

NOTES

CHALLENGING CONGRESS'S SINGLE-MEMBER DISTRICT MANDATE FOR U.S. HOUSE ELECTIONS ON POLITICAL ASSOCIATION GROUNDS

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INTRODUCTION

In 1967, in the wake of the Voting Rights Act of 1965 (VRA), Congress enacted a law requiring every state to elect its representatives to the U.S. House of Representatives in single-member districts.¹ Congress's mandate was based on a well-founded fear that, in response to the VRA's success in combating discriminatory voting laws, states would adopt multimember congressional districts with winner-take-all voting in an attempt to keep black candidates from winning representation.² In the years after the law was passed, single-member districts—combined with the success of the VRA—increased the number of black candidates elected to the U.S. House,³ and paved the way for the use of majority-minority voting districts to ensure communities of color could elect a candidate of their choice.⁴ However, more than fifty years later, Congress's single-member districting scheme for U.S. House elections has had unintended and far-reaching consequences for America's national political health.⁵ Furthermore, modern analysis reveals that single-member districts, in the context of twenty-first century technology and geographical trends, poorly deliver on Congress's original goal of ensuring fair representation of communities of color.⁶ As a result, Congress has reached peak levels of dysfunction and partisan gridlock, and the composition of Congress lags behind the growing diversity of the American electorate.⁷

To spur desperately needed reform of America's U.S. House elections, this Note challenges the constitutionality of Congress's

1. 2 U.S.C. § 2c (2012) ("Representatives shall be elected only from districts so established, no district to elect more than one Representative.").

2. See *infra* note 15 and accompanying text.

3. See *infra* note 19 and accompanying text.

4. See *infra* notes 20-23 and accompanying text.

5. See *infra* Part I.B.

6. See *infra* Part III.C.

7. Kristen Bialik & Jens Manuel Krogstad, *115th Congress Sets New High for Racial, Ethnic Diversity*, PEW RES. CTR. (Jan. 24, 2017), <http://www.pewresearch.org/fact-tank/2017/01/24/115th-congress-sets-new-high-for-racial-ethnic-diversity/> [<https://perma.cc/QVW2-PEXW>] ("Despite the increase in nonwhite representation in Congress, whites account for 81% of the current Congress but represent just 62% of the population. This gap has widened over time.").

single-member district mandate, arguing that the law violates voters' First Amendment political association rights. Single-member districts, which result in winner-take-all⁸ elections to fill all 435 seats in the U.S. House, effectively preserve a two-party system. With only one winner in each district, and only one vote to cast for each voter, elections naturally devolve into a two-candidate horse race.⁹ The result is that, in the 115th Congress, every member of the U.S. House belonged to one of the two major parties,¹⁰ leaving minor-party voters and those dissatisfied with major-party policy positions with the unenviable choice of voting their conscience—and in all likelihood, wasting their vote—or holding their noses and voting for one of the two major parties.

Relying on the analytical framework provided by the *Anderson-Burdick* standard,¹¹ this Note applies the Court's jurisprudence on political association rights to Congress's mandate of single-member districts. The *Anderson-Burdick* standard requires courts to evaluate the burden an election law imposes on voters' political association rights, and weighs that burden against the government's legitimate interests advanced by the law in question.¹² Although the *Anderson-Burdick* standard was developed through the Supreme Court's evaluation of *state* election laws, this Note takes the position that the standard represents the most logical approach to evaluating a First Amendment political association challenge to an Act of Congress.

Part I documents the history precipitating Congress's single-member district mandate and the troubling impact the mandate has had on America's political health. Part II describes the Court's development of the *Anderson-Burdick* standard as a means to

8. FairVote, a nonpartisan election reform organization, defines "winner-take-all" as "[a] voting system used in which the candidate with the most votes wins, and supporters of all other candidates receive no representation." FAIRVOTE, MONOPOLY POLITICS 2018: THE ROOT OF DYSFUNCTION IN THE U.S. HOUSE OF REPRESENTATIVES 6 (2017), https://www.fairvote.org/monopoly_politics_report_2018 [<https://perma.cc/YX5N-7S9R>] [hereinafter MONOPOLY POLITICS 2018].

9. MAURICE DUVERGER, POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE 217 (Barbara & Robert North trans., John Wiley & Sons 2d ed. 1963) (1951).

10. CONG. RESEARCH SERV., MEMBERSHIP OF THE 115TH CONGRESS: A PROFILE 1 (2018), <https://fas.org/sgp/crs/misc/R44762.pdf> [<https://perma.cc/PWU5-NMM8>].

11. See *infra* Part II.A.

12. See *infra* Part II.A.

evaluate state election laws burdening voters' political association rights and examines the Court's recent decision to vacate a district court's analysis of partisan gerrymandering through the lens of political association rights. Part III articulates the burden single-member districts impose on voters and weighs that burden against Congress's original legitimate interest in ensuring representation for black voters in the U.S. House. Part IV anticipates and addresses potential institutional concerns about the Supreme Court weighing in on Congress's chosen method of political representation.

I. CONGRESS'S MANDATE: GOOD INTENTIONS AND UNINTENDED CONSEQUENCES

Part I first explores Congress's important reason for mandating single-member districts in the wake of the Voting Rights Act. It then examines the collateral consequences of using single-member districts to elect the U.S. House and illustrates how the current system has paved the road to the partisan polarization and gridlock that permeates American politics today.

A. An Extension of the Voting Rights Act

Congress passed its single-member district mandate for U.S. House elections in 1967, on the heels of the VRA of 1965.¹³ The VRA resulted in a massive surge of newly registered black voters in southern states, where invidious laws had, up to that point, severely disenfranchised black citizens.¹⁴ In response to the success of the VRA, southern states began to adopt multimember districts with winner-take-all voting in state and local elections in an attempt to keep black candidates from winning representation.¹⁵ In practice,

13. Andrew Spencer, Christopher Hughes & Rob Richie, *Escaping the Thicket: The Ranked Choice Voting Solution to America's Districting Crisis*, 46 CUMB. L. REV. 377, 378 (2015-16).

14. See ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 39-48 (2015) ("The 302,000 African-Americans who had registered under the [VRA] in the past year would have their rights protected, and millions more would get an opportunity to exercise their most fundamental right.").

15. See, e.g., *id.* at 56 ("[Mississippi] denied black voters representation in the state legislature by creating large, multi-member state legislative districts in which black voting strength was diluted.").

this meant states would draw districts large enough to ensure that white voters constituted a majority, and then hold at-large, winner-take-all elections for all the seats in the district.¹⁶ Assuming the white majority voted as a group, black voters would be locked out of representation regardless of how many seats were up for election.¹⁷ Congress feared that states would apply this discriminatory tactic to congressional elections, and, in 1967, passed a federal mandate that each state elect its U.S. House representatives from single-member districts to combat state attempts at diluting black votes.¹⁸

The immediate impact of the law, combined with the powerful enfranchising effect of the VRA, was undeniable: in just five election cycles after single-member districts were mandated, the number of black congressmembers elected to the U.S. House tripled from five to fifteen.¹⁹ Furthermore, since Congress passed its mandate, single-member districts have become a crude—albeit straightforward—means of remedying vote dilution²⁰ cases brought under section 2 of the VRA.²¹ A typical remedy in such cases is to require a state or locality to draw, where possible, districts in which a racial minority community comprises a majority of the electorate and is thus able to elect a candidate of its choice.²² In *Thornburg v. Gingles*, a landmark vote dilution case, the Supreme Court went as far as

16. Note, *Racial Vote Dilution in Multimember Districts: The Constitutional Standard After Washington v. Davis*, 76 MICH. L. REV. 694, 695 (1978).

17. Spencer, Hughes & Richie, *supra* note 13, at 378 (“[S]ome states and localities threatened to shift from denying votes of racial minorities to diluting them with racially gerrymandered districts or winner-take-all at-large elections.”).

18. *Id.*

19. *Vital Statistics on Congress*, BROOKINGS INST. (May 21, 2018), https://www.brookings.edu/wp-content/uploads/2017/01/vitalstats_ch1_full.pdf [<https://perma.cc/S565-A678>].

20. Vote dilution is the practice of impeding a group of racial minority voters from “convert[ing] their voting strength into the control of, or at least influence with, elected public officials.” Richard L. Engstrom, *Racial Vote Dilution: The Concept and the Court*, in *THE VOTING RIGHTS ACT CONSEQUENCES AND IMPLICATIONS* 13, 14 (Lorn S. Foster ed., 1985).

21. See Spencer, Hughes & Richie, *supra* note 13, at 384-85. Section 2 of the Voting Rights Act prohibits voting practices that discriminate against racial, ethnic, or language minority voters, regardless of intent. 52 U.S.C. § 10303 (2012).

22. See, e.g., *United States v. Osceola County*, 475 F. Supp. 2d 1220 (M.D. Fla. 2006) (holding that the county’s at-large, bloc voting system violated section 2 of the VRA by preventing a Hispanic candidate from being elected despite Hispanic voters forming a politically cohesive minority voting group, and subsequently ordering a plan providing for a district in which Hispanic citizens constituted a majority of eligible voters).

stating that “single-member district[s] [are] generally the appropriate standard against which to measure minority group potential to elect.”²³

As long as a group of voters is numerous and compact enough to comprise a majority in a district, Congress’s mandate gives district mapmakers a tool to ensure that racial minority communities are able to elect a candidate of their choice to the U.S. House.²⁴ However, more than fifty years of experience since Congress’s mandate has revealed troubling shortcomings when using these districts as a proxy for representation of a voting group’s interests.²⁵ Part III of this Note will further explore the limitations of majority-minority districts, and point to alternatives to single-member districts as a better means of providing racial minority communities with representation and political power in the U.S. House.²⁶

B. Paving the Road to Political Dysfunction

When Congress passed its single-member district mandate in 1967, it could not anticipate the collateral impact of its chosen electoral structure on American politics over the course of the next few decades. The American political experience since the 1970s demonstrates that single-member districts are a driving factor of two interrelated and fundamental problems in U.S. House elections: plummeting levels of electoral competition and fierce partisan polarization.

Competition has rapidly dwindled in U.S. House elections over the past few decades. In 1992, for example, 134 House districts were within 3 percentage points of being a fifty-fifty partisanship district; however, in the 2016 election, that number dropped to just 23 of the 435 House districts.²⁷ This trend is the product of Congress’s single-member district system, combined with hardening partisanship over the past few decades.²⁸ Not only has partisanship grown

23. 478 U.S. 30, 50 n.17 (1986).

24. See *infra* note 162 and accompanying text.

25. See *infra* notes 163-72 and accompanying text.

26. See *infra* Part III.C.

27. MONOPOLY POLITICS 2018, *supra* note 8, at 38.

28. E.g., Alan I. Abramowitz, Brad Alexander & Matthew Gunning, *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. POL. 75, 80 (2006)

stronger among voters, but it has done so along geographic lines.²⁹ Therefore, when only one person is elected to represent a district, partisan and geographic realities make it very hard to draw consistently competitive districts.³⁰ FairVote, a nonpartisan election reform organization, argues that “hardening partisanship has a wide range of negative effects in the context of our current winner-take-all, single-winner district system of elections,” including “a staggering lack of competition that leaves millions of Americans without any hope of winning representation” or having a representative who feels compelled to listen to them.³¹ Moreover, easily manipulated single-member districts exacerbate the effectiveness of partisan gerrymandering,³² in which opposing-party voters are packed into as few districts as possible to gain an electoral advantage for the party drawing the maps, further hindering competition.³³

This increasing lack of competition under the current single-member district regime further fuels the partisan polarization afflicting American political discourse. As districts become safer for the partisans elected in them, the incentives for reaching across the aisle rapidly diminish, and the only threat to reelection comes from

(explaining declining competition in U.S. House districts “[a]s a result of both increased partisan polarization and increased partisan consistency in voting behavior”).

29. Lee Drutman, *This Voting Reform Solves 2 of America's Biggest Political Problems*, VOX (July 26, 2017, 3:21 AM), <https://www.vox.com/the-big-idea/2017/4/26/15425492/proportional-voting-polarization-urban-rural-third-parties> [https://perma.cc/B3W9-TFST] (“The hardening of partisan lines has strong geographical implications. That’s because urban areas—and, increasingly, suburban areas—tend to vote Democratic while exurban places tend to vote Republican.”).

30. *Id.* (“[A]s long as we have single-member districts, and as long as Democrats concentrate in cities while Republicans live outside of the cities, any attempt to redraw districts to make them competitive would require awkwardly connecting slices of city to far-flung patches of country in ways that look even stranger and uglier than the current gerrymanders.”).

31. MONOPOLY POLITICS 2018, *supra* note 8, at 29.

32. The Supreme Court defined the term “partisan gerrymandering [as] the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power.” *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015).

33. *See* Spencer, Hughes & Richie, *supra* note 13, at 379-80 (arguing that gerrymandering “is an inevitable consequence of any single-winner district system,” and that multimember districts with proportional voting methods are the best way to combat partisan gerrymandering).

challengers in partisan primary elections.³⁴ Lee Drutman, in advocating for Congress to abandon single-member districts to restore civility to American politics, notes that “[t]here are few rewards for [politicians in safe districts] to depart from party group-think to work with the other side to broker deals, and lots of punishments should they try.”³⁵

The incentive structures created by Congress’s current winner-take-all, single-member district scheme have resulted in crippling legislative gridlock and dysfunction.³⁶ According to Professor Samuel Issacharoff, “the total enacted legislation annually by the U.S. Congress has declined considerably from the 1970s.”³⁷ During the 1970s, just after the adoption of single-member districts, the 95th Congress passed “as many as 804 bills,” whereas the 114th Congress passed “only 329 bills.”³⁸ Ideological polarization is at its worst in the U.S. House. “DW-NOMINATE” scores, a means of representing legislators’ voting records on a spatial map, show that the U.S. House of Representatives was recently the most ideologically polarized it has ever been since researchers began tracking such things just before 1880.³⁹

While there may be other contributing factors for declining competition and bipartisanship in America, single-member districts bear significant responsibility for the current state of affairs on Capitol Hill. In light of a half-century worth of evidence as to the collateral consequences of Congress’s mandate, and for the constitutional reasons soon to be articulated, the nation’s current single-member district regime must be replaced. This Note argues that to spur necessary change, voters must look to the courts and challenge Congress’s mandate on constitutional grounds. Only then will Members of Congress be forced to abandon an electoral system that

34. Drutman, *supra* note 29 (arguing that politicians from safe U.S. House districts must only worry about “the remote chance that they might get primaried, a lingering threat that keeps them from doing anything that would upset their party’s base voters”).

35. *Id.*

36. See, e.g., Samuel Issacharoff, *Democracy’s Deficits*, 85 U. CHI. L. REV. 485, 499 (2018) (“[I]n the modern era, the words ‘Congress’ and ‘dysfunction’ seem to go together like a horse and carriage.”).

37. *Id.*

38. *Id.*

39. See Jeff Lewis, *Polarization in Congress*, VOTEVIEW (Aug. 14, 2019), https://voteview.com/articles/party_polarization [<https://perma.cc/P2HL-S37R>].

has paved the road to political dysfunction and voter frustration, and reimagine a more representative and responsive system for electing “the People’s House.” This Note provides a roadmap for such a challenge under the First Amendment.

II. AN ANALYTICAL FRAMEWORK FOR EVALUATING BURDENS ON VOTERS’ POLITICAL ASSOCIATION RIGHTS

To challenge the constitutionality of Congress’s single-member district mandate in U.S. House elections, this Note argues that single-member districts violate voters’ First Amendment political association rights. In order to evaluate *state* election laws that burden association rights, the Supreme Court developed a balancing test known as the “*Anderson-Burdick*” standard.⁴⁰ Part II explores the history and development of this standard, and then considers the Court’s recent decision to vacate a district court’s analysis of partisan gerrymandering through the lens of political association rights.

It is important to note that the *Anderson-Burdick* standard was developed through the Court’s evaluation of *state* laws and has not historically been used beyond such contexts. The law this Note addresses, however, is an Act of Congress enacted pursuant to its enumerated power to regulate the time, place, and manner of elections for the U.S. Senate and House.⁴¹ Even so, Congress’s single-member district mandate for U.S. House elections is subject to the constraints of the Constitution, like any law.⁴² Because the *Anderson-Burdick* standard represents a robust and well-developed standard used by the Supreme Court to evaluate First Amendment political association challenges to state election laws, this Note uses the standard as a framework to evaluate Congress’s single-member district mandate.

40. See *infra* Part II.A.

41. U.S. CONST. art. I, § 4, cl. 1.

42. See, e.g., *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (holding section 4(b) of the VRA unconstitutional because it infringed upon the constitutional sovereignty of the states).

A. Developing a Standard

The Supreme Court's jurisprudence with respect to voters' political association rights under the First Amendment began with its decision in *Williams v. Rhodes* in 1968.⁴³ Ohio passed a series of election laws that made it harder for new parties to gain access to the state's ballot for choosing presidential electors.⁴⁴ The most notable of these laws was a requirement that new political parties obtain petition signatures from at least 15 percent of the number of ballots cast in the last gubernatorial election.⁴⁵ The practical impact of the new law was that it was "virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties."⁴⁶ The Independent Party challenged the laws on an equal protection basis.⁴⁷ However, the Court articulated two rights of voters that "overlapp[ed]," stating that the voters' right "to associate for the advancement of political beliefs, and the right ... regardless of their political persuasion, to cast their votes effectively," were burdened by the state's new laws.⁴⁸

In an opinion by Justice Hugo Black, the Court held that Ohio's laws, in their totality, imposed an unconstitutional "burden on voting and associational rights," violating the First and Fourteenth Amendments.⁴⁹ The Court reasoned that the laws effectively gave the two major parties "a complete monopoly" on representation, stifling "[c]ompetition in ideas and governmental policies," which go to "the core of our ... First Amendment freedoms."⁵⁰ Although other decisions had established political association rights protected by the Constitution,⁵¹ *Williams* was trailblazing in that it established

43. 393 U.S. 23 (1968).

44. *Id.* at 24.

45. *Id.* at 24-25.

46. *Id.* at 25.

47. *Id.* at 27.

48. *Id.* at 30.

49. *Id.* at 34.

50. *Id.* at 32.

51. *See, e.g., NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (holding that the Constitution protects one's "freedom to engage in association for the advancement of beliefs and ideas").

access to the ballot as an important means of political association for voters.⁵²

Williams was followed by *Kusper v. Pontikes* in 1973, in which the Court struck down an Illinois law prohibiting individuals from voting in a political party's primary election if they had voted in another party's primary in the preceding twenty-three months.⁵³ The Court again invoked the First and Fourteenth Amendments in holding that the law "substantially restrict[ed] voter[s]' freedom to change [their] political party affiliation" and burdened voters' participation in primary elections.⁵⁴

These cases paved the way for the Court's decision in *Anderson v. Celebrezze*, in which a constitutional standard began to emerge for evaluating burdens on ballot access.⁵⁵ In *Anderson*, independent presidential candidate John Anderson challenged Ohio's early filing deadline for independent candidates, arguing the law was "an unconstitutional burden on the voting and associational rights of [his] supporters."⁵⁶ The Court agreed that the law imposed a burden that fell "unequally on ... independent candidates," and in doing so, "impinge[d], by its very nature, on associational choices protected by the First Amendment,"⁵⁷ characterizing the burden as "a significant state-imposed restriction."⁵⁸

Such a finding, however, did not complete the Court's analysis. The Court acknowledged that Ohio might justify placing burdens on voters' associational rights by demonstrating a legitimate state interest served by the law in question,⁵⁹ citing its decision in *Storer v. Brown*.⁶⁰ The State asserted three distinct interests in passing the law: "voter education, equal treatment for [major-party] and

52. See Daniel P. Tokaji, *Gerrymandering and Association*, 59 WM. & MARY L. REV. 2159, 2183 (2018).

53. 414 U.S. 51, 52-53 (1973).

54. *Id.* at 57.

55. 460 U.S. 780 (1983); see Tokaji, *supra* note 52, at 2184.

56. *Anderson*, 460 U.S. at 782.

57. *Id.* at 793-94.

58. *Id.* at 795.

59. *Id.* at 802-03.

60. 415 U.S. 724 (1974). In *Storer*, the Court upheld, among a few other restrictive provisions, a California law restricting independent candidates' access to the general election ballot when that candidate had been defeated in a political party's primary that year, or had been registered with a political party within the preceding year. *Id.* at 726, 736.

independent candidates alike, and political stability.”⁶¹ The Court—while recognizing all three of the State’s interests as legitimate—discarded the first two interests easily, finding no evidence that the law in question actually furthered those goals.⁶²

As for the latter, the Court found that Ohio’s interest in promoting political stability in a nationwide presidential election was not nearly as strong as California’s interest in avoiding political fragmentation within its own state boundaries in *Storer*.⁶³ In a 5-4 opinion written by Justice Stevens, the Court found that Ohio’s “interest in protecting political stability” writ large could not justify the burden on Anderson’s supporters’ associational rights.⁶⁴ Furthermore, the Court reiterated a guiding principle from *Kusper*, maintaining that when a “[s]tate has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.”⁶⁵

In 1992, the Court refined the standard it set forth in *Anderson* when it upheld Hawaii’s ban on write-in voting in *Burdick v. Takushi*.⁶⁶ In upholding Hawaii’s law, the Court characterized the ban as “only a limited burden on voters’ rights to make free choices and to associate politically through the vote.”⁶⁷ The majority, led by Justice White, reasoned that because Hawaii provided for easy access to the ballot until two months before the State’s primary election, any burden on voters’ freedom to associate was “borne only by those who fail[ed] to identify their candidate of choice until days before the primary [election].”⁶⁸

The Court’s characterization of the ban as a “reasonable” burden was a stark contrast from its characterization of the Ohio law in *Anderson* as “a significant state-imposed restriction.”⁶⁹ These differing characterizations of the burden imposed on voters made all

61. *Anderson*, 460 U.S. at 796.

62. *Id.* at 796-801.

63. *Id.* at 804.

64. *Id.* at 805-06.

65. *Id.* at 806 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973)).

66. 504 U.S. 428, 441-42 (1992); Daniel P. Tokaji, *Voting Is Association*, 43 FLA. ST. U. L. REV. 763, 777 (2016).

67. *Burdick*, 504 U.S. at 439.

68. *Id.* at 436-37.

69. *Compare id.* at 440, *with Anderson*, 460 U.S. at 795.

the difference in the Court's analysis, as the characterizations functionally determined the level of scrutiny that the state's restriction received.⁷⁰ As Professor Daniel P. Tokaji, who has written extensively about the Court's political association jurisprudence as applied to voting rights, succinctly summarized, "*Burdick* reaffirmed *Anderson*'s 'flexible standard,' while clarifying that strict scrutiny applies only if the challenged law imposes a 'severe' burden on association or voting."⁷¹ Since Hawaii's ban on write-in voting imposed only a "slight" burden, according to the majority, the Court gave the state more deference in pursuit of its legitimate interest in avoiding factionalism in state politics.⁷² From the Court's analysis in *Burdick* and its distinguishing from *Anderson*, the *Anderson-Burdick* standard emerged.⁷³

B. Addressing America's Districting Crisis Through a Political Association Rights Lens

Thus far, this Part has focused on the Court's application of this balancing test with respect to ballot access for minor political parties, as that issue has served as the impetus for the Court's development of a workable standard for evaluating state election laws. In the last two decades, however, members of the Court have invoked the First Amendment in dealing with other "voting as association" issues such as photo identification laws,⁷⁴ primary election structures,⁷⁵ and, most salient for the purposes of this Note, partisan redistricting.⁷⁶

70. See *Burdick*, 504 U.S. at 434.

71. Tokaji, *supra* note 52, at 2188.

72. *Burdick*, 504 U.S. at 439.

73. See Tokaji, *supra* note 52, at 2188.

74. See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203-04 (2008) (holding that an Indiana law requiring voters to present a photo identification "impose[d] only a limited burden on voters[]" and that the state's interest in preventing voter fraud carried the day (internal quotations omitted)).

75. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 570, 577, 586 (2000) (holding that the state's adoption of a "blanket primary" system in which every candidate was listed on each voter's primary ballot regardless of party affiliation, violated the political associational rights of members of the Democratic Party).

76. See *Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring); *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring).

For some time, there was hope that using an analytical framework grounded in voters' political association rights would provide the courts with a long-sought-after standard to strike down partisan gerrymanders. In *Vieth v. Jubelirer*, a case in which the Court began grappling with the constitutionality of partisan gerrymandering, Justice Anthony Kennedy invoked the First Amendment in a concurrence.⁷⁷ Although the *Anderson-Burdick* standard was not used to decide the case, Justice Kennedy suggested that a better lens through which to view potentially unconstitutional partisan redistricting was by viewing suspect maps as a potential violation of voters' First Amendment political association rights.⁷⁸ In Justice Kennedy's view, "First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights."⁷⁹ Where district lines "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."⁸⁰

Members of the Court next alluded to political association rights with respect to districting in a concurring opinion in *Gill v. Whitford*.⁸¹ Once again, the case did not turn on the First Amendment.⁸² However, in a concurring opinion authored by Justice Elena Kagan, a group of four Justices once again suggested that the First Amendment likely provided a better starting point for plaintiffs making a constitutional argument against the burdens of partisan

77. See *Vieth*, 541 U.S. at 306, 314 (Kennedy, J., concurring). The plurality in the case affirmed the district court's decision on the grounds that there were no "judicially enforceable" limits on partisan gerrymandering, and that the case was therefore nonjusticiable under the Court's political question doctrine. *Id.* at 305-06 (plurality opinion).

78. See *id.* at 314 (Kennedy, J., concurring).

79. *Id.*

80. *Id.* at 315.

81. 138 S. Ct. at 1938 (Kagan, J., concurring).

82. A five-member majority held that the plaintiffs failed to demonstrate that the district map drawn by the Wisconsin state legislature burdened their individual votes, and thus lacked Article III standing. *Id.* at 1933 (majority opinion) (holding that the plaintiff's efficiency gap calculations were "an average measure" demonstrating a burden on Democratic voters statewide, but that such calculations "[did] not address the effect that a gerrymander has on the votes of particular citizens"). The plaintiffs brought their claim under both the First and Fourteenth Amendments, but the vast majority of their evidence and argument was based on an allegation of vote dilution in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1923-24.

gerrymandering.⁸³ Justice Kagan noted that the standing analysis for a First Amendment political “association[] claim would occasion a different standing inquiry than the one in the Court’s [majority] opinion.”⁸⁴ Citing Justice Kennedy in *Vieth*, Justice Kagan argued that when a group of voters’ representational rights are burdened, the harm they face may be more nuanced than the mathematically supported claims of vote dilution under the Equal Protection Clause.⁸⁵ Voters “deprived of their *natural political strength* by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives).”⁸⁶

However, hope that the First Amendment framework alluded to in *Vieth* and *Gill* would ultimately be applied to partisan gerrymanders vanished in 2019, when a five-member majority of the Court in *Rucho v. Common Cause* decided that constitutional challenges to district maps drawn to favor a single party were “political questions beyond the reach of the federal courts.”⁸⁷ *Rucho* arose on appeal from the Middle District of North Carolina, where the district court held that North Carolina’s congressional districts made it so unlikely for Democratic candidates to prevail that “voters affiliated with the North Carolina Democratic Party” had their associational rights “chilled.”⁸⁸ Citing *Anderson*, the district court held that this chilling effect—manifesting itself in the form of difficulty in generating voter turnout, attracting candidates, and raising money—“represent[ed] cognizable, and recognized, burdens on First Amendment rights.”⁸⁹

In vacating the decision below, Chief Justice John Roberts read the district court’s decision to mean that “any level of partisanship in districting” should be regarded as discrimination against members of the opposing party.⁹⁰ According to Chief Justice Roberts,

83. *See id.* at 1938 (Kagan, J., concurring) (“[P]artisan gerrymanders may infringe the First Amendment rights of association held by parties, other political organizations, and their members.”).

84. *Id.*

85. *Id.*

86. *Id.* (emphasis added).

87. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2490-91, 2506-07 (2019).

88. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 931 (M.D.N.C. 2018).

89. *Id.* at 932.

90. *Rucho*, 139 S. Ct. at 2504, 2508.

such a holding would demand that courts arbitrarily—and therefore, unconstitutionally—draw difficult lines as to “when partisan activity goes too far,” essentially choosing partisan winners and losers.⁹¹

As vehemently as one might disagree with the Court’s decision to abdicate its role in adjudicating partisan power grabs in district mapmaking,⁹² Chief Justice Roberts’s opinion does well to highlight the conundrum that winner-take-all, single-member districts pose for mapmakers and courts alike. Single-member districts are unique in that they force even the most well-intentioned district mapmaker to make difficult decisions about which measures of “fairness” to prioritize at the expense of others.⁹³ Courts could demand that states prioritize competition, but doing so would likely threaten to create wildly disproportionate partisan outcomes.⁹⁴ Similarly, prioritizing “traditional districting criteria” like maintaining political boundaries or keeping communities of interest together may be a facially benign approach, but geographic realities—namely, the urban-rural divide among Democrats and Republicans—would likely result in elections that are just as utterly devoid of competition as America’s current gerrymandered reality.⁹⁵

The crux of the problem is that as long as courts or mapmakers are working within the confines of single-winner districts, they will always be sacrificing one measure of fairness for another. And, as

91. *Id.* at 2504.

92. This author agrees with Justice Kagan that partisan gerrymandering is “anti-democratic in the most profound sense,” and that the majority in *Rucho* abandoned its role in defending the nation’s democratic “foundations.” *Id.* at 2525 (Kagan, J., dissenting).

93. *See id.* at 2500 (majority opinion) (“The initial difficulty in settling on a ‘clear, manageable and politically neutral’ test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of ‘unfairness’ in any winner-take-all system.”); *see also* Austin Plier, *Late-Night TV Tackles Gerrymandering: John Oliver Leaves Viewers with Glimmer of Hope but Ignores Solution*, SALON (Apr. 14, 2017, 2:58 AM), https://www.salon.com/2017/04/13/late-night-tackles-gerrymandering-john-oliver-leaves-viewers-with-glimmer-of-hope-but-ignores-solution_partner [<https://perma.cc/54DM-QA9M>] (“In real life, independent commissions can strive for competition, but geographic realities often force them to sacrifice one value (competition) to ensure another (fair partisan outcomes).”).

94. *See Rucho*, 139 S. Ct. at 2500 (“[M]aking as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party.”).

95. *Id.* at 2500-01 (noting that even if the Court mandated “‘traditional’ districting criteria,” the political and geographic reality “of a State ... can itself lead to inherently packed districts”).

Chief Justice Roberts demonstrated, the Court is loath to choose among these measures of fairness—particularly when plaintiffs ask the Court’s remedy to predict and assign partisan outcomes.⁹⁶ Instead, the Court relegated itself to the sidelines of the “districting wars” in the faint hope that self-interested Congressmembers will come together to fix fundamental flaws in an electoral system that insulates most members from general election competition.⁹⁷

This Note argues that plaintiffs’ First Amendment challenge is better directed elsewhere. Rather than challenge gerrymandered district lines and force the Court “to reallocate political power between the two major political parties,”⁹⁸ the best path out of the nation’s districting quandary is to challenge the constitutionality of Congress’s mandate of single-member districts themselves. Part III uses the Court’s well-developed *Anderson-Burdick* standard as an analytical framework to challenge the constitutionality of single-member districts on political association grounds.⁹⁹

III. USING THE *ANDERSON-BURDICK* FRAMEWORK TO CHALLENGE SINGLE-MEMBER DISTRICTS ON POLITICAL ASSOCIATION GROUNDS

At its core, the *Anderson-Burdick* standard weighs the burden that a law imposes on voters’ political association rights against the government’s pursuit of legitimate interests.¹⁰⁰ Courts are to examine “the character and magnitude of the asserted [associational] injury,” and determine the degree to which voters are burdened by a challenged restriction.¹⁰¹ If the burden on voters is “slight,”¹⁰² “reasonable,” and “non-discriminatory,” then Congress’s legitimate interests are “generally sufficient to justify ... restrictions.”¹⁰³

96. *Id.* at 2499 (“Our cases ... clearly foreclose any claim that ... legislatures in reapportioning must draw district lines to come as near as possible to allocating seats ... in proportion to what their anticipated statewide vote will be.”).

97. *See id.* at 2508 (highlighting proposals in Congress meant to address partisan gerrymandering, and noting that “the avenue for reform established by the Framers, and used by Congress in the past, remains open”).

98. *Id.* at 2507.

99. *See infra* Part III.

100. *See Tokaji, supra* note 52, at 2189-90.

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

102. *Burdick v. Takushi*, 504 U.S. 428, 439 (1992).

103. *Anderson*, 460 U.S. at 788.

However, “significant”¹⁰⁴ or “severe” burdens on association receive strict scrutiny, and such restrictions “must be narrowly drawn to advance a state interest of compelling importance.”¹⁰⁵ If Congress has “a less drastic way of satisfying its legitimate interests,” it cannot choose a means which “broadly stifles” voters’ association rights.¹⁰⁶ This Note does not, per se, assert that the *Anderson-Burdick* standard must be applied should the Court evaluate Congress’s single-member district mandate. However, the standard provides a useful analytical frame for weighing the interests at issue.

Part III evaluates the character and magnitude of the burden single-member districts impose on voters in U.S. House elections. In light of the jurisprudence described above, this Part argues that the burden on voters’ political association rights is severe enough to warrant strict scrutiny under the *Anderson-Burdick* standard. Furthermore, this Part argues that Congress’s legitimate interest in adopting single-member districts is poorly served by its mandate. With more effective alternatives to single-member districts at Congress’s disposal that do not “broadly stifle” voters’ rights, its mandate cannot survive strict scrutiny.¹⁰⁷

A. *The Character and Magnitude of the Burden*

There has long been a broad consensus that the single-member district is among the most powerful and defining of electoral forces in American politics. French political scientist Maurice Duverger first posited his now famous “Duverger’s Theory” in 1951, which states that first-past-the-post voting¹⁰⁸ in single-member districts is the primary driving force preserving the two-party system.¹⁰⁹

104. *Id.* at 795.

105. *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)) (internal quotation marks omitted).

106. *Anderson*, 460 U.S. at 806 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973)).

107. *See id.*

108. First-past-the-post voting (also known as “plurality voting”) is a voting “system in which the candidate with the most votes wins without necessarily a majority of votes.” FAIRVOTE, *Electoral Systems 101*, https://www.fairvote.org/research_electoralystems101 [<https://perma.cc/FME5-7JPD>].

109. *See* DUVERGER, *supra* note 9, at 217, 226 (“[T]he simple-majority single-ballot system favours the two-party system. Of all the hypotheses that have been defined in this book, this

Duverger accurately described the unique burden on voters, stating that when more than two candidates or parties run, “electors soon realize that their votes are wasted if they continue to give them to the third party,” thus creating a “natural tendency” of voters “to transfer their vote to the less evil of its two adversaries in order to prevent the success of the greater evil.”¹¹⁰ In other words, a voter casts their ballot strategically, in the hopes that their vote will tip the scales in favor of the least objectionable candidate among the two most-likely winners.¹¹¹ Duverger also hypothesized that single-member districts have a dampening effect on potential third-party competition due to a feature which distorts representation.¹¹² When only one individual will represent an entire district, the system effectively “transform[s] 51% of the votes into 100% of the political power” in the district.¹¹³ Unless a third party can capture upwards of 33 percent of the vote (which, given the aforementioned tendency of voters to make strategic, rational choices at the ballot, is highly unlikely) the two major parties continue to reign supreme.¹¹⁴

Modern scholars agree with Duverger’s assessment of the impact of single-member districts on voters and the viability of third parties. In their assessment of “politics as markets,” professors Samuel Issacharoff and Richard Pildes refer to the single-member district as “one of the building blocks of the political order” which “inevitably has the effect of channeling political competition into a two-party structure.”¹¹⁵ Under a single-member district regime, the authors claim that voters cast a ballot, “not primarily as a means of expressing their political values, but as a means of influencing the choice between the two candidates with the most likely chance of winning.”¹¹⁶ Professor Richard Hasen has stated that “short of

approaches the most nearly perhaps to a true sociological law.... [The] system appears then to be capable of maintaining an established dualism in spite of schisms in old parties and the birth of new parties.”).

110. *Id.* at 226.

111. *See id.*

112. *Id.*

113. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 675-76 n.121 (1998) (paraphrasing Duverger’s argument).

114. *Id.*

115. *Id.* at 674.

116. *Id.* at 675-76 n.121.

eliminating winner-take-all elections or single-member districts ... the United States is likely to continue to be dominated by two major political parties.”¹¹⁷

While there is broad consensus among scholars that American voters are handcuffed to two-party dominance due to single-member districts, there is also strong evidence suggesting voters are yearning to break free. According to a Gallup poll in September 2017, an astounding 61 percent of Americans believe that the nation’s political landscape needs a viable third major party.¹¹⁸ This dissatisfaction with the two major parties is reflected in party registration numbers and voter sentiment toward Congress. Of party-registered voters in 2018, nearly 30 percent were registered as political independents.¹¹⁹ Furthermore, Congress has failed to break the 30 percent mark in its approval rating since September 2009, and has not seen a majority approval rating since 2003, when it benefited from the national unity associated with the beginning of the Iraq War.¹²⁰ Voters’ disdain for members of Congress is not reserved to the party with a majority of seats, either. Since March 2009, a majority of Gallup poll respondents have expressed disapproval with the way both Democratic and Republican members of Congress have handled their jobs.¹²¹

With such stark disapproval of both major parties for much of the past two decades, one might be shocked to learn that 98.3 percent of voters in the 2018 midterm elections cast a vote for one of the two

117. Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 333.

118. Lydia Saad, *Perceived Need for Third Major Party Remains High in U.S.*, GALLUP (Sept. 27, 2017), <https://news.gallup.com/poll/219953/perceived-need-third-major-party-remains-high.aspx> [<https://perma.cc/Q3MS-2HGL>].

119. Rhodes Cook, *Registering By Party: Where the Democrats and Republicans Are Ahead*, SABATO’S CRYSTAL BALL (July 12, 2018), <http://crystalball.centerforpolitics.org/crystalball/articles/registering-by-party-where-the-democrats-and-republicans-are-ahead/> [<https://perma.cc/8G25-E5PV>].

120. *Congress and the Public*, GALLUP, <https://news.gallup.com/poll/1600/congress-public.aspx> [<https://perma.cc/RUF3-7M2H>]; see, e.g., Frank Newport, *Seventy-Two Percent of Americans Support War Against Iraq*, GALLUP (Mar. 24, 2003), <https://news.gallup.com/poll/8038/seventytwo-percent-americans-support-war-against-iraq.aspx> [<https://perma.cc/8VFM-7S6M>] (describing high approval ratings for the president and the war as “an expected ‘rally effect’ increase that usually accompanies U.S. involvement in war or a situation in which Americans are in harm’s way on foreign shores”).

121. *Congress and the Public*, *supra* note 120.

major parties.¹²² During the 115th Congress, the U.S. House was comprised entirely of Republicans and Democrats—all 435 voting members.¹²³ In fact, only three nonmajor party candidates have been elected to the U.S. House since 1965.¹²⁴ However, the dissonance between voting patterns and voter sentiment makes sense in light of Duverger's widely accepted theory. Voters are smart. They understand that, despite their disapproval of the two major parties, the most rational way to exert influence in the voting booth is to cast their lot with one of the two favorites in the hopes that they will help tip the scales in favor of the candidate that is least objectionable.¹²⁵ To be fair, a great number of voters undoubtedly express their true preference by voting for one of the major parties. However, this dissonance between voter sentiment and electoral results highlights the fact that single-member districts impose a distinctly hard-to-quantify burden on voters. The system bends voters to its will, forcing many to make an unenviable choice, and masks the evidence of its impact with misleading results.¹²⁶

Given the focus on minor political parties and independent candidates in the Court's development of its political association jurisprudence to this point,¹²⁷ one might assume that the group injured by single-member districts is limited to voting members of a minor political party struggling for representation. Certainly, these voters are burdened by single-member districts, but the nature of the injury in question requires a broader view of the electorate. Just because almost every voter casts a vote each election cycle for one of the two major parties, one must not mistake their votes as endorsements. This Note takes the position that there is an identifiable group of voters injured by Congress's single-member district regime, which includes: (1) those who buck the system and

122. Allan Smith, *Democrats Won House Popular Vote by Largest Midterm Margin Since Watergate*, NBC NEWS (Nov. 21, 2018, 3:22 PM), <https://www.nbcnews.com/politics/elections/democrats-won-house-popular-vote-largest-midterm-margin-watergate-n938996> [https://perma.cc/82H9-ML9M].

123. *Party Divisions of the House of Representatives, 1789 to Present*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions/> [https://perma.cc/6DAK-RDEW].

124. *Id.*

125. *See supra* notes 110-17 and accompanying text.

126. *See supra* notes 111-15 and accompanying text.

127. *See supra* Part II.A.

vote outside the major parties *and* (2) those who make a rational decision about how to best exert their electoral influence and vote for one of the major parties, but are deeply unsatisfied with both of the major-party nominees in a district.

This is an important point, because if the burden in question is simply characterized as a dearth of representation for minor party candidates in the U.S. House, plaintiffs will fall short of their mark. The Supreme Court has clearly articulated that there is no right to proportional representation for voters who cannot push their candidate to the finish line.¹²⁸ Those voters still must “pull, haul, and trade to find common political ground” with other members in their voting jurisdiction.¹²⁹ However, the burden articulated in this Part goes beyond the representation of minor parties and straight to the very ideals of voter choice and associational freedom.

In this regard, it helps to keep in mind that the remedy hypothetical plaintiffs would seek is not a district drawn in a manner that ensures or even favors their selection. Rather, the voters described above are currently deprived of elections in which a legitimate group of dissenters from America’s nationalized partisan ideologies can form a meaningful, viable electoral movement. Congress’s current single-member district regime, set against the backdrop of the fierce partisan polarization it has created, forces voters to choose between two bundles of policy positions with effectively no overlap on most major issues.¹³⁰ Certainly, one cannot deny that the vast majority of voters identify with one major party more than the other. But the goal of the above discussion of voter sentiment is to argue that these voters are not nearly as ideologically homogenous as the Democratic

128. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019) (“Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation.” (quoting *Davis v. Bandemer*, 478 U.S. 109, 130 (1986) (plurality opinion))).

129. *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994).

130. Congressional voting records indicate that partisans in Congress increasingly vote as a unit. *The Collapse of the Voting Structure—Possible Big Trouble Ahead*, VOTEVIEW BLOG (Jan. 12, 2017), <https://voteviewblog.com/2017/01/12/the-collapse-of-the-voting-structure-possible-big-trouble-ahead/> [<https://perma.cc/VM9Z-LF7E>] (“[S]ince November 2000 ... Congressional voting [has] collapse[d] into a one dimensional near Parliamentary voting structure; that is, the parties are very unified.”). “DW-NOMINATE” scores, a means of representing legislator voting records ideologically on a spatial map, show that the U.S. House of Representatives is the most ideologically polarized it has ever been since DW-NOMINATE scores were tracked starting just before 1880. *About the Project*, VOTEVIEW, <https://voteview.com/about> [<https://perma.cc/6T64-HM8X>]; Lewis, *supra* note 39.

and Republican partisans that represent them. By preserving a binary, zero-sum politics, single-member districts suppress this vibrant range of policy views from meaningfully surfacing in our political discourse, on our ballots, and in the halls of Congress. This is the associational harm.

In sum, the lack of ideological diversity in the U.S. House is not in and of itself a violation of voters' political association rights.¹³¹ However, given America's historic level of political polarization,¹³² thoroughly diminished electoral competition,¹³³ and deep-seated voter dissatisfaction,¹³⁴ the degree to which Democrats and Republicans in Congress are increasingly homogenous and durably insulated from legitimate third-party competition should serve as a blaring alarm, signaling that voters' associational freedoms are seriously burdened by the status quo.

B. Challenging Congress's Single-Member District Mandate Requires Strict Scrutiny

While the Court's political association jurisprudence requires a determination as to whether a political association injury is severe enough to merit strict scrutiny, it gives very little guidance as to what constitutes a severe injury.¹³⁵ As Professor Tokaji puts it, the *Anderson-Burdick* standard "is about as open-ended as legal standards come."¹³⁶ In *Williams*, the Court focused on the impact of a petition signature requirement on new political parties and their supporters.¹³⁷ In *Anderson*, the court found Ohio's early filing deadline to severely burden "disaffected" voters.¹³⁸ Yet, in *Burdick*,

131. See *supra* note 128 and accompanying text.

132. See *supra* note 130 and accompanying text.

133. See *supra* note 27 and accompanying text.

134. See *supra* notes 118-20 and accompanying text.

135. See Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 342 (2007) ("What drives the classification of certain election laws as severely burdensome in kind? ... [T]here is certainly not a doctrinally settled [answer].").

136. Tokaji, *supra* note 52, at 2197.

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

138. *Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983) (quoting *Williams v. Rhodes*, 393 U.S. 23, 33 (1968)).

Hawaii's ban on write-in votes was merely "slight."¹³⁹ What should courts make of this limited line of cases in the context of single-member districts, where voters' ability to cast a vote outside of the two major parties is not directly prohibited, but their political association rights are clearly infringed upon?

Professors Issacharoff and Pildes suggest that courts should evaluate laws affecting the democratic process through the lens of politics as a competitive market.¹⁴⁰ "Only through an appropriately competitive partisan environment," they argue, "can ... the policy outcomes of the political process be responsive to the interests and views of citizens."¹⁴¹ Issacharoff and Pildes advocate that courts follow the lead of corporate law scholarship, which has shifted from a focus on the duties of corporate managers to an emphasis on "the background competitive structures within which managers make decisions."¹⁴²

Correspondingly, they argue that courts considering judicial intervention in the area of election law should shift from a focus on enforcing individual rights to a closer examination of "the background structure of partisan competition."¹⁴³ In demonstrating this shift in thinking, Issacharoff and Pildes level heavy criticism of the Court's holding in *Burdick*.¹⁴⁴ They argue that the Court in *Burdick* mistakenly applied a conventional individual-rights analysis, focusing on whether the First Amendment protected the right of an individual voter to cast a protest write-in vote.¹⁴⁵ Instead, the Court should have viewed Hawaii's write-in ban in the context of the state Democratic Party's attempt to insulate itself from political competition.¹⁴⁶ The authors argue that courts evaluating potential First Amendment violations "ought to focus on whether the process

139. *Burdick v. Takushi*, 504 U.S. 428, 439 (1992).

140. See Issacharoff & Pildes, *supra* note 113, at 646 ("The key to our argument is to view appropriate democratic politics as akin in important respects to a robustly competitive market—a market whose vitality depends on both clear rules of engagement and on the ritual cleansing born of competition.").

141. *Id.*

142. *Id.* at 647.

143. *Id.* at 648.

144. *Id.* at 672-73.

145. *Id.* at 672 ("[T]he Court misunderstood *Burdick*'s claim by applying a narrow, individualistic, nonsystemic conception of his claim.").

146. *Id.* at 673.

remains sufficiently open to challenge and reform, or whether the costs of mobilizing effective challenge have been raised so high as to leave the system insufficiently responsive.”¹⁴⁷

When analyzing the concurring opinions in *Vieth* and *Gill*, one is inclined to believe Justices Kennedy and Kagan took note of the analogy that Issacharoff and Pildes offer. Departing from the Court’s focus on individual rights in *Burdick*, Justice Kennedy took a broader view in *Vieth* by recognizing the capacity for partisan gerrymanders to impinge upon “voters’ representational rights.”¹⁴⁸ Justice Kennedy’s concurrence echoed the “politics-as-markets approach” of Issacharoff and Pildes¹⁴⁹ by articulating the danger in allowing partisans to draw district lines in a manner that “impos[es] burdens on a disfavored party and its voters,” and stems competition in the political market.¹⁵⁰ In *Gill*, Justice Kagan took a similarly broad view of the implications that partisan gerrymandering might have on the political market, expressing concern over district lines which deprive a party of its “natural political strength,” thus “weaken[ing] its capacity to perform” basic party functions.¹⁵¹ The language in these concurring opinions illustrates how prospective plaintiffs might wield the First Amendment as a tool for restoring competition to the political market where partisans have attempted to freeze out their competition—much in the way Issacharoff and Pildes advocate.¹⁵²

In a more recent attempt at analogizing a segment of private sector law to political association jurisprudence, Professor Issacharoff argues that courts might also look to antitrust law to better understand how to evaluate restrictions on voting rights.¹⁵³ Issacharoff expresses concern as to the “[m]issing [p]iece” in American voting jurisprudence: an inability of courts to grapple with the fact that partisans themselves run so much of the nation’s

147. *Id.*

148. *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring).

149. Issacharoff & Pildes, *supra* note 113, at 707.

150. *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring).

151. *Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring).

152. See Issacharoff & Pildes, *supra* note 113, at 673.

153. See Samuel Issacharoff, *Voter Welfare: An Emerging Rule of Reason in Voting Rights Law*, 92 IND. L.J. 299, 324-25 (2016).

election law and administration.¹⁵⁴ In response to this problem, he points to the manner in which antitrust law has dealt with similarly self-interested capitalists who attempt to stack the deck in their own favor: a simple guiding principle of consumer welfare.¹⁵⁵ Issacharoff argues that courts should use a similar principle “of voter welfare” when dealing with improper partisan motivation—“the third rail of electoral challenges.”¹⁵⁶ “All the balancing in the world cannot yield a result if one cannot specify the objective of the balancing test,” and Issacharoff argues that voter welfare should be the court’s ultimate objective.¹⁵⁷ By applying the Issacharoff and Pildes theory of “politics as markets” and Issacharoff’s “voter welfare” model to single-member districts, one can make a strong case that the burden imposed on voters is best characterized as “severe,” and that Congress’s mandate, therefore, must receive strict scrutiny.

C. Weighing Congress’s Legitimate Interest

Upon establishing that a law imposes a severe burden on voters’ political association rights and merits strict scrutiny, a court must examine the government’s legitimate interest in maintaining its legislative scheme and conduct a balancing of that interest against the burden on voters.¹⁵⁸ Congress “may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties,” should “a less drastic” means of achieving its interest prove readily available.¹⁵⁹ In weighing the government’s interest, the Court also evaluates the degree to which a law actually furthers the interest it purports to advance.¹⁶⁰ The following discussion measures the effectiveness of Congress’s mandate in achieving its legitimate interest of ensuring representation of racial minority

154. *Id.* at 321.

155. *Id.* at 323-24.

156. *Id.* at 321, 324.

157. *Id.* at 323-24.

158. Elmendorf, *supra* note 135, at 318; *see* Tokaji, *supra* note 52, at 2190.

159. *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (quoting *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973)).

160. *Id.* at 796-99 (finding “no merit in the State’s claim” that Ohio’s early filing deadline advanced its legitimate interest in “treating all candidates alike”).

communities in the U.S. House. Upon a finding that single-member districts ineffectively deliver on this legitimate interest, combined with an understanding that more effective alternatives are available to Congress, Part III concludes that single-member districts cannot be sustained.

The history precipitating Congress's mandate and subsequent use of single-member districts as a tool for remedying cases of racial minority vote dilution does well to demonstrate the key role that single-member districts currently play in ensuring representation of racial minority communities in the U.S. House.¹⁶¹ However, majority-minority single-member districts come with real drawbacks for the communities of voters they are meant to benefit. One need not look any further than the standard that the aforementioned *Gingles* case set forth to find serious shortcomings of single-member districts as a standard for remedies under the VRA. In *Gingles*, the Court held that in order to bring a successful claim under section 2 of the VRA, a plaintiff must prove, among other preconditions, that "the minority group is *sufficiently numerous and compact* to form a majority in a single-member district."¹⁶² This raises a significant hurdle for racial minority groups that, while numerous, are not compact enough for a single-member district to be drawn in which those voters comprise a majority.

Moreover, even in districts where racial minority communities are sufficiently compact to be entitled to representation under the standard set forth in *Gingles*, majority-minority districts have consequences for the effectiveness of such representation. Harvard Law Professor Lani Guinier has raised serious concerns about the ability of racial minority communities represented in single-member districts to influence the legislative process and policy outcomes.¹⁶³ Guinier, in arguing that single-member districts are an ineffective means of ensuring representation of racial minorities in legislative bodies, states that single-member "districting wastes votes because it forces minorities to concentrate their strength within a few

161. See *supra* notes 13-23 and accompanying text.

162. Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 344 (1998) (emphasis added) (citing *Gingles v. Thornburg*, 478 U.S. 30, 50-51 (1986)).

163. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 127-37 (1994).

electoral districts and thereby isolates them from potential legislative allies.”¹⁶⁴ Due to this inefficiency, Professor Guinier pushes back against the assumption that becoming a district majority “works as a proxy for interest.”¹⁶⁵ Instead, she notes that creating majority-minority districts necessarily also requires “creating majority white districts in which the electoral success of white legislators is not dependent on black votes. In this way, race-conscious districting may simply reproduce within the legislature the disadvantaged numerical and racial isolation that the majority minority district attempted to cure at the electoral level.”¹⁶⁶

Attempts at drawing race-conscious¹⁶⁷ single-member districts face other hurdles as well. In *Shaw v. Reno*¹⁶⁸ and *Miller v. Johnson*,¹⁶⁹ the Supreme Court further curtailed the effectiveness of single-member districts as a means of ensuring racial minority representation. In *Shaw*, the Court evaluated the constitutionality of North Carolina’s Twelfth District, “a narrow, oddly shaped majority-black district.”¹⁷⁰ The Court created a new cause of action, holding that a single-member district was unconstitutional “if it is so ‘irrational’ as to be understood only as an ‘effort to segregate voters into separate voting districts because of their race.’”¹⁷¹ The Court cited the fear that such districts would promote racial stereotypes and “balkanize [voters] into competing racial factions.”¹⁷² In *Miller*, the Court provided a more articulate standard for measuring such claims, holding that plaintiffs can challenge districts by showing “that race was the predominant factor” in creating the district, to the detriment of race-neutral principles such

164. *Id.* at 135.

165. *Id.*

166. *Id.*

167. Professor Guinier defines the term “race-conscious” in the context of districting as “the practice of maximizing or consolidating the number of minority group members in a single, or a few winner-take-all subdistricts.” Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1135 n.2 (1993).

168. 509 U.S. 630 (1993).

169. 515 U.S. 900 (1995).

170. Mulroy, *supra* note 162, at 346.

171. *Id.* at 346-47 (quoting *Shaw*, 509 U.S. at 657-58).

172. *Shaw*, 509 U.S. at 657.

as “compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests.”¹⁷³

Despite originally functioning as a limit on the ability of district mapmakers to maximize racial minority representation, the *Shaw* cause of action now predominantly functions as a means for racial minority voters to combat maps in which racial minority communities have been tightly packed into suspiciously few districts, minimizing the voters’ potential electoral success.¹⁷⁴ This fact illustrates how single-member districts, in the context of today’s age of precise district mapmaking, can too easily be leveraged to depress the representation of racial minority communities.¹⁷⁵ It also gives further credence to Professor Guinier’s fear that majority-minority districts undercut the political leverage of the communities in such districts.¹⁷⁶

Professor Steven J. Mulroy, a former civil rights lawyer for the U.S. Department of Justice, notes that *Shaw* and *Miller*, combined with the VRA, create “a dilemma for anyone interested in drawing fair electoral districts. The [VRA] requires that race be taken into account when drawing districts, but the *Shaw* cause of action requires that race not be used ‘too much.’”¹⁷⁷ The use of alternative voting methods in multimember districts offers “the way out of this dilemma” according to Mulroy.¹⁷⁸

173. *Miller*, 515 U.S. at 916.

174. Jamin B. Raskin, *Taking the States’ Congressional Delegations Seriously: A Twelfth Amendment and First Amendment Approach to Identifying the Worst Gerrymanders*, 59 WM. & MARY L. REV. ONLINE 127, 163 (2018) (“There are not many people motivated to bring *Shaw* claims anymore, except African Americans themselves.... [Plaintiffs understand] that their votes are being traduced and diluted through the cynical ‘packing’ process underway in redistricting throughout the South.”).

175. See, e.g., Spencer, Hughes & Richie, *supra* note 13, at 387 (“African-American voters comprise 29.9% of the vote in Louisiana, 24.7% of the vote in Alabama, and 26.3% of the vote in South Carolina, yet they have the power to elect only one member (out of six, seven, and seven seats, respectively) in each state’s sole majority-minority district.” (footnotes omitted)).

176. See GUINIER, *supra* note 163, at 135. To truly comprehend the ramifications of this problem, consider the fact that “a majority of the African-American population in every state with a history of racially polarized voting lives in a majority-white district.” Spencer, Hughes & Richie, *supra* note 13, at 387.

177. Mulroy, *supra* note 162, at 348.

178. *Id.* at 349.

To underscore the potential of alternative voting methods, one need not look any further than the proven track record of alternative voting methods in at-large or multiwinner district elections to elect *local* legislative bodies compiled by Spencer, Hughes & Richie.¹⁷⁹ The authors point to remedies in Alabama, Texas, South Dakota, Illinois, North Carolina, and New York as “places where plaintiffs sued local jurisdictions for their use of winner-take-all, at-large voting, and where the jurisdictions settled by adopting [proportional] voting methods instead of switching to [single-member] districts.”¹⁸⁰

It is important to stress that this critique of single-member, majority-minority districts seeks not to diminish or understate their incredible improvement upon winner-take-all at-large voting schemes, or the hard-fought success of civil rights leaders¹⁸¹ in achieving improved representation through a combination of the VRA and single-member districts. And certainly, without an alternative voting method to winner-take-all elections, any multi-member or at-large scheme would be unpalatable as a means of fair representation for all.¹⁸² However, more than fifty years of experience with single-member districts has demonstrated that Congress’s 1967 mandate no longer represents the most effective way to address the problem it sought to solve.

The foregoing analysis demonstrates that Congress’s single-member district mandate imposes a severe burden on voters’ political association rights, and therefore must receive strict scrutiny. Furthermore, while well-intentioned at its inception, the mandate poorly serves its original intended purpose in the wake of the VRA.

179. See Spencer, Hughes & Richie, *supra* note 13, at 395.

180. *Id.*

181. See, e.g., BERMAN, *supra* note 14, at 5 (“On the afternoon of March 7, 1965, [John] Lewis ... headed over to Brown Chapel, the redbrick headquarters of Selma’s civil rights movement.... Lewis and six hundred marchers came face-to-face with an army of blue-helmeted Alabama state troopers when they reached the Edmund Pettus Bridge.... ‘I really thought I was going to die. I thought it was the last protest.’”).

182. Congress could adopt any number of alternative systems to single-member districts that would still ensure groups of voters in the minority in any given jurisdiction could earn their fair share of representation. For example, a bill introduced in the House during the 115th Congress would have states that elect five or fewer representatives to the U.S. House do away with district lines altogether and elect representatives at-large using ranked choice voting, a voting method that produces proportional, rather than winner-take-all, results. See Fair Representation Act, H.R. 3057, 115th Cong. §§ 202-203 (2017).

In light of these changed circumstances, the burden on voters' First Amendment rights must outweigh Congress's legitimate interest in mandating single-member districts. With any number of "less drastic" election schemes available to Congress that would better ensure representation for all, courts cannot continue to uphold "a legislative scheme that broadly stifles the exercise of fundamental personal liberties."¹⁸³

It is worth noting that in response to a challenge of this nature to single-member districts, Congress would likely argue the law is also a means to achieve several other legitimate interests that have been recognized by the Supreme Court in previous cases decided under the *Anderson-Burdick* standard, such as, an interest in maintaining a two-party system to promote political stability and avoid factionalism.¹⁸⁴ This Note only addresses the most predominant interest Congress had in mind when it passed the law in 1967, but the problems facing American democracy described in Part I begin to build the case against the notion that single-member districts promote political stability or avoid factionalism.¹⁸⁵

IV. CONCERNS ABOUT JUSTICIABILITY

Despite the evident implications single-member districts have for voters' political association rights, opponents of the foregoing constitutional arguments will likely raise the issue of justiciability. Part IV explores dicta from *Timmons v. Twin Cities Area New Party* indicating the Court's reticence to consider the constitutionality of single-member districts due to its political question doctrine,¹⁸⁶ and then rebuts these justiciability concerns in the context of the Court's political question jurisprudence.

183. *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (quoting *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973)).

184. *See, e.g., Storer v. Brown*, 415 U.S. 724, 736 (1974) (recognizing pursuit of "political stability" and avoidance of "unrestrained factionalism" as legitimate state interests).

185. *See supra* Part I.B.

186. 520 U.S. 351, 362 (1997).

A. Timmons and the Court's Reticence to Intervene

The Supreme Court has long been reticent to enter the “political thicket” and decide cases that hinge on political questions which, in the Court’s view, ought to be left to the discretion of the political branches of government.¹⁸⁷ In this way, the Court’s political question doctrine is “essentially a function of the separation of powers.”¹⁸⁸ However, since it “first entered the political thicket in the early 1960s,” the Court’s “oversight over the political process has expanded” significantly.¹⁸⁹

Despite the Court’s expanding role in this area, there remains a prevailing view that Congress’s choice of single-member districts is a policy choice beyond the reach of First Amendment analysis. The Court, in dicta, seemingly expressed this view in *Timmons*, a case in which the *Anderson-Burdick* standard was applied to a Minnesota law banning fusion voting.¹⁹⁰

The plaintiffs—a local minor political party—argued that the law kept the party from building “political alliances and thus broadening [its] base of ... support for its activities.”¹⁹¹ The United States Court of Appeals for the Eighth Circuit agreed, highlighting minor party members’ “no-win choice” between “vot[ing] for candidates with no realistic chance of winning, defect[ing] from their party and vot[ing] for a major party candidate who does, or declin[ing] to vote at all.”¹⁹²

The Supreme Court reversed, holding that the state’s antifusion law did “not directly preclude[] minor political parties from developing and organizing.... Nor ha[d] Minnesota excluded a particular group of citizens, or a political party, from participation in

187. See, e.g., *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (expressing the Court’s hesitancy to decide cases about reapportionment under the political question doctrine, with Justice Frankfurter writing that “[c]ourts ought not ... enter this political thicket”).

188. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

189. Issacharoff & Pildes, *supra* note 113, at 644.

190. *Timmons*, 520 U.S. at 362. Fusion voting allows “more than one political party [to] support a common candidate. Consequently, the name of a single candidate can appear on the same ballot multiple times under multiple party lines.” *Fusion Voting*, BALLOTPEDIA, https://ballotpedia.org/Fusion_voting#cite_note-definition-1 [<https://perma.cc/T5W8-FSNK>].

191. *Timmons*, 520 U.S. at 360 (quoting *Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 199 (1996)).

192. *McKenna*, 73 F.3d at 199.

the election process.”¹⁹³ In concluding that the burden imposed on voters was not severe, the Court likened the antifusion law to single-member districts, stating that “[m]any features of our political system—*e.g.*, single-member districts ... make it difficult for third parties to succeed in American politics.... But the Constitution does not require States to permit fusion any more than it requires them to move to proportional-representation elections.”¹⁹⁴

In the wake of *Timmons*, there are differing views as to the meaning of the foregoing mention of single-member districts. One possible explanation expressed by Professor Hasen is that the Court simply did not view single-member districts as burdensome enough to require heightened scrutiny.¹⁹⁵ Hasen postulates that laws favoring the two-party system need only rational basis review, and therefore “the Court would not need to apply heightened scrutiny to an argument that the use of single-member districts ... are unconstitutional.”¹⁹⁶

Other scholars, however, are inclined to believe the Court’s mention of single-member districts serves to telegraph its view that Congress’s single-member district mandate is a political decision outside the bounds of judicial oversight. Professors Issacharoff and Pildes seemingly take this view, characterizing single-member districts as a problematic, yet permanent, feature of the American political landscape.¹⁹⁷ They state “that, for institutional reasons, courts are hardly likely to declare [single-member] district[] elections and [first-past-the-post voting] unconstitutional,” as they would likely “find it well beyond their proper role.”¹⁹⁸ Issacharoff and Pildes are critical of the *Timmons* Court’s analysis as to the burdensome nature of Minnesota’s antifusion law,¹⁹⁹ but agree with the *Timmons* Court that single-member districts are off the table.²⁰⁰

193. *Timmons*, 520 U.S. at 361.

194. *See id.* at 362.

195. *See* Hasen, *supra* note 117, at 344 n.77.

196. *Id.*

197. *See* Issacharoff & Pildes, *supra* note 113, at 679.

198. *Id.*

199. *Id.* at 685 (“In contrast to the way the ... Court approached *Timmons*, under a political markets analysis of electoral regulation, the antifusion laws should trigger exacting judicial scrutiny.”).

200. *Id.* at 679.

Other scholars concur with this view. In an article responding to the Issacharoff and Pildes theory of politics as markets, David Schleicher argues that the American political market should be treated in the same way economic regulations treat natural duopolies.²⁰¹ He argues that the Court in *Timmons* viewed American politics through this lens and ruled accordingly,²⁰² despite the fact that “it is relatively clear that our single-member district/[first-past-the-post] system imposes a severe burden on the extent to which elected officials are representative[s] of voters’ preferences.”²⁰³ In fact, Schleicher argues that when one applies Issacharoff and Pildes’s theory of political competition, “it is impossible to ... maintain [first-past-the-post] elections” in single-member districts.²⁰⁴ A similar scholarly view suggests that single-member districts fall into a category of “substantially burdensome regulations that are not subject to strict scrutiny.”²⁰⁵ To submit these laws to strict scrutiny would be to “call[] into question the long-accepted structure of the American [political] system.”²⁰⁶

Each of these three interpretations of the Court’s dicta in *Timmons* alludes to the fact that single-member districts *must survive* a constitutional challenge, but *not on the merits* of a First Amendment inquiry. There is general agreement among these views that single-member districts impose a severe burden on voters’ political association rights,²⁰⁷ but also consensus that a faithful application of the Court’s political association jurisprudence to Congress’s long-standing single-member district mandate is beyond

201. David Schleicher, “Politics as Markets” Reconsidered: Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections, 14 SUP. CT. ECON. REV. 163, 192 (2006).

202. *Id.* at 197-98 (“If the American electoral system is a natural duopoly, then constitutional review of electoral regulation of parties should permit rules that favor the existence of a two-party system, because creating barriers to entry for small third parties makes it more likely that the winner of an election will be the choice of the majority.”).

203. *Id.* at 191.

204. *Id.*

205. *The Supreme Court, 1996 Term: Leading Cases*, 111 HARV. L. REV. 309, 314 (1997).

206. *Id.* at 316.

207. Issacharoff & Pildes, *supra* note 113, at 674 (“[S]ingle-member district[s] inevitably [have] the effect of channeling political competition into a two-party structure.”); *see supra* notes 202-05 and accompanying text.

the proper role of the Court.²⁰⁸ The common thread, it seems, is an acknowledgement of the Court's political question doctrine and doubt as to the justiciability of a challenge to single-member districts.

B. Rebutting Justiciability Concerns

The *Timmons* Court's mention of single-member districts is only dicta, and thus is not binding law.²⁰⁹ However, in light of the prevailing view that a constitutional challenge to single-member districts may not be justiciable, it is worth very briefly examining the Court's "political question" jurisprudence to properly rebut such an argument.

In *Baker v. Carr*, a landmark case in developing the Court's political question doctrine, the Court overturned a district court's ruling that the plaintiffs' Fourteenth Amendment challenge to Tennessee's reapportionment laws was nonjusticiable.²¹⁰ The district court based its decision on the Supreme Court's opinion in *Colegrove v. Green*, in which a plurality of Justices held that a challenge to Illinois's reapportionment of legislative districts was a political question beyond the bounds of the Court's proper role.²¹¹

In reversing the district court in *Baker*, the Supreme Court drastically narrowed its holding in *Colegrove*, and gave some guidance as to what constitutes a nonjusticiable political question.²¹² The Court stated that, based on its political question doctrine jurisprudence, there were six circumstances—none of which were present in the apportionment case before it—in which a political

208. See, e.g., Issacharoff & Pildes, *supra* note 113, at 679 ("[F]or institutional reasons, courts are hardly likely to declare districted elections and [first-past-the-post] unconstitutional.").

209. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362 (1997) (finding that Minnesota's *fusion ban* did not impose a severe burden on New Party's associational rights, and holding the law to be constitutional).

210. 369 U.S. 186, 198 (1962) ("[T]his cause presents no nonjusticiable 'political question.'").

211. 328 U.S. 549, 550, 556 (1946) ("To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket.").

212. *Baker*, 369 U.S. at 209-10 ("The District Court misinterpreted *Colegrove v. Green*.... Appellants' claim that they are being denied equal protection is justiciable, and ... 'the right to relief ... is not diminished by the fact that the discrimination relates to political rights.'" (quoting *Snowden v. Hughes*, 321 U.S. 1, 11 (1944))).

question might preclude the Court's involvement: (1) there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) the Court lacks a "judicially discoverable and manageable standard[] for resolving" the question; (3) circumstances exist which make it impossible for the Court to decide the case "without an initial policy determination of a kind clearly for nonjudicial discretion;" (4) the Court cannot decide the case "without expressing lack of the respect due coordinate branches of government;" (5) there is "an unusual need for unquestioning adherence to a political decision already made;" or (6) there is "potential[] of embarrassment from multifarious pronouncements by various departments on one question."²¹³ This Part will conclude by addressing the first, third, and fourth of these potentially thorny "political thickets" as they relate to Congress's single-member district mandate.²¹⁴

The first guiding principle from *Baker* is that when the text of the Constitution commits an issue to another branch of government, it may indicate that judicial oversight of the issue is impermissible.²¹⁵ When it comes to regulating democracy, the Constitution explicitly grants Congress the power to regulate the time, place, and manner of elections for the U.S. Senate and House.²¹⁶ However, just because Congress's single-member district mandate flows from a constitutionally enumerated power does not mean that the law is immune from the limits of the Constitution.²¹⁷ The Court demonstrated as much regarding the aforementioned Elections Clause in *Shelby County v. Holder*, when it struck down section 4(b) of the VRA because it infringed upon the constitutional sovereignty of the

213. *Id.* at 217.

214. As Part II demonstrates, the *Anderson-Burdick* test constitutes a judicially accepted standard for dealing with alleged violations of voters' political association rights. *See supra* Part II. Furthermore, the fifth and sixth concerns raised by the *Baker* Court are not of particular concern should the Court be asked to rule on the constitutionality of Congress's single-member district mandate.

215. *See Nixon v. United States*, 506 U.S. 224, 228 (1993); *Baker*, 369 U.S. at 217.

216. U.S. CONST. art. I, § 4, cl. 1.

217. *See Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) ("[W]hen an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803))).

states.²¹⁸ Congress's single-member district mandate is no different: just because the Constitution empowers Congress to regulate federal elections does not mean such laws are exempt from constitutional review.²¹⁹

The third and fourth concerns raised by the *Baker* Court are similar, and taken together in the context of challenging Congress's single-member district mandate, they can best be summarized as prohibiting the Court from usurping Congress's legislative power.²²⁰ By ruling on the constitutionality of single-member districts, the Court would not prescribe any preferred election system for U.S. House elections, nor decide which theory of political representation Congress should adopt, as members of the Court have cautioned against.²²¹ Instead, the Court would simply decide if one specific method of representation (single-member districts) comports with voters' political association rights under the First Amendment.²²² Moreover, the Court would not be "reallot[ing] political power between the two major political parties, with no ... legal standards to limit and direct their decision[]." ²²³ By striking down Congress's mandate, the Courts would not in theory or in practice take seats from any one party or give them to another; it would choose no winners or losers.

This Note's argument is also notably different than the line-drawing requested by the plaintiffs in *Rucho*, in which the Court balked at the prospect of answering the question: "How much is too

218. 570 U.S. 529, 557 (2013). It is worth noting that while *Shelby County* does well to illustrate the fact that laws passed by Congress pursuant to the Elections Clause are still subject to constitutional review, this author subscribes to Justice Ginsburg's view that the majority's decision was tantamount to "throwing away your umbrella in a rainstorm because you are not getting wet." *Id.* at 590 (Ginsburg, J., dissenting).

219. *See id.* at 557 (majority opinion).

220. *See Baker v. Carr*, 369 U.S. 186, 217 (1962).

221. *See, e.g., Holder v. Hall*, 512 U.S. 874, 892 (1994) (Thomas, J., concurring in the judgment) (expressing his concern that the Court's vote dilution jurisprudence had "immersed the federal courts in a hopeless project of weighing questions of political theory"); *Baker*, 369 U.S. at 300 (Frankfurter, J., dissenting) ("What is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy.").

222. *See supra* Part II.B.

223. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). As explained earlier, the Court can turn to the *Anderson-Burdick* standard for a well-developed frame of analysis for evaluating burdens on political association rights. *See supra* Part II.A.

much [partisanship in redistricting]?”²²⁴ If one views election systems on a spectrum of most burdensome to least burdensome, this Note argues that single-member districts represent the “most burdensome” endpoint of the spectrum.²²⁵ Indeed, one cannot possibly elect *less than a single member* to the U.S. House in a district. By striking down Congress’s chosen method of representation in the U.S. House, the Court would not dictate that Congress instead adopt the “least burdensome” endpoint on the spectrum (i.e., the most granular version of proportional representation one can imagine).²²⁶ Rather, with the “most burdensome” point on the spectrum of systems of representation spoken for by the Court, Congress would then have an opportunity to weigh any number of alternatives that better achieve its legitimate interests in having a national standard for U.S. House elections.²²⁷

Shelby County represents a modern example of the Court taking this approach. In *Shelby County*, the Court found that circumstances had changed so much since the VRA was enacted in 1965 that the law’s preclearance formula was no longer constitutional.²²⁸ By striking down the provision, the Court did not mandate a legislative path forward, nor preclude Congress from passing an updated preclearance formula.²²⁹ Rather, upon finding that a statute violated the Constitution, the Court struck it down, allowing Congress to pass any number of alternatives to the unconstitutional version on the books.²³⁰ Should the Court strike down Congress’s single-member district mandate, it would similarly force Congress to adopt a new system that “speaks to current conditions,”²³¹ while

224. *Rucho*, 139 S. Ct. at 2501.

225. Schleicher, *supra* note 201, at 191 (“[I]t is relatively clear that our single-member district/[first-past-the-post] system imposes a severe burden on the extent to which elected officials are representative of voters’ preferences.”); *see supra* Part III.

226. *See Vieth v. Jubelirer*, 541 U.S. 267, 338 (2004) (Stevens, J., dissenting) (“The Constitution does not, of course, require proportional representation of racial, ethnic, or political groups.”).

227. *See supra* note 182 and accompanying text.

228. *See Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (expressing the fact that America had changed since 1965, and that Congress must ensure that its legislation “speaks to current conditions”).

229. *See id.* (“Congress may draft another formula based on current conditions.”).

230. *See id.*

231. *Id.*

refraining from dictating to Congress how that system must function.

It is also worth noting that Congress's single-member district mandate lies partly in the hands of a U.S. House full of self-interested partisans belonging to the two major parties.²³² Drawing upon Professor Issacharoff's aforementioned "voter welfare" model as a means to combat self-interested partisans in charge of election rules, it is hard to imagine an election law in more serious need of court intervention than single-member districts.²³³

"It is emphatically the province and duty of the judicial department to say what the law is,"²³⁴ and when presented with a statute that violates the Constitution, the Court cannot avoid its duty "merely 'because the issues have political implications.'"²³⁵ Should the Court be presented with a constitutional challenge to Congress's single-member district mandate, it can and must fulfill its duty to rule on the merits.

CONCLUSION

When Congress enacted its single-member district mandate for U.S. House elections in 1967, the law was a simple means to a well-intentioned end.²³⁶ However, fifty years of experience using single-member districts to elect the U.S. House has illustrated the serious consequences Congress's chosen election system has had on American politics.²³⁷ Furthermore, modern analysis reveals that the law poorly delivers on its original goal,²³⁸ while severely stifling voters' political association rights and precluding any hope of robust competition in our national marketplace of ideas.²³⁹

With hopes dashed that the Court would step in to directly address partisan gerrymandering, it is time for democracy advocates

232. *See supra* note 10 and accompanying text.

233. *See* Issacharoff, *supra* note 153, at 322-24.

234. *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

235. *Id.* (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983)).

236. *See supra* Part I.A.

237. *See supra* Part I.B.

238. *See supra* Part III.C.

239. *See supra* Part III.

to think—quite literally—outside the single-member district box. The best path out of the nation’s districting quandary is moving beyond its current single-member district paradigm altogether, and the most compelling First Amendment challenge plaintiffs can bring is against Congress’s mandate of districts themselves. Now is the time to challenge America’s outdated means of electing the “People’s House,” and usher in a responsive electoral system to reinvigorate the nation’s politics.

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