PARTISAN GERRYMANDERING:
FINALLY ADDRESSING A TWO HUNDRED THIRTY YEAR CHALLENGE*

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How much political motivation and effect are too much on drawing electoral districts? This question has been presented often to the Supreme Court throughout its history. However, the Court has never answered this question, mainly because there is not a judicially manageable standard to review the issue. Looking at the writings and motivations of the Founders, this is a remarkably easy question to answer.

Any amount is too much. President Madison wrote that political parties were a disease on American government.1 President Washington devoted a considerable portion of his farewell address warning about the toxic role political parties could play in the government.2 President Adams wrote that a

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* This article was sent to printing before the announcement of Rucho v. Common Cause, 588 U.S. __ (2019).
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1. The Federalist No. 10, at 46 (James Madison).
2. George Washington, Farewell Address (Sept. 19, 1796).
representative assembly should exactly resemble the people. 3 “Great care should be taken . . . to prevent unfair, partial, and corrupt elections.”4

The term gerrymandering received its name in 1813, after Governor Elbridge Gerry signed into law an electoral map which assured his election to the House of Representatives.5 However, this was not the first instance of gerrymandering in America. That distinction goes to Patrick Henry’s attempt at preventing Madison from being elected to the House in 1788.6 Gerrymandering has been denounced consistently throughout American history, just not by the Supreme Court. President Harrison called it “political robbery.”7 President Garfield condemned partisan gerrymandering and stated, “[t]hat no man, whatever his politics, can justly defend it.”8

Partisan gerrymandering is exactly what Adams warned as the greatest threat to this assembly. Partisan gerrymandering preordains the election result creating reliability safe districts. Most often this occurs by “packing”9 or “cracking.”10 Three hundred, twenty-eight of the four hundred, thirty-five House seats were considered “[s]olid”11 before the 2018 midterm election.12 If you add in the “[l]ikely”13 seats, then only 40 out of

3. JOHN ADAMS, Thoughts on Government: Applicable to the Present state of American Colonies, (1776).
4. Id.
5. The Gerry-Mander, or Essex South District Formed into a Monster!, SALEM GAZETTE, Apr. 2, 1813.
8. Id.
9. Id. Placing a large number of voters with a certain political affiliation in a single district so that that party wins in a landslide.
10. Id. Diluting the voting power of a party across many districts.
11. Id. The party, whether it be the Republican or Democrat, had higher than a ninety-five percent chance to win the race.
13. Id. The party, whether it be the Republican or Democrat, had higher than a seventy-five percent chance to win the race.
435 seats were actually competitive.\textsuperscript{14} That is not what Adams had in mind when he spoke of fair and impartial elections.

It is true that some of these districts will never be truly competitive because of the political geography. However, this does not mean that districts should be drawn to suppress voting power. When the districts are drawn to keep a certain party in power, the votes of anyone not in that party are inherently less meaningful. This is voter suppression, plain and simple and the Court should have addressed this long ago.

Part I of this Note will examine the standards for invalidating electoral maps. Part II will provide an overview of the recent decision from the Middle District of North Carolina in the consolidated case \textit{Common Cause v. Rucho}.\textsuperscript{15} Finally, using these sources Part III will propose a standard, which courts can use to examine electoral maps for partisan gerrymandering. Additionally, Part III will suggest possible ways states can avoid a court nullifying their electoral map.

\textbf{PART I}

The most often cited reason why courts refuse to hear redistricting cases is because they present a nonjusticiable political question. The Political Question Doctrine was created in the foundational case, \textit{Marbury v. Madison}.\textsuperscript{16} Despite its name, this doctrine does not solely address politics. It is more of a catch all, for what courts cannot or will not address. The most prevalent aspect of this doctrine for gerrymandering cases is the lack of a judicially discoverable or manageable standard for addressing the issue.\textsuperscript{17} This has allowed courts to refuse to hear

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\textsuperscript{14} Id.

\textsuperscript{15} Common Cause v. Rucho, 318 F. Supp. 3d 777 (M.D.N.C. 2018). The plaintiffs in this case are Common Cause, North Carolina Democratic Party, League of Women Voters of North Carolina, and individuals from each of North Carolina’s thirteen electoral districts. The defendants in this case are Senator Robert Rucho, Senator Philip Berger, Representative David Lewis, Representative Timothy Moore, A. Grant Whitney Jr. as head of the North Carolina State Board of Elections, the board itself, and the State of North Carolina.

\textsuperscript{16} See Marbury v. Madison, 5 U.S. 137 (1803).

\textsuperscript{17} Baker v. Carr, 369 U.S. 186, 217 (1962).
the issues that they believe would be better addressed through the political process. The idea being that if citizens do not approve of partisan gerrymandering, they can vote representatives out of office. The problem with this is gerrymandering is meant to protect these representatives and keep them in office by diluting the voting power of citizens.

Courts have not shied away from addressing gerrymandering when it has been motivated by other reasons than partisan. The “[o]ne man, one vote” rule struck down an Alabama district map, on Equal Protection Clause grounds, when the districts were not substantially equal in population.18 Additionally, the Court has struck down race-based districts or districts that show, by the totality of the circumstances, unequal access to the voting process based on race.19

The Court in Baker allowed a challenge to reapportionment to proceed based on an Equal Protection Clause argument.20 In political question cases it is not the federal judiciary’s relation to the states, it is the relation between the other federal branches.21 The mere fact that a case seeks protection of a political right does not present a nonjusticiable political question.22 Furthermore, the Court held that voters had standing when they could show disadvantage to themselves.23

In Reynolds, the plaintiffs challenged the Alabama electoral map because it had not been redrawn for fifty years and some counties had grown exponentially, resulting in disproportionate representation in the legislature.24 “The fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State.”25 The Court, following the Equal Protection Clause

18. See Reynolds v. Sims, 377 U.S. 533 (1964) (districts need to have roughly the same amount of people).
21. Id. at 210.
22. Id. at 209.
23. Id. at 206.
24. See generally Reynolds, 377 U.S. at 533.
25. Id. at 560-61.
argument, formulated the test for constitutionality of congressional districts as having substantially equal population.\textsuperscript{26} This test is commonly known as “[o]ne man, one vote.”

In \textit{Miller}, the plaintiffs challenged a Georgia district.\textsuperscript{27} Georgia had been required to receive preclearance by the Attorney General or the District Court for the District of Colombia before any change relating to voting regulations.\textsuperscript{28} This preclearance procedure was enacted in the Voting Rights Act (“VRA”) of 1965 and applies to redistricting.\textsuperscript{29} The preclearance mechanism requires that the proposed change will not have the effect or intent to restrict anyone’s right to vote based on their race.\textsuperscript{30}

After two attempts at gaining preclearance Georgia’s third plan was accepted. This plan had three majority-minority districts and the Eleventh District specifically was so heavily gerrymandered that it stretched from Atlanta to Savannah with narrow strips of land connecting the district.\textsuperscript{31} The approved plan spilt twenty-six counties as opposed to its predecessor which spilt only three counties.\textsuperscript{32} The plaintiffs in \textit{Miller} challenged the Eleventh District as a racial gerrymander. In holding that the predominant factor behind drafting the Eleventh District was racially motivated, the Supreme Court invalidated Georgia’s electoral map.\textsuperscript{33} In a nod to \textit{Shaw},\textsuperscript{34} the Court reaffirmed that the shape of districts could be used as evidence of an impermissible gerrymander, though it would not be decisive.\textsuperscript{35}

In \textit{Thornburg}, the plaintiffs challenged the North Carolina state electoral map contending that it diluted black citizens’

\begin{enumerate}
\item Id. at 559.
\item Id. at 905.
\item Id.
\item Id. at 906.
\item Id. at 908.
\item Id. at 908.
\item Miller, 515 U.S. at 928.
\item Id. at 916.
\end{enumerate}
votes, thus violating the VRA.\textsuperscript{36} Specifically, they challenged seven districts, a single member district and six multi-member districts.\textsuperscript{37} The VRA had been amended in 1982 to include a totality of the circumstances test in section two. However, the section did not guarantee proportionally representation equal to the minorities’ proportion of the population.

The totality of circumstances test looked at historical trends of discrimination, bloc voting, and outcomes of previous elections to determine whether the districts had the effect of diluting votes.\textsuperscript{38} The test was violated when members of a protected class had less of an opportunity to participate in the electoral process, and the plaintiff must prove the existence of racial bloc voting, as well as, provide evidence beyond an allegedly dilutive mechanism and a lack of proportional representation.\textsuperscript{39} In this context, racial bloc voting is when the majority race votes as a group to prevent a racial minority’s favored candidate from being elected. The Court agreed with the plaintiffs and held that North Carolina’s electoral map had been drawn so as to dilute the voting power of black citizens.\textsuperscript{40}

The most recent gerrymandering case the Supreme Court heard, \textit{Gill v. Whitford}, challenged the Wisconsin map.\textsuperscript{41} The plaintiffs in that case alleged that the map was drawn to disadvantage Democrats by cracking and packing their voters.\textsuperscript{42} The Court refused to rule on the merits of the case because the plaintiffs did not include a citizen from every district in the state, and they were challenging the map as a whole.\textsuperscript{43} The vote dilution injury is district specific and therefore a voter may only challenge the district where they reside.\textsuperscript{44} To have standing the plaintiff must have suffered an injury as a result of the challenged action. The Court held that the plaintiffs did not have

\textsuperscript{36} See generally \textit{Thornburg}, 478 U.S. at 34.
\textsuperscript{37} \textit{Id.} at 35.
\textsuperscript{38} \textit{Id.} at 46.
\textsuperscript{39} \textit{Id.} at 43.
\textsuperscript{40} See generally \textit{Thornburg}, 478 U.S. at 80.
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.} at 1931.
\textsuperscript{44} \textit{Id.} at 1930.
standing to challenge the entire map because the districts that did not have plaintiffs in the case did not harm anyone bringing suit.\textsuperscript{45}

However, the Court gave hope that they will address political gerrymandering in the future. Justice Kagan in her concurrence stated, “[c]ourts have a critical role to play in curbing partisan gerrymandering.”\textsuperscript{46} Furthermore, the Court laid out how parties must construct their challenge to electoral maps.\textsuperscript{47} If challenging the constitutionality of all the districts in a state, there must be a citizen from every district as a plaintiff.\textsuperscript{48} The Supreme Court recognizes that partisan gerrymandering needs to be addressed. Furthermore, the Court has most likely attempted to devise a judicially manageable standard for courts to evaluate partisan gerrymandering cases. Now all that needs to be done is for the Court to address the challenge of partisan gerrymandering by holding that the practice is counter to the Constitution and enumerate a judicially manageable standard.

PART II

The court in \textit{Common Cause} addresses the challenge of partisan gerrymandering.\textsuperscript{49} In contrast to \textit{Gill}, there were citizens from each of North Carolina’s districts when they challenged the map in \textit{Common Cause}.\textsuperscript{50} The plaintiffs claimed that North Carolina’s map violated the Equal Protection Clause of the Fourteenth Amendment by diluting votes, the map violated the First Amendment rights of the plaintiffs, and the map violated Article I of the constitution by dictating electoral outcomes.\textsuperscript{51} In essence the plaintiffs are contesting that the 2016 map drafted by the Redistricting Committee could have only produced the result through discrimination.\textsuperscript{52} The result was ten

\begin{footnotesize}
\begin{enumerate}
  \item Id. at 1934.
  \item Id. at 1941 (Kagan, J., concurring).
  \item \textit{Gill}, 138 S. Ct. at 1925.
  \item Id. at 1928.
  \item \textit{Common Cause}, 318 F. Supp. 3d at 799.
  \item Id.
  \item Id. at 815.
  \item Id. at 801.
\end{enumerate}
\end{footnotesize}
Republicans and three Democrats were elected to Congress.

Equal Protection Clause

To establish an Equal Protection claim, a plaintiff must trace the discrimination to an official action.\textsuperscript{53} Furthermore, for a partisan gerrymandering claim, the plaintiff must show the drafting body intended to apply partisan considerations in an invidious manner or unrelated to a legitimate legislative objective.\textsuperscript{54} Therefore, a drafting body can take into account historical political data and political considerations, without running afoul of the Constitution. The district court for the Eastern District of North Carolina went so far as to hold that even if a plaintiff established a redistricting plan that was enacted with discriminatory intent and had that effect, it would be constitutionally valid if the discriminatory effects are attributable to the state’s political geography or another legitimate redistricting objective.\textsuperscript{55}

The court in \textit{Common Cause} based their decision that North Carolina’s 2016 redistricting plan violated the Equal Protection Clause on two grounds: first, the expressed sentiments of legislators and studies of the 2016 plan. The brazen attitude the legislators took when drafting the 2016 plan is stunning. The co-chairs of the committee responsible for drawing the map, Representative Lewis and Senator Rucho, instructed Dr. Hofeller* on what the objectives of the map were to be and what criteria to use to achieve those objectives.\textsuperscript{56} Those instructions included the primary objective, to maximize the number of districts that Republicans could win. These instructions were provided to Dr. Hofeller before the committee ever met and decided on what criterion to use in drafting the map. As a result, Dr. Hofeller completed drafting the map before the committee even met, and the draft did not take into account any of the

\textsuperscript{53} \textit{Id.} at 861.
\textsuperscript{54} \textit{Id.} at 862.
\textsuperscript{55} \textit{Common Cause}, 318 F. Supp. at 861.
\textsuperscript{56} Dr. Thomas Hofeller has been responsible for drafting the electoral map for North Carolina for thirty years.

\textsuperscript{56} \textit{Common Cause}, 318 F. Supp. at 803.

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The criteria used to draft the map was intended to give Republican a political advantage in elections and to maintain the super majority of Republican Representatives to Congress. Representative Lewis confirmed this intent when asked about the criterion, freely labeling their efforts as a partisan gerrymander. Presumably, these elected officials were comfortable acknowledging their intent because the Supreme Court has failed to unequivocally state that partisan gerrymandering has no place in American governance.

Second, the court in Common Cause based their Equal Protection finding on studies completed by researchers for the plaintiffs. Dr. Jonathan Mattingly used computer modeling to evaluate all possible drawings of the North Carolina districting map. Next, he eliminated the maps that included non-contiguous districts, maps with population deviations exceeding 0.1 percent, maps that were not reasonably compact under common statistical measures of compactness, maps that did not minimize the number of county and census voting district splits, and maps that did not comply with the VRA.

Then, Dr. Mattingly used data from the 2012 election to generate outcomes for the possible maps. According to the computer models the result from the 2016 plan would only occur less than one percent of the time. The most often result from the models was eight Republicans and five Democrats. This provided statistical evidence that the drafters cracked and packed Democratic voters, and thus diluted their votes.

The plaintiffs also presented findings of Dr. Jowei Chen, as evidence of an invidious partisan gerrymander. Dr. Chen created an algorithm to draw three random sets of a thousand election maps. Similar to Dr. Mattingly, Dr. Chen used voting data in evaluating the partisan performance of the 2016 plan as compared to his samples. However, Dr. Chen’s evaluation used

57. Id. at 869.
58. Id.
59. Id.
60. Id. at 871.
61. Id. at 872.
63. Id. at 874.
the same data that Dr. Hofeller and the Committee used in drafting the 2016 map.

The logic behind Dr. Chen’s samples is that if a computer draws maps based on the accepted traditional criteria and the results from the 2016 map fall outside the results from the computer drafted maps, then the 2016 map cannot be explained by traditional criteria.64 Dr. Chen used different parameters for each set of a thousand computer drawn maps. The first set was based on what he considered the non-partisan criteria adopted by the Committee: population equality, contiguity, minimizing county and VTD splits, and maximizing compactness.65 This first set generated zero results similar to the result of the 2016 map, with the most often occurring result being six or seven Republicans elected.66

The second set of maps were drafted with the same criteria as the first set, with the addition of not pairing incumbents in a single district. The Committee had stated one of its goals was to protect incumbents when drafting the 2016 map, however the 2016 map paired two of the incumbents.67 The results again yielded zero results similar to the 2016 map with the highest occurring result being six or seven Republicans elected.68

Dr. Chen in his third set sought to replicate the number of split counties and paired incumbents rather than minimize them. As with the first and second sets, the results were the same, zero results similar to the 2016 map. “Dr. Chen concluded that ‘[t]he 2016 Plan is an extreme partisan outlier when compared to valid, computer-simulated districting plans’ and that the Committee’s ‘[p]artisan goal—the creation of 10 Republican districts—predominated over adherence to traditional districting criteria.’”69

The Legislative defendants naturally contested the findings of Dr. Mattingly and Dr. Chen, raising the contentions that their

64. Id. at 875.
65. Id. at 875.
66. Id.
67. Id. at 875.
69. Id.
evaluations rest on the assumption that voters vote for the party and not for the individual and that there were implicit criteria that North Carolina’s General Assembly took into account when drafting and approving the 2016 map.\textsuperscript{70} The court rejected the first objection for several reasons. Chief among them, the assumption that Dr. Mattingly and Dr. Chen relied on was the same as Dr. Hofeler, when drafting the 2016 map.\textsuperscript{71} The court rejected the argument that the General Assembly relied on implicit criteria because the criteria were not adopted by the Committee and there is no evidence of the criteria in the legislative record.\textsuperscript{72}

Having concluded that the plaintiffs had established an invidious political gerrymander on a statewide scale, the court next turned to a district by district analysis. Following the example of \textit{Gill}, the court used racial gerrymandering precedent to evaluate the 2016 plan. The court enumerated several factors that are indicative, but not dispositive of, an impermissible consideration predomination. Those factors were a lack of respect for political subdivisions, the shape of the district, and demographic data.\textsuperscript{73} Plaintiffs may also present alternative maps as evidence of an invidious consideration.

After evaluating each of North Carolina’s thirteen districts by these factors the court found that twelve of the thirteen violated the Equal Protection Clause. The map violated the Equal Protection Clause because the intent of the 2016 map was to entrench the Republicans in power and subordinate other parties by cracking and packing those voters, thus diluting their votes. The 2016 map did, in fact, have discriminatory effect by enabling an extreme partisan outcome. Additionally, the results were not attributable to the political geography of North Carolina or other legitimate redistricting considerations.\textsuperscript{74} As such all three prongs of an Equal Protection claim were met: discriminatory intent, discriminatory effect, and lack of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{70} Id. at 877-79.
\item \textsuperscript{71} Id. at 878.
\item \textsuperscript{72} Id. at 879.
\item \textsuperscript{73} \textit{Common Cause}, 318 F. Supp. at 899-900.
\item \textsuperscript{74} Id. at 923.
\end{itemize}
\end{footnotesize}
justification for the discriminatory effect.

First Amendment Claim

“The First Amendment operates as a vital guarantee of democratic self-government.”75 “The First Amendment protects ‘[t]he right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.’”76 Partisan gerrymandering inherently punishes voters of the disfavored party for expressing their views by diluting their voting strength.

The court in Common Cause addressed four lines of precedent applicable to the First Amendment argument presented by the plaintiffs. The First Amendment prohibits the government from favoring or disfavoring particular viewpoints and thus the government cannot regulate speech when the motivating ideology is the rationale for the restriction.77 The test for viewpoint discrimination is whether the government has singled out messages for disfavor based on the viewpoint expressed.78 Viewpoint discrimination is presumed unconstitutional and receives strict scrutiny.79

The next precedent addressed was partisan gerrymandering seeks to dilute certain political speech and thus violates the First Amendment. All too often speech restrictions based on who the speaker is, is a means to control the content.80 In partisan gerrymandering the goal is to give an advantage to one group in expressing its views on a debatable political question.

Additionally, the court addressed the precedent for penalizing people for engaging in political speech. By utilizing historical voting data to invidiously redistrict, a government can

79. Rosenberger, 515 U.S. at 830.
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penalize a group for their past speech. In particular partisan gerrymandering violates the First Amendment interest of not penalizing citizens for their political affiliations, voting history, or expressing a political view.\(^{81}\)

Finally, the court addressed precedent dealing with electoral regulations that have the potential to burden political speech. Any regulation of the electoral process will have some effect on political speech, but the states have a significant interest in this regulation. A court hearing a challenge to an electoral regulation must weigh the injury to First and Fourteenth Amendment rights against the state’s precise interests in the regulation and the extent the interest makes it necessary to burden citizens.\(^{82}\) However, the Court has struck down facially neutral regulations that burdened particular candidates or parties.\(^{83}\)

Having determined that the First Amendment applies to partisan gerrymandering cases, the court in Common Cause, next needed to determine how to test whether a redistricting plan did in fact violate the First Amendment. The League asserted that the same three prong framework from the Equal Protection analysis should be the test: thus, requiring the plaintiff to demonstrate discriminatory intent, discriminatory effect, and a lack of justification for the discriminatory effects.\(^{84}\) In contrast, Common Cause asserted that once a plaintiff has established the redistricting body intended to discriminate against a certain candidate, party, or viewpoint the burden is shifted to the defendants to prove that the regulation is narrowly designed to serve a compelling state interest.\(^{85}\) As the Supreme Court has not established a test for assessing First Amendment challenges to partisan gerrymandering, the court designed the following test: was the districting plan intended to burden entities or individuals who support a disfavored party, did the districting plan burden individuals or entities, and was the government actor’s discriminatory motivation the cause of the First

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\(^{81}\) Vieth, 541 U.S. at 314 (Kennedy, J., concurring).
\(^{82}\) Common Cause, 318 F. Supp. at 926.
\(^{83}\) Id.
\(^{84}\) Id. at 927.
\(^{85}\) Id. at 928.
Amendment burdens imposed by the districting plan.\textsuperscript{86} The court spent little time addressing whether the General Assembly intended to burden non-Republicans by discriminating via the 2016 plan as the court had dedicated considerable time to the subject earlier. It was clear from the studies done and the testimony of the defendants that the intent was to disadvantage non-favored parties and individuals. As such the court concluded that the General Assembly intended to burden the speech and associational rights of non-Republicans.\textsuperscript{87}

In addressing the second prong of their test the court in \textit{Common Cause} considered the defendant’s contention that partisan gerrymandering does not prevent people from voting, running for office, or expressing their political views.\textsuperscript{88} The defendants also asserted that partisan gerrymandering does not chill or deter individuals from engaging in political activity. An action chills if it deters a person of ordinary firmness from exercising their First Amendment rights.\textsuperscript{89} A claimant does not need to show that they forego the activity completely to demonstrate injury.\textsuperscript{90} The plaintiffs presented a great deal of evidence that the partisan gerrymander made voters feel as though their votes did not matter, Republican and Democrat alike; additionally, the plaintiffs experienced significant difficulty in attracting strong candidates, raising money, and getting voters to the ballot box.\textsuperscript{91} All of these events the Supreme Court has recognized as real burdens on the First Amendment rights of citizens.\textsuperscript{92} The court was not swayed by the defendant’s contention that the burden on the plaintiff’s First Amendment rights was minor, as the burdens were numerous and the defendants did not present justification on the same level as the burdens.\textsuperscript{93}

In evaluating the causation aspect of the test, a redistricting

\textsuperscript{86} \textit{Id.} at 929.
\textsuperscript{87} \textit{Id.} at 930.
\textsuperscript{88} \textit{Common Cause}, 318 F. Supp. at 931.
\textsuperscript{89} \textit{Id.}
\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{Id.} at 932.
\textsuperscript{92} \textit{See generally} Anderson v. Celebrezze, 460 U.S. 780 (1983).
\textsuperscript{93} \textit{Common Cause}, 318 F. Supp. at 934.
plan that burdens First Amendment rights can be deemed constitutional if legitimate state interests, that are unrelated to the body’s intent to burden the rights of individuals, justify the First Amendment burdens imposed.94 The 2016 plan was clearly a cause of the burdens on voters, organizers, and candidates. Much the same as the Equal Protection evaluation, the political geography of North Carolina nor any other legitimate redistricting reason justifies the discrimination against non-Republicans. As all three prongs of the court’s test were met, it found the 2016 plan violated the First Amendment.95

Article I

Common Cause contended that the 2016 plan also violated two provisions of the Constitution. First, Section Two of Article I, which states in part that the “House of Representatives shall be composed of Members chosen . . . by the People.”96 Second, the Elections Clause which relates to the time, place, and manner of elections; and that these regulations will be decided by the States, with Congress reserving the ability to alter the states’ regulations.97 The Framers understood that the Elections Clause would delegate to the states the ability to pass procedural regulations for congressional elections.98 States are empowered to prescribe regulations designed to ensure elections are fair and honest, not dictate an electoral outcome, or favor or disfavor a class of candidates.99 That is precisely what partisan gerrymandering seeks to do, dictate an electoral outcome and disadvantage a certain class of candidates.

The court in Common Cause held the 2016 plan exceeded the power delegated by the Elections Clause in three ways: the clause does not empower states to disfavor certain parties or individuals in drawing congressional districts, the plan’s pro-Republican bias violates other constitutional provisions, and the

94. Id. at 935.
95. Id.
plan is an impermissible effort to dictat electoral outcomes.\textsuperscript{100} The Elections Clause was meant as a safeguard against politicians entrenching themselves or their interests over the people.\textsuperscript{101} In contrast the 2016 plan’s stated purpose was to give Republican’s an advantage and maintain the super majority representation in the congressional delegation.

Next, the court reiterated the 2016 plan violated the Equal Protection Clause and the First Amendment, thus violating the Elections Clause.\textsuperscript{102} Additionally, the court found the plan violated Section Two of Article I because a partisan gerrymander inherently removes the power of electing representatives from some of the people and gives it to the drafters of the electoral map.\textsuperscript{103} Finally, the court held the 2016 plan was a successful attempt to dictate electoral outcomes.\textsuperscript{104} They again pointed to the statements made by Senator Rucho, Representative Lewis, and Dr. Hofeller, which indicted the goal for the plan was to cement the composition of the congressional delegation at ten Republicans.\textsuperscript{105} Therefore the court concluded that the Election Clause does not authorize partisan favoritism in redistricting.\textsuperscript{106}

The court in \textit{Common Cause}, laid out a framework for future courts to address the challenge of partisan gerrymandering. This has been done before. Now, it is on the Supreme Court to accept the standard or prescribe one of their own. The one thing that cannot happen is ignoring the challenge, yet again.

\textbf{PART III}

Determining a judicially manageable standard with which to evaluate claims of partisan gerrymander, is the most important next steps. Using the experience from the examined cases above, this Note proposes a two-step test to determine the

\textsuperscript{100} \textit{Common Cause}, 318 F. Supp. at 937.
\textsuperscript{102} \textit{Common Cause}, 318 F. Supp. at 937.
\textsuperscript{103} \textit{Id.} at 940.
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.} at 941.
\textsuperscript{106} \textit{Id.}
constitutionality of election maps. Following the proposed test is what states can do to avoid running afoul of the test.

Judicially Manageable Standard

The proposed test consists of two prongs of analysis, beginning with an examination of the face of the election map for discrimination, and then an examination of the effects of facially neutral election maps. The proposed first prong is: election maps that are drawn with the intention to disadvantage a group of people because of their viewpoint or political affiliation are void. Courts should look to the legislative record and the criteria used to draft the map when looking for facially discriminatory redistricting. If the drafters made statements that one of the goals of drafting the challenged map is to give an advantage to one group over another, that would be evidence of an invidious, unconstitutional redistricting effort. Additionally, if the criteria used when drafting the map involves some notion of partisan or viewpoint advantage, that would be evidence as well.

The second prong of the proposed test is: in view of the totality of the circumstances, the maps that have the effect of diluting votes are void. The factors that a court should look at include, but are not limited to: demographic data, voting data, lack of respect for political subdivisions, the shape of the district, pairing incumbents, and expert studies. These factors will help courts identify cracking and packing of voters, which are indicative of invidious partisan gerrymandering. This evidence would be weighed against legitimate state interests in regulating elections.

Courts should utilize demographic data to understand where the members of different political factions reside. Additionally, this data could be used to show that the congressional delegation is skewed in favor of one party when the number of voters in the different parties are not proportionally represented. This is not to say that it has to be an exact proportion, but if there is outsized representation it could be indicative of an invidious intent on the part of the drafters.

The use of voting data would present similar evidence as demographic data. Additionally, this data could show a chilling
effect of a partisan gerrymandered electoral map. The voting data would provide data on participation in the elections, and thus be evidence that repeatedly one affiliation’s turnout is underperforming.

A lack of respect for political subdivisions would take the form of splitting counties, cities, neighborhoods, or voting districts unnecessarily. Going hand in hand with a lack of political subdivisions is the shape of the district. When someone thinks of a gerrymandered district, they are picturing an oddly shaped district that is not compact. These districts are as easy to identify as the spots on its namesake, a salamander. As such courts should consider the compactness of districts and whether they are contiguous.

Pairing incumbents when redistricting, especially when they have the same affiliation, would provide evidence of an intent to disadvantage that affiliation. However, that is not to say that incumbents should be protected at all costs, as that can lead to partisan gerrymandering. Finally, as with any court case, expert testimony can play a role in assisting the trier of fact in coming to their conclusion. As evidenced by Common Cause, the experts were instrumental in the court’s determination. Expert studies should be welcomed and utilized to rule on the challenged map.

These criteria would be weighed against legitimate state interests. Legitimate state interests could include complying with the VRA, compatibility with the Constitution, integrity of political subdivisions, competitiveness between parties, and other rational state interests. However, the state interest must be compelling and outweigh the burden placed by the regulations in order to justify infringing on voters’ rights.

Undoubtedly Justice Scalia would critique this proposed test as an invitation for judges to rule based on their political affiliation. However, the bedrock of the American judge is an impartial, neutral arbiter. Furthermore, the second prong of the proposed test is a high standard; if there is a discriminatory effect on voting the map, is presumed unconstitutional, unless the defendants can present a compelling state interest for why the map was drawn in that manner. Finally, if the concern over judges ruling based on political preference is overwhelming, the test could be amended to remove the weighing of state interests,
thus removing the balancing test and making it a bright-line test. The test would then be any discriminatory or diluting effect would render the map void. The most important aspect of this issue is that something be done. It is no longer acceptable to simply stand by and let the practice continue.

State Actions to Avoid Nullification

Redistricting should happen after every Census, and naturally states would be concerned about running afoul of the proposed test when they take on redistricting. There are three options for states who want to avoid a challenged map. All end with legislature approval and would need to have nonpartisan criteria for the drafting process.

First, the state’s supreme court or retired judges should draft the map. Pennsylvania’s Supreme Court recently drafted the congressional map after the legislature and the governor could not agree on a map that did not violate the state’s constitution. Generally, judges have a reputation and an expectation for neutrality; this would be an asset to generating confidence in the process and would make it less likely that this commission would draft a discriminatory partisan map. The drawback with this approach is if the sitting state supreme court drafted the map, they would not be available to hear a challenge to the map.

Next, the governor could appoint a nonpartisan commission to draft the election map. This is a popular option that has been implemented in several states across the nation. However, these commissions still have the potential to produce a partisan gerrymander. The determining factors for a potential partisan gerrymander result are the composition of the commission and the criteria they use to guide their drafting efforts.

Finally, state legislatures can continue to draft the election maps. They must be aware of the precedent that their map will be voided if they intend to or in fact produce a partisan advantage that is not attributable to the political geography of

the state. This option contains the highest likelihood of discriminatory partisan intentions playing a role in the drafting of a map, as the politicians will be the drafters. However, that is not to say all politicians want to subvert the will of the people via a gerrymander. The state legislature would need to make a good faith effort to draft an election map that does not give a partisan advantage to one group over others. A good faith effort would be not allowing politics to play a role in the drafting of electoral maps.

“We must meet the challenge rather than wish it were not before us.”108 Justice Brennan famously stated this in a speech, but the next sentence he spoke is of equal importance to partisan gerrymandering: “The challenge is essentially, of course, one to the capacity of our constitutional structure to foster and protect the freedom, the dignity, and the rights of all persons within our borders, which it is the great design of the Constitution to secure.”109 Justice Brennan may not have been speaking about partisan gerrymandering, but this practice presents a clear threat to the freedom, the dignity, and the rights of citizens. It is time that the Supreme Court addresses the challenge before them and finally take on partisan gerrymandering. The goal is not to have every race be competitive; that is the responsibility of the candidates, parties, and organizers. The goal is to have a level playing field where the government does not interfere with the People’s power to choose their elected officials. It is long past due time that the Supreme Court does its part in ensuring this outcome. Thankfully they have an opportunity to correct 230 years of inaction.

109. Id.