3d at 933 (Griesbach, J., dissenting).

304. Issacharoff & Karlan, *supra* note 116, at 563-64.

305. *See* Issacharoff, *supra* note 29, at 600; Issacharoff & Pildes, *supra* note 5, at 646.

306. *See* Issacharoff & Pildes, *supra* note 5, at 646-47.

a fair reading of Justice Kennedy's opinion in light of the associational cases he cited suggests that there is in fact a theory of representation, albeit one that can only be gleaned by reading between the lines.[307] One might further argue, as Dan Lowenstein has, that the major parties do not require judicial protection of their associational rights because they are "grown-ups who ... can be expected to take care of themselves."[308] This may be true in some contexts, but the associational rights cases recognize that there are circumstances in which courts should step in to protect the nondominant party's associational rights.[309] As long as those cases remain law, there is a strong doctrinal argument for judicial intervention in partisan gerrymandering, which can entrench the dominant party as surely as virtually any other imaginable practice.

Perhaps the most serious concern is one that has been made with respect to every standard for partisan gerrymandering that has ever been proposed: that it is not judicially manageable.[310] It must be conceded that the standard I recommend leaves considerable room for judicial discretion. There are no bright lines to be found here. This, in turn, opens the door to the claim that judges will reach beyond their proper sphere, intruding on functions that more properly belong to political actors.

This manageability question is the most difficult one, because its answer depends on how one understands the role that federal courts should play in a democracy. There are first-order disagreements on this question.[311] For those who worry most about "legal imperialis[m]"[312]—or, less rhetorically, judges overstepping their proper bounds—this concern is sure to be dispositive. Yet there is a countervailing concern, one that the Court has often found dispositive in other contexts: that the dominant political faction will use what might otherwise be a fleeting majority to lock itself into power and lock its main competitor out, preventing the minority from becoming a majority and denying the people the accountability upon which

307. *See* Vieth v. Jubelirer, 541 U.S. 267, 314-16 (2001) (Kennedy, J., concurring in the judgment).

308. *See* Lowenstein, *supra* note 186, at 1790.

309. *See supra* Part II.A.

310. For leading examples of this line of argument, see Lowenstein & Steinberg, *supra* note 29, at 3-5; and Schuck, *supra* note 29, at 1330.

311. *See, e.g.*, CAIN, *supra* note 217, at 130.

312. *Id.*

representative democracy depends.[313] Thirty years ago, it was plausible to characterize partisan gerrymandering as "a self-limiting enterprise."[314] Not anymore. The increasingly sophisticated technology that mapmakers have at their disposal allows them to draw maps that at once give them a disproportionate number of seats and ensure a durable majority, even in years when the opposing major party runs especially strong.[315] The case for judicial intervention has thus become stronger over the decades in which the Court has struggled with the question of partisan gerrymandering. The balancing test applied in the voting-as-association cases provides the best available standard.

CONCLUSION

As the Supreme Court has long recognized in its voting-as-association cases, there is no litmus test that can magically separate permissible and impermissible burdens.[316] Yet these cases articulate a standard that has proven manageable in related contexts and can be adapted to the problem of partisan gerrymandering.[317] Conscientious judges will surely disagree on how the *Anderson-Burdick* balancing test applies in this context, as they have done in cases involving voter identification and other burdens on voting. To acknowledge the reality of reasonable disagreement in a standard's application is not, however, to say that there is no judicially manageable standard. If federal courts are to serve their proper role in preventing the dominant political faction from subordinating its competitors, a concern nearly as old as the Republic itself, then an association-based challenge to excessive partisan gerrymanders should be recognized.

313. *See supra* Part II.A.

314. *See* Davis v. Bandemer, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring in the judgment).

315. *See supra* notes 86-101 and accompanying text.

316. *See* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

317. *See supra* Part III.B.