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Doing Our Politics in Court: Gerrymandering, "Fair Representation" and an Exegesis into the Judicial Role

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DOING OUR POLITICS IN COURT:
GERRYMANDERING, “FAIR REPRESENTATION”
AND AN EXEGESIS INTO THE
JUDICIAL ROLE

Luis Fuentes-Rohwer*

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INTRODUCTION

In a not-so-distant past, the U.S. Supreme Court displayed a remarkable unwillingness to monitor matters political. This is no longer the case. The change in judicial posture began in earnest in the early 1960s, with the Court’s decision in Baker v. Carr.1 Baker’s demands were very modest; only egregious circumstances, as then seen throughout the country, warranted judicial intervention.2 All too soon, however, passive regulation of the political thicket gave way to judicial control of reapportionment questions. This institutional shift began almost immediately after the Court imposed an equipopulation standard in Reynolds v. Sims.3 In the words of the late Professor Dixon, written at the time of Reynolds, "[C]ourts not only have entered the thicket, they occupy it."4 Today, it is fair to say that judicial involvement in democratic politics is a common thread weaved into the fabric of our political culture.5

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3 377 U.S. 533, 537 (1964); see Robert G. Dixon, Jr., The Court, the People, and “One Man, One Vote”, in Reapportionment in the 1970s, at 7, 11 (Nelson W. Polsby ed., 1971).
4 Robert G. Dixon, Jr., Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation, 63 Mich. L. Rev. 209, 210 (1964); see also Michael A. Fitts, The Hazards of Legal Fine Tuning: Confronting the Free Will Problem in Election Law Scholarship, 32 Loy. L.A. L. Rev. 1121, 1121 (1999) ("Far more than was ever imaginable several decades ago, litigants are asking the judicial process to draw the permissible limits of political activity."); Richard H. Pildes, The Theory of Political Competition, 85 Va. L. Rev. 1605, 1606 (1999) ("In the relatively short time since [Baker], the United States Supreme Court has not only entered the ‘political thicket,’ but with remarkable speed has found conflicts of democratic politics coming to dominate its docket.").
This change in judicial posture towards redistricting questions—though misguided in certain respects—reflects a worthy goal. Prior to its intervention in *Baker*, the Court adhered to a formalistic understanding of the franchise. At that time, the relevant constitutional question focused on the act of voting, not its weight or meaning. *Baker* and *Reynolds* changed all that; these cases may be understood as seeking to shift the focus on the franchise as a measure of acquiring full and effective representation as opposed to a measure for merely registering electoral preferences. On these terms, the Court must be commended for recognizing that voting is more than formalistic exercise.

This new recognition of the franchise opened up very promising lines of inquiry into the notion of full and effective participation. And yet, the Court may be credited for identifying the question of representation but very little else. For all its promise and early jurisprudential efforts, the Court was never able to convey sensibly what exactly this new focus on representation and participation meant. A satisfying answer notwithstanding, the Court continued to limit the legitimate discretion of state actors while dealing with pressing questions of democratic rights. Worse yet, it may be said that the Court ultimately proved to be too successful, too confident, and ultimately too cavalier in its handling of political matters. Those who wished for a manageable standard got exactly that, the formalistic and mechanical “one person, one vote.” As a consequence of this failure, we now have a judiciary too willing to thrust itself into policy debates.

This Article responds to this state of affairs, a state amply reflected in modern voting rights law. In so doing, it argues that the

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6 *Reynolds*, 377 U.S. at 565 (explaining that political fairness may be loosely defined as "the achieving of fair and effective representation for all citizens").


8 Rick Pildes labels this new judicial posture the “constitutionalization of democracy.” Richard H. Pildes, *Constitutionalizing Democratic Politics, in A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY* 155 (Ronald Dworkin ed., 2002). As he argues, “the Court now almost reflexively acts as if it were appropriate for constitutional law always to provide ready answers as to what makes democracy ‘best.’" *Id.* at 156. This is problematic, he continues, because the Court no longer asks “whether there are appropriate reasons that democratic politics itself is not the proper forum in which to address those questions.” *Id.*
Court should play a passive, minimalist role, a position that would afford the relevant political actors the needed space to carry out their policymaking duties as necessary.9 Three premises ground the discussion throughout. First, the Court has made clear that the redistricting task belongs to the states.10 Second, the redistricting process raises difficult and contested questions of politics and democratic theory. And third, debates over redistricting choices at the state level are really debates over the concept of "fair representation," debates that are inherently complex and ultimately not amenable to judicial resolution.

These premises in mind, how must the Supreme Court understand and approach matters of electoral politics, and particularly cases involving racial and political gerrymandering? Many observers contend that the Court must retain a strong presence in the gerrymandering thicket while policing its contours aggressively.11 This Article

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9 To be clear, this Article does not stake a states' rights position. The question of whether voting rights law has cut too deep into matters of state sovereignty remains wholly outside the scope of this Article. Many commentators make precisely this point, to be sure. See, e.g., City of Rome v. United States, 446 U.S. 156, 193-200 (1980) (Powell, J., dissenting); id. at 206-21 (Rehnquist, J., dissenting); Katzenbach v. Morgan, 384 U.S. 641, 671 (1966) (Harlan, J., dissenting); Melissa L. Saunders, The Dirty Little Secrets of Shaw, 24 HArv. J.L. & PUB. POL'Y 141, 147-48 (2000) (asserting that the Shaw line of cases "reflect[s] a callous disregard—indeed, utter contempt—for the autonomy of the states' political processes, a disregard that cannot be squared with basic principles of federalism and democratic self-government"). This Article is focused instead on our structural commitments as reflected in established electoral practices. To put this point a different way, the challenge is to find a space between Justice Frankfurter's absolutist "political questions" regime and the aggressive review we have come to experience.

10 See, e.g., Voinovich v. Quilter, 507 U.S. 146, 156-57 (1998); Growe v. Emison, 507 U.S. 25, 34 (1993); Chapman v. Meier, 420 U.S. 1, 19 (1975); see also Bush v. Vera, 517 U.S. 952, 978 (1996) (recognizing the Court's "longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan"). The Court holds on to this view even in the face of contradictory signals sent in the wake of Shaw v. Reno, 509 U.S. 650 (1993), and its progeny. See Vera v. Bush, 517 U.S. 952, 978 (1996); Miller v. Johnson, 515 U.S. 900, 915-16 (1995). But see Miller, 515 U.S. at 949 (Ginsburg, J., dissenting) ("The Court's disposition renders districting perilous work for state legislatures . . . . Genuine attention to traditional districting practices and avoidance of bizarre configurations seemed, under Shaw, to provide a safe harbor . . . . In view of today's decision, that is no longer the case." (citations omitted)); Pamela S. Karlan, The Fire Next Time: Reapportionment After the 2000 Census, 50 Stan. L. Rev. 731, 753 (1998) ("Although the courts pay great lip service to the idea that reapportionment is a core state function whose inherently political nature 'requires courts to exercise extraordinary caution' before intervening, the reality seems to belie their protestations." (citation omitted)).

disagrees. In a nutshell, this Article argues that the gerrymandering debate is really a debate about the difficult concept of representation. At the heart of most criticisms lies the view that gerrymandered districts are tainted districts, a skewed representative measure of the constituency in question. On these terms, however, the better question is an institutional one: would we gain a tangible measure of electoral representation qua individual districts were the Court to aggressively monitor the crafting of electoral districts? Put a different way: would the judicial cleansing of gerrymandered districts lead to gains in terms of electoral representation? As this Article makes amply clear, answers to these questions are not as clear-cut as one might expect.

This Article develops this position over the course of four Parts. Part I makes three particular points. First, under a single-member districting system, the concept of representation must focus on the question of representation at the district level. In so doing, critics of the gerrymander must shift their attention away from the larger jurisdiction, whether state or national politics, and towards the dynamics found within each particular district. Second, critics often decry gerrymandered districts because representatives elected from such districts are thought to be less accountable and less responsive than representatives from non-gerrymandered districts. This Part disputes these simplistic characterizations. It concludes that the concept of fair representation under present districting practices fares surprisingly well.

The third point may be considered the heart of the Article. As matters stand, existing electoral structures provide a very strong incentive to gerrymander. Yet, once the relevant institutions behave as expected, we cry foul while wishing to enlist the Court's help to cleanse

Perspective, 79 N.C. L. REV. 1301, 1304-06 (2001); Samuel Issacharoff, Gerrymandering and Political Cartels, 116 HARV. L. REV. (forthcoming 2002); Samuel Issacharoff & Richard Pildes, No Place for Political Gerymandering, TEX. LAW., Aug. 5, 1996, at 25; see also Samuel Issacharoff & Pamela S. Karlan, The Hydraulics of Campaign Finance Reform, 77 TEX. L. REV. 1705, 1705 (1999) (“Electoral reform is a graveyard of well-intentioned plans gone awry . . . . Consider a few simple examples. The Supreme Court finally broke the lockhold of the self-interested refusal to redistrict in the landmark Baker and Reynolds decisions. Three decades later, however, the political gerrymander is not only alive and well; it has assumed the role of an institutionalized industry that seems largely immune from substantive review.” (citations omitted)).


the political system of the very outcomes we must expect from present electoral arrangements. As part of this argument, this Part remains agnostic about the redistricting process as it presently stands. The more important question focuses on the Court's proper role in these matters. Rather than wishing for aggressive judicial intervention, dissatisfaction with the redistricting process must lead to changes in our electoral structures.\(^\text{14}\) In light of all that we know about the Court's role in the redistricting thicket and particularly its behavior in recent years, this Part concludes that the Court is not the proper instigator of change.

The remainder of the Article counsels for a minimalist judicial approach to both racial and political gerrymandering questions. Part II focuses on the appropriate judicial response to the political gerrymander. This Part argues that the Court must safeguard the outer boundaries of the political process, those areas last seen in the infamous malapportioned districts of the 1960s. Short of those egregious facts, the Court must play a passive role. More specifically, this Part joins those who wish for a better process, one where the relevant actors behave as prudent civil servants, always conscious and respectful of their moral duties and willing to place the public interest ahead of their own. This is not a fitting description of the world we live in, to put it mildly.\(^\text{15}\) As such, the better question looks to how courts must respond to the realities of the political world once we agree that redistricting duties are appropriately entrusted to state legislatures. To date, the Court has played a passive role in political gerrymandering cases, focusing on those rare moments when majorities lock out mi-

\(^\text{14}\) Professors Issacharoff and Pildes complain that "[i]n the American context, no deliberative decision was made to choose [single-member electoral districting] over [proportional representation], and one cannot say that, as an original matter, American electoral structures were designed to limit competition to two dominant parties." Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 Stan. L. Rev. 643, 677 (1998). This Article does not take issue with this view. My more general point is that, reasons for its implementation aside, we have designed the political structures of our democracy in a way we have enjoyed for well over a century. To ask the Court to reform this system, as critics of the gerrymander implicitly ask, is far more simple than doing the hard, yet requisite, work of reforming the system through established political means. For such critics, see David J. Garrow, Ruining the House, N.Y. Times, Nov. 23, 2002, at A29; and Samuel Issacharoff, In Real Elections, There Ought To Be Competition, N.Y. Times, Feb. 16, 2002, at A19.

norities in perpetuity. This Part defends the Court's approach to political gerrymandering.

Part III examines the racial gerrymander. It argues that the modern racial gerrymanders are a subspecies of the political gerrymander. Thus, this Part also counsels for a passive judicial role in Shaw-like cases. Finally, Part IV, by way of a conclusion, contends that the courts must analyze all redistricting plans carefully, deferentially, and respectfully. While it does not advocate a return to the political questions regime of pre-Baker v. Carr, this Part argues that cases fit for judicial intervention will be few and far between.

I. ON THE MATTER OF REPRESENTATION AND THE GERRYMANDERING QUESTION

The hated gerrymander is under siege. Commentators are unanimous in their condemnation of the practice. For example, Martin Shapiro wrote over a decade ago that "[g]errymandering is a bad, bad thing." The gerrymander is said to "corrupt politics," for, in its

16 This formulation acknowledges the difference between lockups, which serve to disadvantage minor parties, and lockouts, which shut them out of the process altogether. See Bruce E. Cain, Garrett's Temptation, 85 VA. L. REV. 1589, 1601 (1999).


18 See Pamela S. Karlan, Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket, 82 B.U. L. REV. 667, 674 (2002) (exploring ways by which the Court may "extricate itself from the tangle it has created in the Shaw cases").

19 Cf. Karcher v. Daggett, 462 U.S. 725, 761 (1983) (Stevens, J., concurring) (exhorting judicial intervention in redistricting controversies only for egregious cases); id. at 754 (Stevens, J., concurring) (explaining that the standard he advocates would pose a burden "that plaintiffs can meet in relatively few cases"); Cousins v. City Council, 466 F.2d 830, 859 (7th Cir. 1972) (Stevens, J., dissenting) (arguing that the burden which plaintiffs must overcome is a severe one); id. at 860 (Stevens, J., dissenting) ("I do not suggest at facts as extraordinary as those alleged in Gomillion are necessarily required, but I am persuaded that if compliance with the standard of population equality is present, judicial intervention is not warranted unless the facts dramatically and convincingly foreclose any permissible construction of the legislature's work." (citations omitted)).

20 Martin Shapiro, Gerrymandering, Unfairness, and the Supreme Court, 33 UCLA L. REV. 227, 251 (1985); see Robert B. McKay, Reapportionment: The Law and Politics of Equal Representation 229, 255 (1965); David Wells, Against Affirmative Gerrymandering, in Representation and Redistricting Issues 85–86 (Bernard Grofman et al. eds., 1982). But see Bruce E. Cain, Simple vs. Complex Criteria for Partisan Gerrymandering: A Comment on Niemi and Grofman, 33 UCLA L. REV. 213, 226 (1985) (arguing that partisan plans are the real evils in need of eradication, and that a partisan gerrymander, while a nuisance, is not "the great evil it is portrayed to be").
worst form, it "condemns political groups to permanent minority status almost regardless of their electoral strength or of changes in voter preferences." More generally, yet just as significantly, Backstrom and his colleagues argue that "[n]o one can seriously defend gerrymandering." They are not alone.

At their core, these criticisms worry about the question of "fair representation," the very question found at the heart of much of our modern voting rights law. The Voting Rights Act, for example, focuses on the "opportunity . . . to participate in the political process and to elect representatives of their choice." Similarly, the genesis of the redistricting revolution may be traced to the Court's struggle with this question. These two examples are quite telling in one crucial respect. In both the post-1982 Voting Rights Act cases and the redistricting battles post-\textit{Baker}, the Supreme Court has played an aggressive role in policing the contours of the political process. Put another way, the Court has played a central role in our enduring quest for a working definition for the concept of "fair representation."

This is a misguided judicial posture. This Part presses this point over the course of two Sections. The first Section highlights the political aspects of the redistricting process. It also focuses on the single-member character of our structure of representation. Taken together, these two positions cast heavy pressure on those who advocate for aggressive court intervention. The second Section argues similarly that modern redistricting practices address the question of "fair representation" quite well. More specifically, it contends that gerrymandering practices are both unsurprising and democratically healthy, in terms of electoral representation. Taken together, these Sections respond to the many critics who assail the political gerrymander. Upon inspection, the practice may be far less noxious than generally presumed.

\section*{A. Welcome to the Thicket: Redistricting and Politics}

This first Section contends that recurring judicial interventions in the longstanding debate over "fair representation" are generally unwise. Two general premises lead me to this view. First, the redistricting...

\begin{itemize}
  \item 23 Charles Backstrom et al., \textit{Establishing a Statewide Electoral Effects Baseline}, in \textit{Political Gerrymandering and the Courts}, supra note 22, at 145, 165.
\end{itemize}
ing process as presently structured involves matters of the utmost partisan and ideological nature. In choosing sides, the intervening court will of necessity side with one party over another as the question of representation recedes to the background. From afar, we may describe the debate as one over fair representation, yet, upon closer inspection, it is clear that this particular question is far from anyone's mind.

Second, our general preference for single-member districts places grave demands on critics of the gerrymander. In carving up a large jurisdiction into smaller districts, the locus of representation shifts inward, towards each smaller jurisdiction. For this reason, general critiques of a redistricting plan are often inadequate; far more important is the question of representation within each particular district. This insight, coupled with our professed affection for a strong two-party system, leads to the creation of gerrymandered districts. Thus the question at the heart of this Article: what role should federal courts play in such a process? This Section takes up each argument in turn.

25 See J. Morgan Kousser, Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction 426–39 (1999); Heather K. Gerken, Morgan Kousser's Noble Dream, 99 Mich. L. Rev. 1298, 1326–31 (2001) (reviewing Kousser, supra); Saunders, supra note 9, at 146 (contending that districting plans "are being tied up in litigation for years—litigation whose outcome seems to depend on little more than the personal political predilections of the particular federal judges who happen to be assigned to the case"). It is precisely for this reason that courts gravitate towards clear, hard rules. See Richard H. Pildes, Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s, 80 N.C. L. Rev. 1517, 1520 (2002) ("[I]n cases involving the raw distribution of political power, courts are particularly drawn to bright-line, formal rules precisely because rules of this sort might mitigate the tension between a necessary judicial role in this area and the risk that courts will appear to be partisan players in the most political act of all: designing representative institutions and allocating political power."); cf. Roy A. Schotland, The Limits of Being "Present at the Creation", 80 N.C. L. Rev. 1505, 1515 (2002). Schotland argues,

Standards are essential for all judicial action, although if we decide obscenity cases with analysis like "I know it when I see it," we do not jeopardize the judiciary. In contrast, if judicial review of districting suffers standardless subjectivity, there is danger that subjectivity degenerates to partisan preference; and if the courts are in fact or are justifiably seen as partisan, then their ability to perform their highest role is endangered.

Id.

1. The Politics of Redistricting

Anyone wishing to witness a political clash of the highest order need only attend a state redistricting session. The examples are many, and, in hindsight, all of them quite amusing. In Illinois after the 1980 census, for example, State Senator Mark Rhoads thought he had the votes to pass his party’s preferred redistricting plan. Using parliamentary tactics to his advantage, however, Senator Philip Rock managed to delay a vote on the plan. Senator Rhoads became outraged and attempted to charge the podium to reach Senator Rock. Before he could reach him, however, Senator Sam Vadalabene intervened and punched Senator Rhoads in the jaw. An eyewitness commented that “for a moment it looked as though both benches were going to empty.”27 With the television cameras rolling, the adversaries were pulled apart. In the end, quite predictably, the process ended up in deadlock.28

This is a typical example of the tensions inherent in the redistricting process.29 The claim is fairly undisputed: redistricting has intensely partisan qualities.30 Compounding matters, this is also a process with an implicit zero-sum, win-lose quality. Put another way, it is impossible to carve out districts in a politically “neutral” way.31 No matter which way we slice a given jurisdiction, neutral lines simply do not and will not exist; any one line drawn in any given place will benefit one party, hinder the other.32 This reality is inherent to any

28 Id. at 33.
29 See Andrew Gelman & Gary King, Enhancing Democracy Through Legislative Redistricting, 88 AM. POL. SCI. REV. 541, 541 (1994).
30 See Richard Pérez-Peña, With 2 Congressional Seats Lost, Albany Begins Battling Over Who Must Go, N.Y. TIMES, Jan. 22, 2002, at B1 (“[Redistricting] is as nakedly political and partisan an exercise as this highly politicized Capitol has to offer. It is about alliances and rewards, about scraping for every advantage for yourself and your party, about staying alive.”).
31 This is not to say that redistricting is an evil in and of itself. The opposite is true. See Davis v. Bandemer, 478 U.S. 109, 128 (1986) (“The very essence of districting is to produce a different—a more ‘politically fair’—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats.”).
32 See Gaffney v. Cummings, 412 U.S. 735, 753 (1973) (“District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely.”); see also Daniel D. Polsby & Robert D. Popper, The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering, 9 YALE L. & POL’Y REV. 301, 310 (1991) (“Every districting method helps someone at least to the extent of hurting someone
redistricting model under a two-party system. This is precisely what Robert Dixon had in mind when he wrote that all redistricting is gerrymandering.\textsuperscript{33}

From this perspective, the real inquiry looks to how those public officials in charge of redistricting should perform this most political task. Some might expect these legislators to behave like conscientious public servants, elevating the public good ahead of their own. One may also ask, quite sensibly, that these legislative bodies pay close attention to the difficult question of "fair representation" thrust to the forefront by \textit{Reynolds}. All the relevant evidence points to the view that these expectations are clearly unwarranted. When it comes to redistricting, self-interest displaces civic-mindedness as the impetus behind the enacted plans. This should not be surprising, especially in light of the previous conclusions over the inherent impossibility of crafting neutral lines and their concomitant partisan effect.

A cursory look at the process demonstrates that the relevant political actors understand the process exactly this way. The politics are played across two reinforcing planes. On one plane are the state legislators, the actors charged with the initial task of drafting redistricting legislation. This plane is political in its purest form, as the earlier example intimated.\textsuperscript{34} The second plane finds all federal actors, from officials at the Department of Justice (DOJ) to federal judges invited into the thicket through the Fourteenth Amendment by \textit{Baker v. Carr}.\textsuperscript{35} These actors are less consciously political, for their duties arise from both statutory and constitutional demands. This is not to say that political considerations are completely removed from this plane; the reality is far from it. During the 1990 redistricting round, to describe a well-known example, DOJ discharged its section 5 duties with a vengeance, asking covered jurisdictions to maximize the creation of
majority-minority districts whenever possible. This is precisely the situation that gave rise to Shaw v. Reno. Some commentators attribute the 1994 Republican capture of the House of Representatives precisely to this strategy.

This Section argues that both of these planes are clear expressions of political will, as the parties seek to gain an enduring advantage for the following decade. But there is more. Up until 1961, the federal bench was cordoned off to partisans wishing to challenge state redistricting plans. Baker v. Carr changed that, of course, yet this intervention was well-warranted, for circumstances in many states were quite egregious, what may be described as a political lock-up. Such is not the case any longer, once the Court established the one person, one vote principle in Reynolds v. Sims. Thus the question: should the courts play this central role any longer?

To my mind, the answer is no. When courts intervene, they simply take sides in highly politicized debates. They do very little else. The relevant actors know this, of course, and for this reason those who lose at the legislative level are always ready to challenge the enacted plan in state and federal court, depending on where they expect to find a more receptive partisan audience. This is now a decennial occurrence; just this past redistricting round, examples may be gleaned by looking to California, Illinois, Michigan, Mississippi, New Jersey, North Carolina, and Texas, to name a few. At the heart of this Article stands the proposition that judicial intervention in redistricting matters should not be so aggressive.

36 See Maurice T. Cunningham, Maximization, Whatever the Cost: Race, Redistricting, and the Department of Justice 1–11 (2001); Mark S. Monmonier, Bushmanders and Bullwinkles: How Politicians Manipulate Electronic Maps and Census Data To Win Elections 121–35 (2001); Pildes, supra note 25, at 1558–59 (discussing the use of section 5 for partisan reasons). But see Bernard Grofman, Would Vince Lombardi Have Been Right If He Had Said: “When It Comes to Redistricting, Race Isn’t Everything, It’s the Only Thing”, 14 Cardozo L. Rev. 1237, 1254 (1993) (“[T]he claim that a Republican-controlled DOJ has been enforcing the Voting Rights Act in a selective and partisan manner is simply not supported by the evidence from 1990s redistricting.”).


38 For the debate surrounding this particular point, see David T. Canon, Race, Redistricting, and Representation: The Unintended Consequences of Black Majority Districts 75–77 (1999); David Lublin, The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress 110–14 (1997).


40 Issacharoff & Pildes, supra note 14, at 644–52.

2. Fair Representation and Single-Member Districts

The second argument is both complex and contested. Put simply, our preference for single-member districting places much stress on criticisms of political gerrymandering. In pursuing this claim, this Section focuses its attention on the widely held norms of political equality, responsiveness and representation. As part of this argument, this Section contends that the Court has spilled much ink while in pursuit of its goal of political equality, yet has done so without properly considering the question of fair representation. Curiously, this is the question at the heart of the Court’s redistricting mission.

This argument begins by looking to our time-honored practice of single-member districting. In turning to this electoral method, we send a clear signal about our views over the concept of representation. We signal our commitment to representation at the district level; representatives do not represent the state but their constituents, those who reside within their district.\(^4\) As a result, when drawing lines, one must look to the individual and her choices in the given election. In so doing, it is clear that a majority of voters are always satisfied, for they always vote for the winning candidate. How then to argue that redistricting is ever unfair to any individual voter, even in egregiously gerrymandered districts? More specifically, why look at the entire jurisdiction at all when measuring the representational caliber of the districting plan? When looking to the general vote count, objections and criticisms often arise. And yet, why look there?

Two responses come to mind. First, this focus on the general vote count places great stress on theories of representation, as it shifts the locus of authority and legitimacy from the individual constituency to the general jurisdiction, in clear tension with our commitment to single-member districting. In order to see this point more clearly, one need only take a cursory glance at the establishment of single-member districting in the nineteenth century and the reasons for their implementation. The larger goal then was one of fair representation, a goal that an at-large system had difficulties in carrying out. The at-large system became particularly problematic once party allegiances came into being, for one party with a majority of voters within a state could

\(^{42}\) This is not to say, to be clear, that Congress never responds as a collective body to national trends, because “relatively minor adjustments in the congressional electorate can, because of the aggregative effects of the single-member district system, produce a dramatic shift in behavior at the institutional level.” Melissa P. Collie & John Lyman Mason, The Electoral Connection Between Party and Constituency Reconsidered: Evidence from the U.S. House of Representatives, 1972–1994, in Continuity and Change in House Elections 211, 231 (David W. Brady et al. eds., 2000).
control an entire congressional delegation. In this vein, the single-member districting system may be seen as embodying a theory of democratic politics whereby power is diffused and majoritarian domination is fragmented across the larger jurisdiction. In doing so, representation becomes a crucial matter at the district level. This is another way of reinforcing the earlier point: it is the constituents within the district that matter, not the state as a whole.

Second, looking from the district to the state as a whole faces a strong empirical obstacle. As it is generally made, the point is that gerrymandering distorts the political process and ultimately biases the system towards one party or the other. This point must be true for the gerrymandering claim to have any bite; after all, if gerrymanderers distort district lines to their hearts' content, yet the system is ultimately unbiased towards one party or another, the effect of the gerrymander on policymaking would be negligible, if existent at all. In other words, the intent to gerrymander must be followed by political advantages in the larger legislative body. Otherwise, why worry? As it happens, researchers conclude that these lines exhibit minimal amounts of partisan bias, if any at all.

One may respond to this line of argument by professing affection to *Reynolds v. Sims* and the individual right to vote. This response does not help much, for two reasons. First, turning to *Reynolds* signals a commitment to the individual and away from the group as the locus of political authority. This move is problematic in many ways. To begin, the context here is redistricting, an arena where the notion of individual rights takes a backseat to what a leading scholar in the field has termed "aggregate rights." As such, those who speak of individual rights in this context must do a lot more than simply assert the moniker of *Reynolds* and expect their opponents to go on the defensive. In fairness, one may try to bolster their claim; after all, the "one person, one vote" revolution is commonly understood as embracing a moral electoral imperative. The claim still falls short. Surely the

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44 See id. at 124.
45 See David Butler & Bruce Cain, *Congressional Redistricting: Comparative and Theoretical Perspectives* 32 (1992); Gelman & King, *supra* note 29, at 542.
46 *Reynolds*, 337 U.S. at 558.
48 See, e.g., Bernard Grofman & Howard A. Scarrow, *Current Issues in Reapportionment*, 4 Law & Pol'y Q. 455, 459 (1982) ("[T]he doctrine of ‘one person, one vote’ has been elevated to the status of moral platitude."); see also Robert G. Dixon, Jr., *The
point cannot be that all votes must count equally within a given districting plan. Redistricting is a zero-sum game, a condition that the utmost care may not overcome. Thus, even the most careful of redistricters will have to place individuals in some districts where the votes will be insignificant. Further, what to make of the curious ways in which we withhold the franchise from many groups for very questionable reasons? Finally, census imperfections and the choice of figures upon which to base compliance with *Reynolds* and its progeny render this argument ultimately unpersuasive.

Second, the method by which critics choose to attack gerrymandered plans is curious at best. On the one hand, the *Reynolds* claim focuses on the right to vote and its individualistic quality. And yet, the traditional move looks to the figures from the general jurisdiction in order to show discrimination. This makes little sense. A subsequent Section will press this claim in much more detail, particularly the conventional use of the seat/votes ratio.

This move to *Reynolds* raises a much more important inquiry. To wit: what to make of our general quest for fair representation? Seen through the lens provided by *Reynolds*, what does the doctrinal turn to strict population equality signal in terms of political representation? Put yet another way, what does the Court’s position tell us about its normative conception of the right to vote and political representation? A leading answer to this question points to the concept of political equality. More specifically, the use of single-member districting, coupled with the one person, one vote standard, leads to a view of political equality. It may lead to a strong or weak view of equality, depending on the degree to which the Court chooses to enforce its equipopulation mandate. The Court’s approach is as follows.

In the congressional districting area, equality is applied quite strictly. The leading case is *Karcher v. Daggett*, where the Court invalidated a New Jersey redistricting plan with a maximum deviation of 0.6984% in favor of a plan with a smaller deviation. Of note, the

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*Warren Court Crusade for the Holy Grail of "One Man-One Vote",* 1969 Sup. Ct. Rev. 219, 268 ("'One man-one vote' should be perceived as the symbol of an aspiration for fairness, for avoidance of complexity, for intelligibility in our representational process—indeed, for a sense of meaningful membership in the polis.").


51  See *infra* Part II.B.1.

52  See *Butler & Cain*, supra note 45, at 68. But see id. at 57, 69.

differences between the two plans in question were statistically insignificant. So why choose one plan over the other? In the Court's view, a state must make a good-faith effort to achieve population equality among districts, and any deviation must be explained and justified. In the New Jersey example, the fact that a second plan was available, a plan with a population disparity closer to zero, required an explanation from the legislative majority in the state. The state did not proffer one, for its real reasons were hardly commendable. And so the Court struck the plan down.

In contrast, state legislative plans have much greater leeway in reconciling subsidiary goals with the equality mandate. Here, the Court has established a de minimis threshold of 10% maximum deviation from equality. Plans under this threshold are presumptively constitutional. Plans over the threshold are treated as constitutionally suspicious. This is not to say that they are presumptively unconstitutional, but to say instead that the state must proffer a legitimate state interest in defense of their redistricting choices. Some of these interests include the maintenance of existing political subdivisions and the creation of compact, contiguous districts. The pursuit of a politically fair plan, a rather controversial goal, has also been added to this list. To its credit, the Court has shown much needed flexibility in analyzing these plans, as it must.

Taken together, these two approaches encapsulate the spirit of my argument. To begin, a cursory review of the case law reveals that the Court does not have a theory of politics and representation. This is precisely as it should be, for the question itself is a difficult and contested one. The state and local cases reflect this flexibility. The same may not be said for the congressional cases. The example of New Jersey after the 1980 census is an extreme one, no doubt. All the same, it highlights the deficiencies in the Court's approach to redistricting questions. As the Court pursues the equality principle with thoughtless abandon, it ignores many competing and worthy values. The argument itself is quite bland and unimpressive. To wit: the Equal Protection Clause demands equality. Why? Well, because

equality is demanded by the Equal Protection Clause, for "legislators represent people, not trees or acres." This is not the Court's most impressive performance.

Before turning to the next Section, two concluding observations are warranted. First, the practice of single-member districting sends a clear signal about our commitment to fragmenting the locus of political representation from the national and state level to the individual districts. In this way, criticisms of particular districting plans must begin by looking to the individual districts, not the plan as a whole. And if those within each district are satisfied by the legislative choices made, what is left of the criticisms? This observation raises a second, more important point. When analyzing districting plans, the Court is really inquiring into the decidedly difficult question of "fair representation" raised initially by Reynolds. To be sure, answers to this question are difficult and contested. This Section does not proffer to have definitive answers. Rather, it questions the Court's self-assuredness when providing what are at best debatable answers.

3. Conclusion: Gerrymandering, Structure and Judicial Review

These arguments in hand, this Section concludes that under present electoral arrangements, courts must play a limited role in political gerrymandering questions. The argument is structural in kind. We begin with a single-member districting system, which leads to the creation of two parties. These are the same parties that we place at the core of the redistricting process. We do not place them ourselves, of course, yet in assigning this task to state legislatures we essentially do as much, especially in those states where one party controls the legislature and the governor's office. Our districting system also produces imperfect district lines, whereby some votes within districts will necessarily be wasted. The result from this structural design is, and must be, a politically gerrymandered plan. After all, what is a political party to do? In seeking to gain every advantage they can through redistricting, parties behave as rational actors. It is hard to condemn them for doing so.

One may respond to this position in two ways. First, this argument demands that parties control the entire process; as such, it will apply only to a few situations, for it is very seldom that a party may

59 Reynolds, 377 U.S. at 562.
60 This is known as "Duverger's Law." See Maurice Duverger, Political Parties: Their Organization and Activity in the Modern State 216-28 (1951); Issacharoff & Pildes, supra note 14, at 675 n.121.
61 See Polsby & Popper, supra note 32.
achieve this control. Second, one may criticize the parties for violating other-regarding norms and focusing solely in their interests. This Article agrees with either of these responses, yet stands by its earlier conclusion. The first response is quite correct in asserting that these situations will not arise often. It thus follows that courts will play a limited role in this area. Note however, that this response does not speak to the conclusion reached in this Section but its frequency. In doing so, it reinforces my larger claim.

The second response is also correct. In crafting their partisan gerrymandered plans, state legislative majorities behave in narrow, self-interested ways, and in so doing they "offend the ideal of a public-regarding politics towards which our polity should strive." And yet, it is also true that they are behaving rationally. Thus the question: what else should we ask of them? Under our present configuration, it seems clear that the result is simply inevitable. This is not to say that the redistricting process would not benefit from changes in its basic structure. Until it does change, however, the better question looks to the courts and their posture towards these highly politicized contests.

A common objection to the argument defended in this Section posits that rationality alone need not lead to a view of judicial deference. As the argument was put to me, the fact that business insiders wish to make as much money as they possibly can does not mean that we should not have insider trading laws. Professor Issacharoff makes a similar move when he analogizes the bipartisan gerrymander to a market division agreement while invoking the authority of the Sherman Act in order to argue for the illegitimacy of both. Both examples share a common thread: the invocation of statutory law in order to argue for intervention into market affairs. Such a move is not made in

62 See BUTLER & CAIN, supra note 45, at 9; Schuck, supra note 15, at 1345 n.86.
63 Schuck, supra note 15, at 1330.
64 For example, Sam Issacharoff calls for the establishment of redistricting commissions. See Issacharoff & Pildes, supra note 14, at 699; see also Garrow, supra note 14 ("[C]ontrol over redistricting must be taken away from politicians whose goal is to minimize competitive democratic elections and maximize the number of safe seats for their party."); Pildes, supra note 43, at 139 ("Thus, however unintended, perhaps the long-term effect of the Supreme Court's redistricting doctrines will ultimately be to drive the redistricting process out of the hands of current officeholders—no small contribution to the ideal and practice of democratic politics.").
65 See Richard L. Hasen, A "Tincture of Justice": Judge Posner's Failed Rehabilitation of Bush v. Gore, 80 Tex. L. Rev. 137, 154 (2001) (book review) ("If the Supreme Court will intervene periodically in the political process, it behooves us to continue the debate over when it is appropriate for courts to intervene in the political process.").
66 See Issacharoff, supra note 11 (manuscript at 6–7, on file with author).
the redistricting context, for good reason; statutory law in this area is scant at best. These examples are quite helpful all the same, for they highlight the position taken by this Article. In a nutshell, and to repeat a point made earlier, were Congress or a state legislature to outlaw bipartisan gerrymanders, however defined, the analogies would follow quite nicely. This Article would not take issue with such changes in the law. Without passage of such a law, however, the analogies lose their force. In essence, the critics wish for the Court to intervene into contested matters under the aegis of the equality principle and very little else. Such a state of affairs is reminiscent of *Bush v. Gore*. This Article takes the position that, absent explicit statutory guidance—as found in the antitrust and insider trading context—the Court must not play an active role.

To conclude, this Section contends that the federal courts should view the redistricting process from afar. Our structural commitments lead me to this view. From our commitment to a districting system arise two competing and fairly stable parties, which we then place in charge of the redistricting process. The parties then behave rationally and redistrict to their advantage. Asking the Court to step in at this point would be to ask it to rearrange political decisions and their expected repercussions irrespective of constitutional commitments. When putting the point this way, the example of Election 2000 comes immediately to mind. To ask our courts to step in and influence political controversies of the highest order under their idiosyncratic impressions of fairness should bother many. It is precisely for this reason that this Article calls for a lessened judicial role.

This position might give some readers reason for pause; after all, is not redistricting the leading medium through which citizens can express their political preferences? And further, can anyone truly committed to the civil rights revolution ask for less from the Court, not more? Implicit in these questions is whether courts have anything valuable to offer once they decide to examine redistricting plans. Or, put differently, how well do redistricters carry out their duties in terms of political representation? The next Section analyzes this question.

**B. The Real Question: Of Interests and Constituents**

Implicit in questions over the concept of representation is a particular background assumption about the nature of our democratic experiment. Namely, questions of democratic theory are both complex and often intractable. Redistricting cases are really cases about

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answers to these difficult theoretical questions.\textsuperscript{68} This formulation leads to the question at the heart of this Article. Put simply, what role do federal courts have to play in redistricting matters, even under the worst-case scenarios, when state legislatures act in clear political fashion to further their political interests while minimizing the oppositions? To restate the crux of my argument, the federal courts should play a small role in this area. Questions of representation are not amenable to easy resolutions and, absent exigent circumstances, it is best to honor our redistricting pre-commitments, which place the states at the helm.

In order to see this point more clearly, this Section focuses on the concept of “fair representation.” To the critics, gerrymandered districts offend precisely this concept. In order for the criticisms to have their intended effect, however, it is not enough to say that gerrymandered districts are constitutionally noxious simply because representatives are choosing their constituents, not the other way around. After all, the key question is that of representation; so long as this precondition is not violated, complaints should be few. It must be the case, to put this point differently, that a gerrymandered district fails to represent those within it, fails to “achiev[e] . . . fair and effective representation for all citizens.”\textsuperscript{69} The real task lies in translating this formulation into a working definition, a definition with which redistricters and lower courts can carry out their respective duties. This is no easy task, which accounts in great measure for the Court’s struggle with this question. To begin, we may take the view, as the Court did in Reynolds, that the Equal Protection Clause demands a strict population norm.\textsuperscript{70} The Baker revolution\textsuperscript{71} put this question to rest.\textsuperscript{72} In the real world, however, such a norm means very little.\textsuperscript{73} This Section examines two promising understandings of the term.

\textsuperscript{68} See Bruce E. Cain, Election Law as a Field: A Political Scientist’s Perspective, 32 Loy. L.A. L. Rev. 1105, 1107 (1999) (contending that, “even though democratic theory has not played a major role in [the voting/representation cases], the implicit democratic theory questions are actually quite important”); Issacharoff & Pildes, supra note 7, at 1174 (contending that the voting rights arena “tak[es] democracy itself out of the background and plac[es] it squarely at the center of our inquiries”); Mark Rush, The Law of Democracy, 5 Law & Pol. Book Rev. 299 (1998) (“[T]he controversies that inhere in electoral process case law really have everything to do with the conflicting strains of democratic theory and, in reality, little to do with the inconsistencies of jurisprudence.”).


\textsuperscript{70} Id. at 568.

\textsuperscript{71} See supra note 1 and accompanying text.

\textsuperscript{72} This is not to say, to be clear, that I agree with it. See Cain, supra note 68, at 1110. See generally Morton J. Horwitz, The Warren Court and the Pursuit of Jus-
This Section concludes, as before, that the concept of "fair representation" fares much better than generally allowed.

1. Representation in Congress: Interests

The first version is the well-known concept of interest representation. This version is found at the center of the modern debate over the nature and scope of the Voting Rights Act, and particularly the debate after the 1990 census over the creation of majority-minority districts. This version of representation relegates constitutional concerns to the background. Three reasons lead me to this view.

First, the question of representation is quite difficult, perhaps intractable. The debate over majority-minority districts offers an easy example. Should a state attempt to maximize majority-minority districts, or should it create instead influence districts? The debate over this question is quite fierce, devoid of clear and unambiguous answers. Some researchers, for example, contend that increases in descriptive representation have come at the expense of substantive representation. Others respond that people of color benefit in terms of political representation when given the chance to elect representatives of color. In this vein, recent studies have concluded that the election of blacks to Congress affects white political involvement negatively, yet only rarely does it increase black political engagement. Others dispute this characterization, contending instead that blacks...
mobilize in districts represented by African-Americans, or, more generally, that the polity as a whole exacts benefits from the election of black and minority representatives.

This debate raises innumerable questions, two of which prove directly relevant to my general thesis. First, how do we find common ground in this debate? We may think of this question as epistemological in kind. In other words, what are the right answers or, at the very least, what are the better answers? It should be clear that common ground has been hard to reach, and will continue to be. This formulation leads to the second question: who should ultimately decide these questions? Those who look to the U.S. Constitution for answers are implicitly wishing for the federal courts to resolve these questions. This move is quite problematic, for not only are the issues raised here difficult policy questions, but it is also true that the Constitution says precious little about them. Without more, these are precisely the kind of issues better suited for the political process to resolve.

More importantly, this is a debate for which Congress has already offered its preferred answer, with the Voting Rights Act as amended in 1982. One could disagree with the goals of this seminal statute, enforcement by DOJ, or its interpretation by the Supreme Court; in fact, many reasonable people do. This is only to say that questions in this

__and a black Democratic candidate). Professor Gay’s words of caution are worth considering:

[t]he political significance of black congressional representation cannot be reduced strictly to measures of policy activism or constituency service, and it cannot be understood by singular attention to its consequences for black Americans. To a great extent, the behavior of white constituents truly distinguishes the political dynamics of black-represented districts. The findings of this study should alert us to the significant role that minority representation has played in compromising the appeal of politics for many white Americans, while fostering a more dynamic political life for only some African Americans.

Gay, supra, at 600.


79 See Zoltan L. Hajnal, White Residents, Black Incumbents, and a Declining Racial Divide, 95 Am. Pol. Sci. Rev. 603 (2001) (arguing that white Republicans appear immune to effects of black incumbency; however, for Democrats and Independents, a black mayor decreases racial tension and increases racial sympathy and support for black leadership).

80 Girardeau A. Spann, Proposition 209, 47 Duke L.J. 187, 192 (1997) (“There is . . . nothing in the Constitution that is capable of resolving this social policy dispute without simply elevating one policy preference above the other for reasons of subjective normative appeal. The meaning of the Equal Protection Clause is simply indeterminate with respect to the constitutionality of [race conscious policymaking].”).
area are quite contested. For this reason, this is a question better left to the political process. Not surprisingly, a constitutional fight looms in the near future over the Voting Rights Act. This is unfortunate on many fronts. I would much rather see a political fight.

Second, once we speak in terms of interests, the locus of representation shifts away from the individual districts and to the general population. This proposition is well understood. The congressional career of Luis Gutierrez, Representative from Illinois's 4th Congressional District, offers a pertinent example. To be sure, Representative Gutierrez represents the people from his district, and apparently does so quite well. It is also true, however, that he pays attention to issues concerning Puerto Rico, such as the involvement of the U.S. Navy in Vieques, the status of the island under U.S. rule, and the like. The relationship between Rep. Gutierrez and Puerto Rico is such that the island's governor, Sila Calderon, flew to Chicago to personally campaign for him. Her stated reasons for campaigning in Chicago were to support candidates who would support the interests of the island. To be clear, this dynamic is not candidate-specific; similar arguments may be made for members of the Congressional Black Caucus, women members of Congress, or any other group salient enough to warrant representation. In this context, the notion of gerrymandered districts loses much salience. In fact, it becomes largely irrelevant.

Third, it is at best questionable whether the maximization of political influence at a pre-determined point in a ten-year cycle provides enough evidence to support a claim of "unfair representation." I say more about this particular point below. For now, it suffices to say that it is doubtful whether analysts are sophisticated enough to be able to measure what exactly "unfair representation" looks like.

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83 Id.
84 The career of then-Senator Spencer Abraham comes to mind. As an Arab-American, it may be said that he represented the interests of Arab-Americans while a member of Congress. See James Zogby, Abraham and Daniels: Two Arab Americans in the Bush Cabinet, Washington Watch, Jan. 15, 2001, at http://www.aaiusa.org/wwatch/011501.htm (last visited Dec. 2, 2002).
85 This is not to say that this notion of representation takes precedent over constituent representation; for obvious reasons, it cannot. Members who "invite consistently strong opposition and regularly court defeat in representing their vision of the national interest" are taken care of by the political process. Gary C. Jacobson, The Politics of Congressional Elections 231 (3d ed. 1992).
2. Representation in Districts: Constituents

The second version dovetails on the previous discussion of representation within single-member districts. The point as generally made is that gerrymandered districts are unrepresentative districts, unfair, undemocratic. Under our present state of affairs, the argument goes, incumbents have gained such a stranglehold on the process that they do not afford their constituents the proper degree of political representation. Rather, they are said to represent particularized interests, in the form of interest groups or political action committees. This charge has a lot to commend it and resonates widely with the general public, as the debate over term limits amply demonstrated. However, the supporting evidence is not particularly favorable.\(^8\)

To begin, the evidence supports the view that members of Congress do a creditable job of representing their constituents.\(^8\) This position makes sense, for incumbents must please a majority of their constituents in order to hold on to their seats. And they do, in two ways. One way to please constituents is by committing staff members to the casework generated from the district. It matters little that much of this casework stems from rules and procedures created by Congress itself. As far as the constituents are concerned, their representative is solving their problems, and that is all that matters.\(^8\) This is another way of saying that members of Congress place reelection atop their list of priorities, and this in turn leads them to structure the institution in ways that will not hurt their prospects.\(^8\)

\(^8\) As this evidence largely focuses on the federal legislature, the discussion will be largely limited to this branch of government. For a recent study examining both state and congressional data and reaching similar conclusions as to both, see Stephen Ansolabehere & James M. Snyder, Jr., The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942-2000, 1 Election L.J. 315 (2002), showing that incumbency advantage has grown for state and local offices across both legislative and electoral offices although marginals have declined only for House elections, and concluding that a needed explanation cannot simply point to incumbency alone.

\(^8\) Robert S. Erikson & Gerald C. Wright, Voters, Candidates, and Issues in Congressional Elections, in Congress Reconsidered 91, 112 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 1993) ("In terms of ideological direction, individual House and Senate members respond to their constituencies. In turn, ideological direction matters when constituencies decide which candidates they will elect and which they will not.").


A second way by which to please constituents is through policy congruence. At first glance, it should be obvious that perfect congruence between a representative and her constituency is factually impossible; congruence is thus a question of degree. It is also true that researchers have had a difficult time measuring constituency opinion, assuming that such a thing exists on any given issue. Left to their ingenuity, researchers have cautiously concluded that a link indeed exists between constituency opinion and roll-call voting, although the connection varies across issue contexts and is not terribly strong.

The notion of policy congruence leads to a much more important issue: whether elections allow voters to control their congressional representatives. In light of the negative connotations attached to the institution of Congress with its ranks full of incumbents and career politicians, the expected answer to this question is negative. Some research supports this conclusion, yet not all. Others question this conclusion, and argue instead that electors in fact control their representatives through the ballot box, if indirectly. According to this competing view, representatives anticipate the preferences of unattentive citizens while accounting for the preferences they do know, those from attentive publics. In this way, they estimate the potential preferences of their constituents, in order to avoid future electoral trouble.

A final point merits attention. Throughout this Section, the specter of careerism has loomed large. This is the central argument offered against gerrymandering: that incumbents are able to manipulate district lines for self-serving ends, benefiting themselves at the expense of the public at large. One may respond to this position a number of ways. First, it is useful to look at the causes behind the high retention of incumbents in Congress. Among these, one finds the

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franking privilege, generous travel allowances, staff devoted solely to constituency work, and "greater access to publicity and campaign cash." These various perks allow the incumbent to create a positive image for herself in her district, an advantage that prospective opponents must fight very hard to overcome. Other factors include redistricting, weaker challengers, and weakened party identification. Yet another view of congressional elections and the high rate of incumbency reelection brands members of Congress as "strategic actors who created their own campaign organizations, knew their districts, took positions, advertised, and claimed credit." These incumbents ultimately win elections "not because they were 'safe' by some outside standard; rather, they were safe because they understood their district[s], tailored their campaigns to the[ir] district, performed nonpartisan constituency services, and rather than lose, they strategically retired when losing seemed like a likely prospect." Curiously, from all the factors offered to explain the high rate of incumbent success, John Alford and David Brady conclude that "only redistricting seems to be clearly incorrect." They reach this conclusion due to the fact that the Senate shows a similar pattern of incumbency advantage post-1960, yet the institution does not undergo redistricting changes.

94 Erikson & Wright, supra note 87, at 99.
95 See Alford & Brady, supra note 89, at 151.
96 David W. Brady et al., An Introduction to Continuity and Change in House Elections, in Continuity and Change in House Elections, supra note 42, at 4.
97 Id.; see Gary W. Cox & Jonathan N. Katz, Elbridge Gerry's Salamander: The Electoral Consequences of the Reapportionment Revolution 7–8 (2002) (contending that incumbents "retire when scared off, and this propensity inflates standard estimates of the incumbency advantage. Indeed, by our estimates, the incumbency advantage enjoyed by Democratic incumbents was never—even after 1966—statistically discernible from zero"); Gary C. Jacobson, Reversal of Fortune: The Transformation of U.S. House Elections in the 1990s, in Continuity and Change in House Elections, supra note 42, at 10–11 (documenting the decline in incumbency advantage in the last 40 years).
98 Alford & Brady, supra note 89, at 151.
99 See also Kenneth Collier & Michael Munger, A Comparison of Incumbent Security in the House and Senate, 78 PUB. CHOICE 145, 145–46 (1994) (challenging the "conventional wisdom[,] and assert[ing] that the advantage enjoyed by members of the House compared to those of the Senate has been exaggerated and that Senators are just as secure in office, if not more so"); Amihai Glazer & Bernard Grofman, Two Plus Two Equals Six: Tenure in Office of Senators and Representatives 1953–1983, 12 LEG. STUD. Q. 555 (1987) (developing a mathematical model and demonstrating that, in terms of expected years of service, members of both House and Senate may be equally secure).
Second, one may conclude, if cautiously, that longer terms in Congress do not result in reduced attention to constituents. In fact, level of voter satisfaction with their particular incumbents is quite high. The reasons for this support are not surprising. For one, the style of each representative as she goes back to her district varies yet, by and large, representatives seek to inspire trust in their constituents while emphasizing accessibility. This strategy leads to a level of comfort that might help excuse "bad" votes and ultimately poses the representative as "one of us." If and when this happens, electoral support is likely forthcoming. Another reason is structural. As Gary Jacobson explains, "[t]he system allows members to take the 'right' positions, make pleasing statement, and bring home the bacon while avoiding responsibility for the collective performance of Congress." This argument leads to Fenno's paradox: the public hates Congress while it simultaneously loves its own representative. This sentiment has been modified recently: "it seems that voters hate incumbency but at least tolerate their incumbent." And toleration is a good thing in electoral terms, as far as the incumbent is concerned.

Before turning to the next Part, which discusses the fate of the gerrymander in court, a caveat is warranted. In presenting this social science evidence, I must underscore the fact that this Section does not profess to settle these longstanding and contentious debates. A cursory glance at the arguments presented here should make that clear. Rather, my point is far more limited. Those who assail gerrymandering practices and call for increased judicial intervention fall back all too often on stereotypes and accepted understandings; rarely do they point to this or any other evidence. As argued earlier, the gerrymandering debate is really a debate over the question of "fair representation." This is a debate worth having. This Part takes that view seriously and concludes that the concept of representation does not fare as poorly as the critics assert. On the contrary, it fares remarkably well.

This view in tow, the next question concerns how the gerrymandering question has fared in court. Such is the task of the next Part.

100 John R. Hibbing, Careerism in Congress: For Better or For Worse?, in CONGRESS RECONSIDERED, supra note 87, at 67.
101 See JACOBSON, supra note 85, at 136–41.
103 JACOBSON, supra note 85, at 38.
104 See FENNO, supra note 102, at 164–68.
105 Alford & Brady, supra note 89, at 155.
II. The Gerrymander in Court: Examining the Classic Political Question

A. Doctrine: The Road from Reynolds to Bandemer Through the New Jersey Turnpike

The question of manageable standards in redistricting is an important one, deserving of careful consideration. Yet, as the late Professor Dixon wrote shortly after the Court's initial tightening of its equipopulation rule, "Wielding one man, one vote, like a meat-ax, the Court has not been content only to lop off extreme population malapportionment. It has come close to subordinating all aspects of political representation to one overriding element—absolute equality of population in all legislative districts." The Court has not guarded this area flexibly, as it must, but has micro-managed. Instead of judicial guardianship, we have had a judicial straightjacket. Instead of a judicial branch, we have gotten an institution that resembles its legislative counterparts much too closely.

106 Dixon, supra note 3, at 7, 11; see Karcher v. Daggett, 462 U.S. 725, 774 (1983) (White, J., dissenting) ("The only way a legislature or bipartisan commission can hope to avoid litigation will be to dismiss all other legitimate concerns and opt automatically for the districting plan with the smallest deviation. Yet no one can seriously contend that such an inflexible insistence upon mathematical exactness will serve to promote 'fair and effective representation' ... Such sterile and mechanistic application only brings the principle of one man, one vote into disrepute."); Avery v. Midland County, 390 U.S. 474, 510 (1968) (Stewart, J., dissenting) (complaining that apportionment "is far too subtle and complicated a business to be resolved as a matter of constitutional law in terms of sixth-grade arithmetic").

107 In a recent essay, Rick Pilides has analogized this area of the law to the infamous Lochner era. See Pilides, supra note 43, at 127–28; see also Ward E.Y. Elliott, The Rise of Guardian Democracy (1974) (offering theories to explain the rise of voting reforms in the past and present, and discussing the effect that Supreme Court involvement in the reform process has had on American democracy); Philip B. Kurland, Politics, the Constitution and the Warren Court 92 (1970) (arguing that the Court has come to emulate legislative institutions, and wrongly so, because the Court has a responsibility to discrete minorities, whereas legislatures respond to majorities, individuals, and interest groups); Ward Elliott, Prometheus, Proteus, Pandora, and Procrustes Unbound: The Political Consequences of Reapportionment, 37 U. CHI. L. REV. 474, 492 (1970) (arguing that reapportionment has had only a trivial influence on politics, and claiming it has not revitalized representational government but instead has exhibited a court "imposing their own distorted and incomplete versions of representative government upon the states"); Philip B. Kurland, Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government, 78 HARV. L. REV. 143 (1964) (describing the proactive nature of the Warren Supreme Court and suggesting that there is no threat of opposition to such judicial power from the other branches).
The Court's very own evolution from its early *Baker v. Carr* days to the end of the Burger Court's tenure supports this position. Soon after the judicial gate swung open in *Baker*, the Court adopted an individual rights model of the franchise and the right to vote. Under this view, each and every person must be afforded the right to cast an equally weighed ballot. Each person, to use the Court's own language, must have one undiluted vote. This view, taken to its extreme, brought us *Kirkpatrick v. Preisler*, *Wells v. Rockefeller*, and, in a five-four decision, *Karcher v. Daggett*, instances where minuscule degrees of vote dilution, some statistically insignificant, were declared unconstitutional in the presence of alternative plans with lower ratios. The Burger Court, however, soon moved away from this voting rights model and towards a group-centered model of politics and political participation. Fittingly, the last major case of the Burger Court's tenure, *Davis v. Bandemer*, encapsulates a sensible approach to voting rights cases.

This Part tells the story of the gerrymander in court over the course of three Sections. The first Section looks to the Court's early incursion into the reapportionment field, in *Baker v. Carr*. It argues that this action was both necessary and appropriately respectful of the complexities inherent in this area. This position is also consistent with the Court's holding in *Reynolds v. Sims*, when the Court extended the equipopulation principle to state legislative plans. The second Section moves ahead a generation, to the Court's holding in *Karcher v. Daggett*. *Karcher* is important not for what it says as much as for what it refuses to see. As a result, *Karcher* displays the Court's clear misgivings with the gerrymandering problem as well as its inability to examine it appropriately. Finally, the third Section discusses the Court's answer to the hated gerrymander, in *Davis v. Bandemer*. This Section sides with the Court and concludes that its approach is a sensible one, respectful of legislative authority while mindful of the pitfalls and partisan possibilities inherent to the redistricting craft.

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117 *Karcher*, 462 U.S. at 725.
118 *Davis*, 478 U.S. at 109.
1. **Baker’s Promise and Reynolds’s Deliverance**

Looking back to the Court’s initial entry into the famed political thicket, the source of the Court’s displeasure was quite clear. In examining the redistricting plan in Tennessee, it was difficult, perhaps impossible, to proffer a legitimate state interest in defense of the state’s action. Plain and simple, the legislature had refused to enact a reapportionment plan since 1901, and in so doing the lines by 1960 had very little relation to the population figures of the existing districts. Also, the facts raised a very convincing case for the proposition that city dwellers, who composed a clear majority within the state in terms of population, had no way, short of revolution, for changing the status quo. This was a classic lockout scenario, for those in power were entrenched and refused to give up that power voluntarily. For this reason, it is widely held that the Court’s intervention was necessary.\(^{119}\)

The problem with the Court’s opinion in Baker is often found not in what the Court did, but what it did not do. To most observers, the Court gave precious guidance to the lower courts deciding redistricting cases post-Baker. I do not share this sentiment;\(^ {120}\) I do agree, however, that the Court left many things unsaid. For example, it is clear that while the Court did not adhere to a strict population requirement, population played a key role in its decision, as it must. This is true for both the majority opinion and the various concurrences, all of which pointed to the existing population disparities as proof of the irrationality of the plan. It is also true that the Court could have said a great deal more on the issue of standards. What counts as a legitimate state interest, for example? Further, if rationality lies at the core of the equal protection standard applicable in redistricting cases, how far from population equality may a state deviate without coming into conflict with constitutional proscriptions?

The Court turned to these and similar questions two terms later, in Reynolds v. Sims.\(^ {121}\) In Reynolds, the Court confronted a scenario similar to the one in Baker: the State of Alabama had refused to redraw its district lines for quite some time, and as such the population numbers within each existing district bore very little semblance of rationality. On these facts, the Court purported to provide a standard

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120  See Fuentes-Rohwer, supra note 2, at 1357–59.

121  Reynolds, 377 U.S. at 533.
proper to the constitutional inquiry first developed under *Baker*. It did so in the following way:

representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.\textsuperscript{122}

This argument places population equality at the center of the debate over standards for redistricting. The Court made this proposition much clearer a few pages below, when it wrote that "[p]opulation is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies."\textsuperscript{123}

This point is now well established in the literature and requires very little explanation. A much more interesting point, and one that may be gleaned from the Court's own opinion in *Reynolds*, argues that *Baker* and *Reynolds* share similar doctrinal traits and approaches. Under *Baker*, states were required to use population as a starting point. A majority of lower courts with redistricting cases in their dockets so understood *Baker* soon after it was decided. The more important aspect of the Court's initial approach looked to deviations from the population standard. That is, states could deviate from population equality, yet egregious population disparities required a justification. At this point in the inquiry, states must proffer a legitimate reason for the their particular plans.

The Court's opinion in *Reynolds* may be understood similarly. In general, the Court held that "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."\textsuperscript{124} This is now standard fare in redistricting circles. Yet, the Court told us a lot more than this.\textsuperscript{125} In the next sentence, for example, we are told that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a *substantial fashion*
diluted when compared with votes of citizens living in other parts of the State.”

Also, the Alabama plan is unconstitutional because its deviation from population equality is “too egregious” to afford a conclusion that it “was apportioned sufficiently on a population basis.”

In this vein, the Court made clear that “mathematical nicety is not a constitutional requisite,” yet legislatures must be apportioned “sufficiently on a population basis.”

What, then, is the real standard under *Reynolds*? It is not “mathematical exactness or precision,” the Court made clear. Rather, “the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable.” The choice of words reveals a great deal about the doctrinal posturing established by the Court’s opinion. The redistricting effort to craft districts of equal population must be “honest” and of “good faith.” Equality must only be achieved “as is practicable.” This is not the language of rigid rules and ready-made answers; this is language that establishes a flexible constitutional norm, a language of institutional flexibility both for courts and legislatures. At all times, however, the goal remains “affording adequate representation to all parts of the State.”

As part of this constitutional inquiry, the language employed by the Court left much for the states to carry out their redistricting duties as necessary. Some states may wish to “maintain the integrity of various political subdivisions, insofar as possible”; others may wish to create “compact districts of contiguous territory.” Also, what may be permissible in one state may not be so in another, depending on the particular circumstances at play. In sum, “[s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy,” deviations from population equality are permissible. On this test, a state’s justifications will prove to be key, for deviations are acceptable so long as they are properly justified. This is not to say that

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126 *Reynolds*, 377 U.S. at 568 (emphasis added).
127 *Id.* at 569.
128 *Id.* (emphasis added).
129 *Id.* at 577.
130 *Id.*
131 *Id.*
132 *Id.*
133 *Id.* at 578 (emphasis added).
134 *Id.*
135 *Id.*
136 *Id.* at 579.
137 *Id.*
the Court gave redistricters free rein, for it did not. In fact, it foreclosed some avenues that might be perfectly rational, such as geographical considerations.\footnote{See id. at 580. The Court also rejected the federal analogy or the balancing of urban and rural interests. See id. at 571–76. Additionally, the Court downplayed the existence of legislative inaction, see Davis v. Mann, 377 U.S. 678, 691 (1964), or the availability of state remedies, such as initiatives or referenda. See Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 733 (1964). In so doing, it went farther than Baker professed to go.} It is to say instead that the Court did not intend to apply the equipopulation principle as a straightjacket. It is to say that Reynolds is much closer to Baker than often presumed.

A final point merits consideration. While pursuing this doctrinal course, the Court was cognizant of larger questions of political representation. In explaining that a state may choose to follow preexisting political subdivisions, the Court wrote that “[i]ndiscriminate districting . . . may be little more than an open invitation to partisan gerrymandering.”\footnote{Reynolds, 377 U.S. at 578–79.} Put this way, it appears as if the Court did not wish to condone the practice, much less encourage it. And yet, it is clear from the opinion that it did not wish to address the gerrymandering question head on. Through the years, this question has been quite elusive, and properly so.

2. Avoiding the Inevitable: Karcher v. Daggett

The Court had many opportunities to address the gerrymandering question post-Reynolds, yet declined to do so.\footnote{See, e.g., Gaffney v. Cummings, 412 U.S. 735 (1973); Taylor v. McKeithen, 407 U.S. 191 (1972); Ely v. Klahr, 403 U.S. 108, 112–13 n.5 (1971).} The New Jersey redistricting plan post-1980 census provided the Court with yet another opportunity to address this concededly difficult question. A majority of the Court declined the invitation yet managed to invalidate the enacted plan on a questionable reading of the relevant constitutional standard. This was a classic “backdoor” invalidation of a gerrymander.\footnote{See Dixon, supra note 5, at 493–96.} The case was Karcher v. Daggett.\footnote{462 U.S. 725 (1983).}

In Karcher, the Court confronted a clear partisan gerrymander in the redistricting plan for New Jersey’s congressional delegation. The Democratic Party controlled the process in its entirety and was thus able to craft any districting plan of their liking, which it undoubtedly
As such, the question in *Karcher* was not whether a gerrymander had taken place; rather, the real question looked to the Court and its doctrinal analysis of the gerrymander. Perhaps surprisingly, the Court chose to duck this important question once again.

The case came down to the minutiae of statistics, census data and population inequality. According to the new census figures, New Jersey was entitled to fourteen congressional seats, with each seat at an average population of 526,059. The legislature agreed on a plan with average districts that differed from the ideal figure by 0.1384%, or 726 people. Furthermore, the difference between the largest district and the smallest district was 0.6984% of the average district, approximately 3674 people.

Of note, a competing plan offered to the legislature by Dr. Ernest Reock, political science professor at Rutgers University and Director of the Bureau of Government Research, had a maximum difference of 0.4514%, or 2375 people.

The Court began its analysis by recalling its high standard of review for congressional districts. In essence, this is a standard where equal really means equal and de minimis deviations from equality are non-existent. For the Court, the first question in litigation of this kind is whether any existing population variances could have been reduced or even eliminated with a better effort from the legislature. Those who challenge the redistricting plan carry the burden of proof here; they must show lack of a good faith effort on the part of the legislature. Failure to overcome this burden ends the inquiry. If this burden is met, the second question then asks the State to proffer evidence to show that the existing variances are necessary to achieve a legitimate goal.

In framing the inquiry this way, the Court set aside the gerrymandering question for another day. All the same, it held against the New Jersey gerrymander. To begin, the Court explained that no de minimis standards exist in congressional districting; after all, if a 0.7% deviation should be considered de minimis, how would the Court evaluate a 0.8% deviation, or 0.9%, or 1.0%?

Thus framed, the question was really about the justifications proffered by the State in

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143 *See id.* at 788–89 (“In this case, one cannot rationally believe that the New Jersey Legislature considered factors other than the most partisan political goals and population equality.”).

144 *Id.* at 727–28.

145 *Id.* at 728.

146 *Id.*

147 *Id.* at 728–29.

148 *See id.* at 730–31.

149 *See id.* at 732.
choosing the plan that it chose. The State did not proffer very much, and as such their chosen plan failed constitutional scrutiny.

The Court’s decision in *Karcher* does not provide very much evidence on the crucial question of judicial standards for gerrymandering cases. The evidence it does provide points to the general level of discomfort by various members of the Court on the gerrymandering question. This is one of two lessons that may be gleaned from the *Karcher* opinion. More specifically, it is clear that this opinion is but a backdoor approach to invalidating what is clearly a gerrymandered districting plan. A more formal, unambiguous approach must loom on the horizon. The second lesson picks up on a comment made earlier about the Court’s approach in this area. Put simply, it is clear that the Court does not have a theory of democratic politics.150 It is also clear, as seen quite starkly in *Karcher*, that the equipopulation standard does not begin to fill the necessary void. As such, it could be said at the time of *Karcher* that momentum was gaining for the Court to face the doctrinal merits of the gerrymandering question. On this particular point, the Court did not disappoint.

3. Back to *Baker*: *Davis v. Bandemer*

Three years later, the Court finally confronted the hated gerrymander. The setting this time was the Indiana redistricting process; the case was *Davis v. Bandemer*.151 In *Bandemer*, the plaintiffs brought a challenge to the state reapportionment plan, alleging that the enacted plan had been drafted in order to disadvantage the Democratic Party and its delegates. According to their claim, “each political group in a State should have the same chance to elect representatives of its choice as any other political group.”152 Put differently, the claim here is that “Democratic voters over the State as a whole, not Democratic voters in particular districts, have been subjected to unconstitutional discrimination.”153 Put this way, the question of political representation arises quite forcefully. Unsurprisingly, the Court’s answer to this decidedly complex question left a lot to be desired.

Declaring this claim a justiciable one, a Court plurality held that the plaintiffs must “prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group”154 in order to prove their claim. The intentionality inquiry

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150 See Lowenstein, *supra* note 58 *passim.*
152 *Id.* at 124.
153 *Id.* at 127.
154 *Id.*
poses modest requirements; after all, “[a]s long as redistricting is
done by a legislature, it should not be very difficult to prove that the
likely political consequences of the reapportionment were in-
tended.”\textsuperscript{155} The effects prong has proven to be far more cryptic. In
the Court’s words,

\begin{quote}
[U]nconstitutional discrimination occurs when the electoral system
is arranged in a manner that will \textit{consistently degrade} a voter or a
group of voters’ influence on the political process as a whole. . . .
[T]he question is whether a particular group has been unconstitu-
tionally denied its chance to effectively influence the political pro-
cess. . . . In this context, such a finding of unconstitutionality must
be supported by evidence of \textit{continued frustration} of the will of a ma-
jority of the voters or effective denial to a minority of voters of a fair
chance to influence the political process.\textsuperscript{156}
\end{quote}

Under this exigent test, political gerrymanders are unconstitu-
tional in their most egregious forms. It is not enough for the plaintiffs
to claim that they lost a political battle or a series of elections. Accord-
ing to the Court, the plaintiffs must show a political process break-
down where the system could no longer, by any sensible account, be
called democratic.\textsuperscript{157} \textit{Bandemer} thus signals a judicial propensity to
safeguard the democratic process gingerly. As long as the process
functions properly, the Court will remain uninvolved; only when the
process malfunctions, to the point of collapse, will the Court intervene
and afford litigants a remedy, in the name of democratic principles.

Seen this way, one may analogize the Court’s position in \textit{Bandemer}
to a market scenario, in the sense that benefits to consumers are best

\textsuperscript{155} Id. at 129.

\textsuperscript{156} Id. at 132–33 (emphasis added). The Court stated that
an equal protection violation may be found only where the electoral system
substantially disadvantages certain voters in their opportunity to influence
the political process effectively. In this context, such a finding of unconstitu-
tionality must be supported by evidence of continued frustration of the
will of a majority of the voters or effective denial to a minority of voters of a fair
chance to influence the political process.

\textsuperscript{157} This is another way of saying that \textit{Bandemer} is rightly concerned about process
failure. \textit{See} Samuel Issacharoff, \textit{Judging Politics: The Elusive Quest for Judicial Review of
Political Fairness}, 71 Tex. L. Rev. 1643, 1663 (1993) (“The Supreme Court’s adoption
of the partisan gerrymandering cause of action in \textit{Bandemer} turns on a belief that
gerrymandering is indeed a significant problem which can rise to the level of an un-
constitutional distortion of the political process.”); \textit{cf.} Pamela S. Karlan, \textit{All Over the
the state process fails completely ought federal courts step in and do the reapportio-
ment themselves.”).
reflected in healthy, robust competition in a free market.\textsuperscript{158} Once a firm achieves its goals too well and monopolizes its given field, however, federal law is immediately implicated. Similarly, Bandemer calls for judicial intervention only when redistricters do their jobs too well. Due to the difficulties inherent in the redistricting task, this will not happen often. To some, this is Bandemer's undoing;\textsuperscript{159} to my mind, therein lies its virtue.

Curiously, the scholarly commentary on Bandemer is predominantly critical of the Court's position. In general, critics complain not that Bandemer is an unwelcome intrusion into political matters,\textsuperscript{160} but, puzzlingly, that Bandemer does not extend the Court's doctrinal venture far enough. As one critic put this point, "it is a necessary companion to the one person, one vote accomplishment to make sure that election procedures are truly fair."\textsuperscript{161} Another such critic explained, in my view more sensibly, "the ultimate test of Davis v. Bandemer will be determined by its ability to provide relief from egregious political gerrymandering without exposing virtually every districting plan to tedious and unnecessary judicial scrutiny."\textsuperscript{162} These accounts posit the Court as democratic arbiter, as the only institution with both the will and the wherewithal to police the combustible arena of political reapportionment.\textsuperscript{163}

These criticisms have gained much currency in recent years. This Section takes direct issue with them. To be clear, it concedes the prior point, whether the Court could develop useful standards in this area without subjecting our political institutions to a system of proportional representation. On this point, the critics are both ready and willing to provide standards,\textsuperscript{164} and this Section does not dispute

\textsuperscript{158} See Schuck, supra note 15, at 1338–48. See generally Issacharoff & Pildes, supra note 14, at 646 (arguing that "an appropriately competitive partisan environment" enables a "well-functioning political process").

\textsuperscript{159} See, e.g., Samuel Issacharoff et al., The Law of Democracy: Legal Structure of the Political Process 563 (1998); Ely, supra note 11, at 617.

\textsuperscript{160} Some critics do make this point. See Schuck, supra note 15, at 1330 (insisting that "[judicial regulation of partisan gerrymandering would be a cure worse than the disease").

\textsuperscript{161} Backstrom et al., supra note 23, at 165; see Ely, supra note 11, at 621.

\textsuperscript{162} Grofman, supra note 22, at 29, 57–58.

\textsuperscript{163} See Samuel Issacharoff, Oversight of Regulated Political Markets, 24 Harv. J.L. & Pub. Pol'y 91, 97 (2000) ("Unfortunately, the most significant power [not immediately accountable to the political process] is possessed by the judiciary.").

\textsuperscript{164} See, e.g., Backstrom et al., supra note 23, at 160–62 (proposing a standard of unconstitutional gerrymandering—"whether that number of districts in which the majority party dominates is other than 50% plus one of all districts"—and developing its measure); Gordon E. Baker, The "Totality of Circumstances" Approach, in POLITICAL
them. The better question is whether the Court should intervene in these highly political contests. The answer is not as facile as many critics periodically posit. As a result, this Section sidesteps the critics' contention that Bandemer's doctrine is practically non-existent in any useful sense. It is true that federal courts have only once struck down

Gerrymandering and the Courts, supra note 22, at 203 (enumerating eight indicators that courts may consider when determining when a political gerrymander has occurred). In the opinion of Michael D. McDonald and Richard L. Engstrom, who provide yet another measure of political gerrymandering,

A gerrymander exists when (1) the district configurations do not provide, as nearly as is practicable, a symmetrical pattern of the groups percentages across districts, or (2) the group percentages are not, as nearly as is practicable, what could be expected to arise from the residential patterns when the formal districting criteria are applied.

Michael D. McDonald & Richard L. Engstrom, Detecting Gerrymandering, in Political Gerrymandering and the Courts, supra note 22, at 178, 189; see also Robert N. Clinton, Further Explorations in the Political Thicket: The Gerrymander and the Constitution, 59 Iowa L. Rev. 1, 40-41 (1973) (“A review should analyze the entire apportionment scheme to determine whether it operates to systematically dilute a particular interest’s vote, thereby creating a special obstacle to that group’s efforts to use the electoral process to effectuate their policy objectives.”); Richard L. Engstrom, The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation, 1976 Ariz. St. L.J. 277, 282 (offering a burden shifting standard, whereby plaintiffs would only need to make a prima facie case and the burden to explain and justify the plan would fall to the state).

In this vein, Justice Stevens has similarly argued that the proper standard is suggested by three characteristics of the gerrymander condemned in Gomillion: (1) the 28-sided configuration was, in the Court’s word, “uncouth,” that is to say, it was manifestly not the product of a routine or a traditional political decision; (2) it had a significant adverse impact on a minority group; and (3) it was unsupported by any neutral justification and thus was either totally irrational or entirely motivated by a desire to curtail the political strength of the minority.

Mobile v. Bolden, 446 U.S. 55, 90 (1980) (Stevens, J., concurring). In Karcher, Justice Stevens stated,

If a State is unable to respond to a plaintiff’s prima facie case by showing that its plan is supported by adequate neutral criteria, I believe a court could properly conclude that the challenged scheme is either totally irrational or entirely motivated by a desire to curtail the political strength of the affected political group.

Karcher v. Daggett, 462 U.S. 725, 760–61 (1983) (Stevens, J., concurring); see also Cousins v. City Council, 466 F.2d 830, 860 (7th Cir. 1972) (Stevens, J., dissenting) (“[I]f a highly improbable shape is inexplicable except by reference to an impermissible gerrymandering purpose, in my opinion a challenge to the classification as resting on a ground wholly irrelevant to the achievement of a valid state objective should be sustained.”).
a redistricting plan on Bandemer grounds.\textsuperscript{165} This is a function of the Court’s understanding of democratic politics; by definition the question of “egregious” gerrymanders will necessitate the enduring control of a state majority by one party.\textsuperscript{166} This is very difficult to do, perhaps impossible. Seen this way, Bandemer is thus a case for relaxed standards and intervention only for extreme cases, as Grofman’s words intimate\textsuperscript{167} and others have accurately forecasted.\textsuperscript{168} On this reading, I have yet to see a case that calls for judicial intervention. Interestingly, neither has the Court.\textsuperscript{169}

Before turning to and answering some of the leading objections to the partisan gerrymandering doctrine, it is worth pausing briefly to underline the current state of the doctrine. In light of Davis v. Bandemer,\textsuperscript{170} it is clear that the Court now has at least a semblance of a theory of democratic politics. This is the lockout theory, which worries whether groups have been completely shut out of the political process. The Court’s initial entry into the redistricting thicket was influenced in great measure by this problem, as political and geographical minorities in state legislatures simply refused to release their strangleholds on state power. We saw this problem in Tennessee pre-\textit{Baker} and in Alabama pre-\textit{Reynolds}, among others. In \textit{Baker}, for example, Justice Clark did not side with the ultimate majority on the ques-

\textsuperscript{165} See Republican Party v. Martin, 980 F.2d 943, 950–58 (4th Cir. 1992). This case is important for many reasons, particularly for the way in which it highlights the philosophical differences between defenders of an aggressive posture to judicial review of politics and the more passive model I defend here. Soon after the Fourth Circuit affirmed the lower court finding of an unconstitutional partisan gerrymander, the Republican party managed to stage a comeback in the midterm elections, obtaining a legislative majority in the state House for the first time in this century. See Edward Walsh, \textit{North Carolina Reflects Voting Shift in South: GOP Takeover Nov. 8 Both Wide and Deep}, WASH. POST, Nov. 26, 1994, at A1. Professor Issacharoff brands this judicial incursion an “embarrassment,” Issacharoff, \textit{supra} note 11 (manuscript at 11–12, on file with author), and I do not disagree with the label. To his mind, this means that the case law must provide clearer standards by which to guide lower courts; to my mind, in contrast, this means that courts must play a very passive role.

\textsuperscript{166} The critics also raise objections to the bipartisan gerrymander, which they equate to a political cartel. The earlier point about the concept of representation, \textit{see supra} Part I.B., applies with equal force to this argument.

\textsuperscript{167} \textit{See supra} note 162 and accompanying text.

\textsuperscript{168} Daniel Hays Lowenstein, Bandemer’s \textit{Gap: Gerrymandering and Equal Protection}, \textit{in Political Gerrymandering and the Courts}, \textit{supra} note 22, at 64.

\textsuperscript{169} Consistent with early warnings of the Court’s role in political matters, the plaintiffs must meet a very high standard. These claims, while justiciable, will not carry the day under most circumstances. \textit{See Badham v. Eu}, 694 F. Supp. 664, 669–71 (N.D. Cal. 1988) (three-judge court), \textit{aff’d}, 488 U.S. 1024 (1989).

\textsuperscript{170} 478 U.S. 109 (1986).
tion of judicial intervention until he was convinced that the courts were the only institution capable of dislodging the existing power glut. In *Reynolds*, the district court took a similar view of the facts at issue, and in so doing sought to "releas[e] the strangle hold on the legislature sufficiently so as to permit the newly elected body to enact a constitutionally valid and permanent reapportionment plan." On my reading of *Bandemer*, this is exactly the view of democratic politics pursued by the plurality. Short of a lockout, the political process should be left alone.

Further, it is worth keeping in mind two of the central premises of this Article: that all redistricting is gerrymandering and that redistricting raises difficult and contested political questions of the highest order. It is also worth remembering Justice Douglas's observation that the gerrymandering question is "the other half of *Reynolds v. Sims*." In many important respects, these views are reflected in the argument to this point. Its conclusion is also mindful of this reality. More specifically, we must treat the redistricting and gerrymandering questions together, for they are but two sides of the same coin. In doing so, this Article contends that the proper doctrinal approach is to adopt a de minimis standard across the board (which will take care of all future *Karchers*) and then apply *Bandemer* across the board.

**B. Objections: Of Bad Numbers, Bad Process and Safe Seats**

The *Bandemer* standard has proven to have very little teeth, and its tenets "may be difficult of application." Short of taking the task away from legislatures, the standard is as it should be, for this approach "recognizes the delicacy of intruding on this most political of legislative functions." In response to the likely criticisms of this po-

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173 See also Cain, *supra* note 16, at 1601.
177 *Id.* at 143. In taking this view, this Part agrees with Peter Schuck and his view of the political process and limited court intervention. See Schuck, *supra* note 15, at 1330. Our differences lie mainly in our confidence in the ability of gerrymanderers to lock up their processes competently. In light of our malapportionments of the past, this Part does not share his optimism in declaring these questions nonjusticiable. Let me be clear. If the point is that the Court has no role to play in these matters, as Justice Frankfurter seemed to advocate in his dissent in *Baker*, then the old malapportioned plans of the past may become a worry again. *Reynolds* took care of this worry by
sition, the next Section addresses four traditional objections to partisan gerrymanders in general.

1. The Conventional Seats/Votes Ratio

The first objection looks to the raw numbers at issue in the Indiana election of 1982. This point, simply, is that a majority of voters supported one party over its main competitor, and yet this electoral victory was not reflected in the composition of the incoming legislature.\(^1\)\(^7\)\(^8\) This is known as the seats/votes ratio.\(^1\)\(^7\)\(^9\) More specifically, while Democratic candidates received over 50% of the votes, they only won 43% of the seats.\(^1\)\(^8\)\(^0\) For those who support the electoral outcome at issue in Bandemer, this is another way of asking what exactly is wrong with a redistricting outcome where the party with the most votes does not get the most seats, especially in a world of single-member legislative districting? Looking specifically to the facts in Bandemer, why must 51.9% of the voters necessarily garner over 50% of the seats? Two easy answers are often provided to this question. First, critics respond that under a single-member districting system, the fairest way to allot seats is in proportion to the votes cast. For this reason, the claim is often made that once courts begin to inquire into redistricting matters, the only logical stopping point will be a system of proportional requiring new districts every ten years to correspond with new census figures. Of course, one may advocate a middle road, with a role for the Court in redistricting cases up until Reynolds and like cases, but not for gerrymandering controversies "commonly understood." One could thus argue that the Court must ensure "equality" through the Fourteenth Amendment short of tackling gerrymandering questions head on. This may be Professor Schuck's point. Advocating this point requires a very nuanced defense of Baker and Reynolds, but not Bandemer. To my mind, however, Baker and Bandemer are one and the same, thus rendering any such defense quite difficult, perhaps impossible. If Baker raises justiciable questions, to put this point differently, so must Bandemer.


\(^{179}\) For a sampling of the myriad difficulties raised by this particular measure, see, for example, id. at 201–10. See also Butler & Cain, supra note 45, at 58 (explaining that percentages, standing alone, tell us very little; one needs baseline strength to gauge gerrymandering in order to account for, inter alia, ticket splitting). Courts and commentators alike pay a great deal of attention to this measure. See, e.g., Bandemer v. Davis, 603 F. Supp. 1479, 1491–92 (S.D. Ind. 1984), rev'd, 478 U.S. 109 (1986). This is not to say, to be clear, that this relationship is a good measure of political fairness. Standing alone, it is far from it. See Bandemer, 478 U.S. at 159–60 (O'Connor, J., concurring); Daniel Hays Lowenstein & Richard L. Hasen, Election Law 178–79 (2d ed. 2001); Daniel H. Lowenstein & Jonathan Steinberg, The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?, 33 UCLA L. Rev. 1, 49–64 (1985).

\(^{180}\) Bandemer, 603 F. Supp. at 1485.
representation. Second, a frequent response finds refuge in elementary democratic theory. Put simply, a majority of voters must ipso facto control a majority of seats. This argument does not get any simpler than that.

But things are never as simple as often made out to be. Going back to the facts at issue in Bandemer, the numbers themselves do not interest me as much as the process by which the districts at issue came into being. In other words, how was the Republican Party able to capture a majority of both state houses as well as the governor’s office in 1980? The answer is easy: blame on this score may be laid at the feet of the Reagan landslide of 1980. For a swing state, which Indiana is considered to be, capturing all major elective offices is no small feat. And yet, after it happened, the Republicans were fortunate to reap short-term rewards for their efforts.

The key, of course, is that the rewards were “short term.” The Republicans redrew the district lines in 1981, and then a new election took place the next year. And puzzlingly, in this next election, the Democrats made an expected comeback (Indiana is a swing state, after all) and received over 50% of the votes. It is on the strength of this one election that the plaintiffs argued in Bandemer that their rights had been infringed. I respond to this position in two ways.

First, and as the facts in Bandemer clearly demonstrate, redistricting and the ratio between seats and votes is subject to the ebbs and flows of democratic politics and political participation. In 1980 the Indiana Republicans were able to sweep their state, yet by 1982 the Democratic party had not only recovered but had also overcome their adversaries at the polls. This case study raises some very interesting questions. What, for example, should have taken place in 1982 once the Democrats had received over 50% of the vote? Or, what should have taken place prior to that in the 1981 redistricting? To answer the second question, some critics argue that the redistricting process should be “conducted at a safe distance from the immediate demands of the political process,” whether by delegating the responsibility to blue-ribbon commissions, special masters, or, inter alia, by precommitting redistricters through the development of ex ante redistricting

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181 See Bandemer, 478 U.S. at 155-59 (O’Connor, J., concurring); Sanford Levinson, Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won’t It Go Away?, 33 UCLA L. Rev. 257, 277-78 (1985); Schuck, supra note 15, at 1381.
182 See Bandemer, 603 F. Supp. at 1485.
183 Issacharoff, supra note 157, at 1691.
184 See, e.g., McKay, supra note 20, at 269-71; Dixon, supra note 33, at 10; Ely, supra note 11, at 634-35; Issacharoff, supra note 157, at 1691-95.
This Section does not quibble with these proposals and might even welcome them; my general position assumes instead that legislators will continue to be in charge of state and congressional redistricting. The first question presents a much more difficult scenario. In 1982, the Democratic victory at the polls led most observers to conclude that the Democrats must ipso facto receive a legislative majority. Yet, upon closer inspection, it is not clear to me why that should be the case. In order to see this new possibility, imagine a factual scenario where, instead of a Democratic victory under a newly devised Republican plan, as in the Bandemer situation, we instead witness a string of Republican majorities at the polls. Then, in 1988, and riding on the coattails of a Democratic landslide similar to Reagan’s in 1980, the Indiana Democrats garner 60% of the statewide vote. What should be the outcome of this election? Would we expect the Indiana legislature to be reflective of this new electoral majority?

Of course we would not. Under our single-member districting system, the expectation is not that electoral outcomes will be immediately reflected in legislative membership but, instead, that electoral lines will be drawn every ten years, lines that will serve as ground rules for all subsequent electoral clashes. Neutral lines are unavailing, and a line moved an inch to the left or to the right on the map may determine whether the resultant plan will favor one party over another. Yet, if we really wished for legislative membership to be reflective of each and every election, we would have a very different system than the one we have; we would have a proportional representation system where legislative seats would be awarded to parties anew after every election. Instead, under our system, some tendency towards the result we see in Bandemer is inevitable.

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185 See Issacharoff, infra note 157, at 1664–69.
186 See Andrea Bierstein, Millennium Approaches: The Future of the Voting Rights Act After Shaw, De Grandy, and Holder, 46 Hastings L.J. 1457, 1527–32 (1995) (making such an argument for the adoption of a proportional representation system); Cain, supra note 20, at 225 (suggesting that proportional representation would require abandoning the district-based system, but that “partisan disagreements over redistricting are an enormous nuisance, causing unnecessary partisan rancor and wasting much time [and are likely not] more harmful than that”); Samuel Issacharoff, Groups and the Right To Vote, 44 Emory L.J. 869, 908 (1995) (“E[qui-populational districting] [has] become . . . the peculiar means for interest representation.”); Samuel Issacharoff, Supreme Court Destabilization of Single-Member Districts, 1995 U. Chi. Legal F. 205 passim (explaining that single-member districts are a difficult way to carry out the Court’s promise, post-Reynolds, of fair and effective representation).
Second, the actual figures in Bandemer (51.9% of the vote, 43% of the seats), without more information, are quite unimpressive. It is curious that debates over the necessity of judicial intervention arise simply on the strength of these facts. Yet, to demand a different result in Indiana after the 1982 election, and in light of the 1980 election and the Republican wave, is to ask a great deal of redistricters and those in charge of crunching the numbers and manning the computers. This criticism implicitly demands a districting plan exquisitely sensitive to electoral nuances and flows. In light of our ten-year census counts and traditional reapportionment and redistricting requirements, such a system would be both difficult to attain and perhaps

American-style. No system is perfect. Majority rule creates losers and winners, and our system has tolerated the routine creation of losers with remarkable equanimity." (footnote omitted)).

188 For the district court in Bandemer, these numbers made all the difference in the world. See, e.g., Bandemer v. Davis, 603 F. Supp. 1479, 1485–86 (S.D. Ind. 1984), rev'd, 478 U.S. 109 (1986). The court wrote, for example,

Most significant among these many statistical figures is the fact that in 1982 Democratic candidates for the Indiana House earned 51.9 percent of all votes cast across the state. However, only 43 Democrats were elected to seats. The State argues that it is possible that this disparity is explained by the Republicans fielding better candidates or other factors which make the outcome of such elections sensitive to the interests of the voters and the issues of the day. The Court would readily concede this possibility, but the disparity between the percentage of votes and the number of seats won is, at the very least, a signal that Democrats may have been unfairly disadvantaged by the redistricting.

Id. at 1485. On the strength of these figures, the district court concluded that "there was a built-in bias favoring the majority party." Id. at 1486.

In reference to Karcher v. Daggett, commentators similarly argue that the New Jersey legislature had been able "to concoct a fierce partisan gerrymander." Lani Guinier & Pamela S. Karlan, The Majoritarian Difficulty: One Person, One Vote, in REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 207, 215 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997). From this description, one would expect a complete Democratic domination as reflected in the 1982 congressional delegation. The numbers, however, are not quite as promising. In 1982, the Democratic Party received 56% of the vote, while the Republican Party received 43%. See AMERICA VOTES 15: A HANDBOOK OF CONTEMPORARY AMERICAN ELECTION STATISTICS 235 (Richard M. Scammon & Alice v. McGillivray eds., 1983). Out of fourteen available seats, and all things being equal, one would expect the Democrats to gain eight of those seats to the Republicans' six. In actuality, and in specific light of this "fierce gerrymander," the Democrats gained nine seats to the Republicans' five (under the 1984 plan, interestingly, the Democrats did gain eight seats, the Republicans six). All the hoopla and contention is over one seat. For all its fierceness, New Jersey redistricters still have a lot to learn.
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Furthermore, elections are always concerned with the representation of interests, with winning and losing in the sense that victories lead to spoils, defeats lead to further planning for future combat. If this is true, the question in Bandemer then becomes a qualitative one: what happened to the Indiana public in the two years between 1980 and 1982, and how may this change of position be reflected in such a short term? Again, it remains unclear whether such reflection is either possible or desirable. Keeping in mind the larger end of political representation, it is clear that the relevant means are both contestable and imperfect. Numbers alone, however, do not tell the whole story.

2. A Tainted Process

A second objection may be directed instead to the process that led to the enactment of the challenged plans. In Bandemer, for example, we have a "fiercely competitive and unashamedly partisan" redistricting fight. This was a process where the minority party was granted very little access and influence. Further, the adopted plan was introduced on the last day of the legislative session, which gave the minority party very little time to review a great mass of information. Put simply, this process was a total legislative railroading, a plan enacted by the majority party for its maximum benefit. As a state senator candidly commented in light of this plan, "I don't make goals for the opposite team." The challenged plan in Karcher was similarly partisan, as evidenced by a letter from Speaker Christopher Jackman to Ernest Reock, the Director of the Bureau of Government Research at Rutgers University, in response to a submission by Profes-

190 Bandemer, 603 F. Supp. at 1502 (Pell, J., dissenting).
191 Id. at 1484.
192 The court noted, The challenged plan was the product of the majority party's application of computer technology to the task of mapmaking. The minority party was wholly excluded from the mapmaking process which culminated in the present district lines. Only in the final hours of the legislative session were the details of the plan revealed to the members of the minority party. Minuscule time was available for the plan to be scrutinized, and its import debated. Rather, the minority party was intentionally precluded from participating in the process by which the present plan was drawn up. Clearly, such a procedure is in degradation of the constitutional norm of fair, effective and equal representation.

193 Id. at 1495 (citations omitted).
194 Id. at 1484 (quoting deposition testimony of Indiana Senator Charles Bosma).
sor Reock of a "‘model’ redistricting proposal." According to the district court, this was a "remarkable reply." Its substance makes fairly clear that, as the Speaker wrote, "apportionment is a political process. No apologies need be made for interests which exist and the pressures which bear upon those who are burdened with the decisions of apportionment." The final map, according to the dissenting judge, "leaves me, as a citizen of New Jersey, disturbed." In sum, the legislative majority, like their counterparts in Indiana, wished to redistrict their state in order to accomplish very partisan goals.

These stories lead commentators to decry the evils of gerrymandering in general and to call for judicial intervention. Sam Issacharoff, for example, writes that Bandemer presents an example of "the very real problem of capture and manipulation of districts endemic to the reapportionment process." Similar criticisms are leveled at the New Jersey plan. In response, one may argue that the Reock plan in New Jersey is in fact a fair plan and that the legislature would have been well served in adopting it. All the same, the New Jersey example does not present a convincing case for judicial intervention. The way things stand, with legislatures placed at the helm of redistricting controversies, the results in New Jersey and Indiana are inevitable. Those wishing for a different process are wishing instead for a different system altogether. This Article would not criticize any such proposals; in fact, it might even embrace them. But that is a separate debate altogether. Looking specifically to the state legislatures during the redistricting process, it is hard to chastise them for behaving as rational actors, especially when the end result accomplishes the goal of electoral representation as well as it does.

3. Targeting Discretes and Insulars

A third objection posits the claim that partisan gerrymandering is but a kind of invidious discrimination against parties. Justice Stevens

195 Id. at 981.
196 Id. at 990 (App. B).
197 Id. at 984 (Gibbons, J., dissenting).
198 Issacharoff, supra note 157, at 1687.
199 See, e.g., Guinier & Karlan, supra note 188, at 214-16.
200 The point here is not simply that the minority party was shut out of the process completely, for such is the fate of political minorities. Rather, the loudest objections are directed at the structures that would allow such captures in the first place, particularly for questions deemed as important as redistricting.
makes this point often, dating back to his dissenting opinion, as an appellate court judge, in Cousins v. City Council.\textsuperscript{201} As he wrote,

As a matter of principle, invidious discrimination against Americans of Polish, German, or Italian ancestry is just as indefensible as discrimination against Americans of African ancestry. It seems equally clear that such discrimination against Catholics, Jews, Protestants or Mormons is in the same category. Unquestionably the same rules must be applied to the classification of voters on grounds of national origin, ethnicity, or religion, as race. It can be demonstrated that political groups are also entitled to equal treatment.\textsuperscript{202}

In other words, when a party in control of the redistricting process acts against its competing party, it is discriminating against its competitor because of its partisan status, not in spite of it. In fact, this claim may be pressed much further; the goal is to permanently crush the opposition into submission, to gain a palpable and enduring political advantage. The doctrinal point, on this view, is that \textit{any} group, including major political parties, is deserving of judicial protection.\textsuperscript{203} This Section responds to this position in two ways.

First, it sides with Justice O'Connor when she writes in Bandemer that the major political parties will be able to take care of themselves. The prohibition against targeting groups, which dates back to United States v. Carolene Products's famous Footnote Four,\textsuperscript{204} is concerned that minority groups will not be able to defend themselves in the political process. The worry, in other words, is not a general one about harming and targeting groups; it is instead a worry that some groups, when targeted, will not be able to protect themselves and thus will need the judiciary to intervene on their behalf.\textsuperscript{205} Without question, this is not

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\item \textsuperscript{201} 466 F.2d 830, 847-61 (7th Cir. 1972) (Stevens, J., dissenting).
\item \textsuperscript{202} \textit{Id.} at 850. For another example, see Justice Stevens's dissent in Shaw v. Reno, 509 U.S. 630, 676-79 (1993) (Stevens, J., dissenting).
\item \textsuperscript{203} A leading commentator reads the Court's opinion in Bandemer exactly this way. \textit{See} Lowenstein, \textit{supra} note 168, at 74–89.
\item \textsuperscript{204} United States v. Carolene Products, 304 U.S. 144, 152-53 n.4 (1938).
\item \textsuperscript{205} The Court explained in Strauder v. West Virginia, for example, If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment.
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the case when we look to the redistricting arena and major political parties.

Second, gerrymandering cases are not about targeting in the traditional sense. In *Bandemer*, for example, the legislature was clearly motivated by a desire to protect as many incumbents as possible. A similar motivation arises from the process in New Jersey. In this way, it is simply a function of zero-sum games that my gain is your loss and vice versa. Thus, to benefit Republicans within a state, by definition, is to harm Democrats. Any other result is simply unavailing.

What, however, to make of *Gomillion v. Lightfoot* and race cases in general? If *Bandemer* is not about targeting but partisanship, then is not *Gomillion* similarly about race and not about targeting any specific group? One must respond to this argument gingerly. Put simply, a cursory look at the facts and social circumstances in Tuskegee in the late 1950s and early 1960s demonstrates that the Alabama legislature in 1957 was targeting black residents, and only them, for exclusion. The history of race relations in Alabama and the efforts by whites there to keep blacks from voting make a very strong case for exactly this conclusion. We know that *Gomillion* is about targeting the way we know that Jim Crow in general is about targeting as well. Political parties cannot make a similar claim.

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206 See Larry Alexander, *Lost in the Political Thicket*, 41 FLA. L. REV. 563, 577-78 (1989) (advocating judicial restraint in political gerrymandering cases because "no demonstrable harm results from gerrymandering regardless of its motivation").


211 Justice O'Connor's concurrence in *Bandemer* agrees with this point. In her view, politics is a contact sport, and so long as major political parties are engaged in the battle, democracy need not be worried. See *Davis v. Bandemer*, 478 U.S. 109, 144 (1986) (O'Connor, J., concurring). Of course, she takes her claim further and argues that these claims are never justiciable under the Equal Protection Clause. *Id.* In his concurring opinion in *United Jewish Organizations v. Carey*, Justice Brennan made an analogous claim, one that ultimately reinforces my position here. 430 U.S. 144, 168-72 (1977) (Brennan, J., concurring). As he wrote, to condone political gerrymandering (or "political-party apportionment") is not to condone racial gerrymand-
4. Rigging Outcomes and the Perils of the Redistricting Craft

A fourth objection raised against the partisan gerrymander worries about "perpetual" losers and their inability to affect the political process in light of their minority status. The claim is simply that legislators will be able to cement their majority status ad infinitum thanks largely to their control of the redistricting process. For support, one may offer the examples of Tennessee and Alabama prior to 1962 and the Court's decision in *Baker v. Carr*.\(^1\)\(^2\)\(^1\)\(^2\)

The point is quite valid in the abstract. In practice, however, the internal checks in the redistricting system guard against permanent, or long-lasting representative lockouts. In our system, states are required to redraw their district lines every ten years with the advent of new census figures. In this way, the process ideally reflects the political reality on the ground, as people shift from one state to the next, from one part of the state to another. For those in charge of the actual line drawing, they are given one shot to affect the politics of their state for the next ten years. This shot is not randomly assigned, but is a reflection of their political power at a predetermined point in the continuum. For those who worry about this condition, whether a party or an interest group or legislators in general, they could always make the upcoming redistricting into a campaign issue.\(^2\)\(^1\)\(^3\)\(^1\)\(^4\) In this vein, the better the gerrymander, the better chance that this will be an issue of any salience to prospective voters.\(^2\)\(^1\)\(^4\) Yet, so long as the facts

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\(^1\) Id. at 171 n.1 (Brennan, J., concurring). In his own words, "Political affiliation is the keystone of the political trade. Race, ideally, is not." Id. (Brennan, J., concurring). To be sure, it will sometimes be difficult to sort racial from political considerations. These times will require decisionmakers to exercise due care. See also Easley v. Cromartie, 532 U.S. 234, 235–36 (2001) (discussing the role that considerations of race play in boundary-drawing and considering the correlation between race and political behavior).

\(^2\) 369 U.S. 186 (1962).

\(^3\) See Butler & Cain, supra note 45, at 4; L. Karen Darner, In Northern Virginia, Political Challenges Mark House Redistricting Talks, WASH. POST (ALEXANDRIA-ARLINGTON EXTRA), Apr. 26, 2001, at 4. Darner wrote,

I will be the first to recognize that 10 years ago, the Democratic plan had faults based on partisanship. We all know how successful the Democrats were with their 1991 plan to keep a majority of House and Senate seats. In addition to losing the majority in both houses, our arrogance gave birth to George Allen the governor.

Darner, supra.

\(^4\) The infamous gerrymandering in Massachusetts provides a pertinent illustration. In the early 1800s, Massachusetts could have been labeled a Federalist state. In 1811, Republicans gained control of all three branches of the state government. They then set about the task of redistricting their state, a process that produced the infa-
in *Baker* do not repeat themselves, where legislators lock themselves in power in perpetuity and refuse to redraw district lines in the face of clear shifts in population, the redistricting battles should be allowed to play themselves out.

Further, who are these "perpetual" losers, especially in the context of partisan gerrymandering? If the claim is that a party can subjugate another for a very long time, both major parties will be more than able to take care of themselves. Further, and as Peter Schuck writes, the "motive to gerrymander is considerably stronger than [the] ability to execute and sustain one." The argument for permanent domination of the political process by one party over another assigns to the gerrymanderer a great deal of ingenuity and savvy, sprinkled with a great deal of luck. To put the point mildly, the redistricting process involves many factors and circumstances, some of which are out of the reach of the person entrusted with drawing the actual lines. For example, a gerrymanderer must juggle with the uncertainty inherent in the redistricting process; must be careful to keep its plan politically low key, lest she incur an electoral backlash in future elections; must waste votes across districts, one way or another, and thus must attempt to forecast future elections, turnouts and the like in order to ensure the desired outcome; must balance partisan gains from a redistricting plan with the cost of a much more polarized legislature; and, inter alia, must take a position on the question of what percentage of the voting public within a district makes a seat a "safe" one.

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mous salamander map that gave rise to the term "gerrymander." The map was highly successful in terms of benefiting the Republican party. While the Federalists garnered a majority of votes, they only won 37% of the legislative seats. See George Athan Billias, Elbridge Gerry: Founding Father and Republican Statesman 323 (1976). Two points are of interest to me. First, "[t]he gerrymander law aroused a furor and split the political parties still further." Id. at 317. That is to say, the opposing party did not take its defeat silently but instead raised its complaints publicly. Second, due partly to this redistricting issue and partly to other considerations, Gerry lost the governorship to Caleb Strong by 1200 out of over 100,000 votes cast. See id. at 323.

215 Bandemer, 478 U.S. at 152 (O'Connor, J., concurring).
217 See Butler & Cain, *supra* note 45, at 1–16; Bruce A. Cain, The Reapportionment Puzzle 148–54 (1984); Schuck, *supra* note 15, at 1341–44. In the context of minority-majority districts, for example, researchers argue as to the percentage that will in fact ensure a safe seat. Compare David Lublin, The Paradox of Representation 45–54 (1997) (arguing that a safe seat is reached with only 55% of registered voters), with Charles Cameron et al., Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?, 90 Am. Pol. Sci. Rev. 794, 794 (1996) (lowering Lublin’s figure to 47%). For a terrific discussion of the political science data concerning
conclude, political losers are seldom, if ever, losers in perpetuity; the process is far too complex for that.

5. On the Need for Electoral Competition

A final objection to the political gerrymander complains that under a well-crafted plan, elections are a sham, the incumbents in question shielded away from true competition. Professors Issacharoff and Pildes, leading exponents of this position, put this point characteristically well, as they write, "Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interests and views of citizens." On this view, competition lies at the heart of our electoral system.

This view has much to commend it. To be sure, one would be hard pressed to argue against a view of elections as providing voters with a slate of candidates from which to choose their preferred representative. All the same, three responses merit careful consideration, responses that lead me, as before, to argue for a lessened judicial role in political matters.

The first response looks to the notion of constitutional pluralism and points to the many values often reflected during the redistricting process and beyond. On this account, a redistricting plan meets constitutional proscriptions when and if it reflects any of a number of well-settled democratic norms, such as majority rule, electoral representation and responsiveness, to name a few. It is quite clear that electoral competition must be catalogued under any such list. Far more important is the fact that a redistricting plan cannot possibly reflect all values, for some of these values lie in tension with others; choices must be made. To be clear, this first response is by no means intended as a criticism of the "competition" model. Rather, it is a concession to the strength of its democratic pedigree as situated district percentages necessary for black voters to elect a black candidate, see Pildes, supra note 25, at 1529–39.

218 See Issacharoff, supra note 163, at 94–95. See generally Issacharoff & Pildes, supra note 14 (arguing that courts should aim to eliminate artificial barriers to political competition); Pildes, supra note 4, at 1606–07 (discussing the theory of political competition and certain characteristics of constraints thereon).

219 Issacharoff & Pildes, supra note 14, at 646.


221 See Persily et al., supra note 73, at 1520–21 (arguing that an inherent tension exists between the values of competition and electoral responsiveness).
within the larger electoral context. Put differently, it is clear that electoral competition is a value worth pursuing, yet not the only one.

The second response focuses on what may be the most damning implication of this objection: the lack of accountability and electoral responsiveness. This argument lies at the heart of the argument in favor of electoral competition. For example, "[t]hrough reducing the prospect of challenge, elected officials act as monopolists who create significant entry barriers and then exact monopoly rents. The more secure their hold on power, the more existing officeholders are free to pursue their own interests rather than interests of their constituents"; "[t]here is little normative justification for permitting the sinecure of an entrenched, unaccountable minority that cannot be dislodged through the normal operation of the political process." Curiously, this particular argument often stands alone, devoid of much support. Yet, the available evidence is far more promising.

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222 Issacharoff & Pildes, supra note 14, at 709; Issacharoff, supra note 163, at 95. In a recent work, Professor Issacharoff asks whether a legislature could do away with elections altogether and decide by itself who returns to the legislature in the next session, and who stays home. He analogizes this argument to the current state of most legislative elections across the country, as the number of safe, noncompetitive seats is quite high. See Issacharoff, supra note 11, at 22–27, 33–35. This position assigns to the elections themselves very little weight, a point amply refuted by much of the available evidence. See, e.g., David W. Brady et al., Differences in Legislative Voting Behavior Between Winning and Losing House Incumbents, in Continuity and Change in House Elections, supra note 42, at 178, 181–89 (arguing that elections hold representatives accountable and that those who take extreme positions vis-à-vis their district’s preferences increase their probability of electoral defeat); Robert S. Erkson & Gerald C. Wright, Representation of Constituency Ideology in Congress, in Continuity and Change in House Elections, supra note 42, at 177 (“Overall, members heed the general policy preferences of their constituents; they lose votes—and sometimes elections—if they stray too far ideologically.”); id. at 150 (“[M]embers tend to represent the mean or median ideological position of their districts, and do so in direct proportion to their electoral insecurity. They do so for good reason, as constituencies often will turn incumbents out of office when they are ideologically unresponsive.”). Elections matter in the eyes of the electorate, even for those seats that appear noncompetitive to the outside observer. It is for this reason that doing away with elections would seriously violate important democratic norms in ways that noncompetitive elections do not.

223 For example, Professors Issacharoff and Pildes cite Professor Daniel Ortiz for support. Issacharoff & Pildes, supra note 15, at 709 n.272 (citing Daniel R. Ortiz, Federalism, Reapportionment, and Incumbency: Leading the Legislature To Police Itself, 4 J.L. & Pol. 653, 675 (1988)). Professor Ortiz develops this particular point as follows, By redrawing district lines in such a way as to favor their own reelection, incumbents can partially protect themselves from challenge. They can then pursue their self-interests at the expense of their constituents’ interests with less fear of being unseated. The smaller their fear, moreover, the more
than they allow. The debate over the hated gerrymander as traditionally carried out is at its core a debate about the concept of representation. And on this point, judicial doctrine, and particularly its passive approach to gerrymandering questions, stands on firm ground. I have already presented some of the evidence from political science above. Arguments from political theory are also unhelpful. After all, the concept of representation is devoid of clear definitions, thus making arguments about lack of representation quite difficult to make. Further, it is surely right that the move from direct political participation to a system of representation immediately compromises our political freedom and autonomy. More specifically, nobody could fully represent every member of a group, be it an interest group or the inhabitants of a congressional district. The question of representation is thus a question of degree, not as facile as often implied by the tenor of the criticisms against modern redistricting practices.

The third response returns to the thesis at the heart of this Article: whether the Court must step in and influence these highly politicized controversies. This Article argues that the Court should. In making this point, it proves instructive to keep in mind the stakes of the redistricting process and the dimensions of the political infighting witnessed therein. The "politics-as-markets" model offers a useful referent, in the context of vote dilution claims:

where there is intense partisan competition, disputes over the relative distribution of political power could be left to democratic polit-

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Daniel R. Ortiz, Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself, 4 J.L. & POL. 653, 675 (1988). As should be clear from the text, this is a curious argument. To begin, it is not clear whether elected officials are able to protect themselves from challenge through redistricting to the degree this argument envisions. Further, the bulk of the evidence on this issue points in the opposite direction: the rise of the personal vote has meant that members of Congress spend more of their time on constituency matters, not less. See, e.g., Bruce E. Cain et al., The Personal Vote: Constituency Service and Electoral Independence passim (1987) (arguing that partisan decline has led to rise of constituency service, personal appeal and recognition as ensuring reelection); Mayhew, supra note 88, at 49–59, 121–22 (contending that congressional members care about individual positions in relation to the sentiment of their districts, but do not care quite so much, if at all, about policy outcomes); John A. Ferejohn, On the Decline of Competition in Congressional Elections, 71 AM. POL. SCI. REV. 166, 175 (1977) (defending the view that electoral defeat is due to neglect in matters of constituency service, not to issue positions). Finally, it is not altogether clear how a legislator may be so safe from electoral repercussions as to ignore a majority of voters within her district.

224 See PITKIN, supra note 12, at 4–6.
225 See Wolff, supra note 90, at 27–34.
ics itself—rival factions would presumably compete for excluded blocs of voters. The very difficulty of defining “dilution” justifies limiting the judicial role to ensuring a robust competitive environment.226

This Article agrees. So long as the political process remains vibrant and competitive between rival factions, the federal courts must play a secondary role. This argument is structural in scope: to overturn redistricting plans on the strength of a value of political competition—a value for which a working definition proves quite difficult227—would amount to a backdoor fine-tuning irrespective of prior commitments. Such an approach raises the specter of Bush v. Gore228 quite strongly, for the Court would in essence be asked to proffer its preferred view of political fairness ahead of the views of those institutions entrusted with such duties. To put this point a different way, the political process is “an independent system charged with choosing the appropriate ends of government.”229 We must either let the process run its course or amend it on our own. The one thing we must clearly do is stop asking the federal courts to do the heavy lifting.

III. THE NEW POLITICS OF RACE: RACE QUESTIONS AS POLITICAL QUESTIONS

The previous Part questioned the ease with which critics assail partisan gerrymanders and ultimately concluded that judicial intervention in this area should be guarded at best. This next Part extends this position to the concept of racial gerrymandering and particularly to those gerrymanders borne out of the 1990s redistricting process, what Mark Monmonier has labeled “Bushmanders.”230 This Part agrees that the Court has a special role to play when examining racial gerrymanders. However, it contends that the modern racial gerrymander is better understood as a type of political gerrymander.231

226 Issacharoff & Pildes, supra note 14, at 702. In the most recent redistricting cycle, for example, the early results point to the conclusion that the parties managed to battle one another to a draw. See Alison Mitchell, Redistricting 2002 Produces No Great Shakeups, N.Y. TIMES, Mar. 13, 2002, at A20.
227 See Richard L. Hasen, The “Political Market” Metaphor and Election Law: A Comment on Issacharoff and Pildes, 50 STAN. L. REV. 719, 724–28 (1998); Persily et al., supra note 73, at 1315 (“The ‘preordination’ of an election is really what makes it non-competitive, but that phenomenon turns out to be a very tricky one to describe and to measure.”).
228 531 U.S. 98 (2000).
229 Fitts, supra note 4, at 1123.
230 MONMONIER, supra note 36, at 1–12.
Furthermore, this area is partially governed by federal law, specifically by the Voting Rights Act.\(^{232}\) For these reasons, this Part similarly concludes that courts should not examine these plans as aggressively as it did during the 1990s.\(^{233}\)

\section*{A. The Voting Rights Act, Vote Dilution and the Gingles Test}

Those in charge of crafting new district lines must pay attention to many different factors. Some of these are statutory requirements stemming from their particular state constitutions. Demands for contiguity, compactness and preservation of pre-existing political subdivisions are often included in this list.\(^{234}\) Redistricters must also pay careful attention to the demands of federal law, as codified in the Voting Rights Act, as amended in 1982. This necessity presents them with a dilemma: while they must pay attention to racial considerations under section 2 of the Act, the Supreme Court's recent equal protection jurisprudence subjects the use of race to fatal strict scrutiny review. I address this difficulty below. For the purposes of this Section, I focus here on the redistricting process and particularly the creation of racial districts.

This story begins with the 1965 enactment of the Voting Rights Act, as amended in 1982. This is a story best told through the Court's interpretation of the Act in \textit{Thornburg v. Gingles}.\(^{235}\) In \textit{Gingles}, the Court explored whether a particular redistricting plan violated section 2 by providing people of color "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."\(^{236}\) To the Court, the statutory inquiry focuses on the ability of blacks and whites to elect representatives of...
their choice.\textsuperscript{237} In the Court's words, "[t]he essence of a section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."\textsuperscript{238} Thus, the query: when do these inequalities in electoral opportunities arise?

In general, these inequalities are likely to arise through the use of multimember districts. This is not to say that the use of these districts is statutorily suspect, the Court made clear,\textsuperscript{239} but to say instead that their use, coupled with three preconditions, will likely lead to a statutory violation.\textsuperscript{240} The preconditions are now well known and require little discussion. First, the minority group must demonstrate that it is large enough to be able to form a majority in a single-member district.\textsuperscript{241} Second, the group must be politically cohesive.\textsuperscript{242} And third, plaintiffs must show the existence of racial bloc voting.\textsuperscript{243} When these three conditions are met, a court must then ask "whether the totality of facts, including those pointing to proportionality, show[] that the new scheme would deny minority voters equal political opportunity."\textsuperscript{244} If so, section 2 demands the use of race in the formation of new districts that will effectuate the promise of the Act.\textsuperscript{245}

This is an important point, often lost in contemporary debates. Modern constitutional doctrine demands the application of strict scrutiny review whenever the state classifies persons along racial lines.\textsuperscript{246} Some commentators extend this proposition to racial districting.\textsuperscript{247} Yet, it is also true that the state must take racial characteristics into account or risk violating federal law. As such, redistricters face a

\begin{itemize}
\item \textsuperscript{237} Id. at 47.
\item \textsuperscript{238} Id.
\item \textsuperscript{239} Id. at 48.
\item \textsuperscript{240} Id. at 48–51.
\item \textsuperscript{241} Id. at 50.
\item \textsuperscript{242} Id. at 51.
\item \textsuperscript{243} Id.
\item \textsuperscript{245} Gingles, 478 U.S. at 44.
\item \textsuperscript{246} Adarand Constructors v. Pena, 515 U.S. 200 (1995); City of Richmond v. Croson, 488 U.S. 469 (1989).
\end{itemize}
difficult conundrum; while they must take note of race in crafting their district lines, they must be careful while doing so lest they risk offending modern equal protection principles. In fact, to many influential commentators, the use of race in redistricting is central to our quest for “fair representation.”248

This Section does not reach any definitive conclusions on this important debate. Rather, it is descriptive in nature; that is, seven members of the Court seem to agree that the state must use race in redistricting.249 Yet, it is also true that sometimes the state goes too far. Clearly, Gomillion may be catalogued under the rubric of “going too far.” What to make of the more difficult cases presented by the Bushmanders of the 1990s, when race played a central role and the resulting districts were of dubious shapes? In other words, how does Gomillion compare to its doctrinal cousin, if a distant one, Shaw v. Reno?250 Quite clearly, they are not the same case. The balance of this Part takes up and defends this crucial distinction.

B. The World According to Shaw

In Shaw, the question presented is whether the infamously bizarre District 12251 violated constitutional norms. The history of the case up to 1993 convinces me that it does not. Before turning to the specific facts at issue in Shaw, it is helpful to first offer some needed reminders. As we know, the Court has generally allowed political actors much discretionary room to devise redistricting plans of their choice, and to take myriad factors into account.252 The reasons for


251 See infra notes 259–62 and accompanying text.

252 See, e.g., Voinovich v. Quilter, 507 U.S. 146, 156–57 (1993); Growe v. Emison, 507 U.S. 25, 34 (1993); Chapman v. Meier, 420 U.S. 1, 27 (1975). The Court holds on to this view even in the face of contradictory signals sent in the wake of Shaw and its progeny. See Miller v. Johnson, 515 U.S. 900, 915–16 (1995); Bush, 517 U.S. at 978. But see Miller, 515 U.S. at 949 (Ginsburg, J., dissenting) (“The Court’s disposition renders redistricting perilous work for state legislatures. . . . Genuine attention to traditional districts and avoidance of bizarre configurations seemed, under Shaw, to provide a safe harbor. In view of today’s decision, that is no longer the case.” (citations omitted)); Karlan, supra note 10, at 753 (“Although the courts
doing so are powerful ones and are reflected in the thesis posited in this Article. In the abstract, redistricting choices do not pose direct questions of harm unless evidence of vote dilution or population disparities is found.\textsuperscript{253} No matter which way we carve up a state’s area, some voters will win, others will lose; under our chosen political system, such a result is inevitable. It thus stands to reason that these voters meet the requisite standing requirements under Article III. While they have lost something and consider themselves harmed, they have suffered no more harm under this scenario than do partisans whose policies fail to gain congressional enactment.\textsuperscript{254} Worse yet, allowing these complainants a forum in federal court to raise and debate their grievances would grind our democratic process to a halt and would make a mockery of our electoral system. All that a citizen is afforded is a chance to participate in the process, a chance to win and affect the policies of her liking; one is not afforded the right to win.

Ruth Shaw was afforded this opportunity when she turned out to vote in her home district in North Carolina. Prior to this time, the state had been involved in a redistricting and pre-clearance dialogue with the DOJ. Once the state legislators completed their partisan effort and produced a plan acceptable to all involved parties, Shaw’s place of residence did not change, nor did her neighbors’. All that changed, according to the new districting plan, was her voting district. In a contested Fall election, she voted for Mel Watt, the African-American Democratic candidate running in District 12. Congressman Watt carried a majority of votes from that district.\textsuperscript{255}

Soon after the election, some North Carolinians (including the Republican Party) objected to the election results. For these plaintiffs, the issue was not the electoral outcome but the district itself. In their estimation, the final redistricting plan, under which the election took place, was an unconstitutional political gerrymander under the Court’s holding in \textit{Davis v. Bandemer}. The district court disagreed,
and so did the Supreme Court. These plaintiffs, however, were hardly discouraged. The second time around, they argued not that the district was politically gerrymandered, but that it was racially gerrymandered, and thus violative of the Fourteenth Amendment’s Equal Protection Clause. And in this second round of litigation, the Supreme Court partially agreed with them. In Shaw v. Reno, the Court concluded that a plaintiff may state a claim under the Equal Protection Clause when the districting plan, “though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and . . . the separation lacks sufficient justification.”

Ruth Shaw, the named plaintiff in the case, thus managed to defeat her own congressional choice, not at the ballot box but in the judicial sphere.

In Shaw, the Supreme Court began its excursion into these uncharted waters by conceding that the claims raised there were analytically distinct from previous equal protection claims. This move is necessary in light of the facts at issue because, as the dissenting faction has argued loudly and clearly in Shaw and subsequent cases, the plaintiffs are not precluded from voting and the strength of their ballots is not unconstitutionally diluted in the traditional sense. This case is about redistricting, plain and simple, and the combustive arena that are state legislatures during such trying times. And yet, even the most cursory of looks at a map of North Carolina’s District 12 is sure to raise many an objection. Put bluntly, District 12 is just plain ugly, barely contiguous, and the most non-compact of all 435 districts in the nation. The Justices must have looked at this map and grimaced, while thoughts of Flast v. Cohen filled their heads. Little details,
such as standing issues, could always be sorted out in the future. The map alone spoke a thousand words.\footnote{263}

This same map, however, did not speak in doctrinal terms, so the hard work of situating its excesses within our constitutional world proved far more difficult. In \textit{Shaw}, we clearly see the Court's struggle with defining the harm at issue, an effort that gave birth to what commentators have labeled the "expressive harms" doctrine. In the words of its leading theorist, Richard Pildes, "[a]n expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about."\footnote{264} More specifically, the \textit{Shaw} doctrine seeks to ensure that state action reflects the proper "respect for relevant public values,"\footnote{265} or, stated negatively, that it does not represent a disruption of "constitutionally underwritten public understandings about the appropriate structure of values in some arena of public action."\footnote{266}

\textit{Shaw} is directly traced to an attitudinalist discomfort with the North Carolina map and specifically with the contours of District 12. Put simply, a cursory glance at the map led a Court majority to the conclusion that such political displays must be unconstitutional. For

\footnote{262 They might have thought, "We don't know how, we don't know why, but this district has got to be unconstitutional, so somebody, anyone, must have standing to raise the claim." See John Hart Ely, \textit{Standing To Challenge Pro-Minority Gerrymanders}, 111 Harv. L. Rev. 576, 579-80 (1997).}

\footnote{263 See, for example, the discussion during the oral argument for \textit{Hunt v. Cromartie}, 526 U.S. 541 (1999):

MR. EVERETT (counsel for Cromartie): Mr. Chief Justice, and may it please the Court: I am back again with a map show and that's because the maps are a very important part of the history. There are two maps that we're going to show—

QUESTION: Well, certainly they are, but I think, at least speaking for myself, my concern is that there may well have been sufficient evidence here to preclude the court from granting summary judgment on this question. So, I would be most interested in how you justify that.

MR. EVERETT: Your Honor, we—I think the maps are a key to that. Starting first with the 1992 map, which is over here, which is part of the history and which was part of the Court's opinion in \textit{Shaw v. Reno} . . . .


\footnote{265 \textit{Id.} at 507.}

\footnote{266 \textit{Id.}
this reason, the opinion itself reads as an after-the-fact rationalization for the *a priori* conclusion that such districts must be unconstitutional. *Shaw* may thus be read the same way that commentators traditionally read *Baker*: as a call to reform without much helpful guidance. In this vein, the easiest line of attack has focused along the lines of standing and traditional constitutional harms. Yet, if the leading rendition of “expressive harms” doctrine fails to persuade, blame must be directed not at those who struggle to understand this new claim, but at the Court, which opened up an analytically distinct inquiry without the requisite thoughtfulness.

C. Gomillion *Meets* Shaw in Our New Equal Protection World

The conclusions raised to this point will leave the “neutral principles” crowd dissatisfied. In order to press the claim of a lessened judicial role convincingly, what is needed is a doctrinal argument that distinguishes *Gomillion v. Lightfoot* the Tuskegee gerrymandering case of 1960, from *Shaw v. Reno*, the North Carolina redistricting controversy begun in 1993. To the critics, these cases are one and the same, as both of them consider the use of race as a classificatory tool. This Article disputes this characterization as much too facile and ultimately unhelpful. More specifically, it responds to the critics in three ways.

The first response tracks the views of the dissenting Justices in *Shaw*. To begin, the majority is right when it argues that *Gomillion* offers support for the contention that “district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption.” This is not to say, however, that the use of
race must always be invalidated absent compelling reasons. While *Gomillion* and *Shaw* must be carefully scrutinized, in other words, they must be treated differently. As Justice White wrote in his dissent in *Shaw*:

In light of this background, it strains credulity to suggest that North Carolina’s purpose in creating a second majority-minority district was to discriminate against members of the majority group by “impair[ing] or burden[ing their] opportunity . . . to participate in the political process.” The State has made no mystery of its intent, which was to respond to the Attorney General’s objections, improving the minority group’s prospects of electing a candidate of its choice. I doubt that this constitutes a discriminatory purpose as defined in the Court’s equal protection cases—i.e., an intent to aggravate “the unequal distribution of electoral power.”

Justices Stevens and Souter have made similar arguments. Clearly, race played a role in both *Gomillion* and *Shaw*. Their uses, however, were quite distinct. The only way the two cases may be equated is by treating any and all racial classifications similarly and

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271 *Shaw*, 509 U.S. at 666 (White, J., dissenting) (quoting United Jewish Organizations v. Carey, 430 U.S. 144, 179 (1977) (Stewart, J., concurring); *Shaw*, 509 U.S. at 678 (Stevens, J., dissenting)); see id. at 668–69 (White, J., dissenting).


273 In this vein, a skeptic may still argue that *Gomillion* and *Shaw* are both dilution cases, situations where the state simply drew district lines yet did not invidiously harm any given resident. The facts belie this characterization. In *Shaw*, the conclusion is true: North Carolina voters were used as “filler people,” and as such were placed in districts where they would be unable to select the representatives of their choice. Whether “filler” treatment rises to the level of unconstitutionality is an open question. Compare *Ely*, supra note 262, with *Issacharoff & Karlan*, supra note 267. In *Gomillion*, however, the plaintiffs were removed from the city limits and “thrust into the unincorporated part of Macon County, while they remained within Tuskegee’s three-mile police jurisdiction. . . . Thus, the response was unavailable that although the *Gomillion* plaintiffs could no longer vote in District X—Tuskegee—they could now vote in District Y.” *Issacharoff & Karlan*, supra note 267, at 2280 n.25 (citations omitted). In so doing, the state denied black Tuskegee residents the right to vote. *Gomillion* is thus closer to vote denial situations than vote dilution cases. See *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 335 n.3 (2000) (“*Gomillion v. Lightfoot* involved a proposal to redraw the boundaries of Tuskegee, Alabama, so as to exclude all but 4 or 5 of its 400 black voters without excluding a single white voter. Our conclusion that the proposal would deny black voters the right to vote in municipal elections, and therefore violated the Fifteenth Amendment, had nothing to do with racial vote dilution.” (citations omitted)).
disregarding the obvious state purposes behind the given state actions. History and social practices, however, get in the Court's way.\textsuperscript{274}

The second response presses the distinction between dilution and invidiousness. That is to say that the focal point of equal protection claims is the concept of invidiousness, what may be termed the "evil eye" standard. This is the practice found in \textit{Gomillion}. In \textit{Shaw}, conversely, we speak instead of vote dilution, as we must, courtesy of the Voting Rights Act. The two concepts are not the same. The "evil eye" standard has a long and unfortunate history and may often be equated with dilution claims. This is so, it should be clear, because of Jim Crow, because of our racial history. Departing from the premise that dilution is inevitable (all redistricting is gerrymandering, after all), we must be careful when looking for "evil eyes" when in the presence of dilution claims. Absent Jim Crow, political outcomes should be left unmolested.\textsuperscript{275}

The third response looks to the state interests in the two cases, which are dissimilar at best and lead to different results. To begin, the states should only be required to proffer a legitimate state interest in order to defend their redistricting choices.\textsuperscript{276} The North Carolina legislature would have very little problem doing so, for it can point to DOJ and the Voting Rights Act as the reason for the shape of its contested district.\textsuperscript{277} This is not to say that section 2 requires a non-compact district, or that section 5 requires the district we ultimately see in \textit{Shaw}. It is to say instead that the process that led to the challenged district is clearly a political process.\textsuperscript{278} After the initial challenge by DOJ under section 5, that is, the previous political compromises within the state were threatened. The challenged District 12 is thus a political compromise in that the working legislative majority within

\begin{itemize}
\item \textsuperscript{274} See, e.g., \textit{Shaw}, 509 U.S. at 671 n.7 (White, J., dissenting) ("I borrow the term 'segregate' from the majority, but, given its historical connotation, believe that its use is ill advised. Nor is it a particularly accurate description of what has occurred. The majority-minority district that is at the center of the controversy is, according to the State, 54.71\% African-American. Even if racial distribution was a factor, no racial group can be said to have been 'segregated'—i.e., 'set apart' or 'isolate[d]'." (citations omitted)).
\item \textsuperscript{275} Cf., e.g., \textit{Johnson v. De Grandy}, 512 U.S. 997 (1994) (holding that there is no section 2 violation where minority voters form effective voting majorities).
\item \textsuperscript{276} See \textit{Fuentes-Rohwer}, supra note 2 (arguing for a hardened rational basis test to evaluate redistricting plans).
\item \textsuperscript{277} Cf. \textit{United Jewish Orgs. v. Carey}, 430 U.S. 144, 164–65 (1977) ("New York adopted the 1974 plan because it sought to comply with the Voting Rights Act. This has been its primary defense of the plan, which was sustained on that basis by the Court of Appeals . . . . [T]he Court of Appeals was essentially correct.").
\item \textsuperscript{278} See \textit{Charles & Fuentes-Rohwer}, supra note 17, at 261–65.
\end{itemize}
the state sought to preserve its previous gains in the face of yet another constraint added to their equation, in the face of the Voting Rights Act.

In this vein, whether the Voting Rights Act is a legitimate exercise of state power is a separate question altogether, a question that may be laid at the feet of Chief Justice Warren and *South Carolina v. Katzenbach.*279 The Alabama legislature in 1957, however, cannot proffer a similar justification for the shape of the contested district and its effect on the black residents of Tuskegee. In other words, the state action in *Gomillion* fails the same way that it failed in *Romer v. Evans,*280 *City of Cleburne v. Cleburne Living Center,*281 and *United States Dept. of Agriculture v. Moreno.*282 The desire to harm an unpopular group does not qualify as a legitimate state interest.

On this argument, few cases will match the result achieved by the Court in *Gomillion.*283 Such cases will demand great care from the Court, as well as a thoughtful inquiry into the history and social practices in question. In some important respects, the argument here borrows much from Professor Lawrence’s “cultural meaning” test.284 It asks for careful inquiries into social history and political context. It asks, in other words, for thoughtfulness and deliberation. It asks for a judge to distinguish between *Brown v. Board of Education*285 and historically black colleges, between the blatant use of redistricting lines in order to keep blacks out of a municipality and the enactment of redistricting lines in order to ensure the election of a black representative.

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283 See *Smith v. State Exec. Comm.,* 288 F. Supp. 371 (N.D. Ga. 1968); *Smith v. Paris,* 257 F. Supp. 901 (M.D. Ala. 1966); Robert G. Dixon, Jr., *The Warren Court Crusade for the Holy Grail of “One Man-One Vote”,* 1969 SUP. CT. REV. 219, 265 (“As might be expected, some racial gerrymandering challenges have been successful in the Deep South where past patterns of racial discrimination may make it easier to reach a conclusion of either racial intent or racial effect, and on a more meager record than in the North.” (citing Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965)).


For example, assume a fact situation where the use of at-large elections serves to effectively eliminate the voting strength of racial minorities.\textsuperscript{286} Or imagine a situation where state actors suspiciously alter an institution's internal electoral methods,\textsuperscript{287} or the size of a legislative or administrative office,\textsuperscript{288} once racial minorities assume positions of political power. Or imagine a social practice whereby minority voters are disenfranchised within the context of the particular political system.\textsuperscript{289} These situations may very well raise some very strong presumptions of unconstitutionality. The particular question in each situation would not be decided by the state's mere use of race, but its use for harmful purposes. The constitutional violation is not the use of race, but the intentional action against racial groups for any reason whatsoever. This is the most sensible reading of \textit{Gomillion v. Lightfoot}.

Contrast these cases to fact scenarios where the state, for example, is acting pursuant to its perceived responsibility under section 2 of the Voting Rights Act, or DOJ's commands under section 5.\textsuperscript{290} Complicating matters, such scenarios might involve the splintering of actual communities within the given geographic area.\textsuperscript{291} On these cases, the state is not acting against racial groups qua race. In fact, the state is acting, at least in theory, to further these groups' interests. Without more, these situations should not call for automatic judicial invalidation. Put more simply, \textit{Shaw} and its progeny are not \textit{Gomillion}. They are not even close. The critics aside,\textsuperscript{292} it is clear that the state

\textsuperscript{286} See City of Mobile v. Bolden, 446 U.S. 55 (1980). Of note, the district court concluded on remand that the at-large system in Mobile was established and maintained "because of" and not "in spite of" its dilutive impact on black electoral strength." Bolden v. City of Mobile, 542 F. Supp. 1050, 1075 (S.D. Ala. 1982); see also Rogers v. Lodge, 458 U.S. 613, 616 (1982) (noting the "overwhelming proof" that an at-large voting system in Georgia was maintained for a discriminatory purpose).


\textsuperscript{288} Cf. Holder v. Hall, 512 U.S. 874 (1994) (rejecting argument that size is subject to a vote dilution challenge under section 2).


\textsuperscript{291} See United Jewish Orgs. v. Carey, 430 U.S. 144 (1977) (reapportionment split the Hasidic community).

\textsuperscript{292} John Hart Ely has written, for example, that "it is sometimes hard to tell whether a gerrymander is 'antiminority' or 'prominority,' as in \textit{Wright} and \textit{Carey}, [and that] strikes me as yet another argument for the ultimate suggestion of this Article, that race be taken out of the process altogether." Ely, \textit{supra} note 11, at 608 n.2.
actors in *Gomillion* had some intentions in mind very different from those in *Shaw*. If one does not see it from reading both cases thoughtfully, there is very little that can be said to help one see it. One case is about racial oppression, the other is far from that.

**CONCLUSION: SAFEGUARDING THE POLITICAL PROCESS**

In recent years, commentators have exhorted a much more aggressive judicial posture over the political gerrymandering issue. The Court itself has taken on such a posture over modern racial gerrymandering claims. This Article explored these many calls to inject the Court into heated redistricting controversies. To be sure, this Article agrees with Justice Douglas on the importance of the inquiry about the nature of redistricting and its effect on the political process. This Article takes this view farther back in time, however, and posits that a judicial response to the gerrymandering question began in earnest with the Court’s decision in *Baker v. Carr*. In *Baker*, it was clear that the Tennessee legislature was simply refusing to redraw its district lines for no better reason than political self-interest. As such, *Baker* is but a direct precursor to *Davis v. Bandemer*. In fact, while the rhetoric is different, these cases are but mirror images of one another. Both cases worry about representation and political losses, while setting a high standard for litigants to meet, in deference of the complexities at issue in the reapportionment field.

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293 The debate over the intent standard is both complex and multi-faceted. Its nuances are outside the scope of this effort, and I address the debate elsewhere. See Luis Fuentes-Rohwer, *Discrimination as Intent and the Centrality of the Judicial Role* (2002) (unpublished manuscript, on file with author).


295 See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting) (“The consistency that the Court espouses would disregard the difference between a ‘No Trespassing’ sign and a welcome mat.”).

296 Whitcomb v. Chavis, 403 U.S. 124, 176 (1971) (Douglas, J., dissenting) (“The problem of the gerrymander is how to defeat or circumvent the sentiments of the community. The problem of the law is how to prevent it.”).


298 See Dean Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last*, 1986 Sup. Ct. Rev. 175, 188 (noting that the issue in *Baker*, though couched in “fairness” rhetoric, was purely political).
In this vein, the more important question worries about the role that critics would wish to ascribe to our federal judicial officers. The constitutional question, after all, is one of judicial intervention and the existence of manageable standards. On this point, Martin Shapiro argues, "Gerrymandering is a bad, bad thing. And there is nobody around to fix it except courts. They may have a lot of trouble doing it, and it may get them into a lot of trouble, but they must do it anyway because there is no one else who can." A separate position analogizes the redistricting process to a market. On this model, some commentators have much faith in the market's ability to correct itself, while others would posit the Court as the institution in charge of ensuring that an "appropriate market in political competition exists." This Article agrees with these two positions, at least in spirit. It shares with them a belief in limited court intervention. To declare a matter justiciable, as in Baker, Bandemer, and Shaw, need not lead to increased judicial intervention. These cases presented the Court with extreme facts, thus making judicial intervention easy. This is not to say that all three cases were properly decided. Rather, the point is that the promise of Baker and the reality of Bandemer point in a flexible and forgiving jurisprudential direction. The same may not be said of Shaw. Thankfully, as I have argued elsewhere, Shaw's time has finally passed.

299 Shapiro, supra note 20, at 251.
300 See Schuck, supra note 15, at 1337-45.
301 Issacharoff & Pildes, supra note 14, at 717.
302 See Charles & Fuentes-Rohwer, supra note 17, at 310-11.