

THE PARTY'S OVER: PARTISAN GERRYMANDERING AND THE FIRST AMENDMENT

DAVID SCHULTZ*

The Supreme Court's *League of United Latin American Citizens v. Perry* ("LULAC")¹ decision demonstrated yet again the poverty and disappointment of approaching the issue of partisan gerrymandering with an equal protection jurisprudence.

For those who had thought that the opinion would produce a consensus on the Court defining manageable standards for the adjudication of partisan gerrymandering, the decision was a failure. Conversely, for others who believe Felix Frankfurter was correct in *Colegrove v. Green*² when he said that the Court should not venture into the political thicket of reapportionment,³ the decision was also a failure because the Justices were unable to secure the fifth vote necessary to overturn *Davis v. Bandemer*⁴ and rule partisan gerrymandering a nonjusticiable question. Instead of resolving the questions hanging from *Vieth v. Jubelirer*,⁵ LULAC left the fate of partisan gerrymandering for another day. LULAC's precedent is that partisan gerrymanders are justiciable yet unsolvable.

Yet within the fractured LULAC opinion Justice Stevens suggested (as he had earlier in *Vieth*⁶) another approach to the partisan gerrymander puzzle: treat it not as an equal protection claim, but as a First Amendment

* Professor, Graduate School of Management, and Department of Criminal Justice and Forensic Science, Hamline University; School of Law, University of Minnesota; Visiting Professor, Department of Law, American University Armenia. Ph.D/J.D., University of Minnesota; LL.M., University of London; M.A., Rutgers University; M.A., SUNY Binghamton; M. Astronomy, James Cook University; B.A., SUNY Binghamton. Acknowledgments go to Steven Gottlieb at Albany Law School for his instructive comments.

¹ 126 S. Ct. 2594 (2006).

² 328 U.S. 549 (1946).

³ *Id.* at 555 (stating that to "sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action.").

⁴ 478 U.S. 109 (1986).

⁵ 541 U.S. 267 (2004).

⁶ *Id.* at 324–25 (Stevens, J., dissenting).

freedom of speech or association issue.⁷ While as early as *Vieth* this approach had been suggested by Justice Kennedy,⁸ neither there nor in *LULAC* has reorientation of partisan gerrymandering from an equal protection to a First Amendment violation been seriously explored. Instead, almost universally, the examination of political gerrymandering from a First Amendment perspective has been dismissed.⁹ In light of the failure of *LULAC* to produce agreed-upon manageable standards under an equal protection analysis to address political gerrymanders, and given Justice Stevens again suggesting a First Amendment approach, this Article reexplores this path of analysis.

This Article will argue that partisan or political gerrymandering is a violation of the First Amendment's free speech or association clauses because the government can never justify its use solely as a compelling government interest when it comes to reapportionment. To make this claim, the first part of the Article will examine how the issue of redistricting was originally grounded in equal protection claims, with

⁷ *LULAC*, 126 S. Ct. at 2634 (Stevens, J., concurring).

⁸ *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring).

⁹ See, e.g., Michael Weaver, Note, *Uncertainty Maintained: The Split Decision Over Partisan Gerrymanders in Vieth v. Jubelirer*, 36 LOY. U. CHI. L.J. 1273, 1329–35 (2005); Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 397, 407–10 (2005); Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 808 n. 181 (2005); Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims after Vieth*, 3 ELECTION L. J. 626, 635 (2004); Samuel Issacharoff and Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 577 (2004); Robert A. Koch, Note, *A Wolf in Sheep's Clothing: Gaffney and the Improper Role of Politics in The Districting Process*, 39 U. MICH. J. L. REFORM, 99, 109 (2005); Justin Driver, *Rules, the New Standards: Partisan Gerrymandering and Judicial Manageability After Vieth v. Jubelirer*, 73 GEO. WASH. L. REV. 1166, 1178 (2005). Compare: JoAnn D. Kamuf, "Should I Stay or Should I Go?": *The Current State of Partisan Gerrymandering Adjudication and a Proposal for the Future*, 74 FORDHAM L. REV. 163, 204–11 (2005) (arguing that the First Amendment may in fact provide a viable alternative to the equal protection analysis); Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1131–39 (2005) (reviewing RICHARD H. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* (2003)) (arguing that First Amendment analysis "has been met almost reflexively with swift and utter condemnation by leading election law scholars"); Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209, 1212–13 (2003) (contending that a First Amendment analysis might be appropriate when it addresses the political activity of racial minorities).

partisan gerrymandering simply morphing out of this jurisprudence. The remainder of this section will then examine the Supreme Court's three partisan gerrymandering cases, demonstrating the dissensus around its justiciability and resolution as an equal protection claim. Part two of the Article will then argue that both growing out of the Court's jurisprudence in the Hatch Act and patronage cases, as well as in its viewpoint discrimination holdings, there is ample precedent to treat partisan gerrymandering as a First Amendment issue such that the consideration of party association or political views in the drawing of district lines should be subject to strict scrutiny and held unconstitutional, perhaps subject to one notable exception. Overall, the thesis is that the Court's inability to find manageable standards thus far is due to its employing a faulty equal protection analysis to partisan gerrymanders that has failed to appreciate the First Amendment issues in redistricting. Instead, if a First Amendment approach is used, this type of redistricting is unconstitutional because it is inconsistent with the mandate that government should be impartial when it comes to how it governs, especially when it comes to defining the rules of representation and the allocation of legislative seats and political power.

I. GERRYMANDERING AND EQUAL PROTECTION

A. *Equal Protection and One-Person, One-Vote*

From almost the beginning, federal redistricting litigation has centered on Fourteenth Amendment equal protection challenges.¹⁰ While in *Colegrove*, litigation was unsuccessfully brought under the Reapportionment Act of 1929,¹¹ and in *Gomillion v. Lightfoot*,¹² it was the Fifteenth Amendment,¹³ subsequent litigation grew out of equal protection challenges.

For example, in *Baker v. Carr*,¹⁴ the Court was asked to revisit its *Colegrove* decision, this time as an equal protection challenge.¹⁵ Here, the State of Tennessee had last apportioned its state legislative seats in 1901 but had not reallocated seats to reflect changes in population since that

¹⁰ See Robert B. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 660–61, 705–06 (1963) (discussing the central role of the equal protection clause in the then-emerging redistricting litigation).

¹¹ *Colegrove v. Green*, 328 U.S. 549, 551 (1945).

¹² 364 U.S. 339 (1960).

¹³ *Id.* at 346–47.

¹⁴ 369 U.S. 186 (1962).

¹⁵ *Id.* at 188, 208.

date.¹⁶ As a result, between 1901 and 1961 the state's population had increased from a little over two million to over three-and-one-half million citizens.¹⁷ In addition to the population growth, the population had shifted geographically and the number of eligible voters had grown by approximately fourfold.¹⁸ Hence, districts were of various populations, leading plaintiffs to assert a violation of the Fourteenth Amendment Equal Protection Clause.¹⁹

While the federal district court rejected hearing the dispute because it presented a nonjusticiable dispute under *Colegrove*,²⁰ Justice Brennan, writing for the majority, reached a contrary conclusion, seeing the equal protection challenge as a justiciable question.²¹ To reach that conclusion, he undertook an analysis of the Article III power of the Supreme Court under the Constitution,²² seeking to understand exactly what a "political question" was and what types of issues it was forbidden from taking.²³ Brennan rejected claims that the mere assertion of a political right constituted a nonjusticiable political question.²⁴ Yet the Court did argue that claims arising under the Guaranty Clause were nonjusticiable.²⁵ What is a nonjusticiable political question?

We have said that "In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by

¹⁶ *Id.* at 191.

¹⁷ *Id.* at 192.

¹⁸ *Id.*

¹⁹ *Id.* at 192–95.

²⁰ *Id.* at 198.

²¹ *Id.* at 237.

²² *Id.* at 198–200.

²³ *Id.* at 209–17.

²⁴ *Id.* at 209.

²⁵ *Id.*

the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.²⁶

The political question doctrine was a matter of separation of powers, asking whether the constitutional text had committed the resolution of a specific issue to any particular branch of the national government. More exactly, the Court outlined several characteristics regarding what constituted a political question.

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.²⁷

Overall, unless the Constitution clearly committed the issue to another branch for resolution, or it required the Court to make a prior policy judgment, or there were no clear standards for resolving the matter, then the federal courts were not precluded from hearing the case.²⁸ In the dispute at hand, the Court did not find any of these conditions to obtain, thereby freeing the lower courts to hear the redistricting claim.²⁹ Thus, as

²⁶ *Id.* at 210–11 (citations omitted).

²⁷ *Id.* at 217.

²⁸ *Id.* at 228.

²⁹ *Id.* at 228, 237.

with *Gomillion* for racial gerrymandering, malapportionment could now be addressed by the judiciary.

Left unresolved in *Baker* was the establishment of a standard by which to judge if malapportionment had occurred. If no manageable standard for resolving the claim could be found, then by the logic of *Baker* the reapportionment controversy would still be deemed nonjusticiable.³⁰ The construction of that standard would occur in *Reynolds v. Sims*.³¹ But the manageable standard and *Reynolds* did not immediately follow from *Baker*. In *Gray v. Sanders*,³² for the first time, the Court struck down a voting procedure which weighed rural votes more heavily than those votes from other areas.³³ In the challenged “county unit system” for voting, each county was given a unit vote equal to that of the size of its representation in the state house.³⁴ This yielded a situation where the largest counties received three unit votes and others lesser votes.³⁵ The Equal Protection Clause is cited as the basis of the holding, indicating that such a system did not allocate seats mathematically on the basis of population.³⁶ By that, a county, for example, that was five times as populous as another did not receive five times as many seats. Then in *Wesberry v. Sanders*,³⁷ the Court mandated that congressional districts must be of equal population. Although *Wesberry* specifically acknowledged the equal protection claim, the Court decided not to reach that argument,³⁸ relying instead on Article I, Section 2.³⁹

In *Reynolds*, the Court finally did articulate a manageable standard for adjudicating redistricting issues: “The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”⁴⁰ In reaching that conclusion the Court noted

³⁰ Hasen, *supra* note 9, at 637–38.

³¹ 377 U.S. 533 (1964).

³² 372 U.S. 368 (1963).

³³ *Id.* at 379–81.

³⁴ *Id.* at 370–71.

³⁵ *Id.* at 371 n.1.

³⁶ *Id.* at 379.

³⁷ 376 U.S. 1 (1964).

³⁸ *Id.* at 8 n.10.

³⁹ *Id.* at 17. The Court came to rely on Article I, section 2 in litigation challenging congressional redistricting and on the equal protection clause in state redistricting challenges.

⁴⁰ 377 U.S. at 558.

how “[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests”⁴¹ and that the right to vote was diluted

if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State’s voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical.⁴²

Thus, *Reynolds* established the basic standard for reapportionment that would dominate subsequent redistricting decisions—promotion of the one-person, one-vote standard, as mandated under the Equal Protection Clause.⁴³ For the Court:

We hold 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. Simply stated, 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.⁴⁴

⁴¹ *Id.* at 562.

⁴² *Id.* at 562–63.

⁴³ 377 U.S. at 557–78.

⁴⁴ *Id.* at 568.

While one-person, one-vote was the general standard for all of its apportionment decisions, the Court subjected it to subsequent refinement and articulation. First, in *Lucas v. Forty-Fourth General Assembly of Colorado*,⁴⁵ the Court confronted a districting scheme similar to that found at the congressional level.⁴⁶ Under the scheme, the lower house of the Colorado legislature was apportioned by population, but the upper house, or senate, was apportioned like the United States Senate in that geography would be a factor in the allocation of seats.⁴⁷ As it did in *Reynolds*,⁴⁸ the Court in *Lucas* rejected the federal analogy, under the Equal Protection Clause,⁴⁹ finding no logical basis for apportioning one house by population and another by a different method.⁵⁰ Finally, in *Avery v. Midland County*,⁵¹ the Court mandated under the Equal Protection Clause that the one-person, one-vote standard also be extended to local government units.⁵²

While one-person, one-vote was the official mathematical standard, the Court applied it differently to congressional versus state and local government seats. In *Kirkpatrick v. Preisler*,⁵³ *White v. Weiser*,⁵⁴ and most notably *Karcher v. Daggett*,⁵⁵ the Court rejected even minor deviations from the one-person, one-vote standard for congressional seats, appearing to mandate near-mathematical equality. However, in these cases the Court used Article I, Section 2 of the Constitution as the basis of the decisions.⁵⁶ When it came to apportionment of state and local government seats, the Court seemed more willing to tolerate some variance—over 10% from the least to the most populous districts—if needed to prevent dividing subunits of state and local government.⁵⁷

⁴⁵ 377 U.S. 713 (1964).

⁴⁶ *Id.* at 738.

⁴⁷ *Id.* at 717–19.

⁴⁸ 377 U.S. at 571–76.

⁴⁹ *Lucas*, 377 U.S. at 736.

⁵⁰ *Id.* at 738–39.

⁵¹ 390 U.S. 474 (1968).

⁵² *Id.* at 480–81.

⁵³ 394 U.S. 526, 530–31 (1969).

⁵⁴ 412 U.S. 783, 791–92 (1973).

⁵⁵ 462 U.S. 725, 730–31 (1983).

⁵⁶ *Kirkpatrick*, 394 U.S. at 531; *White*, 412 U.S. at 790; *Karcher*, 462 U.S. at 727.

⁵⁷ *See, e.g.*, *Abate v. Mundt*, 403 U.S. 182, 184–87 (1971); *Mahan v. Howell*, 410 U.S. 315, 323–28 (1973); *Gaffney v. Cummings*, 412 U.S. 735, 737–41 (1973). All cases permitting the deviations under the Equal Protection Clause.

A final question when it comes to the one-person, one-vote standard relates to timing. Specifically, how often must redistricting occur in order to be compliant with the *Reynolds* standard? On the one side, while the Supreme Court has not ruled on this issue, several federal courts have held that while adherence to the one-person, one-vote standard is mandatory, the interests of stability and letting incumbents complete their current terms do not require immediate elections based upon new population figures obtained in the most recent decennial census.⁵⁸ Yet conversely, the Supreme Court in the recently decided *League of United Latin American Citizens v. Perry*, held that the Constitution does not bar mid-decade redistricting, even when done solely for partisan motives.⁵⁹ Thus, states are free to redistrict more frequently than once per decade to meet the one-person, one-vote standard, but they also have some freedom beyond the decennial period to depart from it if promoting the stability of existing districts and letting incumbents finish terms are offered as competing interests.

Overall, the redistricting case law that arose subsequent to *Colegrove v. Green* and *Gomillion v. Lightfoot* was litigated under claims arising out of the equal protection law (or a similar type of logic filed under Article I, Section 2, for congressional districting), at least in terms of apportionment disputes addressing the one-person, one-vote issue. In addition, much of the redistricting litigation brought under the VRA raised issues similar to that arising under the equal protection litigation, especially when it came to the legality of race-based malapportionment claims.⁶⁰ It is safe to say, then, the Equal Protection Clause defined the legal logic and framework for apportionment controversies, including its next stage—partisan gerrymandering.

B. Political Gerrymandering and Equal Protection Analysis

One-person, one-vote was a redistricting revolution launched from the Equal Protection Clause.⁶¹ Using it as a basis of litigation may have made sense given the differential treatment alleged among voters, or the racial

⁵⁸ See e.g., *Political Action Conference of Ill. v. Daley*, 976 F.2d 335, 339 (7th Cir. 1992); *French v. Boner*, 963 F.2d 890, 892 (6th Cir. 1992). Both cases rejected equal protection challenges.

⁵⁹ *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2612 (2006).

⁶⁰ See, e.g., *United Jewish Orgs. of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977); *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Shaw v. Reno*, 509 U.S. 630 (1993). These cases draw parallels between Equal Protection Clause and VRA claims).

⁶¹ See *Gray v. Sanders*, 372 U.S. 368, 381 (1962).

motives that often were at the root of much malapportionment, such as in *Gomillion*. Thus, if violation of the one-person, one-vote mandate and racial gerrymandering could be actionable under the Equal Protection Clause, why could not gerrymandering solely for the sake of partisan advantage not also be a constitutional violation? After all, was not the redrawing of lines to help incumbents or one particular party not a practice that went all the way back to Elbridge Gerry's day? Addressing partisan gerrymandering has been the object of three Supreme Court decisions that have done no more than muddle the issues. In all three cases, the Equal Protection Clause was the primary constitutional hook for the litigation, and perhaps for the confusion that resulted.

First, in *Davis v. Bandemer*,⁶² at issue was a suit brought by Indiana Democrats contesting the constitutionality of a 1981 state redistricting plan.⁶³ The specific allegation was that the plan drew legislative lines and seats in such a way as to disadvantage Democrats.⁶⁴ It did so by dividing up cities such as South Bend in arguably unusual ways.⁶⁵ The Democrats filed suit, contending that these districts violated their rights as Democrats, under the Fourteenth Amendment Equal Protection Clause.⁶⁶ The district court had ruled in favor of the Democrats, in part, because of evidence and testimony suggesting that the Republican Party had in fact drawn the lines to favor their own.⁶⁷ When the case reached the Supreme Court a central issue was whether this was a justiciable controversy under the Equal Protection Clause.⁶⁸ The Court held that it was.⁶⁹

To support that conclusion, the Court returned to the discussion of the political question doctrine that it had in *Baker v. Carr*.⁷⁰ It quoted *Baker*'s famous formulation of what a political question was,⁷¹ noting that unless a matter was textually committed to another branch, required a specific type of policy determination not appropriate for the Court, or there were missing manageable standards for resolving the controversy, the issue could be addressed by the federal judiciary. Finding that none of the

⁶² 478 U.S. 109 (1986).

⁶³ *Id.* at 113.

⁶⁴ *Id.* at 115.

⁶⁵ *Id.* at 114–15.

⁶⁶ *Id.* at 115.

⁶⁷ 478 U.S. at 116–17.

⁶⁸ *Id.* at 118.

⁶⁹ *Id.* at 113, 124–25.

⁷⁰ *Id.* at 121.

⁷¹ *Id.* at 121–22 (quoting *Baker v. Carr*, 396 U.S. 186, 217 (1962)).

characteristics outlined in *Baker* existed in the political gerrymandering case before it, it held that the matter was justiciable.⁷² For the Court:

Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of State legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race⁷³

Yet while the case was deemed justiciable, it did not uphold *in toto* the lower court's determination that there was an equal protection violation in *Bandemer*.⁷⁴ Instead, the Court articulated several stipulations that had to be met to sustain a political gerrymandering claim.⁷⁵ First, there had to be proof of intentional discrimination and an actual discriminatory against "an identifiable political group" (here, the Democrats).⁷⁶ Second, "a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause."⁷⁷ Instead, the Court stated that the political process must frustrate political activity in a systematic fashion.

[A]s in individual district cases, 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 unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a

⁷² 478 U.S. at 123, 125–27.

⁷³ *Id.* at 123–24 (quoting *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964)).

⁷⁴ *Id.* at 127, 129.

⁷⁵ See *infra* notes 81–84 and accompanying text.

⁷⁶ *Id.* at 127.

⁷⁷ *Id.* at 132.

minority of voters of a fair chance to influence the political process.⁷⁸

Finally, the Court contended that showing frustration or dilution of political influence in one election was also insufficient.⁷⁹ Instead, it would need to be shown that it took place over several elections.⁸⁰ In sum, to support a constitutional claim for partisan gerrymandering, the *Bandemer* Court stated that one would have to demonstrate intentional discrimination and an actual effect against a group, and that discrimination must have systematically frustrated and diluted the group's ability to influence the political process across several elections.⁸¹ What emerged from *Bandemer* was perhaps the manageable standards called for in *Baker* that would allow the federal judiciary to resolve a controversy. Yet the three conditions of the case proved to be anything but manageable, and the federal courts had never invalidated a redistricting plan as a partisan gerrymander.⁸² This led to demands for the Court to rethink the question of the justiciability of partisan gerrymandering. It did that first in *Vieth v. Jubelirer*⁸³ and then again in *League of United Latin American Citizens v. Perry*.⁸⁴

In *Vieth* at issue was the constitutionality of a Pennsylvania districting plan that drew the seats for its congressional delegation after the 2000 census.⁸⁵ The state lost two seats after the 2000 reapportionment, necessitating a new district map.⁸⁶ Republicans controlled both houses of the Pennsylvania legislature as well as the governor's office.⁸⁷ The Democratic plaintiffs contended that the district lines drawn violated both Article I, Section 2 and the Equal Protection Clause, thereby constituting both a violation of the one-person, one-vote standard and, more importantly here, a partisan gerrymander.⁸⁸ The district court dismissed the plaintiffs' political gerrymandering claim and also denied plaintiffs'

⁷⁸ *Id.* at 133.

⁷⁹ *Id.* at 135.

⁸⁰ *Id.* at 135–36.

⁸¹ DONALD GRIER STEPHENSON, JR., *THE RIGHT TO VOTE: RIGHTS AND LIBERTIES UNDER THE LAW* 246 (2004).

⁸² *Id.* at 246–47.

⁸³ 541 U.S. 267 (2004).

⁸⁴ 126 S. Ct. 2594 (2006).

⁸⁵ 541 U.S. at 272.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

related motion to impose remedial districts.⁸⁹ The plaintiffs then appealed to the Supreme Court.⁹⁰

In a split decision, the Supreme Court held several things. First, a four-person plurality opinion written by Justice Scalia reviewed the history of partisan gerrymandering in the United States, concluding that such a practice went back to the early days of the republic.⁹¹ Given this history, there had also been numerous efforts to address it.⁹² The Court keyed in on the *Baker* discussion that judicially manageable standards or a clear rule was needed for the judiciary to resolve this controversy.⁹³

Justice Scalia next argued that the standards for addressing partisan gerrymandering in *Bandemer* had proved unworkable.⁹⁴ For him:

Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Bandemer* exists. As the following discussion reveals, no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.⁹⁵

Justice Scalia began his argument by examining Justice White's plurality opinion in *Bandemer*.⁹⁶ He echoed Justice O'Connor's concurrence criticizing *Bandemer*'s three-prong test, contending that her prediction that the test would prove unmanageable and arbitrary, and would fall into a simple proportionality test between voting percentages and seats won by a particular party, had since become true.⁹⁷ The Court's review of the employment of the test in the lower courts showed that *Bandemer* provided no guidance to them.⁹⁸

In criticizing the standards for adjudicating partisan gerrymandering, the plurality opinion characterized them all as a variation of intent plus

⁸⁹ *Id.* at 273.

⁹⁰ *Id.*

⁹¹ *Id.* at 274–76.

⁹² *Id.* at 276–77.

⁹³ *Id.* at 277–78.

⁹⁴ *Id.* at 278–81.

⁹⁵ *Id.* at 281.

⁹⁶ *Id.*

⁹⁷ *Id.* at 282–84.

⁹⁸ *Id.* at 282–83.

effects, with the focus being upon the plaintiffs' claim that predominant intent plus effect of the gerrymander is what should guide resolution of the case.⁹⁹ This predominant intent standard, as noted in the opinion, was borrowed from the racial gerrymandering litigation under the Voting Rights Act and the Equal Protection Clause.¹⁰⁰ The plaintiffs argued that the entire statewide redistricting plan must be measured against this standard, but Justice Scalia found that even more unworkable.

Vague as the "predominant motivation" test might be when used to evaluate single districts, it all but evaporates when applied statewide. Does it mean, for instance, that partisan intent must outweigh all other goals—contiguity, compactness, preservation of neighborhoods, etc.—*statewide*? And how is the statewide "outweighing" to be determined? If three-fifths of the map's districts forgo the pursuit of partisan ends in favor of strictly observing political-subdivision lines, and only two-fifths ignore those lines to disadvantage the plaintiffs, is the observance of political subdivisions the "predominant" goal between those two? We are sure appellants do not think so.¹⁰¹

As if plaintiffs' test for determining intent was not bad enough, Justice Scalia also criticized the borrowing of the effects test from the racial gerrymandering/equal protection jurisprudence.¹⁰² While race is immutable, one's politics is not, rendering it difficult to ascertain if people of a specific political affiliation or stripe have been "packed" into or "cracked" among districts.¹⁰³ Moreover, the plurality also stated that even if the effects of a gerrymander could be ascertained, and one accepted the fact that a majority of voters could not elect a majority of the representatives, the Court contended that there would be no constitutional violation because the Equal Protection Clause does not guarantee "a right to proportional representation."¹⁰⁴ What does the Equal Protection Clause

⁹⁹ *Id.* at 284.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 285.

¹⁰² *Id.* at 287.

¹⁰³ "Packing" and "cracking" are gerrymandering jargon for, respectively, creating districts composed largely of the targeted group and ceding such districts to the other side, or creating districts where the targeted group is underrepresented and thus can never assemble a majority needed to win the district.

¹⁰⁴ *Id.* at 287–88.

provide? “It guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. It nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers.”¹⁰⁵

Finally, Justice Scalia also questioned how to establish a party’s “majority status.”¹⁰⁶ The plaintiffs suggested looking to statewide vote totals, but the Court pointed out that “as their own complaint describes, in the 2000 Pennsylvania statewide elections some Republicans won and some Democrats won,” so that approach will not always yield a clear answer.¹⁰⁷ In addition, the Court noted that majority status in a statewide contest is not the only factor affecting voter behavior in a district-level contest.¹⁰⁸ Thus, for all of these reasons, the intent plus effect standard is unmanageable.

The plurality opinion also criticized alternative standards proposed by the dissenters in the case, dismissing all of them as deficient.¹⁰⁹ Of special interest here is the argument presented by Justice Stevens (as criticized and characterized by the plurality) who drew an analogy between First Amendment jurisprudence and the equal protection claims here.

Justice Stevens relies on *First Amendment* cases to suggest that politically discriminatory gerrymanders are subject to strict scrutiny under the *Equal Protection Clause*. . . . It is elementary that scrutiny levels are claim specific. An action that triggers a heightened level of scrutiny for one claim may receive a very different level of scrutiny for a different claim because the underlying rights, and consequently constitutional harms, are not comparable. To say that suppression of political speech (a claimed First Amendment violation) triggers strict scrutiny is not to say that failure to give political groups equal representation (a claimed equal protection violation) triggers strict scrutiny. Only an equal protection claim is before us in the present case—perhaps for the very good reason that a First Amendment claim, if it were sustained, would render

¹⁰⁵ *Id.* at 288.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 292–301.

unlawful *all* consideration of political affiliation in districting, just as it renders unlawful *all* consideration of political affiliation in hiring for non-policy-level government jobs. What cases such as *Elrod v. Burns*, 427 U.S. 347 (1976), require is not merely that Republicans be given a decent share of the jobs in a Democratic administration, but that political affiliation *be disregarded*.¹¹⁰

In part, the plurality's claim is that were the tools for assessing First Amendment claims adopted to apply to political gerrymanders, then either the standards would still be unmanageable or all political considerations in redistricting would need to be banned.¹¹¹

Overall, a four-Justice plurality ruled that partisan gerrymanders were not justiciable and therefore the claims of the Democrats should be rejected. However, five Justices agreed that the Democrats had not proved a partisan gerrymander existed in the case before them and that this type of issue was not justiciable.¹¹² Justice Kennedy concurred that there was no partisan gerrymander here, but he refused to go along with overruling *Bandemer*.¹¹³ He agreed that neutral rules for resolving and adjudicating partisan gerrymanders were needed but he did not agree with the majority that it would never be possible to find them.¹¹⁴ This thus created a five-Justice majority to reject the plaintiffs' claims.¹¹⁵ Because there were not five votes to overrule *Bandemer*,¹¹⁶ partisan gerrymandering claims remained justiciable. However, the dissenters did not agree on the standard for adjudicating such a claim.¹¹⁷ Some observers hoped *League of United Latin American Citizens v. Perry* ("LULAC") would provide an occasion to set the standard, but they were to be disappointed.

LULAC arose out of a high-profile partisan battle in the Texas legislature for control of Texas' congressional delegation.¹¹⁸ Texas picked

¹¹⁰ *Id.* at 294.

¹¹¹ *Id.*

¹¹² *Id.* at 267 (plurality opinion), 306 (Kennedy, J., concurring).

¹¹³ *Id.* at 306–07 (Kennedy, J., concurring).

¹¹⁴ *Id.* at 308, 311.

¹¹⁵ *Id.* at 267 (plurality opinion), 306 (Kennedy, J., concurring).

¹¹⁶ *See id.* at 317 (Stevens, J., dissenting).

¹¹⁷ *See id.* at 318.

¹¹⁸ Linda Greenhouse, *Supreme Court Set to Weigh Central Election-Law Issues*, N.Y. TIMES, Feb. 28, 2006, at A14.

up two additional seats in the 2000 reapportionment.¹¹⁹ At the time of redistricting, the Texas Republican Party controlled the State Senate and the governor's office, but the Democrats controlled the State House of Representatives.¹²⁰ The Republicans and the Democrats were unable to agree to adopt a redistricting scheme and eventually, litigation led to the creation of a court-ordered one.¹²¹ Using this map, the voters elected a Congressional delegation of seventeen Democrats and fifteen Republicans.¹²² However, the 2003 state elections gave Republicans control of both houses of the state legislature.¹²³ With the encouragement of Tom DeLay,¹²⁴ and after a long struggle, including Democrats in the legislature hiding out in Oklahoma to avoid a special session,¹²⁵ the state passed a new redistricting plan in 2003.¹²⁶

Under the new map, in the 2004 elections, Republicans earned a similar percentage of the vote in statewide races as they did in 2000,¹²⁷ but they captured twenty-one of the congressional seats compared to only eleven won by Democrats.¹²⁸ Plaintiffs challenged the 2003 plan in court, claiming, *inter alia*, that it was a partisan gerrymander and that the state and federal constitutions barred a second redistricting scheme following a decennial census.¹²⁹ The district court entered judgment against the challengers on all claims, but in light of *Vieth*, the Supreme Court vacated that decision and remanded the case back to the district court for reconsideration.¹³⁰ On reconsideration, the district court again upheld the new districting plan.¹³¹ Before the Supreme Court were arguments that the 2003 redistricting scheme was a partisan or political gerrymander, that it

¹¹⁹ League of United Latin Am. Citizens v. Perry (LULAC), 126 S. Ct. 2594, 2606 (2006).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Greenhouse, *supra* note 118, at A14.

¹²⁵ See Nick Madigan, *On the Lam, Texas Democrats Rough It*, N.Y. TIMES, Aug. 1, 2003, at A11.

¹²⁶ LULAC, 126 S. Ct. at 2606.

¹²⁷ *Id.* In 2000, voters gave Republicans a 59% majority of the votes for statewide offices, whereas in 2004 Republicans garnered 58%. See *id.* at 2606.

¹²⁸ *Id.*

¹²⁹ *Id.* at 2607.

¹³⁰ *Id.* at 2604.

¹³¹ *Id.*

violated the VRA, and that the mid-decade redistricting violated the one-person, one-vote requirement under the Fourteenth Amendment.¹³² While the Court did find that one of the districts violated the VRA,¹³³ it rejected claims that the mid-decade redistricting violated the Constitution and it also ruled that the appellants had failed to state a claim upon which relief could be granted for the political gerrymander.¹³⁴

Justice Kennedy, writing for yet another divided Court when it came to the partisan gerrymander claim, specifically noted that the theory of the plaintiffs was that mid-decade redistricting solely motivated by partisan objectives violated the Fourteenth Amendment.¹³⁵ A majority of the Court rejected this claim,¹³⁶ stating that not every line was drawn based on partisan objectives.¹³⁷ The plurality held that challengers would have to show how their representational rights were burdened, according to a reliable standard.¹³⁸ The court rejected a mid-decade redistricting exercise as the basis for a *per se* violation.¹³⁹ Similarly, the claim that a mid-decade redistricting violates the one-person, one-vote requirement if done for partisan purposes is also rejected.¹⁴⁰ While Justice Kennedy clearly stated that this decision did not revisit the justiciability of partisan gerrymandering, it rejected the tests offered in this case to define a standard for resolving disputes averring this as a claim.¹⁴¹

As with *Vieth*, *LULAC* produced a divided Court that failed to mend the split over partisan gerrymandering. Justice Kennedy wrote for the Court with various Justices concurring with parts of the decision. The splits were over whether partisan gerrymanders are justiciable (five

¹³² *Id.* at 2607, 2611.

¹³³ *Id.* at 2626 (holding that the redrawing of the lines in District 23 violates the VRA). For the purposes of this article, the VRA claim shall not be discussed.

¹³⁴ *Id.* at 2608, 2612.

¹³⁵ *See id.* at 2609.

¹³⁶ *See id.* at 2605.

¹³⁷ *See id.* at 2609 (plurality opinion) (written by Kennedy, J., joined by Souter and Ginsburg, JJ.) (noting that partisan aims did not guide every line in the plan); *see also id.* at 2632 (Stevens, J., concurring in part and dissenting in part, joined by Breyer, J.) (observing that appellants did not argue that every district line was motivated solely for partisan gain).

¹³⁸ *Id.* at 2610 (plurality opinion).

¹³⁹ The Court stated that “the fact of mid-decade redistricting alone is no sure indication of unlawful political gerrymanders.” *Id.*

¹⁴⁰ *Id.* at 2611–12.

¹⁴¹ *Id.* at 2607–12.

Justices agreed that they were),¹⁴² whether there was a VRA violation in the drawing of district 23 (five agreed there were),¹⁴³ and whether there could be any manageable standard for resolving a political gerrymander (Justice Kennedy rejected the plaintiff's proposed standard, four justices rejected any standards, and four other Justices splintered over various possible standards).¹⁴⁴ *LULAC* left the Court no better off than before, despite a change in two Justices since the *Vieth* decision and with four justices saying political gerrymanders are nonjusticiable, four saying they are and proposing different standards, and Justice Kennedy in the middle saying the issue is justiciable but still in search of a standard. Yet unlike in *Vieth*, there was little discussion of the equal protection logic underlying the claims. Similarly, while in *Vieth* Justices Kennedy and Stevens raised the possibility that these types of claims might be better suited as First Amendment challenges, only Stevens referenced that line of debate and only ever so briefly.

C. Summary

The political gerrymandering cases came to the Supreme Court as equal protection claims arising out of the one-person, one-vote and VRA racial gerrymandering litigation. The reason for doing this may have less to do with logic than convenience; there was already an established jurisprudence on redistricting when *Bandemer* was brought, and by concentrating on the maltreatment one party received at the hands of another, the Court might compare Democrats in Indiana to minority voters in VRA claims or to disenfranchised voters in the one-person, one-vote malapportionment cases. However, as Justice Scalia aptly pointed out in *Vieth*, the analogy between party membership and race (and also demographic or geographic location) breaks down upon closer analysis.¹⁴⁵ Race is immutable, party status is not. Racial block voting is identifiable, partisan voting seems to shift by office and candidate. Race allows for a

¹⁴² Justices Kennedy, Stevens, Souter, Ginsburg, and Breyer.

¹⁴³ Justices Kennedy, Stevens, Souter, Ginsburg, and Breyer.

¹⁴⁴ *Id.* at 2612 (plurality opinion) (rejecting plaintiffs' proposed standard). Chief Justice Roberts and Justices Scalia, Thomas, and Alito rejected all standards to evaluate political gerrymandering. *Id.* at 2663 (Scalia, J., dissenting). Justices Stevens and Breyer disagreed with Justice Kennedy regarding the standard for justiciability. *Id.* at 2626 (Stevens, J., concurring in part and dissenting in part). Justices Souter and Ginsburg argued for another standard separate from Stevens and Breyer. *Id.* at 2647 (Souter, J., concurring in part, dissenting in part).

¹⁴⁵ *Vieth v. Jubelirer*, 541 U.S. 267, 287–88 (2004).

determination of intent or effects by looking at the shape or type of district (majority-minority) formed. Finally, Justice Scalia seemed to suggest that while the one-person, one-vote and racial gerrymandering allowed for something like a structural solution—proportionality, at least in terms of the former—the same was not guaranteed by the Equal Protection Clause in terms of stipulating a one-person, one-party relationship between party votes and representation.¹⁴⁶

II. POLITICAL GERRYMANDERING AND THE FIRST AMENDMENT

A. *Kennedy, Stevens, and the First Amendment*

If equal protection reapportionment jurisprudence has proven thus far to be unsuccessful in providing the standards to remedy political gerrymanders, why not follow the direction suggested by Justices Kennedy and Stevens in *Vieth* and Stevens in *LULAC* and use the First Amendment as the constitutional hook to address these claims?

In *Vieth*, Justice Kennedy responded to criticism from Justice Scalia's plurality opinion that he sought to resolve the dispute in this case by an appeal to fairness and not a standard.¹⁴⁷ Yet in searching for a standard to address the case he noted that perhaps another "subsidiary standard" besides the Equal Protection Clause might be more appropriate.

Though in the briefs and at argument the appellants relied on the Equal Protection Clause as the source of their substantive right and as the basis for relief, I note that the complaint in this case also alleged a violation of First Amendment rights. . . . The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.¹⁴⁸

Justice Kennedy suggested that within the First Amendment jurisprudence, especially in the patronage decisions such as *Elrod v. Burns*,¹⁴⁹ or some of

¹⁴⁶ *Id.* at 288.

¹⁴⁷ *Id.* at 313–14.

¹⁴⁸ *Id.* at 314.

¹⁴⁹ 427 U.S. 347 (1976).

the political party associational rights decisions such as *Democratic Party v. Jones*,¹⁵⁰ might offer a basis for making this claim in that he sees these cases as supporting the propositions that the state cannot enact a law burdening individuals' representational rights or considering their political views absent a compelling governmental interest.¹⁵¹ Justice Kennedy also offers a brief but undeveloped analysis of how a First Amendment jurisprudence would work in comparison to an equal protection approach, noting how the former looks to the burden on representational rights while the latter looks to the permissibility of the classification.¹⁵²

In addition to these brief words by Justice Kennedy in *Vieth*, Justice Stevens in both this case and *LULAC* dropped similar hints about a First Amendment analysis as it applies to political gerrymandering. In *Vieth*, he argued that the Constitution requires neutrality regarding individuals' political beliefs, and he also cited the patronage cases for the proposition that it is not legitimate for the government to discriminate on the basis of politics, political affiliation, or speech.¹⁵³ In *LULAC*, Stevens again made the same point by citing both Justice Kennedy's *Vieth* discussion and when by blending a First Amendment and equal protection analysis to partisan gerrymanders.

The requirements of the Federal Constitution that limit the State's power to rely exclusively on partisan preferences in drawing district lines are the Fourteenth Amendment's prohibition against invidious discrimination, and the First Amendment's protection of citizens from official retaliation based on their political affiliation. The equal protection component of the Fourteenth Amendment requires actions taken by the sovereign to be supported by some legitimate interest, and further establishes that a bare desire to harm a politically disfavored group is not a legitimate interest. See, e.g., *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 447, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Similarly, the freedom of political belief and association guaranteed by the First Amendment prevents the State, absent a compelling interest, from "penalizing citizens because of their participation in the

¹⁵⁰ 530 U.S. 567 (2000).

¹⁵¹ *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004).

¹⁵² *Id.* at 315.

¹⁵³ *Id.* at 317, 324–26.

electoral process, . . . their association with a political party, or their expression of political views.¹⁵⁴

Unfortunately, beyond this brief fragment, Justice Stevens did little to develop his blended First Amendment/equal protection analysis in a way that offers a clear, manageable standard accepted by a majority of the Court for adjudicating political gerrymanders.

B. Criticizing the First Amendment Turn

After *Vieth*, a flurry of authors examined the First Amendment challenges of Justices Kennedy and Stevens. These authors—many of them the leading authors in the field of constitutional and election law—were almost unanimous in their dismissal of any shift from the Equal Protection Clause to the First Amendment in addressing partisan gerrymanders.¹⁵⁵

One line of criticism is that regulation of partisan gerrymanders is not a judicial function. Peter Schuck,¹⁵⁶ for example, writing after *Bandemer*, best captured this sentiment and appeared to anticipate Justice Scalia's arguments in *Vieth* when he argued that partisan gerrymanders are nonjusticiable and that the Court should not try to adjudicate them. For Schuck, "Judicial regulation of partisan gerrymandering would be a cure worse than the disease."¹⁵⁷ According to Schuck, the Constitution does not require political perfection; gerrymandering is the price we pay for a robust political environment that is open and free.¹⁵⁸ Gerrymandering, as a longstanding practice, is politically legitimate and congruent with our political norms.¹⁵⁹ In short, his advice: learn to live with partisan gerrymanders.

¹⁵⁴ *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2634 (2006) (Stevens, J., concurring in part and dissenting in part).

¹⁵⁵ See, e.g., Joseph P. Chamberlain, *Symposium: Electoral Redistricting and the Supreme Court: Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 397, 401–10 (2005).

¹⁵⁶ Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325 (1987).

¹⁵⁷ *Id.* at 1330.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

Schuck would withdraw the Court from the political thicket of partisan gerrymanders. Others, including Nathaniel Persily, agreed.¹⁶⁰ Yet some individuals writing after *Vieth* did not go quite that far, instead confining their criticism of the opinion and the “First Amendment turn” to other matters. Rick Hasen wrote that *Democratic Party v. Jones* does not support Justice Kennedy’s associational harm argument or that it is about people who are subject to disfavored treatment based on their views.¹⁶¹ This case, he contended, is about forced association.¹⁶² In terms of referencing the patronage cases, Hasen stated that there the burden or harm is tangible—individuals lose their jobs—but in the partisan gerrymandering cases, the harm from cracking or packing party members isn’t so clear.¹⁶³ Thus, citing to or referencing the patronage cases as precedent the way Justice Kennedy does is illegitimate or incorrect for Hasen.

Issacharoff and Karlan make a similar claim about the patronage cases,¹⁶⁴ but they ground their argument in a broader philosophical context. The inapplicability of the patronage cases to partisan gerrymanders lies in the fact that the injury in the former resided outside of the political process.¹⁶⁵ By that, their harm “did not require the reviewing court to articulate a political philosophy or to decide in the abstract what constituted a fair employment or contracting policy.”¹⁶⁶ In contrast, they contend, as a second criticism of the First Amendment approach, that “in a political gerrymandering case, the question whether ‘an apportionment has the purpose and effect of burdening a group of voters’ representational rights’ requires deciding what voters’ ‘representational rights’ are.”¹⁶⁷ Missing from the First Amendment analysis is a broader democratic theory that explains what representational rights are,¹⁶⁸ or a political philosophy that informs constitutional theory regarding the scope of majoritarian

¹⁶⁰ Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbant-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 652–53 (2002).

¹⁶¹ Hasen, *supra* note 9, at 636.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Issacharoff & Karlan, *supra* note 9, at 563 (2004).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 564.

politics and what is permissible in popular politics.¹⁶⁹ Lacking this broader theory, their criticism of Justice Kennedy is simply put:

[T]he distinction between relying on the Equal Protection Clause and relying on the First Amendment lies in the fact that “equal protection analysis puts its emphasis on the permissibility of an enactment’s classifications” while First Amendment analysis “concentrates on whether the legislation burdens the representational rights of the complaining party’s voters,” as Justice Kennedy would have it, simply ignores the question that “representational rights” are as yet undefined.¹⁷⁰

In addition to Issacharoff and Karlan, others such as Driver,¹⁷¹ Berman,¹⁷² Charles,¹⁷³ and Lewis,¹⁷⁴ made similar appeals to broader political theories or approaches as a prerequisite to the articulation of clear standards.

Lacking a clear political theory that explains why partisan gerrymandering is wrong leads to a third criticism of the judicial attempts to correct partisan gerrymanders—a lack of clear and manageable standards. This lack of clear standards is why Schuck contended that this issue should be left to the political process.¹⁷⁵ Hasen would pull a Bork¹⁷⁶ and wait for clear standards to emerge through an evolving social consensus,¹⁷⁷ while, as noted, Issacharoff and Karlan would have us wait for a democratic theory to provide guidance in ascertaining clear and manageable standards.¹⁷⁸

A fourth criticism, most vigorously made by Rick Pildes, is that the First Amendment protects individual rights but that partisan

¹⁶⁹ *Id.* at 543, 560.

¹⁷⁰ *Id.* at 564.

¹⁷¹ Driver, *supra* note 9, at 1179.

¹⁷² Berman, *supra* note 9, at 783.

¹⁷³ Guy-Uriel Charles, *Judging the Law of Politics*, *supra* note 9, at 1131–39.

¹⁷⁴ Erika Lewis, *Trailblaze or Retreat? Political Gerrymandering After Vieth v. Jubelirer*, 27 U. HAW. L. REV. 269, 271 (2004).

¹⁷⁵ Schuck, *supra* note 9, at 1330.

¹⁷⁶ See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (arguing that if the Court cannot resolve a case by neutral principles given to it by another body it should not hear the case).

¹⁷⁷ Hasen, *supra* note 9, at 628.

¹⁷⁸ Issacharoff & Karlan, *supra* note 9, at 543, 560, 563.

gerrymandering is a structural problem.¹⁷⁹ Specifically, Pildes argues that individual rights adjudication either is not appropriate for addressing structural issues such as gerrymandering, or such an individualistic rights-based strategy is categorically different than the broader principles demanded to bring about structural reform.¹⁸⁰ Issacharoff and Karlan's appeal to a broader theory similarly seems to make the same assumption.¹⁸¹ All three of them roughly draw a dichotomy between individual rights and governmental structure, as if the two are distinct and as apparently unrelated as a Kantian antinomy.¹⁸² In making these arguments, they seem to be aping Justice Scalia's points in *Vieth* that there is a problem moving from individual claims at the district level about representational rights to statewide assertions regarding impermissible First Amendment motives.¹⁸³

On top of the above four points, others criticized the First Amendment approach to addressing partisan gerrymandering for a variety of reasons. Richard Briffault appears to agree with Justice Scalia that a First Amendment approach to addressing partisan gerrymanders would imprudently eliminate all political criteria from the districting process.¹⁸⁴ Conversely, if not, then there would remain only murky criteria on when partisan considerations were permissible,¹⁸⁵ short of falling into the trap of proportional representation as the adjudicated remedy.¹⁸⁶ For some, the First Amendment provides standards no more exact than the Equal Protection Clause.¹⁸⁷ Alternatively, it might provide standards that would not be clear no matter what.¹⁸⁸

¹⁷⁹ Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 58 (2004). See also Charles, *supra* note 173, 1132–33 for a similar understanding of Pildes' arguments.

¹⁸⁰ Pildes, *supra* note 179, at 58–59.

¹⁸¹ Issacharoff & Karlan, *supra* note 9, at 543, 560, 563.

¹⁸² IMMANUEL KANT, *CRITIQUE OF PURE REASON* 328, 396 (Norman Kemp Smith trans., St. Martin's Press 1965) (1929) (describing how certain paired assertions or propositions such as reason and empiricism stand in apparent contradiction or separation from one another).

¹⁸³ *Vieth v. Jubelirer*, 541 U.S. 267, 284 (2004).

¹⁸⁴ Briffault, *supra* note 9, at 408 (2005); see also *Vieth*, 541 U.S. at 294.

¹⁸⁵ Briffault, *supra* note 9, at 409.

¹⁸⁶ *Id.*

¹⁸⁷ Driver, *supra* note 9, at 1179; *The Supreme Court, 2003 Term Leading Cases, Constitutional Law*, 118 HARV. L. REV. 343, 351 (2004).

¹⁸⁸ Hasen, *supra* note 9, at 628; Adam Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. PA. J. CONST. L. 1001, 1050 (2005).

Overall, scholars and election law specialists have been critically unsympathetic to using the First Amendment to adjudicating partisan gerrymanders. Joann Kamuf, in one of the few articles defending the First Amendment turn,¹⁸⁹ nicely summarizes criticisms of this approach to addressing partisan districting. For Kamuf, claims that redistricting is a task for the political branches to address, or that no manageable standards can be found, or that reapportionment require the courts to make policy decisions, are all potential objections.¹⁹⁰ In addition to what Kamuf lists, lack of a theory to guide the Court, the gap between individual rights and government structure, and the inapposite use of the patronage and party cases by Justice Kennedy to support his propositions, round out the criticisms of the First Amendment turn.¹⁹¹

C. *But are the Critics Right?*

Is the First Amendment fundamentally flawed as a tool for adjudicating partisan gerrymanders as critics contend? Despite some nitpicking and more serious criticisms, a turn towards a First Amendment approach is worth a try. At the worst it would produce results no worse than presently yielded with the Equal Protection Clause and at best, it would resolve a vexing problem that the Court has sought to resolve since *Bandemer*. In offering a First Amendment approach to the partisan gerrymandering problem, this Article agrees with the criticisms of Issacharoff and Karlan that a broader political philosophy or democratic theory is needed to justify or support the constitutional argument. The theory that provides this foundation is classical Liberalism. However, in offering that theory, this Article makes two other points. First, Justice Scalia and others who argue that politics or partisanship are relevant criteria in redistricting are wrong. Instead, Liberal thought, as it will be shown, demands political neutrality, especially in terms of the construction of the basic institutions of government. Second, Pildes and other who argue that a First Amendment rights strategy is inappropriate or an unsatisfactory means to bringing about structural changes are incorrect because rights and structure are connected ontologically, legally, and conceptually.

¹⁸⁹ Joann D. Kamuf, “*Should I Stay or Should I Go?*”: *The Current State of Partisan Gerrymandering Adjudication and a Proposal for the Future*, 74 *FORDHAM L. REV.* 163, 204–11 (2005) (arguing that the First Amendment may in fact provide a viable alternative to the equal protection analysis).

¹⁹⁰ *Id.* at 198–201.

¹⁹¹ *Id.* at 197, 206–07.

1. *Liberal Theory and Partisan Neutrality*

According to John Rawls, neutrality is a central concept of Liberal thought.¹⁹² In making this claim, Rawls appeals to one of the precepts of classical Liberal thought which contends that the state should remain neutral regarding the life choices and preferences of its citizens.¹⁹³ This notion of neutrality, grounded in epistemological objectivity,¹⁹⁴ religious toleration,¹⁹⁵ and the political premises of equality and liberty for all,¹⁹⁶ represents a belief that the government should generally not substitute its concept of the good or the good life for that determined by each individual citizen.

John Locke locates the concept of neutrality both within his writings on government neutrality towards religion,¹⁹⁷ the idea of toleration,¹⁹⁸ and a natural law framework that respects the inherent rights of all individuals to make claims against the government and political society from interfering with their life, liberty, and estate.¹⁹⁹ With Kant, the concept of neutrality is grounded in the individual capacity of citizens to use their own public reason to render political judgments.²⁰⁰ Similarly, John Rawls' situates this neutrality within a Kantian respect for the inherent dignity of rational beings to make choices regarding the ends or goals of their life,²⁰¹ and for

¹⁹² JOHN RAWLS, *POLITICAL LIBERALISM* 190 (1993).

¹⁹³ GUIDO DE RUGGIERO, *THE HISTORY OF EUROPEAN LIBERALISM* 363, 369 (1959); JOHN RAWLS, *A THEORY OF JUSTICE* 254 (1971).

¹⁹⁴ RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE*, 131–64 (1979).

¹⁹⁵ RICHARD ASHCRAFT, *REVOLUTIONARY POLITICS & LOCKE'S TWO TREATISES OF GOVERNMENT*, 37–41 (1986).

¹⁹⁶ FRANKLIN L. BAUMER, *MODERN EUROPEAN THOUGHT: CONTINUITY AND CHANGE IN IDEAS, 1600–1950*, 218–36 (1977).

¹⁹⁷ JOHN LOCKE, *The Spirit of Toleration*, in *LOCKE: SELECTIONS* 43 (Sterling P. Lamprecht ed., Charles Scribner's Sons, 1956) (1689) (“Absolute Liberty, just and true liberty, equal and impartial liberty, is the thing that we stand in need of”).

¹⁹⁸ John Locke, *A Letter Concerning Toleration*, in *CLASSICS OF POLITICAL AND MORAL PHILOSOPHY* 506–10, 512–13 (Steven M. Cahn ed., Oxford Univ. Press, 2002) (1689).

¹⁹⁹ JOHN LOCKE, *An Essay Concerning the True Origin, Extent, and End of Civil Government*, in *JOHN LOCKE, TWO TREATISES OF GOVERNMENT*, paras. 54, 87 (Peter Laslett ed., Cambridge Univ. Press, 1963) (1690).

²⁰⁰ IMMANUEL KANT, *An Answer to the Question: What is Enlightenment?*, in *KANT'S POLITICAL WRITINGS* 54–59 (Hans Reiss ed., H. B. Nisbet trans., Cambridge Univ. Press, 1970) (arguing that the hallmark of the Enlightenment is a monarch deferring to citizens to make public use of their own reason).

²⁰¹ RAWLS, *A THEORY OF JUSTICE*, *supra* note 193, at 254.

his eventual prioritization of the right over the good,²⁰² and respect for the equality of conscience of all.²⁰³ Finally, Jürgen Habermas would see neutrality as grounded in non-hierarchical bargaining and communication that takes place in the public sphere, making possible democratic decision-making.²⁰⁴ While many sources could be cited for this proposition, it is sufficient to state that John Rawls is correct in his basic point that neutrality is important to Liberal thought, eventually manifesting itself in the law in several ways, including the concepts of free speech, religious toleration, equal protection, and equality before the law.²⁰⁵

Neutrality demands thus a sense of disinterestedness by the state in its attitude towards the political and often moral preferences of its citizens. As Rawls recognized in *Political Liberalism*, citizens approach the public sphere from a diversity of moral, religious, and political perspectives; the task of reaching political agreement is respect for this diversity, building upon it an overlapping consensus that must start with an understanding that the state may not favor the views of some at the expense of others.²⁰⁶ How does this concept of neutrality translate over into politics, or more specifically, into the use of partisanship or political preferences in the drawing of district lines? Here is where one can appeal to Liberalism, Rawls, and his construction of the basic rules of justice.

A Theory of Justice seeks to construct the rule of justice that will govern the basic institutions of a society.²⁰⁷ Drawing upon classical social contract theory which situates individuals in a prepolitical state of nature who are asked to devise a government for themselves, Rawls asks what type of basic institutions of justice would rational but mutually disinterested individuals construct for themselves when they are placed under a veil of ignorance.²⁰⁸ Behind this veil of ignorance individuals have general knowledge of their society but they do not know certain facts such

²⁰² *Id.* at 446–52.

²⁰³ *Id.* at 211–16.

²⁰⁴ JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 198–205 (Thomas Burger trans., MIT Press, 1989).

²⁰⁵ See, e.g., RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY*, 46, 183–85 (1992); OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER*, 109–20 (1996) (describing in both books how the concept of neutrality is embedded in the law, especially the First Amendment).

²⁰⁶ RAWLS, *POLITICAL LIBERALISM*, *supra* note 192, at 145–46, 190.

²⁰⁷ RAWLS, *A THEORY OF JUSTICE*, *supra* note 193, at 54–60.

²⁰⁸ *Id.* at 136–37.

as “his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence, and strength, and the like.”²⁰⁹

In effect, stripped of knowledge of personal attributes such as our gender, race, and religion, and therefore rendering them as impartial decision makers stripped of personal bias—therefore neutral—individuals are called upon to construct the rules of justice that will govern their society. Rawls depicts individuals as self-interested and rational maximizers, wanting to maximize social goods,²¹⁰ which means that they might be unlikely to base social distributions on immutable characteristics which they cannot control and which they have no personal knowledge of under the veil of ignorance.²¹¹ Under these constraints, Rawls contends that individuals would opt for his two principles of justice over a utilitarian theory of distribution.²¹² The two principles of justice thus embody a sense of right over good as well as political neutrality.²¹³ They state that “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others” and “social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.”²¹⁴

What are we to make of the veil of ignorance, the Rawlsian bargaining game, and the two principles of justice that he claims individuals would construct to order their society? Imagine individuals behind Rawls’ veil of ignorance asked to devise rules of justice that will order their society, including their political and governmental institutions. Would such individuals, unaware of their partisan preferences, be willing let such partisan values or preferences factor into the organization of the government? The answer is probably not, at least when it comes to the rules determining the awarding of political representatives. A Rawlsian individual behind the veil of ignorance would probably be unlikely to let partisan considerations drive districting, for fear that once the veil of

²⁰⁹ *Id.* at 137.

²¹⁰ *Id.* at 142–49.

²¹¹ *Id.* at 17–22, 142–49.

²¹² *Id.* at 14–15.

²¹³ *Id.* at 15.

²¹⁴ *Id.* at 60. Rawls will subsequently offer various formulations of these two rules, with (b), the difference principle, eventually modified to require inequalities to work to the advantage of the least advantaged in society. *See, e.g., id.* at 95.

ignorance is lifted, seats and boundaries would potentially be drawn to their political disadvantage.

The point with this Rawlsian construct and appeal to Liberalism is simple: it is unlikely that partisan preferences would be an acceptable criterion for the drawing of district lines either under the principle of neutrality inherent in Liberal thought or in a situation where individuals were in a bargaining game, asked to design the basic institutional rules of justice, and they did not know what their partisan identity is. Those, such as Justice Scalia, Schuck, and Briffault, who contend that partisanship is not an illegitimate factor in redistricting simply have it wrong. Nonpartisan districting is dictated by a political philosophy that lies at the heart of American constitutional theory and the First Amendment,²¹⁵ and there is nothing inconsistent in arguing that such an imperative should apply in an all-or-nothing fashion.

2. *Rights and Structure*

A second objection leveled at a First Amendment turn towards addressing partisan districting is that a rights-based strategy is inappropriate for bringing about structural changes such as in representation. Critics who make this argument, or some permutation of it, both misunderstand the nature of litigation and the relationship between rights and governmental or political structures.

Consider first the nature of litigation. Charles has pointed out that a rights-based strategy has changed the structure of reapportionment already when it comes to the one-person, one-vote standard and in terms of the racial gerrymandering.²¹⁶ The judiciary has been exceedingly successful since *Baker v. Carr* in forcing states to undertake decennial redistricting that conforms to the one-person, one-vote mandate, and since *Gomillion v.*

²¹⁵ For a description of the role neutrality plays in the First Amendment see Stephen E. Gottlieb, *Fashioning A Test for Gerrymandering*, 15 J. LEGIS. 1, 10–11 (1988–1989) and Stephen E. Gottlieb, *The Speech Clause and the Limits of Neutrality*, 51 ALB. L. REV. 19 (1986).

²¹⁶ Guy-Uriel Charles, *Judging the Law of Politics*, *supra* note 9, at 1128–29; Guy-Uriel Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, *supra* note 9, at 1260. Both articles contend that a First Amendment analysis might be appropriate when it addresses the political activity of racial minorities.

Lightfoot and the adoption of the Voting Rights Act, the courts have also been very successful promoting minority voting and representation.²¹⁷

Second, one can also read the rights-structure argument as a claim about judicial efficacy, specifically, that the courts are not effective in undertaking efforts to redraw district lines and therefore would not be effective in seeking to effect nonpartisan districting. This objection, if empirical, can be rejected by looking at the 40 years of history the courts have had in redistricting since *Baker*. By that, there is no evidence that the courts have done a worse job than legislatures in districting and, in fact, given that the political branches have foot-dragged and fought the one-person, one-vote standard and the efforts to root out racism in this process, the courts come out looking quite good. Yet if the objection is normative (the courts ought not to address partisan districting), then one is arguing nothing more than a question about the proper role for judges in our society. Ultimately, judicial role hangs both on the type of debate Justice Brennan engaged in over the justiciability of reapportionment in *Baker v. Carr*, or in a discussion about the courts and their relationship to the political process in a democratic society.²¹⁸ Normative disagreements are differences in kind from empirical ones.

A third sense about what the rights-structure argument means looks at the nature of litigation. All litigation is really rights-based in the sense that some type of injury must be demonstrated for a party to have standing.²¹⁹ One cannot simply sue claiming a deficient process or structure unless ultimately one shows an injury.²²⁰ In terms of the First Amendment, several authors have developed elaborate arguments discussing how free speech or association claims are linked to structural conceptions of how society operates.²²¹ Thus, litigation can have numerous goals, including effecting social change or institutional reform.²²²

²¹⁷ See generally QUIET REVOLUTION IN THE SOUTH (Chandler Davidson & Bernard Grofman eds., 1994) (discussing the impact of the Voting Rights Act on representation and voting among African-Americans in the South).

²¹⁸ See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 76 (1980) (examining the impact of the *Carolene Products* footnote four upon the Warren Court's jurisprudence).

²¹⁹ See, e.g., *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471–73 (1982).

²²⁰ *Id.*

²²¹ See, e.g., STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE, 58–63 (1990) (connecting First Amendment rights to limits on majority power); David Schultz & Stephen E. Gottlieb, *Legal Functionalism and Social Change: A Reassessment of* (continued)

Yet a fourth sense in which rights and structure are connected can be understood from the perspective of looking at the underlying or internal connections that exist in the law. These connections can be understood in several ways. Perhaps the most simple is Wesley Hohfeld's claim that there are basic connections among and between legal concepts such as rights and duties or powers and liabilities.²²³ Hohfeld's famous article sought to demonstrate the "intrinsic meaning and scope" of several critical legal concepts, as well as "their relations to one another and the methods by which they are applied."²²⁴ Hohfeld demonstrated interconnections in legal terms, and although "rights" were not connected to "structure" in his essay,²²⁵ it is impossible to understand the former without seeing it as a limit upon the latter. By that, if the Constitution confers a power upon the federal government, such as an ability to tax and spend money for the general welfare, a First Amendment right might serve as a limit upon it if the expenditure is to serve a religious purpose.²²⁶ Thus, rights imply a relational standing to government structure; change one and the meaning of the other also changes.

Another way to comprehend this relationship is to view the law as a Wittgensteinian language game.²²⁷ Here we can draw an analogy, stating that law resembles language in several ways.²²⁸ First, both law and

Rosenberg's The Hollow Hope, in *LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE* 169, 184–87 (David A. Schultz ed., 1998) (noting that all rights litigation is not the same and does not embody the same functionalist or structural goals, that the purpose of rights claims is often to induce structural responses from the courts or other government actors); Stephen E. Gottlieb & David Schultz, *The Empirical Basis of First Amendment Principles*, 19 J. L. & POL. 145, 146–58, 154–56 (2003) (examining the impact of First Amendment litigation upon social toleration).

²²² See, e.g., David Schultz, *Courts and Law in American Society*, in *LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE*, *supra* note 221, at 1, 6, 8–9 (reviewing the literature and research on the use of litigation to effect social and institutional change).

²²³ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16, 30–32 (1913).

²²⁴ *Id.* at 58.

²²⁵ *Id.* at 30–41.

²²⁶ See *Flast v. Cohen*, 392 U.S. 83, 104–06 (1968).

²²⁷ JOHN W. DANFORD, *WITTGENSTEIN AND POLITICAL PHILOSOPHY* 112–14 (1976) (drawing parallels between law, language, and political philosophy).

²²⁸ LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* para. 67 (G.E.M. Anscombe trans., Macmillan Publishing Company 3d ed. 1968) (discussing the idea of family resemblances among different discourses).

language are a collection of concepts.²²⁹ These concepts acquire their meaning both in terms of how they are used²³⁰ and in their relationship to one another within a specific language game.²³¹ Social conventions also determine the meaning of words, with an agreement on the use of a word critical to deciding how it shall be used within a language.²³² Finally (for the purposes of this Article) language is ultimately grounded in social practices and conventions which Wittgenstein refers to as a “form of life.”²³³ Applying this simplified language model to law, legal concepts such as rights, constitution, and representation acquire a meaning based on use and within a context of how other words are defined. Agreements on the meaning of terms is critical to the process of legal interpretation or legal hermeneutics, offering rules on how to read legal texts and render the meaning of terms based, in part, on the structure of sentences and the terms they contain. Finally, if language ultimately sources its meanings in practices that are part of a form of life, one could argue that law itself arrives at its meanings in a set of social practices, customs, and perhaps even a political philosophy, such as Liberalism.

The point in pushing a Wittgensteinian parallel of law and language is that legal terms such as rights, redistricting, and government structure are part of a similar or the same language game. Instead of seeing rights litigation and governmental or political structures as distinct entities, in many cases they are part of one language game such that the meaning of one term has an impact upon another. Change what a right is, or the scope of what “neutrality” means, or what representation is, and other words, as suggested by Hohfeld, will also change. We can also potentially view linguistic social conventions, rules, agreements, or forms of life as a political philosophy or theory that helps to inform meanings in the law. Thus, in response to Issacharoff and Karlan who say that a theory is needed to explain what constitutes harm to representational rights,²³⁴ the language game of Liberalism, with its commitment to neutrality, as well as

²²⁹ *Id.* paras. 1–15. See also Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 182 (1987).

²³⁰ WITTGENSTEIN, *supra* note 228, paras. 43, 82, 122, 340, 381, 384, 432.

²³¹ *Id.* para. 130.

²³² *Id.* paras. 146, 198–205, 224–27.

²³³ *Id.* paras. 23, 241.

²³⁴ Issacharoff & Karlan, *supra* note 9, at 563.

individual liberty and equality, fit that bill, providing the definition that links individual rights claims to political and governmental structures.²³⁵

Besides the parallel of law to a language game, there are two other ways that one can see rights and structure related. First, Kant and then eventually Hegel saw connections in apparent opposites. Kant's antinomies between reason and empiricism, for example find a unity in opposition or connection via transcendental reason.²³⁶ More famously, Hegel drew connections between apparent antithetical concepts such as Being and Nothing and Subject and Object in his dialectical method of analysis.²³⁷ For both Kant and Hegel, internal connections or relations may not actually exist between or among concepts (or Notions for Hegel) that are initially seen. Finally, to make the connection to law most exact, Ronald Dworkin's concept of rights as trumps place limits on the political process,²³⁸ shifting from the majoritarian branches to the judiciary the responsibility for the protection of individual claims.²³⁹ Simply put, rights claims have a structural impact upon how the government operates in terms of who acts and who responds and how.

While this discussion has been extensive, the way to summarize the argument about the relationship between rights and structure can be stated by arguing that:

²³⁵ It should also be pointed out that Issacharoff and Karlan are both wrong and right in their assertion that defining injury in the patronage cases did not require the courts to construct a theory of fair employment or injury. Yes, the courts did not have to construct they theory *ab initio*, but they did have to rely on prior determinations of what did constitute unfair employment or an injury and then they had to apply that theory to the facts at hand, deciding if the concept of fair employment fell under the language game of the First Amendment. In ruling that it did, the Court essentially constructed a new theory to decide what constituted fair employment when the government was the employer.

²³⁶ KANT, *supra* note 182, at 328, 396.

²³⁷ G. W. F. HEGEL, THE LOGIC OF HEGEL 285 (William Wallace trans., Oxford Univ. Press, 1982) (1817); G. W. F. HEGEL, PHENOMENOLOGY OF SPIRIT 28–31 (A. V. Miller trans., Oxford Univ. Press 1977) (1807).

²³⁸ RONALD DWORIN, TAKING RIGHTS SERIOUSLY, at xi (1977) (stating that “Individual rights are political trumps held by individuals.”). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1677–82 (2d ed. 1988) (describing how rights claims can have structural impacts).

²³⁹ RONALD DWORIN, LAW'S EMPIRE, 356 (1986). *See also* Allan C. Hutchinson & Patrick Monahan, *Democracy and the Rule of Law*, in LAW AND MORALITY: READINGS IN LEGAL PHILOSOPHY 357 (David Dyzenhaus & Arthur Ripstein eds., 2d ed. 2001) (citing Ronald Dworkin, *Political Judges and the Rule of Law*, in A MATTER OF PRINCIPLE 71 (1985)).

Democratic theories have ontologies. Each defines its object of inquiry, the critical components of what makes a political system work, and what forces, structures, and assumptions are core to its conception of governance. This ontology will not only include a discussion of human nature but also an examination of concepts such as representation, consent, political parties, liberty, equality, and a host of other ideas and institutions that define what a democracy is and how it is supposed to operate²⁴⁰

Democracies and political systems define the background for individual rights. For Dworkin, they operate “in an abstract way against decisions taken by the community or society as a whole,” with “more specific institutional rights that hold against a decision made by a specific institution.”²⁴¹ These background rights serve as general principles that define rights within a community, with the embodiment of these rights in the law representing specific claims against political institutions to perform certain functions or tasks. To simplify Dworkin’s point: theories (such as about democracy) represent abstract rights regarding how a legal regime should operate, with constitutional law serving as a concrete embodiment of rights in definite institutions and structures.²⁴² As Iredell Jenkins states: “Legally, the recognition that certain persons have a certain right has two immediate and important consequences: it imposes corresponding duties on other persons, and it enlists the state in the protection of these rights.”²⁴³ Individuals rights claims then, thus contrary to assertions by Pildes, are not only related to political and governmental structures, but pursuing them is the most logical and appropriate way to bring about institutional changes, including with how reapportionment and redistricting occur. These claims are also organized by a political or democratic theory, with Liberal

²⁴⁰ David A. Schultz, *The Phenomenology of Democracy: Putnam, Pluralism, and Voluntary Associations*, in *SOCIAL CAPITAL: CRITICAL PERSPECTIVES ON COMMUNITY AND “BOWLING ALONE”* 74 (Scott L. McLean, David A. Schultz & Manfred B. Steger eds., 2002).

²⁴¹ DWORKIN, *supra* note 238, at xii.

²⁴² Compare G.W.F. HEGEL, *HEGEL’S PHILOSOPHY OF RIGHT* 160–74 (T.M. Knox trans., Oxford Univ. Press 1967) (1821). See also David Schultz, *Hegel’s Constitutionalism*, 4 *COMMONWEALTH* 26 (1990) (*examining* Hegel’s concept of constitutionalism and constitutional law).

²⁴³ IREDELL JENKINS, *SOCIAL ORDER AND THE LIMITS OF LAW: A THEORETICAL ESSAY* 241 (1980).

political neutrality serving as the map upon which we give content and meaning to the Constitution, individual rights, an even the concept of representation.

3. *Political Neutrality and the Politics/Administration Dichotomy*

Critics of the First Amendment turn to adjudicating partisan gerrymandering assailed Justice Kennedy's appeal to the patronage and party cases as support for the proposition that partisanship or political preferences are illegitimate preferences to be considered when the state acts. While conceding that the *Jones* case cited by Justice Kennedy may not support his argument, Hasen and others are both right and wrong when it comes to the patronage cases. They are maybe right that the cases do not provide a clear statement of the harm implicated in partisan gerrymandering, but they are wrong in their assertions that they do not stand for the proposition that the state should not be allowed to consider partisanship in its decision-making. Moreover, where Justices Kennedy and perhaps Stevens erred in their referencing of the patronage cases was that they focused too narrowly on them and not on a broader role the Court has had in articulating Liberal neutrality in its decisions. In particular, Liberal neutrality in public administration manifests itself in a Progressive era concept called neutral competence or the politics-administration dichotomy.²⁴⁴ This dichotomy called for a removal of politics in the administration of government, leaving politics to the realm of elected officials who make policy.

Efforts to depoliticize the administrative apparatus of the government can be traced to the late 19th century civil service reform movements that were directed at rooting out the corruption and spoils that had emerged in Andrew Jackson's time and which fully blossomed during Lincoln's and Grant's administrations.²⁴⁵ Political patronage and spoils, which during the Jacksonian era was heralded as a reform movement to improve political accountability, strengthen political parties, and improve the representative quality of the federal bureaucracy,²⁴⁶ had by the 1850s become viewed as a corrupt practice that undermined the moral integrity of the government.²⁴⁷

²⁴⁴ See encyclopedia entries for "neutral competency" and "politics-administration dichotomy" in *ENCYCLOPEDIA OF PUBLIC ADMINISTRATION AND PUBLIC POLICY* 287, 331 (David Schultz ed., 2004).

²⁴⁵ DAVID A. SCHULTZ & ROBERT MARANTO, *THE POLITICS OF CIVIL SERVICE REFORM* 50–53 (1998).

²⁴⁶ *Id.* at 36–40.

²⁴⁷ *Id.* at 44–45.

Thus, starting as early as the 1840s, some in Congress sought to establish competitive examinations for some positions and by 1856 there were demands for a professionalized civil service.²⁴⁸ After the Civil War, Congress, and especially representative Thomas Jenckes from Rhode Island, began pushing for civil service exams and other reforms.²⁴⁹ While claims that spoils were inefficient were articulated, the primary focus of these early reformers was moralistic and aimed at the purification of the federal employment that was tainted by politics.²⁵⁰

The first serious movement towards reform of spoils came in 1871 when Congress issued a joint resolution authorizing President Grant to create a Civil Service Commission (CSC).²⁵¹ This Commission classified some positions, issued guidelines for competitive examinations, and also recommended a ban on political assessments (the practice of employees paying yearly fees in return for continued federal employment).²⁵² The Commission died in 1873 for lack of funding.²⁵³ However, the Grant Commission had created many regulations and terminology that would eventually become the basis for the 1883 Pendleton Act which was the first major federal civil service reform act.²⁵⁴

Further action towards the reform of the civil service took place throughout the 1870s. In 1873, for example, Grant issued an executive order forbidding civil servants from holding state or local offices.²⁵⁵ Although the order did not preclude campaigning, it did place some limits upon the individual's own political career.²⁵⁶ In 1877 President Hayes issued an order limiting the political activities of federal employees by banning their involvement in the management of political organizations, caucuses, conventions, and elections, although their right to vote or speak out on issues was not affected.²⁵⁷

The 1883 Pendleton Act represented a first and small triumph over spoils and the articulation of the position that political control of administration did not further democratic ideals, but instead threatened the

²⁴⁸ ARI HOOGENBOOM, *OUTLAWING THE SPOILS* 7–9 (1961).

²⁴⁹ *Id.* at 13, 49.

²⁵⁰ SCHULTZ & MARANTO, *supra* note 245, at 54–55.

²⁵¹ *Id.* at 60.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 60, 66.

²⁵⁵ DAVID ROSENBLOOM, *FEDERAL SERVICE AND THE CONSTITUTION* 95–96 (1971).

²⁵⁶ *Id.* at 96.

²⁵⁷ *Id.*

neutral administration of justice, the moral integrity of government, and the efficiency of administration.²⁵⁸ Three years subsequent to its adoption, President Cleveland strengthened earlier efforts towards political neutrality by issuing an order that reiterated the ban on political activity by federal employees.²⁵⁹

After the Pendleton Act's passage, the civil service reform movement underwent several important changes. First, passage of the Act was not a complete remedy for all the social and political ills facing the federal government. There were still other problems and the Pendleton Act could not address them because the Act covered only a very small percentage of the positions in the federal government (entry level and clerical positions in urban centers and where custom houses were located).²⁶⁰ "Also, the reform spirit somewhat lapsed on the federal level after 1883 and some hostility against the Act developed in Congress, leading to unsuccessful efforts to repeal it."²⁶¹

However, neither did the desire for reform die nor did the demand to take politics out of administration subside. Reformers at this time believed that the only way to eliminate spoils was to depoliticize the civil service.²⁶² Hence, the reform movement changed in a couple of important ways:

First, starting in the late 1890s and into the early 20th century, there was a new focus to reform. Partly as a result of the Populist movement, reformers became preoccupied with efforts to reconcile the operation of the federal bureaucracy with the basic political values of representative democracy. Reformers asked how a politically-neutral merit system and a tenured civil service could operate within a political system that respected representative democracy and public accountability of public office holders through competitive elections. One solution to this problem would be to try to distinguish politics from administration and push the goal of neutral competence.²⁶³

²⁵⁸ SCHULTZ & MARANTO, *supra* note 245, at 49.

²⁵⁹ *Id.* at 88.

²⁶⁰ *Id.* at 73.

²⁶¹ *Id.*

²⁶² *Id.* at 74.

²⁶³ *Id.*

The experiences of foreign regimes offered later 19th and early 20th century Americans a model for civil service reform and efforts to purge politics from the administration of government. Woodrow Wilson, writing in his 1885 “Notes on Administration,” contended that “the task of developing a science of administration for America should be approached with a larger observance of the *utilities* than is to be found in the German or French treatment of the subject.”²⁶⁴ In this essay Wilson stated for the first time that “*administration* should be subservient to the *politics*,” a distinction that he would make more forcefully in his now famous 1886 essay “The Study of Administration.”²⁶⁵ Administrative questions, for Wilson, are distinct from political questions because while political questions are policy questions, public administration is simply the “detailed and systematic execution of public law.”²⁶⁶ In borrowing from German writers, Woodrow Wilson argued that administration was the detailed execution of general government policies and “lies outside the proper sphere of politics.”²⁶⁷ Policies should be set by elected leaders and their appointees.²⁶⁸ Administration is the province of politically neutral, permanent officials selected for their expertise.²⁶⁹

Though Wilson’s essay had little influence until decades after his death, Frank J. Goodnow’s 1900 *Politics and Administration* was perhaps the most influential book upon early 20th century administrative thinking.²⁷⁰ It sought to clarify the various functions of the state which he described as politics and administration.²⁷¹ Politics is defined as the “expressions of the state will” while administration is the “execution of

²⁶⁴ WOODROW WILSON, *Notes on Administration*, in 5 THE PAPERS OF WOODROW WILSON 49, 49 (Arthur S. Link ed., 1968).

²⁶⁵ *Id.* at 49, 359, 365.

²⁶⁶ *Id.* at 372.

²⁶⁷ *Id.* at 370–71.

²⁶⁸ *Id.* at 376.

²⁶⁹ *Id.*

²⁷⁰ FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT* (Russell & Russell 1967) (1900).

²⁷¹ *Id.* at 18.

these policies.”²⁷² However, while these are distinct functions, there is a need for a harmony between the expression and execution of the law because a popular government must be able to control the execution of the law if its will is to be expressed.²⁷³ Yet, while politics should control administration, there is a limit to how much politics should penetrate into administration lest the latter becomes inefficient.²⁷⁴

The spoils system had produced a coordination of politics and administration, yet the spoils had two glaring deficiencies. One, it led to the impairing of administrative efficiency. Two, and far more important for Goodnow, the spoils was a threat to popular government and competitive elections because it supported the ruling party and kept it in power. The spoils system, a consequence of strong political parties and a decentralized administrative system, was a threat to democracy because “[t]he” party in control of the government offices had made use of them not merely to influence the expression of the popular will, but to thwart it when once expressed.²⁷⁵

While Goodnow did recognize the importance of political parties in a popular government and sought to strengthen them in America, he rejected party (political) control over administration as the best way to harmonize the expression and execution of the popular will.²⁷⁶ Goodnow rejected perhaps the hallmark Jacksonian defense of spoils that it sustained strong parties and democratic control of the bureaucracy.²⁷⁷ Moreover, Goodnow also repudiated earlier claims that open competitive exams would end this corruption because these exams were a small part of the reform movement.²⁷⁸ The solution to preventing administration (party control of offices) from thwarting the political will was to remove it from political and party control.

That it [popular government] shall not be lost in our own case, depends very largely on our ability to prevent politics from exercising too great an influence over administration,

²⁷² *Id.*

²⁷³ *Id.* at 133.

²⁷⁴ *Id.* at 136.

²⁷⁵ *Id.* at 131.

²⁷⁶ *Id.* at 36–38.

²⁷⁷ *Id.* at 112–13.

²⁷⁸ *Id.* at 120–21.

and the parties in control of administration from using it to influence improperly the expression of the public will.²⁷⁹

The best way to assert a new harmony between the expression and the execution of the laws would be by creating a hierarchal and centralized administration with the President at the head to direct the operations of the government.²⁸⁰ Such a centralized system with superiors overseeing subordinates would limit the discretion of the latter and, thus, prevent them from acting politically.²⁸¹

While this model of organization sought to subordinate administration to politics, this subordination did not mean that politics should control administration. Instead, Goodnow makes it clear that this type of control is inefficient.²⁸² There are certain areas of administration, moreover, that should be insulated from politics.²⁸³ These areas include the administration of justice, technical, scientific information gathering, as well as purely administrative management issues.²⁸⁴ These functions should be performed by politically neutral, tenured and competent individuals who are to act in a semi-scientific, quasi-judicial, and quasi-businesslike fashion.²⁸⁵ Such efficient behavior would only be upset by politics.

Central to the arguments of Wilson and Goodnow was that politics and patronage threatened the administrative efficiency of administration and that, in general, administrative and political questions were and should be distinct.²⁸⁶ The former should be addressed by technically competent civil servants insulated from politics.²⁸⁷ Thus, in these writings we see the emergence of a neutral competence ideology that stressed a politics/administration dichotomy in order to promote efficiency and limit the threats parties posed to popular government. Yet an important part of the crusade, particularly on the local level where most of the public sector existed, was a direct attack on political parties and the evil of partisanship, and that the spoils system represented an acceptable relationship among the party, administration, and popular government. Instead, the reformers

²⁷⁹ *Id.* at 131–32.

²⁸⁰ *Id.* at 117–18.

²⁸¹ *Id.* at 118.

²⁸² *Id.* at 38.

²⁸³ *Id.* at 85.

²⁸⁴ *Id.* at 78–82, 85.

²⁸⁵ *Id.* at 87.

²⁸⁶ *Id.* at 370–71; WILSON, *supra* note 264, at 376.

²⁸⁷ GOODNOW, *supra* note 270, at 87; WILSON, *supra* note 264, at 375.

believed that spoils damaged administrative efficiency and popular government and did little for the health of parties. Neutral competence ideology sought to depoliticize the civil service, and it was grounded in a Liberal commitment of neutrality and attempts to reconcile bureaucratic power with the values of American representative democracy.

The Supreme Court jumped on the bandwagon of civil service reform and enforcement of neutral competence ideology in several decisions. In *Ex parte Curtis*,²⁸⁸ at issue was the constitutionality of an 1876 Act that prohibited all members of the Executive branch who had received Senate confirmation from “requesting, giving to, or receiving from, any other officer or employe [sic] of the government, any money or property or other thing of value for political purposes.”²⁸⁹ Curtis was a federal employee who was convicted of violation of this Act in district court for receiving money from employees.²⁹⁰ He appealed contesting its constitutionality. Additionally, in *United States v. Wurzbach*,²⁹¹ the Court upheld a 1925 Corrupt Practices Act that made it illegal for officers and employees of the United States to promote their candidacy or reelection in a party primary.²⁹² Justice Holmes, writing for the Court, ruled that Congress could provide measures that would limit the political pressure that employees might face to contribute money if they were to retain employment.²⁹³

The Hatch Act cases represent another line of decisions where the Court sought to depoliticize the machinery of government. Starting in 1939, Congress passed a variety of acts that sought to place limits upon the ability of the Roosevelt administration to use the federal bureaucracy for political/partisan purposes.²⁹⁴ The Act, specifically section 9, forbade employees and officers of the executive branch from taking any active part

²⁸⁸ 106 U.S. 371 (1882).

²⁸⁹ *Id.* at 382.

²⁹⁰ *Id.*

²⁹¹ 280 U.S. 396 (1930).

²⁹² *Id.* at 398.

²⁹³ *Id.* at 398–99.

²⁹⁴ Hatch Political Activity Act, Pub. L. No. 76-252, 53 Stat. 1147 (1939) (limiting federal employees from actively participating in certain political activities); Act of July 19, 1940, ch. 640, Pub. L. No. 76-753, 54 Stat. 767 (amended 1940) (extending the Hatch Act to include state and local employees); Labor-Management Relations Act, ch. 120, § 304, 61 Stat. 136, 159–60 (1947) (prohibiting contributions by nationally coordinated banks, corporations, and labor organizations to selected political elections and campaigns).

in political management or in political campaigns.²⁹⁵ First in *United Public Workers v. Mitchell*,²⁹⁶ and then again in *United States Civil Service Commission v. National Association of Letter Carriers* (“*Letter Carriers*”),²⁹⁷ the Court upheld against First Amendment challenges the political activity bans in the Hatch Act.²⁹⁸

In *Mitchell* the Court stated that “the interference with free expression is seen in better proportion as compared with the requirements of orderly management of administrative personnel.”²⁹⁹ For the Court, several factors contribute to the need to limit the political activity of workers in order to promote good administrative management. First, it notes how if political activity of federal workers hurts the civil service, its damage is no less than if the activity occurs after work hours.³⁰⁰ Second, the Court indicated how free speech rights had to be balanced against the needs to protect a democratic society against the evils of political partisanship in the federal service.³⁰¹ Specifically, the Court, in citing public administration scholarship as authority,³⁰² held that some believed there was a need to limit political activity in order to promote “political neutrality for public servants as a sound element for efficiency.”³⁰³ Elsewhere, the Court noted that an “actively partisan governmental personnel threatens good administration,”³⁰⁴ and hurts political neutrality, and that, overall, partisan political activity is a threat to efficiency, political neutrality, and discipline.³⁰⁵

United States Civil Service Commission v. National Association of Letter Carriers was also a challenge to Section 9 of the Hatch Act, and again the Court upheld the Act.³⁰⁶ Here the majority stated that “federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and

²⁹⁵ Hatch Political Activity Act, Pub. L. No. 76-252, § 9, 53 Stat. 1147, 1148 (1939).

²⁹⁶ 330 U.S. 75 (1947).

²⁹⁷ 413 U.S. 548 (1973).

²⁹⁸ *Mitchell*, 330 U.S. at 94–96, 103–04; *Letter Carriers*, 413 U.S. at 555–56.

²⁹⁹ *Mitchell*, 330 U.S. at 94.

³⁰⁰ *Id.* at 95–96.

³⁰¹ *Id.*

³⁰² *Id.* at 97 n.32.

³⁰³ *Id.* at 97.

³⁰⁴ *Id.* at 98.

³⁰⁵ *Id.* at 97.

³⁰⁶ 413 U.S. 548, 548 (1973).

on the electoral process should be limited.”³⁰⁷ The basis of this claim rested on the majority’s recounting of the 19th century reforms directed against spoils and in their agreement that “partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly”³⁰⁸ Political neutralization is thus required by the First Amendment. For the majority:

The argument that political neutrality is not indispensable to a merit system for federal employees may be accepted. But because it is not indispensable does not mean that it is not desirable or permissible. Modern American politics involves organized political parties. Many classifications of government employees have been accustomed to work in politics—national, state and local—as a matter of principle or to assure their tenure. Congress may reasonably desire to limit party activity of federal employees so as to avoid a tendency toward a one-party system. It may have considered that parties would be more truly devoted to the public welfare if public servants were not overactive politically.³⁰⁹

The Hatch Acts decisions stated that the political neutrality of federal employees was dictated by the First Amendment.³¹⁰ The patronage decisions³¹¹ pushed the point even further by placing limits upon the government using political affiliation as a factor in hiring, firing, and promotion decisions. In these decisions, the Court engaged in extensive debate concerning the merits of patronage with arguments over the supposed contributions that spoils had to the maintenance of democracy, political parties, public accountability, and administrative control. These debates made significant reference to political science and public administration scholarship on these topics. These debates regarding the merits of patronage occurred within the rhetoric of the neutral competence. In all five of these decisions the Court finds that the consideration of

³⁰⁷ *Id.* at 557.

³⁰⁸ *Id.* at 564.

³⁰⁹ *Mitchell*, 330 U.S. at 100.

³¹⁰ *Letter Carriers*, 413 U.S. at 556–57.

³¹¹ *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 353, 357 (1976); *Branti v. Finkel*, 445 U.S. 507, 515–16 (1979); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64–65, 79 (1990); *Bd. of County Comm’rs v. Umbehr*, 518 U.S. 668, 673, 686 (1996); *O’Hare Truck Serv. Inc. v. City of Northgate*, 518 U.S. 712, 714–15, 726 (1996).

partisan affiliation or party activity in the hiring, firing, promotion, or letting of contracts was a violation of the First Amendment.³¹² It does so by declaring the use of partisanship or party preference is not a compelling governmental interest in employment decisions.³¹³ In all of these decisions, the Court also appeals to the ideology of neutrality and neutral competence.

For example, in *Elrod v. Burns*, Justice Brennan begins his opinion by offering a history of the spoils system in America, noting how the impetus for the Pendleton Act and civil service reform could be traced to the “corruption and inefficiency” of patronage employment.³¹⁴ He contends that patronage is a threat to democracy and popular government because of the advantage it gives to one party in the electoral process.

It is not only belief and association which are restricted where political patronage is the practice. The free functioning of the electoral process also suffers. Conditioning public employment on partisan support prevents support of competing political interests . . . As government employment, state or federal, becomes more pervasive, the greater the dependence on it becomes, and therefore the greater becomes the power to starve political opposition by commanding partisan support, financial or otherwise. Patronage thus tips the electoral process in favor of the incumbent party, and where the practice’s scope is substantial relative to the size of the electorate, the impact on the process can be significant.³¹⁵

The *Branti* Court reaffirmed their holding in *Elrod*.³¹⁶ In the latter Justice Stevens’ majority opinion stated that the real question in the case was “whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.”³¹⁷ It found that except in a few narrow circumstances,

³¹² *Elrod*, 427 U.S. at 348, 369–70; *Branti*, 445 U.S. at 515–16; *Rutan*, 497 U.S. at 75; *Umbehr*, 518 U.S. at 678; *O’Hare Truck Serv.*, 518 U.S. at 720.

³¹³ *Elrod*, 427 U.S. at 362, 369–70; *Branti*, 445 U.S. at 514–15; *Rutan*, 497 U.S. at 69, 74, 78; *Umbehr*, 518 U.S. at 674–77; *O’Hare Truck Serv.*, 518 U.S. at 716–17.

³¹⁴ *Elrod*, 427 U.S. at 354.

³¹⁵ *Id.* at 356.

³¹⁶ *Branti*, 445 U.S. at 517.

³¹⁷ *Id.* at 518.

partisanship was not an appropriate requirement.³¹⁸ In *Rutan*, Justice Brennan stated that, “Today we are asked to decide the constitutionality of several related political patronage practices—whether promotion, transfer, recall, and hiring decisions involving low-level public employees may be constitutionally based on party affiliation and support. We hold that they may not.”³¹⁹

Overall, if one reads the patronage, Hatch Act, *Wurzbach*, and *Curtis* cases together, they demonstrate that the Court has been a consistently strong defender of the First Amendment’s commitment to political neutrality.³²⁰ For the last 100 years the Court has deferred to Congress in its attempts to limit forced monetary contributions within the bureaucracy and to place limits upon the political activity of federal employees. The patronage decisions, on the other hand, represent a direct attempt by the Court to limit use of spoils in hiring, firing, and transfers. Together, these decisions represented a rejection of the use of partisanship or party membership in the performance of governmental duties and adoption of the principles of neutrality inherent in the Liberal tradition.³²¹ More importantly, they offer support to the claims of Justices Kennedy and Stevens that consideration of partisanship can constitute a valid and real harm to citizens because it may lead to the suppression of First Amendment free speech or associational rights.

4. *Defining the First Amendment Harm*

Given the arguments so far made, there are five remaining questions: (1) What is the theory defining the harm in partisan gerrymandering?; (2) What is the harm in partisan gerrymandering?; (3) How do we know when the harm has occurred?; (4) Why should partisan gerrymandering be

³¹⁸ *Id.*

³¹⁹ *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 65 (1990).

³²⁰ See Gottlieb, *Fashioning A Test for Gerrymandering*, *supra* note 215, at 11; Gottlieb, *The Speech Clause and the Limits of Neutrality*, *supra* note 215, at 19; Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 53 (1975–1976); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 249–50 (1983).

³²¹ See also *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605 (1967); *Sherbert v. Verner*, 374 U.S. 398, 404–06 (1963); *Wieman v. Updegraff*, 344 U.S. 183, 191–92 (1952) (ruling as illegitimate the conditioning of hiring decisions based on the suppression of First Amendment rights). In none of these cases was the relinquishment of First Amendment rights accepted as a compelling governmental interest.

compared to the patronage decisions?; and (5) Are there every any circumstances when partisanship should be considered in the drawing of district lines?

To answer the first question, the theory defining the harm is Liberalism. Liberalism demands of the state that it act neutral with regards to its citizens.³²² If we accept neutrality as the yardstick of measurement for eventually determining harm, one need not address the messy problem of defining or assessing what constitutes a burden to representational rights, as Issacharoff and Karlan contend.³²³

Second, the harm in partisan gerrymandering is a state violation of neutrality, more specifically, using partisan factors when drawing of district lines or in the allocation of representative seats. There are two ways to conceptualize this harm. First, the malapportionment of district lines based on partisanship is analogous to being a Democrat in Texas, a Republican in New York, or someone anywhere voting for a third party candidate for president of the United States. In these three cases many allege that these votes are wasted.³²⁴ These are clear disincentives in all three cases to voting as one would prefer, creating harms that range from deciding not to vote to the belief that their vote will not make a difference. Similarly, a Democrat who votes party line in a solidly Republican district will also feel little point in voting, and feel her voice is not heard, much in the same way the remaining minorities in Tuskegee, Alabama felt in *Gomillion v. Lightfoot* after they were redistricted out of the city.

A traditional analysis would assert that they face a one-person, one-vote equal protection violation, yet a First Amendment analysis would assert instead that (at least with the Democrat in a Republican district and a racial minority in Tuskegee) the state violated the principle of both equality and neutrality, producing a form of viewpoint discrimination.³²⁵ In transforming the harm into a First Amendment claim, the Court can draw upon its well-developed line of jurisprudence holding as presumptively invalid content-based, viewpoint discrimination.³²⁶ In using

³²² RAWLS, *supra* note 192, at 190–94.

³²³ Issacharoff & Karlan, *supra* note 9, at 563.

³²⁴ See generally GEORGE C. EDWARDS, III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA (2004) (arguing that the Electoral College serves to disenfranchise many voters not living in competitive states); see also Thomas M. Durban, *The Anachronistic Electoral College*, 39 FED. B. NEWS & J. 510, 510, 514–15 (1992).

³²⁵ Stone, *supra* note 320, at 201–02.

³²⁶ See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–29 (1995); *R.A.V. v. St. Paul*, 505 U.S. 377, 391, 394 (1992); *Simon & Schuster, Inc. v.*

a First Amendment content-based viewpoint analysis to partisan gerrymandering, the Court could employ this jurisprudence³²⁷ to define the range of harms to voters from directly malapportioning to cracking and packing voters based on partisanship (if one can be sure of partisan identity), to automatic presumptions of the invalidity and harm of partisan-based lines much in the same way Justice O'Connor made the argument about race in *Shaw v. Reno*.³²⁸ The point is one can simply postulate that partisan-based gerrymandering is *per se* unconstitutional unless it survives strict scrutiny.

A third question to address is, how do we know when the harm has occurred? More specifically, the issue that has plagued the Court since *Bandemer* has been how to construct judicially-manageable standards that the courts can apply neutrally that will allow for them to adjudicate claims of partisan gerrymandering.³²⁹ It is over the failure of the Court to find these standards that Justice Scalia in *Vieth* wanted to overturn *Bandemer* and declare partisan gerrymanders nonjusticiable.³³⁰ Two possible responses are possible here.

First, as just noted, the Court could use its traditional First Amendment jurisprudence that focuses on intent as an effort to uncover partisan gerrymandering. Under this form of analysis, the use of party membership or partisanship as a criterion in the drawing of redistricting lines would be ruled unconstitutional. The reason for this is that, as this Article has contended, its use would never be considered a compelling governmental interest. Under this type of analysis, while compactness and shape of districts would be acceptable criteria to use in redistricting, partisanship would not be. Drawing upon Justice O'Connor's arguments regarding the use of race in *Shaw v. Reno*, if a districting schema could not be explained

Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 115–16 (1991); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Texas v. Johnson*, 491 U.S. 397, 406 (1989); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 536–37 (1980); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). See also Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 845–46, 894 (2006) (describing how “bad” legislative intent may be used to adjudicate a range of First Amendment issues, including potentially partisan gerrymandering).

³²⁷ See SMOLLA, *supra* note 205, at 48–50 (reviewing the various notions of harm defined under the First Amendment).

³²⁸ 509 U.S. 630, 643–44 (1993).

³²⁹ *Vieth v. Jubelirer*, 541 U.S. 267, 307–09 (2004) (Kennedy, J., concurring).

³³⁰ *Id.* at 281 (plurality opinion).

otherwise except by the inclusion of partisanship as a criterion for boundaries, then the reapportionment would be presumed to be done on the basis of party membership unless defendants could rebut that presumption.

Yet while First Amendment scholarship has developed a sophisticated analysis of intent, these tests may not be adequate or objective enough to detect more subtle uses of partisanship in redistricting. If the intent analysis found in First Amendment jurisprudence is unsatisfactory, a second and more objective test to detect harm is grounded in the “symmetry standard” that was proposed by one of the amicus briefs in the *LULAC* case.³³¹ Based on political science research dating back over three decades,³³² King states:

The symmetry standard measures fairness in election systems, and is not specific to evaluating gerrymanders. The symmetry standard requires that the electoral system treat similarly-situated political parties equally, so that each receives the same fraction of legislative seats for a particular vote percentage as the other party would receive if it had received the same percentage. In other words, it compares how both parties would fare hypothetically if they each (in turn) had received a given percentage of the vote. The difference in how parties would fare is the “partisan bias” of the electoral system.³³³

For Gottlieb: “[S]ymmetry provides an equivalent opportunity for both parties to win elections.”³³⁴ In using the symmetry standard, one examines

³³¹ Brief of Amici Curiae Professors Gary King, Bernard Grofman, Andrew Gelman, and Jonathan N. Katz, In Support of Neither Party at 2–5, *League of United Am. Citizens v. Perry*, 126 S. Ct. 2594 (2006) (Nos. 05-204, 05-254, 05-275, 05-349), 2006 WL 53994 (hereinafter “Gary King Brief”). Justice Stevens cites to the symmetry standard proposed in the Gary King Brief. *Perry*, 126 S. Ct. at 2637 (Stevens, J., concurring in part, dissenting in part) (citing to the symmetry standard).

³³² See, e.g., Richard G. Niemi, *The Relationship Between Votes and Seats: The Ultimate Question in Political Gerrymandering*, 33 *UCLA L. REV.* 185, 194–95 (1985); Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 *AM. POL. SCI. REV.* 540, 540–49, 554 (1973); Bernard Grofman, *Measures of Bias and Proportionality in Seats-Votes Relationships*, 9 *POL. METHODOLOGY* 295, 297–307 (1983); Andrew Gelman & Gary King, *A Unified Method of Evaluating Electoral Systems and Redistricting Plans*, 38 *AM. J. POL. SCI.* 514, 514–15, 536 (1994).

³³³ Gary King Brief, *supra* note 331, at 4–5.

³³⁴ Gottlieb, *Fashioning a Test for Gerrymandering*, *supra* note 215, at 12.

the swing ratio, or the rate at which legislative seats change when votes change.³³⁵ If, for example, for every one percent change in vote a party picks up X number of seats, one wants to look to see if that ratio is the same for all political parties.³³⁶ If there is a statistical difference in the swing ratios, that is a sign of partisan bias.³³⁷ Simplified, the symmetry standard requires that if Democrats win 70% of the seats when they receive 55% of the vote, Republicans should receive the same number of seats when they receive the same percentage of the vote.³³⁸ Thus, partisan gerrymandering occurs when each party does not have the same chance of electing its members when compared to others.³³⁹ Overall, the strength of the symmetry standard is its objectiveness. It avoids the messy search for intent, defining a neutral barometer for partisan bias.

However, the *LULAC* court rejected the symmetry standard alone,³⁴⁰ both because it failed to provide for a sense of fairness,³⁴¹ and because it was based on a hypothetical state of affairs.³⁴² Perhaps, then, another alternative would be to combine an intent and symmetry test together. One could define a partisan gerrymander as one where district lines could not be explained except for the impermissible consideration of partisanship in the drawing of lines (intent), supplemented by evidence that there was a lack of symmetry (effect). Together, the test would try to show that the intent was to engage in a partisan gerrymander and that there was some evidence of representational harm in terms of how votes followed seats. Together, the two factors demonstrate a First Amendment harm.

Fourth, once we know what the harm is, is the drawing of district lines more politics and policy or more like administration? By that, the politics/administration dichotomy and neutral competence drew the lines of partisanship to exclude decisions by elected officials. If elected officials are doing the redistricting, does it not make it policy and therefore permissible to use partisanship in drawing lines? Several responses can be offered here. First, if the arguments about the First Amendment that have been made in the paper are accepted, then it does not matter if the redistricting decisions by legislatures are politics or policy; in both cases

³³⁵ Niemi, *supra* note 332, at 195.

³³⁶ *Id.*

³³⁷ *Id.* at 200.

³³⁸ Gary King Brief, *supra* note 331, at 5.

³³⁹ *Id.* (citing *Davis v. Bandemer*, 478 U.S. 109, 124 (1986)).

³⁴⁰ *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2610–11 (2006).

³⁴¹ *Id.*

³⁴² *Id.*

the consideration of partisan affiliation or party membership is never a valid governmental interest that should be employed when drawing district lines. The concept of viewpoint discrimination as enunciated by the Court does not simply apply to administrative decisions. In the case of *R.A.V. v. St. Paul*, it also extended to laws passed by elected officials to ban cross burning³⁴³. Second, the appeal to the Hatch Act and patronage cases were meant to serve as examples where the Court has issued decisions to take politics out of the basic institutions involved in the administration of government. District boundaries, it is submitted, are more like the basic administrative institutions of government than they are like policy pronouncements of elected officials because the fairness and impartiality in constructing districts assure the proper operations of elections and representation (fair outcomes), much in the same way that impartiality in administration assures a fair and just outcome in decisions reached by public administrators. Overall, partisan gerrymandering is no more legitimate than permitting a legislature to directly reserve specific seats on the basis of party membership. While it is the prerogative of voters to decide to make their decisions on a partisan basis, the principles of political neutrality and the First Amendment preclude the government from doing that, especially when setting the ground rules for an election. The First Amendment, like the Equal Protection Clause, demand that the government act neutrally and that it respect an equality among viewpoints. According to Geoffrey Stone:

It has been suggested that the concept of equality “lies at the heart of the first amendment’s protections against government regulation of the content of speech.” Indeed, it has been argued that, “[j]ust as the prohibition of government-imposed discrimination on the basis of race is central to equal protection analysis, protection against governmental discrimination on the basis of speech content is central among first amendment values.”³⁴⁴

Finally, are there any situations when partisanship should be permitted in the drawing of district lines? There are two possible responses. First, one could argue a hard version of the thesis being advocated here that party affiliation is never a compelling government interest in any decision made by the government. In this case, no exceptions are permitted and therefore

³⁴³ *R.A.V. v. St. Paul*, 505 U.S. 377, 396 (1992).

³⁴⁴ Stone, *supra* note 320, at 201–02.

party membership may never be considered in districting. However, a softer version of the argument would be that the government may use party membership or partisan affiliation only if it could demonstrate a compelling government interest that survived strict scrutiny. One circumstance of the latter can be identified and it occurs when a state might consider partisanship to comply with the requirements of the Voting Rights Act. Specifically, in *Easley v. Cromartie*,³⁴⁵ the Court upheld North Carolina's new districting plan, finding that race was not considered to the exclusion of other factors when drawing congressional boundaries. Here, the Court noted that the burden is on the plaintiffs who challenge a redistricting plan as a racial gerrymander to show that race was the predominant factor in explaining the plan.³⁴⁶ But the Court was not persuaded by the evidence that race and not politics was the issue that determined the line-drawing.³⁴⁷ Specifically, Justice Breyer, writing for the majority, argued that past voting behavior and not necessarily race was used to determine the lines and even though race and voting may correlate, the use of the former is permissible and a possible explanation for the shape of the districts.³⁴⁸ Hence, if voting behavior was the factor to explain the districts, then race was not a factor and therefore no racial gerrymander occurred. As a result of *Easley v. Cromartie* one can effectively create minority-majority districts so long as one can show that voting or other political behavior determined the districting, even if those criteria correlate with race. For the purposes of this Article, the decision in *Cromartie* would permit the consideration partisan factors in order to meet the demands of the Voting Rights Act. Beyond this, a First Amendment turn towards adjudicating partisan gerrymanders would prevent party from being a factor affecting the drawing of district lines.

III. CONCLUSION

The inability to find manageable standards for the adjudication of partisan gerrymanders in *Bandemer*, *Vieth*, and *LULAC* may be sourced in the equal protection approach to them that had been imported from the reapportionment jurisprudence. This Article had sought to argue that perhaps a shift towards a First Amendment analysis of partisan gerrymandering as suggested by Justices Kennedy and Stevens might

³⁴⁵ 532 U.S. 234 (2001).

³⁴⁶ *Id.* at 241–42.

³⁴⁷ *Id.* at 243.

³⁴⁸ *Id.* at 243–44.

prove to be a more fruitful line of inquiry. A First Amendment approach would draw upon Liberalism's commitment to neutrality as embodied in the content-based viewpoint discrimination analysis, rendering the consideration of partisanship in districting to be presumptively invalid except in one situation. A First Amendment turn as advocated here would define the harms associated with it and demonstrate how a rights-based litigation strategy could affect governmental structures. If this Article has accomplished nothing else, the hope is that it gives the First Amendment turn a second look, despite the scorn many critics have heaped upon it.

