A Wolf in Sheep's Clothing: *Gaffney* and the Improper Role of Politics in the Districting Process

Robert A. Koch
*University of Michigan Law School*

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The Supreme Court unanimously agrees that excessive partisan gerrymandering is unconstitutional. A plurality of the Court, however, would hold partisan gerrymandering claims to be nonjusticiable due to the lack of a judicially manageable standard. This Note synthesizes the opinions of a majority of the Court in Vieth v. Jubelirer on the precise harms of partisan gerrymandering and argues that excessive partisan gerrymandering unconstitutionally burdens the representational rights of individual voters. This Note proposes a judicially manageable standard to address that representational harm based on the Court's standard in Shaw v. Reno.

INTRODUCTION

In July 2001, Michigan Republicans attempted to gain three congressional seats by passing a redistricting plan that “packed” some Democrats into five overwhelmingly Democratic districts, and “cracked” remaining Democrats among ten Republican-majority districts. Republicans passed the plan so quickly that it failed to account for over four thousand Michiganders. Rather than send the bill back to the legislature and risk public debate, the Secretary of the Senate unilaterally amended the plan, and the Republican governor signed the revised bill into law on the afternoon of September 11, 2001.

* B.A. 2000, Duke University; J.D. expected 2006, University of Michigan Law School. Thanks to the members of the Journal of Law Reform for their tireless efforts in publishing this piece, and to my family and friends for their love and unending support. This Note is dedicated to McKenna and Ethan Koch—may this Note be one small step towards leaving you a better world.


3. Id. at 207. The District Court upheld the plan. O'Lear, 222 F. Supp. 2d at 859 (“We find that the plaintiffs have alleged disproportionality in abundance, and that the amended complaint contains ample charges of discriminatory motive and procedural irregularities.
In May 2003, Texas Republicans attempted to gain up to seven seats in the state House of Representatives by redistricting a mere two years after the traditional, decennial, post-Census redistricting process. In response, fifty-one Texas Democrats fled the state to prevent a quorum and thereby block a vote on the plan, while state troopers attempted to hunt down three Democrats hiding in the state to force a quorum. Ultimately, the Democrats returned and the Republicans passed a districting map that looked “like an attempt to diagram an oil spill using Legos.”

Gerrymandering—shaping electoral districts for political advantage—is not a new phenomenon. The term was coined almost two hundred years ago after the Governor of Massachusetts, Elbridge Gerry, created a salamander-shaped district for partisan gain. But technological advancements have taken gerrymandering to a new level. “Recent cases now document in microscopic detail the astonishing precision with which redistricters can carve up individual precincts and distribute them between districts with confidence concerning the racial and partisan consequences.” “[L]egislatures, experts, and courts can use databases to map electoral districts in a matter of hours, not months.”

A unanimous Supreme Court agrees that excessive partisan gerrymandering is harmful to the democratic process. However, the

The deficiency here is the lack of any claim of the ‘other indicia’ which is required to show the discriminatory effect which Bandemer requires.”)


5. 78th Texas Legislature, supra note 4, at A01.


7. E.g., WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 606 (encyclopedic ed. 1951).


10. Vieth, 541 U.S. at 293 (plurality opinion); id. at 316 (Kennedy, J., concurring in the judgment); id. at 318 (Stevens, J., dissenting); id. at 343 (Souter, J., joined by Ginsburg, J., dissenting); id. at 360 (Breyer, J., dissenting). See generally Laurence H. Tribe, Comment: Erog v. Hsud and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors, 115 HARV. L. REV. 170, 251 (2001) (“Like these cases drawn from realms as diverse as the separation of church and state and gender classification, Bush v. Gore lays great emphasis on appearances—both of individual ballots and of the vote-counting process as a whole.”).
Court cannot agree on what it should do, if anything, in response. It appears hopelessly split on the exact constitutional harm caused by partisan gerrymandering; without consensus on a harm, there is no agreement on which judicial standards courts should utilize in evaluation such claims; and without a clear judicially manageable standard, the Court is split on whether such claims are even justiciable. Commentators cannot agree about the nature of the harm or the appropriate remedy either.

When the Court revisited this issue last year, a plurality correctly stated that "[e]ighteen years of judicial effort with virtually nothing to show for it justify" revisiting partisan gerrymandering precedent. But instead of focusing on Davis v. Bandemer and attempting to overrule its holding that partisan gerrymandering claims are justiciable, the Court should have focused its efforts on Gaffney v. Cummings and its contention that "[p]olitics and political considerations are inseparable from districting and apportionment." Part I of this Note examines the Court's repeated forays into the partisan gerrymandering arena, particularly its failed attempts at

11. E.g., Vieth, 541 U.S. at 281 (plurality opinion) ("[N]o judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable . . . ."); id. at 314 (Kennedy, J., concurring in the judgment) ("The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering."); id. at 318 (Stevens, J., dissenting) ("[W]hen partisanship is the legislature's sole motivation—when any pretense of neutrality is forsaken unashamedly and all traditional districting criteria are subverted for partisan advantage—the governing body cannot be said to have acted impartially."); id. at 343 (Souter, J., joined by Ginsburg, J., dissenting) ("[I]f unfairness is sufficiently demonstrable, the guarantee of equal protection condemns it as a denial of substantial equality." (citing Davis v. Bandemer, 478 U.S. 109, 129-34 (1986) (plurality opinion)); id. at 360 (Breyer, J., dissenting) ("[O]ne circumstance where use of purely political boundary-drawing factors can amount to a serious, and remediable, abuse, [is] namely, the unjustified use of political factors to entrench a minority in power.").


13. Vieth, 541 U.S. at 281 (plurality opinion).
15. Vieth, 541 U.S. at 306 (plurality opinion).
articulating the harm of partisan gerrymandering and subsequent standards to measure that harm. Part II argues that the proper constitutional inquiry is the harm caused to the individual voter when partisan concerns play a role in districting. Allowing politics to dominate districting runs counter to popular democracy and the essence of the Constitution as a populist document. To maintain the role of the individual voter in our democratic process, Gaffney should be overruled. Part III proposes a judicially manageable standard to adjudicate this harm, guided by Shaw v. Reno.\textsuperscript{17} When politics predominate over neutral districting principles, and a districting plan "rationally cannot be understood as anything other than an effort to separate voters into different districts"\textsuperscript{18} solely on the basis of politics, then a claim arises under the Equal Protection Clause.

I. THE SUPREME BUNGLING OF PARTISAN GERRYMANDERING

"The right to vote is personal . . . ."\textsuperscript{19} "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."\textsuperscript{20} Accordingly, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."\textsuperscript{21} Districting typically does not interfere with the right since "the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment . . . ."\textsuperscript{22} However, these broad principles fly out the window in the world of partisan gerrymandering. Part I.A discusses how the Court gave a green light to the aim of advancing partisan politics. Part I.B examines the framing of the partisan gerrymandering harm as a political group harm, and the subsequent standard the Court established to adjudicate it. Part I.C analyzes the Court's last partisan gerrymandering decision and the uncertain, standardless claim left in its wake.

\textsuperscript{17} 509 U.S. 630 (1993).
\textsuperscript{18} Id. at 649.
\textsuperscript{19} United States v. Bathgate, 246 U.S. 220, 227 (1918) (citations omitted).
\textsuperscript{20} Reynolds v. Sims, 377 U.S. 533, 560 (1964) (quoting Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964)).
\textsuperscript{21} Id. at 555.
\textsuperscript{22} Id. at 565-66.
The Court first addressed the role of politics in *Gaffney v. Cummings*. In *Gaffney*, an apportionment board redistricted Connecticut's General Assembly after a bipartisan commission failed to agree on a plan. The Board sought to create districts that provided "a rough scheme of proportional representation of the two major political parties" (Republicans and Democrats).

Plaintiffs challenged the plan on two fronts: that the deviation of districts from the average district size violated the *Reynolds v. Sims* one-person, one-vote requirement, and that the dominance of political concerns in redistricting constituted an impermissible partisan gerrymander. In upholding the redistricting plan, the Court rejected both arguments. With respect to one-person, one-vote, the Court found that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State."

With respect to the invidiousness of partisan gerrymandering, the Court felt that "[i]t would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it."

In rejecting the claim of partisan gerrymandering, the Court abandoned the *Reynolds* notion that the goal of districting is "effective representation for all citizens." Instead, the Court gave a nod to political party self-interest, maintaining that "[t]he very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large . . . . Politics and political considerations are inseparable from districting and apportionment." To support its holding, the Court merely inferred the permissibility of a political purpose from the fact that

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24. Id. at 736.
25. Id. at 738. Such gerrymanders have been dubbed "sweetheart gerrymanders" based on their bipartisan cooperation. See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 625 (2002); Richard H. Pildes, Foreword: The Constitutionalization of Democratic Politics, 118 Harv. L. Rev. 28, 60 (2004).
28. Id. at 745.
29. Id. at 752.
districting inevitably has a political effect. The Court never examined whether or not politics should play a role in districting, particularly a dominant one, and it implicitly indicated that the extent and role of the political purpose is irrelevant. By rationalizing that a "politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results," the Court lost sight of the fact that a gerrymander is, by definition, the *purposeful* manipulation of district lines for political gain. The Court reasoned political purpose out of the Equal Protection gerrymandering equation and gave a green light to extreme partisan gerrymandering.

**B. Bandemer's Political Party Burden**

The Court was called upon to curb the practice of adversarial partisan gerrymandering in *Davis v. Bandemer.* In *Bandemer,* Indiana Republicans redistricted the state legislature after the 1980 Census by attempting to pack and crack Democrats throughout the state. The Speaker of the House admitted that the purpose of the plan was "to save as many incumbent Republicans as possible." The House of Representatives and Senate maps did not consistently follow county or city lines. In the 1982 election, Democrats received 51.9% of House votes but garnered only 43% of the seats;

32. *Id.* ("It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. . . . The reality is that districting inevitably has and is intended to have substantial political consequences.").

33. *Id.*

34. *See supra* note 7 and accompanying text; *see also* Issacharoff, *supra* note 25, at 612-13 ("The idea that the harm of gerrymandering may result without design runs against the conventional supposition that, at bottom, the gerrymander is a willful attempt to advance one's own interest and harm one's rivals.").

35. 478 U.S. 109 (1986). The Court could have addressed partisan gerrymandering in *Karcher v. Daggett,* 462 U.S. 725 (1983). In *Karcher,* New Jersey Democrats had packed Republicans into two particularly notorious districts, one resembling a swan, and one resembling a fishhook. *Id.* at 762 (Stevens, J., concurring). A plurality of the Court dodged the partisan gerrymandering bullet by rejecting the districting plan on one-person, one-vote grounds, even though the population deviations were inconsequential. *Id.* at 744 (plurality opinion); *see* Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness,* 71 Tex. L. Rev. 1643, 1656 (1993). *Compare Karcher,* 462 U.S. at 728 (invalidating a plan with a maximum deviation of 0.6984%), *with Gaffney v. Cummings,* 412 U.S. 735, 737 (1973) (upholding a plan with a maximum deviation of 1.81%).


37. *Id.* at 116 n.5 (quoting *Bandemer v. Davis,* 603 F. Supp. 1479, 1484 (S.D. Ind. 1984)).

38. *Id.* at 115 (citation omitted).
in two of the larger counties, Democrats received 47% of the vote but garnered only 14% of the House seats.39

Plaintiffs challenged the plan on Equal Protection grounds.40 In examining the redistricting plan, the Court held that partisan gerrymandering claims are justiciable,41 but then splintered as to the appropriate standard with which to adjudicate them. The plurality established a discriminatory intent and effect requirement in the vein of its other Equal Protection jurisprudence,42 while Justice Powell focused on the overall fairness of the districts,43 and Justice O'Connor believed the claims to be nonjusticiable.44 The Court upheld the plan when the plurality found that the plan did not satisfy its discriminatory effect requirement.45

Aside from deciding the question of justiciability, Bandemer is important in two other respects. First, it framed the issue of partisan gerrymandering as a political party issue. Despite their disagreements as to justiciability and standards, all nine Justices viewed the issue as one of group representation.46 This approach represented a shift in vote dilution Equal Protection jurisprudence, which had viewed the right to vote as an individual right, not a group right.47

39. Id.
40. Id.
41. Id. at 124.
42. Id. at 127 (plurality opinion) ("[I]n order to succeed the Bandemer plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." (citing Mobile v. Bolden, 446 U.S. 55, 67-68 (1980))).
43. Id. at 173 (Powell, J., joined by Stevens, J., concurring in part and dissenting in part) ("To make out a case of unconstitutional partisan gerrymandering, the plaintiff should be required to offer proof concerning these factors, which bear directly on the fairness of a redistricting plan, as well as evidence concerning population disparities and statistics tending to show vote dilution.").
44. Id. at 144 (O'Connor, J., joined by Burger, C.J. & Rehnquist, J., concurring in the judgment).
45. Id. at 194 (plurality opinion); id. at 144 (O'Connor, J., joined by Burger, C.J. & Rehnquist, J., concurring in the judgment).
46. Id. at 125 n.9 (plurality opinion) ("[A] group level . . . must be our focus in this type of claim . . . ."); id. at 149 (O'Connor, J., joined by Burger, C.J. & Rehnquist, J., concurring in the judgment) ("The rights asserted in this case are group rights to an equal share of political power and representation . . . ."); see also id. at 167 (Powell, J., joined by Stevens, J., concurring in part and dissenting in part) ("The concept of ‘representation’ necessarily applies to groups: groups of voters elect representatives, individual voters do not.").
47. See Reynolds v. Sims, 377 U.S. 553, 555 (1964) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." (footnote omitted) (emphasis added)); Baker v. Carr, 369 U.S. 186, 207-08 (1962) (framing vote dilution as an issue of debasing the individual right to vote).
Second, the plurality's two-part test set an extremely high burden of proof for future plaintiffs to meet in order to obtain relief. The plurality focused on the tangible effect of election returns, but because prior cases "clearly foreclose[d] any claim that the Constitution requires proportional representation," disproportionate losses at the polls alone would not state a claim. As a result, they altered the Equal Protection analysis to accommodate the political party inquiry, imposing "a threshold showing . . . derived from the peculiar characteristics of these political gerrymandering claims." To state a claim, the political group must have been "denied its chance to effectively influence the political process . . . ." This claim 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." A history of disproportionate results, actual or projected, are required; results of a single election are insufficient.

In creating such a strong burden, the plurality reasoned that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." The test ultimately attempted to draw a constitutional line between simple losing and too much losing. The rest of the Court predicted this nebulous, "peculiar" standard would be unmanageable.

49. Id. at 132.
50. Id. at 134 n.14; see also id. at 171 n.10 (Powell, J., joined by Stevens, J., concurring in part and dissenting in part) (discussing how the plurality's test alters the Equal Protection analysis).
51. Id. at 132–33 (plurality opinion).
52. Id. at 133.
53. Id. at 139.
54. Id. at 135.
55. Id. at 132.
56. Id. at 155 (O'Connor, J., joined by Burger, C.J. & Rehnquist, J., concurring in the judgment) ("[T]his standard will over time either prove unmanageable and arbitrary or else evolve towards some loose form of proportionality."); id. at 171 (Powell, J., joined by Stevens, J., concurring in part and dissenting in part) ("The final and most basic flaw in the plurality's opinion is its failure to enunciate any standard that affords guidance to legislatures and courts.").
Eighteen years after Bandemer, the Court revisited the justiciability and standards of partisan gerrymandering in Vieth v. Jubelirer.\footnote{57} In the years since Bandemer, its test had proven to be unmanageable. The combination of a murky standard and an impossibly high burden of proof had resulted in only one court ever finding a consistent degradation of a political group's influence on the political process,\footnote{58} and that case was rendered moot when the next election proved the District Court's projection of disproportionate results wrong.\footnote{59} Bandemer had "served almost exclusively as an invitation to litigation without much prospect of redress."\footnote{60}

In Vieth, the Pennsylvania General Assembly had redistricted its congressional districts pursuant to the 2000 Census.\footnote{61} In doing so, Pennsylvania Republicans ignored local boundaries and drew irregularly shaped districts as a means of gaining partisan advantage and retribution against Democrats for gerrymanders in other states.\footnote{62} Plaintiffs challenged the plan, \textit{inter alia}, under the Equal Protection Clause, claiming an unconstitutional partisan gerrymander.\footnote{63} The District Court dismissed this claim, and the Supreme Court affirmed.\footnote{64}

In affirming the dismissal, however, the Court remained as fractured as ever on the justiciability and standards of partisan gerrymandering. A plurality wanted to close the door on partisan gerrymandering claims forever. While acknowledging that "an excessive injection of politics is unlawful,"\footnote{65} the plurality nevertheless felt that "[e]ighteen years of essentially pointless litigation have persuaded us that Bandemer is incapable of principled application. We would therefore overrule that case, and decline to adjudicate

\begin{itemize}
\item \footnote{57}{541 U.S. 267 (2004).}
\item \footnote{58}{Republican Party v. Hunt, 841 F. Supp. 722, 732 (E.D.N.C. 1994) ("Plaintiffs have made a sufficient showing that they have been and will continue to be irreparably harmed by the present superior court electoral process."); Vieth, 541 U.S. at 279-80, 282-83 (plurality opinion).}
\item \footnote{59}{Ragan v. Vosburgh, Nos. 96-2621, 96-2687, 96-2739, 1997 WL 168292, at *5-6 (4th Cir. Apr. 10, 1997) ("[T]he challenge to the statewide election scheme is unquestionably moot with respect to elections subsequent to those conducted in November 1994 . . . .").}
\item \footnote{60}{Vieth, 541 U.S. at 279 (plurality opinion) (quoting Samuel Issacharoff et al., The Law of Democracy 886 (rev. 2d ed. 2002)).}
\item \footnote{61}{Id. at 272.}
\item \footnote{62}{Id. at 272-73.}
\item \footnote{63}{Id. at 272.}
\item \footnote{64}{Id. at 306; id. at 317 (Kennedy, J., concurring in the judgment).}
\item \footnote{65}{Id. at 293 (plurality opinion) (emphasis omitted).}
\end{itemize}
these political gerrymandering claims." Justice Kennedy, concurring in the judgment, agreed with the plurality that "[t]he failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make our intervention improper." However, recognizing that "[t]he ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government," he declined to hold partisan gerrymandering to be nonjusticiable in the hope that a manageable standard "will emerge in the future." The four dissenters agreed with Justice Kennedy that partisan gerrymandering claims should remain justiciable, and then proceeded to propose three different, independent standards for adjudicating such claims.

The two notable takeaways from Bandemer beyond the issue of justiciability—the political party harm and high burden of proof—suffered different fates in Vieth. While the Court unanimously recognized the failure of the Bandemer standard, a majority of the Justices in Vieth continued to view the harm of partisan gerrymandering as a group harm. Under a group harm view, the plurality rejected applying the Equal Protection Clause to political parties in voting. The notion of a discriminatory effect inherently has a nondiscriminatory baseline against which to measure itself. The plurality reasoned that an Equal Protection claim in this context would

66. Id. at 306.
67. Id. at 317 (Kennedy, J., concurring in the judgment).
68. Id. at 311, 316–17.
69. Id. at 318 (Stevens, J., dissenting) ("[W]e reaffirm the central holding of the Court in Davis v. Bandemer . . . ." (citation omitted)); id. at 346 (Souter, J., joined by Ginsburg, J., dissenting) ("I would therefore preserve Davis's holding that political gerrymandering is a justiciable issue . . . ."); id. at 355 (Breyer, J., dissenting) ("Sometimes purely political 'gerrymandering' will fail to advance any plausible democratic objective while simultaneously threatening serious democratic harm. And sometimes when that is so, courts can identify an equal protection violation and provide a remedy.").
70. Id. at 318 (Stevens, J., dissenting) ("[W]hen partisanship is the legislature's sole motivation—when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage—the governing body cannot be said to have acted impartially."); id. at 343 (Souter, J., joined by Ginsburg, J., dissenting) ("[If] unfairness is sufficiently demonstrable, the guarantee of equal protection condemns it as a denial of substantial equality." (citing Davis v. Bandemer, 478 U.S. 109, 129–34 (1986) (plurality opinion))); id. at 360 (Breyer, J., dissenting) ("[O]ne circumstance where use of purely political boundary-drawing factors can amount to a serious, and remediable, abuse, [is] namely, the unjustified use of political factors to entrench a minority in power.").
71. See id. at 292 (plurality opinion) ("[T]he four dissenters come up with three different standards—all of them different from the two proposed in Bandemer and the one proposed here by appellants . . . .").
72. Id. at 288; id. at 315 (Kennedy, J., concurring in the judgment); id. at 365–67 (Breyer, J., dissenting).
73. Id. at 288 (plurality opinion).
have to rely on a baseline of proportional representation,74 which
the Constitution does not require.75 Perhaps realizing this, Justice
Kennedy anchored his group harm instead in the First Amend-
ment.76 In his mind, "[t]he inquiry is ... whether political
classifications were used to burden a group’s representational
rights."77 Justice Breyer, on the other hand, continued to view the
group harm as anchored in the Equal Protection Clause, arguing
that the injury is suffered by the majority party when the minority
party entrenches itself.78 Similar to Justice Breyer, the three other
dissenters maintained that partisan gerrymandering sounds in
Equal Protection, but they recast the harm as individual for the
first time. Justice Stevens viewed it as a representational harm suf-
fered by individual voters,79 while Justice Souter, joined by Justice
Ginsburg, viewed the harm as an Equal Protection injury suffered
by individual voters redistricted based on their political affiliation.80

Vieth placed partisan gerrymandering claims back at square one.
Their justiciability is in doubt, placed in an apparent holding pat-
tern until a manageable standard for adjudication emerges.81 The
Court effectively sent out a casting call for a standard, for a theo-
retical and constitutional characterization of the harm inflicted by
partisan gerrymandering that will provide a judicially manageable
standard to lead the Court through this thickest of political thick-
ets.82

74. Id.; see also Davis v. Bandemer, 478 U.S. 109, 147 (1986) (O’Connor, J., joined by
Burger, C.J. & Rehnquist, J., concurring in the judgment).
75. Vieth, 541 U.S. at 288 (plurality opinion) ("[T]his standard rests upon the principle
that groups ... have a right to proportional representation. But the Constitution contains
no such principle."); Bandemer, 478 U.S. at 130 (plurality opinion) (citing Whitcomb v.
76. Vieth, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) ("The First
Amendment may be the more relevant constitutional provision in future cases that allege
unconstitutional partisan gerrymandering.").
77. Id. at 315.
78. Id. at 365-67 (Breyer, J., dissenting).
79. Id. at 330-32 (Stevens, J., dissenting).
80. Id. at 350 (Souter, J., joined by Ginsburg, J., dissenting).
81. The plurality and Justice Stevens disagree over Vieth’s justiciability holding, with
each side claiming Justice Kennedy’s vote on justiciability. Id. at 305 (plurality opinion) ("We
suggest that [lower courts] must treat [Kennedy’s opinion] as a reluctant fifth vote against
justiciability ... that may change in some future case but that holds, for the time being, that
this matter is nonjusticiable."); id. at 317 (Stevens, J., dissenting) ("[F]ive Members of the
Court are convinced that the plurality’s answer to [justiciability] is erroneous."). Ultimately,
they likely are both correct. See id. at 317 (Kennedy, J., concurring in the judgment) ("If
workable standards do emerge to measure these burdens ... courts should be prepared to
order relief." (emphasis added)).
82. See Colegrove v. Green, 328 U.S. 549, 556 (1946) (opinion of Frankfurter, J.).
II. THE INDIVIDUAL HARM OF POLITICS

The casting call of Vieth is not directionless. For all of their differences, the Vieth opinions of Justice Kennedy and the four dissenters were guided by many of the same democratic principles. Part II.A will synthesize the Vieth opinions to characterize the underlying harm of partisan gerrymandering in a way consistent with those principles. Part II.B will step back from the case law and examine the populist roots of the Constitution, juxtaposing partisan gerrymandering with a document that placed a premium on the voice and will of “the People.” Part II.C will tie these concepts of democracy and constitutionalism together to argue that the overt usage of partisan politics in districting is antithetical to popular democracy and the essence of the Constitution as a populist document, and therefore requires that Gaffney v. Cummings be overruled.

A. Finding Vieth’s Common Ground

While they may differ on the type of harm, the scope of inquiry, and the appropriate judicial standard, Justice Kennedy and the Vieth dissenters do have common ground in the partisan gerrymandering debate when it comes to the democratic principles at stake. Any attempt at reconciliation to achieve an adjudicative path forward should start there. All five Justices recognize the need for democratic leaders both to remain responsive to the electorate and govern impartially, and they recognize the threat that partisan gerrymandering poses to these principles.

First and foremost, they appreciate that the will of “the People” lies at the core of our democracy. “‘We the People,’ who ‘ordained and established’ the American Constitution, sought to create and to protect a workable form of government that is in its ‘principles,
structure, and whole mass,' basically democratic. The chosen method "for transforming the will of the majority into effective government" is the legislature, a body "collectively responsible to the popular will. This role of the legislature is vital in a democracy, for "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."

In addition to the need for elected representatives to be responsive to the electorate, the five Justices also recognized the need for them to govern impartially. This is not to say that representatives need to abandon the politics that got them elected in the first place, but "[t]he ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government . . . ." The Constitution enforces 'a commitment to the law's neutrality where the rights of persons are at stake.' . . . Thus, the Equal Protection Clause implements a duty to govern impartially that requires, at the very least, that every decision by the sovereign serve some nonpartisan public purpose.

Partisan gerrymandering threatens both principles. "[T]he increasing efficiency of partisan redistricting has damaged the democratic process to a degree that our predecessors only began to imagine." It is undeniable that political sophisticates understand [the right to fair and effective representation] and how to go about destroying it . . . Partisan gerrymanders threaten legislative responsiveness because they "subvert [the] representative norm . . . [T]he winner of an election in a gerrymandered district inevitably will infer that her success is primarily attributable to the architect of the district rather than to a constituency defined by neutral principles." [T]he will of the cartographers rather than the will of the people will govern.

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88. Id. at 356.
89. Id. at 320 (Stevens, J., dissenting) (quoting Reynolds v. Sims, 377 U.S. 553, 565 (1964)).
90. Id. at 314 (Kennedy, J., concurring in the judgment) (quoting California Democratic Party v. Jones, 530 U.S. 567, 574 (2000)).
91. Id. at 316 (Kennedy, J., concurring in the judgment).
92. Id. at 333 (Stevens, J., dissenting) (quoting Romer v. Evans, 517 U.S. 620, 623 (1996)).
93. Id. at 345 (Souter, J., joined by Ginsburg, J., dissenting).
94. Id. at 343-44 (citation omitted).
95. Id. at 330 (Stevens, J., dissenting).
96. Id. at 331.
threaten impartiality. "[W]hen any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage—the governing body cannot be said to have acted impartially." In such circumstances, "one has the sense that legislative restraint was abandoned."

B. Popular Constitutionalism

The Framers drafted the Constitution as a means of furthering populist democracy. Our first President exclaimed that "[t]he power under the Constitution will always be in the People." Ordinary citizens, not elected officials, define the attitudes and shape of American democracy. Those that serve in elected office are not there to serve themselves; they serve on behalf of, and at the pleasure of, the electorate. "In a world of popular constitutionalism, government officials are the regulated, not the regulators ..." The political landscape has changed since the Framing with the development of an ardent two-party system, but the representative calculus has not. Whoever effectively governs, be it a representative or a political party, may not usurp power from "the People." The self-interest of partisan gerrymandering turns populist democracy on its head, where "many of today's congressional representatives owe their election not to 'the People of the several states' but to the mercy of state legislatures."

The populism of the Constitution not only justifies the justiciability of partisan gerrymandering, it requires it. As a means to the end of democracy, the Constitution structures the processes of government. Malfunction of these processes occurs when those

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97. Id. at 318.
98. Id. at 316 (Kennedy, J., concurring in the judgment).
100. See RICHARD D. PARKER, HERE, THE PEOPLE RULE 48 (1999) (using a fictional story of Italian fascism to describe the need for political mobilization of ordinary people).
101. THE FEDERALIST No. 39 (James Madison) ("[The] government ... derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior."); see also Issacharoff, supra note 25, at 605 (discussing democratic accountability).
102. KRAMER, supra note 99, at 107.
103. See id. at 168 ("The 'voice of the people,' as such, was now expressed mainly by elected representatives responding to political signals and popular movements as refracted through the parties." (citation omitted)).
104. A New Map, supra note 12, at 1202 (citation omitted).
in power manipulate the system to stay in power. Manipulating elections is "the quintessential stoppage" in the democratic process, since elections are the processes by which elected representatives are held accountable to "the People." Though Justice O'Connor once stated that partisan gerrymandering is a "a self-limiting enterprise" through political competition, and the potential exists for self-correction by the political branch, eighteen years effectively without judicial intervention has resulted in some of the most elaborate gerrymanders and least competitive elections in history. Those in power have a vested interest in maintaining the status quo, even if that means sacrificing democratic principles to stay in power, and they clearly have succeeded at doing so.

C. The Improper Role of Politics

After the utter failure of Bandemer's Equal Protection standard, some commentators advocated abandoning partisan gerrymandering Equal Protection litigation in exchange for other constitutional clauses. Before throwing the baby out with the bathwater, however, it is important to ask why partisan gerrymandering is so dangerous to democracy, and why Bandemer's test fared so poorly.

Partisan gerrymandering is harmful because it operates antithetically to the purpose of the political process. By placing political interests before the interests of the electorate, partisan gerrymandering alters, if not frustrates, the will of "the People," rather than represents it. The act of the gerrymander itself creates the injury to each individual voter's democratic representation.

106. Id. at 103.
107. Id. at 117.
110. Hirsch, supra note 1, at 183–84; see supra note 8.
111. Ely, supra note 105, at 117 (citing Henry B. Mayo, AN INTRODUCTION TO DEMOCRATIC THEORY 120 (1960)).
112. See Issacharoff, supra note 25, at 622–23 (arguing that excessive gerrymandering can inflict democratic harms beyond party composition in the legislature).
The Bandemer test failed in part because it focused on the effects of a partisan gerrymander, instead of the act of the gerrymander itself. This led it down the slippery slope of asking how much losing is enough while avoiding a proportional representation requirement.

Similar to the Gaffney Court, the Vieth plurality inferred per se constitutionality of partisan intent in districting due to its inevitable political consequences.\textsuperscript{114} But such an inquiry is more of a conclusion than an analysis, and completely ignores the representational harms caused by partisan gerrymanders. The same holds true for sweetheart gerrymanders. Though eight of the nine Justices in Vieth relied on the validity of Gaffney in assuming their constitutionality,\textsuperscript{115} "[a] bipartisan gerrymander employs the same technique ... as does a partisan gerrymander."\textsuperscript{116} In both types of gerrymanders, bare political self-interests subjugate democratic representation. Though political parties have brought stability to governance,\textsuperscript{117} to allow their interests to override the individual rights of the electorate would "confer[] greater rights on powerful political groups than on individuals; that cannot be the meaning of the Equal Protection Clause."\textsuperscript{118}

This is not to say that politics are per se impermissible.\textsuperscript{119} "It is elementary that scrutiny levels are claim specific."\textsuperscript{120} "[I]f a subsidiary standard could show how an otherwise permissible classification, as applied, burdens representational rights, we could conclude that appellants' evidence states a provable claim under the Fourteenth Amendment standard."\textsuperscript{121} When politics are utilized as part of neutral districting criteria, e.g. respecting political subdivisions, then they have not subjugated representational interests for political self-gain, and an individual voter has not suffered a

\begin{itemize}
\item \textsuperscript{115} Vieth, 541 U.S. at 313 (Kennedy, J., concurring in the judgment); id. at 351 n.6 (Souter, J., joined by Ginsburg, J., dissenting); id. at 355 (Breyer, J., dissenting); cf. id. at 324 (Steven, J., dissenting) ("[T]he plurality errs in assuming that politics is 'an ordinary and lawful motive.'").
\item \textsuperscript{117} E.g., id. at 144–45 ("There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government.").
\item \textsuperscript{118} Id. at 155.
\item \textsuperscript{119} See Vieth v. Jubelirer, 541 U.S. 267, 286 (2004) (plurality opinion) ("[P]artisan districting is a lawful and common practice ... .").
\item \textsuperscript{120} Id. at 294.
\item \textsuperscript{121} Id. at 314 (Kennedy, J., concurring in the judgment).
\end{itemize}
constitutional harm. On the other hand, when politics are used to distort the democratic process, thereby burdening an individual voter's representational rights, such usage sounds in Equal Protection.

As part of its defense of the supposed inherent permissibility of using politics in districting, the plurality asserts the impossibility of separating the two. However, one of the plurality's own footnotes defeats this claim by noting how several states have shifted towards removing political considerations from the districting process. Iowa has utilized a non-partisan commission to perform its districting free from such considerations for almost twenty-five years. While it is true that redistricting inherently creates political effects, such effects can be managed and corrected the way the Framers intended them to be—with active, responsive representation.

The plurality also asserts that political self-interest in gerrymandering is "a time-honored criterion." But "our inquiry does not begin with the judgment of history'; 'rather, inquiry must commence with identification of the constitutional limitations implicated by a challenged government practice.' Technological advances not only have exacerbated the harm of partisan gerrymandering, but they have exposed more clearly the harm it inflicts on democratic representation. The fact that recognition of this

122. Id. at 285-86 (plurality opinion) (citing Gaffney v. Cummings, 412 U.S. 735, 753 (1973)).
123. Id. at 277 n.4 ("A number [of states] have adopted standards for redistricting, and measures designed to insulate the process from politics."); see also Iowa CODE § 42.4 (2005).
124. E.g., Stuart Taylor Jr., Erase the Crooked Lines, LEGAL TIMES, Feb. 14, 2005, at 54. Some commentators argue that one of the harms of partisan gerrymandering is its negative impact on the competitiveness of elections. See, e.g., Issacharoff, supra note 25, at 614 ("The essence of republicanism then becomes not the lack of direct participation in government by the demos but, critically, the fact that the elected representatives were forced to compete in the arena of public accountability."); Issacharoff & Pildes, supra note 12, at 644 (arguing political lock-up forestalls competition). See generally Katz, supra note 12, at 391 (arguing for meaningful political participation). While 2002 had some of the least competitive congressional elections in history, Hirsch, supra note 1, at 183-84, four of Iowa's five congressional House races were highly competitive. Issacharoff, supra note 25, at 626 (citing Rigged Voting Districts Rob Public of Choice, USA TODAY, Aug. 28, 2002, at 13A).
125. Gaffney v. Cummings, 412 U.S. 735, 753 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences."); see also Bork, supra note 114, at 88-89.
harm came relatively late in the game does not alter its impermissibility under the Equal Protection Clause.

Gaffney failed to identify the harm partisan gerrymandering inflicts upon representative democracy. Allowing politics to dominate districting runs counter to popular democracy and the essence of the Constitution as a populist document. Gaffney's holding that "[p]olitics and political considerations are inseparable from districting and apportionment" should be overruled.

III. A Judicably Manageable Path Forward

"A decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process." Such a decision not only might "lead to political instability and judicial malaise," but it also would be unnecessary. Not all political considerations in districting are inherently bad. Some traditional, neutral districting principles involve political considerations. In addition, those drawing the district lines likely have some awareness of the districting's political implications, and the line between political consciousness and political intent is not always clear. The proposed constitutional standard is offended only when political interests subjugate democratic representation.

To adjudicate these claims, courts should adopt the Shaw v. Reno standard, finding a claim under the Equal Protection Clause when "redistricting legislation . . . is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate [partisan considerations] for purposes of voting, without regard for traditional districting principles and without sufficiently compel-

129. Gaffney, 412 U.S. at 753.
133. Shaw v. Reno, 509 U.S. 630, 646 (1993) ("[T]he legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion . . . .").
134. See discussion supra Part II.C (arguing that the constitutional injury of partisan gerrymandering is a democratic representation harm suffered by individual voters); cf. Shaw, 509 U.S. at 646 ("[R]ace consciousness does not lead inevitably to impermissible race discrimination.").
ling justification." This standard would strike a balance between respecting the inherently political process of redistricting using traditional districting principles, while still catching the "exceptional cases" where "legislation, though [partisan]-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of [partisan considerations] . . . ." Perhaps most importantly, its relative manageability has been proven in the race context. Though the standard is not without its critics, it provides guidelines for courts to use in making threshold determinations in what essentially is a non-numerical inquiry.

In his Vieth dissent, Justice Stevens argued for this very test. However, he did so without disturbing Gaffney's holding that political motivation is permissible, attempting instead to heighten scrutiny under the Fourteenth Amendment by invoking First Amendment cases. In addition, he cast the harm as simultaneously individual, group, and expressive. The Vieth plurality summarily rejected his attempt at applying the Shaw standard to partisan gerrymandering based on the fact political considerations are not suspect under Gaffney's view of the Equal Protection Clause. This

135. Shaw, 509 U.S. at 642. Adopting the Shaw standard would nullify the "politics, not race" escape from Shaw claims. See Hunt v. Cromartie, 526 U.S. 541, 551 (1999) ("[A] jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact." (citations omitted)).

136. See Shaw, 509 U.S. at 646.
137. Id. at 649.
139. E.g., id. at 1057, 1074, 1077 (Souter, J., joined by Ginsburg, J. & Breyer, J., dissenting); 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, 694 (2002) ("[T]he Shaw cases offer no prospect of a similarly manageable standard [to one-person, one-vote].").
140. See Pildes, supra note 8, at 2513 n.28 ("[T]he point is not to rank order all districts, but to identify some threshold of extreme bizarreness . . . .").
141. Vieth v. Jubelirer, 541 U.S. 267, 339 (2004) (Stevens, J., dissenting) ("I would apply the standard set forth in the Shaw cases and ask whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles."); see also id. at 326 ("[T]he critical issue in both racial and political gerrymandering cases is the same: whether a single nonneutral criterion controlled the districting process to such an extent that the Constitution was offended.").
142. Id. at 332 ("Political factors are common and permissible elements of the art of governing a democratic society."); see also id. at 338 ("We have held . . . that proportional representation of political groups is a permissible objective . . . ." (citing Gaffney v. Cummings, 412 U.S. 735, 754 (1973))).
144. Vieth, 541 U.S. at 285–86, 293 (plurality opinion).
Note answers the plurality’s critique by identifying the individual harm incurred under the Equal Protection Clause, reasoning the need to overturn Gaffney and heighten scrutiny, and arguing why the harm involved requires that result.

CONCLUSION

The harms that partisan gerrymandering imposes on individual voters and on our democratic system of governance are both numerous and complex. This Note simplified one of those harms in an effort to find common ground on a divided Court and provide a judicially manageable path forward. One answer that provides some relief is better than having no answer and no relief.145

In an ideal world, judges would never have to enter the political thicket of partisan gerrymandering, but that does not mean that they never should. The harms inflicted by partisan gerrymandering strike at the very heart of our system of representative democracy. Currently, the political system itself has demonstrated few signs of self-regulation and correction. Recognizing the democratic harm that partisan gerrymandering inflicts on the individual voter by overruling Gaffney and adopting the Shaw standard to adjudicate partisan gerrymandering claims is a judicially manageable way to restore order to a broken system and vindicate the representation rights of the electorate.

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