

THE NONPARTISANSHIP PRINCIPLE

*By Richard E. Levy**

This essay advances a straightforward proposition: partisan political advantage is not a legitimate purpose for election rules, requirements, or practices that burden the right to vote. One would think that this “nonpartisanship principle” is self-evident. After all, the essence of representative government is the selection of government officials through a democratic process comprised of free and fair elections. Free and fair elections must operate under rules that give voters equal opportunities to cast their ballots and elect the candidates of their choice and that give opposing candidates equal opportunities to garner votes and secure election. Rules, requirements, or practices whose purpose and effect is to skew the electoral process to the advantage of one candidate, faction, or party are fundamentally inconsistent with the premise of democratic elections.

While the nonpartisanship principle seems self-evident and fundamental, even a casual observer of our elections cannot help but notice that the process is replete with rules, requirements, or practices that have the purpose and effect of obtaining political advantage for the party in power. These days, for example, parties in power use sophisticated computer software to gerrymander legislative districts in their favor, with remarkable effectiveness. Likewise, many states have also recently adopted various policies and practices, such as voter ID laws, voter registration requirements, or reduction of voting opportunities, whose apparent purpose is to suppress voting by classes of voters who are likely to vote for the opposing party.

It is hardly surprising that partisan elected officials would seek to gain political advantage through manipulation of electoral rules, regulations, and practices. It is more surprising that the law does not place greater constraints on their ability to do so. In particular, while the nonpartisanship principle is fairly implicit in the United Supreme Court’s voting rights jurisprudence, the Court has taken a hands-off approach when it comes to enforcement. Thus, for example, the Court has declined to recognize or enforce any constitutional limits on partisan political gerrymandering (provided that districts comply with the one person, one vote principle or discriminate on the basis of race).¹ Likewise, the

* J. B. Smith Distinguished Professor of Constitutional Law, University of Kansas School of Law. I wish to thank the Journal Editors for the opportunity to contribute this essay and Justine Koehle, Class of 2017, for valuable research assistance. I also thank the other participants in the symposium for a lively and informative discussions of these important issues.

1. The focus in this article is on constitutional doctrine, rather than the Court’s interpretation and enforcement of the Voting Rights Act. Because the Act is primarily focused on racial discrimination in respect to voting rights, *see* 52 U.S.C. § 10301 (2012) (prohibiting the abridgment of the right to vote “on account of race or color”), it does not directly address the problem of political partisanship. Nonetheless, there is some overlap between the two, insofar as racial groups often tend to favor one or the other political party. In particular, the Court’s recent decision in *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013), which rendered the preclearance

Court has largely declined to inquire into the partisan motivations behind voter ID laws and other requirements that tend to suppress particular classes of voters.

In this essay, I will argue that it is time to take the nonpartisanship principle more seriously, both as a constitutional and policy matter. I shall begin, in Part I, by discussing the constitutional foundations of the nonpartisanship principle in the Court's First and Fourteenth Amendment jurisprudence. In Part II, I will critically examine the Court's refusal to enforce the nonpartisanship principle in the context of partisan political gerrymandering, and discuss its impact on the electoral process. Part III considers, in turn, photo ID and other requirements that tend to suppress the votes of particular groups on the basis of their partisan alignment. Finally, Part IV concludes that the best way to enforce the nonpartisanship principle is to take control over elections away from partisan elected officials.

I. THE CONSTITUTIONAL FOUNDATIONS OF THE NONPARTISANSHIP PRINCIPLE

In this part of the essay, I will discuss the constitutional basis of the nonpartisanship principle. As stated above, I believe that the principle is inherent in the concept of democracy because election requirements, rules, or practices that have the purpose and effect of favoring one party by burdening voters who favor opposing parties undermine the integrity of representative elections. In constitutional terms, the nonpartisanship principle is fairly implicit in the Court's voting rights jurisprudence, which has both First Amendment and equal protection components.

A. The First Amendment and Political Expression

The First Amendment contains a number of provisions designed to protect freedom of expression.² The Free Exercise and Establishment Clauses, which protect freedom of religious expression, are not at issue here. The freedom of speech and press and the rights of petition and assembly protect freedom of political expression (as well as artistic, scientific, and other forms of expression). Election requirements, rules, or practices that have the purpose and effect of favoring one party over its opponents violate these political freedoms.

1. Freedom of Speech

First, partisan electoral rules violate freedom of speech. As developed and explained by the Supreme Court, freedom of speech and press are essential to democracy, because people need to be able to freely discuss the government, the

requirement of act unenforceable, made it easier for states to adopt partisan voting rules. *See infra* notes 112–13 and accompanying text (discussing *Shelby County* and its aftermath).

2. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”).

candidates, and the issues in order to cast an informed ballot.³ Thus, for example, in the (in)famous *Citizens United* decision,⁴ the Court proclaimed that:

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.⁵

Accordingly, political speech, especially speech that is integral to the electoral process, is at the core of the First Amendment and receives the highest degree of First Amendment protection.

Under the Court's First Amendment doctrine, laws that turn on the viewpoint of political speech or the class of political speaker are especially dangerous to these democratic principles, and can only be sustained if they survive "strict scrutiny." Strict scrutiny requires that the end or purpose of the regulation is a compelling governmental interest and the means chosen to achieve this purpose is "necessary" and/or "narrowly tailored" to meet that purpose.⁶ Thus, for example, it is generally understood that freedom of speech and press were, in part, a response to the British law of seditious libel that prohibited criticism of the crown, and that the state could not pass a law banning criticism of the government in power.⁷ More broadly, the Court's free speech

3. This theme is central to the influential concurring and dissenting opinions of Justices Holmes and Brandeis. *See, e.g.,* *Whitney v. California*, 274 U.S. 357, 373–80 (1927) (Brandeis, J., concurring).

4. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (invalidating campaign finance regulation prohibiting corporations from using their general treasury funds to make contributions and expenditures on behalf of candidates). Although the holding of *Citizen's United* may be controversial and contested by some, its premise that political expression is essential to democracy is not.

5. *Id.* at 339 (internal quotation marks and citations omitted).

6. *See, e.g.,* *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011) ("Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest."); *R. A. V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (concluding that hate speech ordinance was not "narrowly tailored to serve compelling state interests"); *Simon & Schuster, Inc. v. Members of State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (concluding that because the state's Son of Sam law "establishes a financial disincentive to create or publish works with a particular content . . . the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."). Although strict scrutiny is sometimes described as "fatal in fact," regulations of speech occasionally survive it. *See, e.g.,* *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding 100 foot buffer zone around polling places in which electioneering was prohibited on election day).

7. Ironically, the Alien and Sedition Acts, which are now recognized as a clear violation of the First Amendment, were enacted not long after the ratification of the Bill of Rights. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history."). The relationship between the First Amendment and political parties was recognized early on in the evolution of doctrine. *See, e.g.,* *De Jonge v. Oregon*, 299 U.S. 353 (1937) (holding that the First Amendment, as applied to the states via the Due Process Clause of the Fourteenth Amendment,

jurisprudence demands neutrality with respect to political viewpoints; i.e., it reflects the nonpartisanship principle.⁸

To the extent that election requirements, rules, and practices regulate speech itself, it is clear that the First Amendment demands neutrality with respect to political viewpoints. Thus, for example, the First Amendment applies to campaign finance restrictions on contributions, expenditures, and advertising.⁹ Although the Supreme Court has not definitively addressed the issue, it is reasonable to assume that the act of casting a vote is itself a form of speech.¹⁰ After all, “[w]hen a citizen steps into the voting booth to cast a vote on a matter properly on the ballot, he or she intends to send a message in support of or in opposition to the candidate or ballot measure at issue.”¹¹ Accordingly, laws that target particular voters because of their tendency to vote for particular candidates or parties are a form of viewpoint discrimination concerning political speech.

2. Freedom of Association

In addition, the Court has recognized freedom of association as a “penumbral” First Amendment right related to the protection of speech, petition, and assembly. In the seminal decision of *NAACP v. Alabama*,¹² the Court explained:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the

protected the right to speak to at a peaceful assembly of the communist party).

8. See, e.g., *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 682 (1988) (“To be consistent with the First Amendment, the exclusion of a [political candidate] from a [debate which was a] nonpublic forum must not be based on the speaker’s viewpoint and must otherwise be reasonable in light of the purpose of the property.”).

9. See, e.g., *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (applying strict scrutiny to invalidate law regulating political expenditures by corporations); *Burson v. Freeman*, 504 U.S. 191 (2004) (applying strict scrutiny but upholding “buffer zone” banning electioneering near polling places on day of elections).

10. In *Burdick v. Talkushi*, the Court upheld a state ban on write-in votes, in the process stating that “the function of the election process is ‘to winnow out and finally reject all but the chosen candidates,’ ” and that “[a]ttributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.” 504 U.S. 428, 438 (1992) (citations omitted). Nonetheless, *Burdick* assumed that the flat ban on write-ins was neutral and nonpartisan, so its analysis is not controlling on whether the nonpartisanship principle applies to state action restricting the casting of votes on partisan grounds. See *id.* (“[W]e have repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls . . . [a]nd there is nothing content based about a flat ban on all forms of write-in ballots.”).

11. *Turner v. D.C. Bd. of Elections and Ethics*, 77 F. Supp. 2d 25, 31 (D.D.C.1999) (concluding that the results of ballots cast and tabulated are protected political speech; cf. *Voting for America, Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013) (recognizing voter registration activities as political speech).

12. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.¹³

This right of association protects the autonomy of the political parties in their internal operations.¹⁴ Nonetheless, parties serve a quasi-public role in the electoral process and so are also subject to constitutional requirements (such as equal protection)¹⁵ and reasonable laws and regulations concerning the conduct of primaries.¹⁶

When it comes to general elections, freedom of association means that rules, requirements, and practices cannot target particular parties for unfavorable treatment. Thus, for example, in *Williams v. Rhodes*,¹⁷ the Court invalidated Ohio laws that made it “virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties.”¹⁸ The Court explained:

The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State’s constitutional power to regulate can justify limiting First Amendment freedoms.¹⁹

If it is impermissible to impose differential burdens on parties’ access to the ballot, it is also impermissible to impose requirements that make it more difficult for supporters of particular parties to register to vote or to cast ballots for the candidates of their choice.

13. *Id.* at 460 (citations omitted); *see also* *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986) (“Restrictions upon the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the right of qualified voters to cast their votes effectively.”).

14. *See, e.g., Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214 (1989) (invalidating state law regulating internal operations of political parties and banning them from endorsing or opposing candidates).

15. *See* *Terry v. Adams*, 345 U.S. 461 (1953) (invalidating a whites-only primary held by the “Jaybird” party, whose endorsement effectively determined the outcome of elections in the state, because the conduct of elections was a public function).

16. *See, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (upholding ban on candidates’ appearing on the ballot for more than one political party as a reasonable measure to prevent voter confusion); *Storer v. Brown*, 415 U.S. 724, 735 (1974) (upholding state law that denied ballot access to independent candidates recently associated with a political party in light of the state’s interest in preserving the integrity of its political processes).

17. *Williams v. Rhodes*, 393 U.S. 23 (1968).

18. *Id.* at 25.

19. *Id.* at 31 (internal quotations and citations omitted); *see also* *Kusper v. Pontikes*, 414 U.S. 51 (1973) (invalidating state law prohibiting voters from voting in primary of one party if they voted in the primary of a different party in the previous election cycle).

B. Equal Protection

In addition to First Amendment doctrine, the nonpartisanship principle is implicit in the Supreme Court's equal protection jurisprudence as it relates to the right to vote. Broadly speaking, this jurisprudence imposes two kinds of restrictions on requirements, rules, and practices that impact the right to vote. First, these requirements, rules, and practices may not discriminate by restricting the right to vote based on impermissible classifications. Second, these requirements, rules, and practices may not impose excessive burdens on the right to vote without sufficient justification. The nonpartisanship principle is fairly implicit in the Court's equal protection jurisprudence concerning the right to vote, although it has declined to apply the nonpartisanship principle to political gerrymandering.

1. Discrimination

Various constitutional provisions prohibit discrimination regarding the right to vote. First, several specific amendments prohibit the denial or abridgment of the right to vote on account of race,²⁰ sex,²¹ or age for those at least eighteen years old.²² In addition, and more relevant for purposes of this discussion, the Equal Protection Clause of the Fourteenth Amendment (and analogous principles applicable to the federal government under the Fifth Amendment's Due Process Clause), also prohibit improper forms of discrimination respecting voting rights.²³

Improper discrimination may appear in relation to the exercise of the franchise (e.g., discriminatory voter registration requirements or discriminatory requirements for casting ballots) or in the way that votes are counted or that representation is structured (such as discriminatory districting or vote dilution). In dealing with discrimination claims, it is clear that some differentiation between racial and political discrimination is needed. For example, it is clearly unconstitutional for a political party to deny the right to cast a ballot in its primary elections to otherwise qualified voters because they are black,²⁴ but equally clear that the party may deny members of opposing parties the right to vote in its primary.²⁵ Nonetheless, a state could not impose similar restrictions

20. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.").

21. U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.").

22. U.S. CONST. amend. XXVI, § 1 ("The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age.").

23. *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960) (applying both equal protection and Fifteenth Amendment to invalidate racial gerrymandering).

24. *Smith v. Allwright*, 321 U.S. 649 (1944).

25. Indeed, the right to do so is protected, at least to some extent, against state interference. *See supra* notes 12–14 and accompanying text (discussing freedom of association); *see generally* *Clingman v. Beaver*, 544 U.S. 581 (2005) (upholding state's semi-closed primary law limiting primaries to members of political party and independent voters); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) (invalidating state law requiring closed primaries as a violation

on voting in general elections, such as limiting the franchise to voters affiliated with a particular political party or banning voters with certain political affiliations.²⁶

The Court has long recognized that, even if ballots are cast without restriction, the right to vote can be denied by the manner in which votes are counted.²⁷ This concern applies in both excessive burden cases, discussed below, and discrimination cases, such as racial gerrymandering, which are the focus here.²⁸ For constitutional purposes, only intentional discrimination is prohibited, so that facially neutral rules, requirements or practices that have a disparate impact are only invalid if discriminatory intent can be proved.²⁹ Although racial gerrymandering is inherently suspect and usually invalid, political gerrymandering is not, except perhaps in extreme cases.³⁰

This difference came into sharp relief in *Hunt v. Cromartie*,³¹ which held that summary judgment was improper in a racial gerrymandering case because there was a factual issue as to the intent or purpose behind an obviously

of political parties' freedom of association right to include independent voters).

26. *Cf. Williams v. Rhodes*, 393 U.S. 23, 31 (1968) ("the right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes").

27. *See, e.g., United States v. Classic*, 313 U.S. 299, 315 (1941) ("Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted."); *United States v. Mosley*, 238 U.S. 383, 386 (1915) (stating that "the right to have one's vote counted is as open to protection . . . as the right to put a ballot in a box").

28. *See Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (invalidating city boundaries that had been gerrymandered into an irregular twenty-eight-sided figure that excluded all but a few of its 400 black voters without excluding a single white voter). For a more recent case dealing with this sort of claim, see *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) (concluding that lower court had applied improper standards in rejecting racial gerrymandering claim). The prohibition of racial gerrymandering applies not only to efforts to suppress minority representation, but also to racial gerrymandering intended to increase minority representation. *See, e.g., Bush v. Vera*, 517 U.S. 952 (1996) (invalidating racially gerrymandered district intended to increase minority representation because it failed strict scrutiny); *Shaw v. Hunt*, 517 U.S. 899 (1996) (invalidating redistricting plan designed to increase minority representation because it failed strict scrutiny); *Miller v. Johnson*, 515 U.S. 900 (1995) (invalidating redistricting plan designed to create several black districts so as to ensure minority representation); *Shaw v. Reno*, 509 U.S. 630 (1993) (holding that any redistricting plan intended to classify or sort voters on the basis of race must survive strict scrutiny).

29. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (concluding that retention of at-large voting for city council did not discriminate against racial minorities). Under § 2 of the Voting Rights Act, however, proof of intent is not required because the act prohibits any rule, requirement, or practice that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . ." 52 U.S.C. § 10301(a) (2015); *see also id.* § 10301(b) (specifying that a violation of subsection (a) occurs if "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice").

30. *See Vieth v. Jubelirer*, 541 U.S. 267 (2004). For further discussion, see *infra* notes 64–78 and accompanying text.

31. *Hunt v. Cromartie*, 526 U.S. 541 (1999).

gerrymandered district. Critically, the state defended the district on the ground that it was drawn to create a strong Democratic district. Thus, the Court reasoned “[o]ur prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact.”³²

Under *Hunt v. Cromartie*, one way to defend against a *racial* gerrymandering case is to claim that the racial impact of districting is an incidental side effect of *political* gerrymandering. As I will explain more fully below, I believe this premise is wrong.³³ For present purposes, the key point is that the nonpartisanship principle is implicit in cases dealing with the casting of ballots in general elections, but the principle does not apply to political primaries, for obvious reasons, or to political gerrymandering claims, for reasons that are less obvious. Although the Court’s discrimination cases are somewhat ambiguous, as discussed in the following section the Court’s cases dealing with impermissible burdens on the right to vote are not.

2. Impermissible Burdens

The Supreme Court has recognized the right to vote as “fundamental” for purposes of equal protection analysis because it is essential to democracy and preservative of other rights. Thus, for example, in *Harper v. Virginia State Board of Elections*,³⁴ the Court held that a state poll tax violated the Equal Protection Clause because the payment or nonpayment of a tax was unrelated to legitimate voter qualifications.³⁵ This line of cases stands for the proposition that rules, requirements, or practices that impose excessive burdens on the right to vote violate equal protection. Although the trigger in such cases is a burden on the right to vote, the principal concern is preserving equality of voting rights and the nonpartisanship principle is fairly implicit in the Court’s analysis.

As noted above, the right to vote encompasses both the right to cast ballots and the right to have those ballots count. Accordingly, just as impermissible discrimination claims may challenge restrictions on voting or the manner in which votes are tabulated, there are two kinds of impermissible burden claims. First, rules, requirements, or practices that make it harder for people to cast their ballots for the candidates of their choice may violate the right to vote. Second, rules, requirements, or practices that make people’s votes count for less (vote dilution) also violate the right to vote.

Harper is an example of the first kind of case; the imposition of a poll tax made it harder for people, especially poor people, to cast their votes. Other kinds

32. *Id.* at 551; *see also* *Bush v. Vera*, 517 U.S. 952, 964 (1996) (plurality opinion) (finding racial gerrymandering and applying strict scrutiny, but observing that “[w]e have not subjected political gerrymandering to strict scrutiny.”).

33. *See generally* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002) (arguing that both racial and political gerrymandering should be treated as suspect and subject to judicial review).

34. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 672 (1966).

35. The Twenty-Fourth Amendment, which explicitly prohibits poll taxes, applies only to federal elections.

of rules, regulations, or requirements that impose burdens on voting include voter ID requirements, restrictions on voter registration, or providing an insufficient window of opportunity to vote (especially when some precincts get an insufficient number of working voting machines).

Even if people are able to cast their votes without restriction, the right to vote is also burdened if those votes are not counted or do not receive equal weight.³⁶ Thus, for example, in *Reynolds v. Sims*,³⁷ the Court held that the Equal Protection Clause incorporates the one person, one vote principle. Under this principle, legislative or other electoral districts must be of roughly equal population, because substantial differences in population effectively dilute the weight of votes in more populous districts.³⁸ Courts also sometimes speak of “vote dilution” as a result of gerrymandering districts of roughly equal population, if the effect is to submerge the votes of some classes of voters so as to prevent them from achieving representation in the political process.³⁹ In any event, it is well established that partisan political advantage is not a valid justification for departing from the one person, one vote principle.⁴⁰

The framework for analyzing burdens on the right to vote is not entirely clear.⁴¹ Although the right to vote is fundamental, not all burdens on the right to

36. Concerns about the accuracy of voting machines, discussed by Professor Clarkson, would fall under this category. See generally Stephanie Philips, *The Risks of Computerized Election Fraud: When Will Congress Rectify a 38-Year-Old Problem?* 57 ALA. L. REV. 1123 (2006).

37. *Reynolds v. Sims*, 377 U.S. 533, 566 (1964); see also *Bd. of Estimate of New York v. Morris*, 489 U.S. 688 (1989); *Brown v. Thomson*, 462 U.S. 835 (1983); *Abate v. Mundt*, 403 U.S. 182 (1971); *Avery v. Midland Cty.*, 390 U.S. 474 (1968).

38. This rule does not apply to the United States Senate or the Electoral College, both of which violate the principle by diluting the weight of votes in more populous states. In *Reynolds*, the Court concluded that these deviations from one person, one vote, which are explicit in the Constitution itself, did not negate the principle as a general requirement of equal protection. 377 U.S. 533 (1964).

39. See, e.g., *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) (stating that “multimember districts may be vulnerabl[e] if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized”).

40. See *Cox v. Larios*, 542 U.S. 947, 949 (2004) (Stevens, J., joined by Breyer, J., concurring in judgment without opinion affirming lower court) (“The District Court correctly held that the drafters’ desire to give an electoral advantage to certain regions of the State and to [democratic] incumbents (but not incumbents as such) did not justify the conceded deviations from the principle of one person, one vote.”).

41. In *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008). The plurality and concurring Justices disagreed as to the proper statement of the test. According to the plurality, authored by Justice Stevens and joined by the Chief Justice and Justice Kennedy, “a court evaluating a constitutional challenge to an election regulation [must] weigh the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Id.* at 190 (internal quotations omitted). Under this approach, the level of scrutiny varies depending on the extent of the burden. In contrast, the concurring opinion, written by Justice Scalia and joined by Justices Alito and Thomas, rejected this approach as too open ended, favoring instead a “two-track approach” under which “[s]trict scrutiny is appropriate only if the burden is severe.” *Id.* at 205 (internal quotations and brackets omitted). Under this approach, the first step is to decide whether a challenged law severely burdens the right to vote.” *Id.* If so, then strict scrutiny applies; if not, the rationale basis test applies. This difference in approach need not detain us here, however, because neither inherently resolves the question whether partisan advantage is a sufficient justification—even for burdens that are not severe.

vote will trigger “strict scrutiny.”⁴² When the burden is not severe, the Court applies the rational basis test, and will uphold reasonable restrictions that further the state’s legitimate interest in preserving the integrity of the electoral process, preventing voter confusion, and related interests.⁴³ Nonetheless, even when strict scrutiny does not apply, the Supreme Court apparently regards partisan political advantage as an illegitimate basis for laws that impose non-severe burdens.

Thus, for example, in *Crawford v. Marion County*,⁴⁴ the Court upheld Indiana’s voter ID law because it did not impose severe burdens on the right to vote and was a reasonable requirement to prevent voter fraud. Nonetheless, *Crawford* at least implicitly recognized that partisan political advantage would not be a legitimate purpose for voter ID laws. Although both the plurality and concurrence agreed that the voter ID law imposed only minor burdens, the plurality (at least) seemed to acknowledge that the law would be invalid if the plaintiffs’ could prove that it was motivated by partisan political advantage.⁴⁵ As will be discussed more fully below, however, the plurality was quick to discount this possibility, so long as the law also served neutral purposes.⁴⁶

Ironically, perhaps, the Court’s decision in *Bush v. Gore*⁴⁷ also seems to rest on the nonpartisanship principle.⁴⁸ In this well-known case, the Court brought a halt to a recount ordered by the Florida Supreme Court in the 2000 presidential election. The Court stated that, “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment,

42. See, e.g., *Reynolds*, 377 U.S. 533, 562 (1964) (“Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized”). For a statement of strict scrutiny, see *supra* text at note 6.

43. This approach was apparently borrowed from cases involving ballot access and freedom of association. See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189–91 (2008) (plurality opinion) (relying on ballot access cases to support the conclusion that incidental burdens on the right to vote do not trigger strict scrutiny). I believe that applying this approach to laws burdening a voters’ ability to cast his or her ballot ignores important differences between freedom of association claims and regulation of ballot access, on the one hand, and laws that burden the right to vote itself. Nonetheless, whether the application of this approach in *Crawford* was proper is not material to my thesis in this paper, so I will take it as a given.

44. *Id.*

45. *Id.* at 203 (“It is fair to infer that partisan considerations may have played a significant role in the decision to enact [the voter ID law]. If such considerations had provided the only justification for a photo identification requirement, we may also assume that [the law] would suffer the same fate as the poll tax at issue in *Harper*.”).

46. See *infra* notes 125–35 and accompanying text (arguing that Court should take this concern more seriously).

47. *Bush v. Gore*, 531 U.S. 98 (2000).

48. I say ironically because, to many observers, the decision in the case itself seems to have been driven by partisan politics. See, e.g., ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* (2001) (“[T]he decision in the Florida election case may be ranked as the single most corrupt decision in Supreme Court history, because it is the only one that I know of where the majority justices decided as they did because of the personal identity and political affiliation of the litigants.”); Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1435–41 (2001) (suggesting that if the roles of parties in the case had been reversed, the outcome of the case would have been different).

value one person's vote over that of another."⁴⁹ The Court concluded that the recount violated this principle because there were no clear rules for determining the intent of the voter in cases in which ballots had been improperly marked.⁵⁰ The Court also expressed concern that the procedures for the recount did not provide any "assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied."⁵¹

Although the decision focused on "arbitrary" differences in treatment, lurking in the background was the concern that the recount process was intentionally skewed to favor the Democratic candidate, Al Gore.⁵² If the counting rules were truly arbitrary, then they would neither discriminate against an identifiable group nor threaten the integrity of the election—the errors that might result would be randomly distributed across parties and candidates and the net result would not alter the outcome of the election.⁵³ In contrast, however, if the recount rules required that doubtful votes for Al Gore would be counted, but doubtful votes for George W. Bush would not be, such a rule would violate equal protection and undermine the integrity of the election.⁵⁴

3. Naked Preferences

A final equal protection doctrine that supports the nonpartisanship principle is the rule against what Professor Cass Sunstein has called "naked preferences"; that is, laws that take from A and give to B for no reason other than B's political power.⁵⁵ The prohibition against naked preferences has application under the so-

49. 531 U.S. at 104–05.

50. *See id.* at 106–07.

51. *Id.* at 109.

52. *See, e.g.,* Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219, 1229 (2002) ("[T]he hand recounts would be supervised by local elected officials, and the chances that such officials would be biased in Gore's favor (or at least not biased in Bush's favor) would be highest in the most heavily Democratic counties."); Jonathan K. Van Patten, *Making Sense of Bush v. Gore*, 47 S.D. L. REV. 32, 66–67 (2002) ("Given the logistical headstart for the manual recount with the ballots from the heavily Democratic counties and the Court's approval of including any 'legal' vote discovered at any point up to the deadline, the Florida court's decision was extremely favorable to Gore's chances, if not intentionally so."); Ronald D. Rotunda, *Yet Another Article on Bush v. Gore*, 64 OHIO ST. L.J. 283, 319 (2003) ("When the people were counting, they knew how many more votes the Vice President would need to catch up, and they changed the way they counted votes with this knowledge in mind."); Kim Lane Scheppele, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1361, 1428 (2001) ("Gore could challenge the vote tallies precisely in the places where he was most likely to pick up votes while ignoring counties that might have had more votes for Bush, leading to the cynical view that Gore wanted not to count every vote, but to count every Democratic vote.").

53. *See generally* Richard Briffault, *Bush v. Gore as an Equal Protection Case*, 29 FLA. ST. U. L. REV. 325 (2001) (criticizing *Bush v. Gore's* application of equal protection doctrine on the ground that variations in rules for counting votes did not discriminate against any identifiable class of voters, threaten the integrity of the elections, or deny effect to any valid vote).

54. *See generally* Jason C. Glahn, *Bush v. Gore from Behind a Veil of Ignorance: Why the Result of Election 2000 Was Ethical (and Legal Too)*, 2 GEO. J. L. & PUB. POL'Y 615 (2002) (defending the outcome in *Bush v. Gore* by reference to a Rawlsian "veil of ignorance" that prevents the adoption of rules intended to produce particular electoral outcomes).

55. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (identifying various constitutional provisions incorporating this overarching constitutional

called rational basis test that applies to equal protection cases in which neither suspect classifications nor burdens on fundamental rights require the application of heightened forms of scrutiny. In such cases, the Court has repeatedly held that “animus” against a politically unpopular group is not a legitimate purpose to sustain a law.⁵⁶

Laws designed to burden one political party in order to favor another would seem to be a plain violation of the prohibition against naked preferences. After all, these laws take from one political party and its supporters in order to benefit another party and its supporters solely to gain political advantage. In this context, “animus” may not be an accurate descriptor,⁵⁷ but the essential point remains: naked political advantage is not a legitimate governmental purpose.

II. POLITICAL GERRYMANDERING

Gerrymandering is a means of vote-dilution by carefully designing legislative or other representative districts so as to make it more difficult for targeted groups to elect candidates of their choice.⁵⁸ By “cracking”⁵⁹ a group’s votes, be it a racial minority or members of a political party, a districting plan can prevent the group from having a majority in any district and so prevent it from electing a representative. Conversely, by “packing”⁶⁰ the group’s votes into a few districts with an overwhelming majority of that group, a districting plan can reduce the number of representatives that group would be able to elect. With advances in technology, sophisticated computer programs allow those in control of the districting process to crack and pack districts aggressively so as to

principle).

56. *See, e.g.,* *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (“The Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.”) (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534–535 (1973)); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”) (quoting *Moreno*); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47 (1985) (“Furthermore, some objectives—such as ‘a bare ... desire to harm a politically unpopular group,’—are not legitimate state interests.”) (quoting *Moreno*).

57. Nonetheless, in today’s political climate, hyperpartisanship arguably leads to animus, as suggested by the tone of our political discourse.

58. The term was coined in 1812 as a response to a legislative district drawn in Massachusetts under Governor Eldridge Gerry, which resembled a salamander. For general discussion of the history of gerrymandering in the United States, see GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY’S SALAMANDER, THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* (2002); ELMER CUMMINGS GRIFFITH, *THE RISE AND DEVELOPMENT OF THE GERRYMANDER* (1907).

59. “Cracking,” as the term implies, refers to the practice of dividing a block of voters across multiple districts to prevent that block from having a majority in any district. *See, e.g.,* *Shaw v. Reno*, 509 U.S. 630, 670 (1993) (describing “the fragmentation of a minority group among various districts ‘so that it is a majority in none,’” *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993), otherwise known as ‘cracking’ ”).

60. *See, e.g., id.* (describing the “ ‘concentration of [minority voters] into districts where they constitute an excessive majority,’ ” *Thornburg v. Gingles*, 478 U.S. 30, 46, n. 11 (1986), also called ‘packing’ . . . ”) (brackets in original).

distort the results of elections.⁶¹ These sorts of tactics are clearly unconstitutional when used to dilute the voting strength of racial minorities, but they apparently are constitutionally permissible when used to dilute the voting strength of minority political parties.⁶² In my view, political gerrymandering of this sort is contrary to the nonpartisanship principle and should be per se invalid.⁶³

A. *The Constitutionality of Political Gerrymandering*

As suggested above, the Court's treatment of political gerrymandering is something of an anomaly, insofar as the Court apparently accepts partisan political advantage as a valid basis for drawing political boundaries that diminish the right to vote.⁶⁴ Although the Court has never fully explained its reasoning on this issue, it apparently regards partisan maneuvering as an inherent feature of the districting process and so is reluctant to treat political gerrymandering as presumptively invalid.⁶⁵ Although the Court has refused to close the door on political gerrymandering claims entirely (ruling that they are not nonjusticiable political questions), such claims are never successful.⁶⁶

The Court has addressed political gerrymandering claims in three cases, *Davis v. Bandemer*,⁶⁷ *Vieth v. Jubelirer*,⁶⁸ and *League of United Latin American*

61. See, e.g., Joann D. Kamuf, Note, *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, 169–70 (2005):

A partisan gerrymander aims to increase partisan advantage in as many districts in a state as possible, "wasting" the maximum number of votes of the opposition party as possible by "packing" and "cracking" districts. Legislators design partisan gerrymanders so that a "disadvantaged party must poll more votes than the party in control of the districting process in order to win a given percentage of the legislative seats.

62. Gerrymandering does not violate the one person, one vote requirement, so long as the resulting districts are of equal size.

63. See generally Guy-Uriel Charles, *Democracy and Distortion*, 92 *CORNELL L. REV.* 601 (2007) (arguing for aggressive judicial review to prevent partisan political gerrymandering).

64. See Adam Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 *U. PA. J. CONST. L.* 1001, 1003 (2005) ("[A] review of the relevant case law suggests that politics is not a permissible justification for even minor population deviations between districts in state and local legislatures, even if it is almost always a permissible cause of gerrymanders.").

65. As Justice O'Connor explained:

The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level. Thus, the legislative business of apportionment is fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out—by the very parties that are responsible for this process—present a political question in the truest sense of the term.

Davis v. Bandemer, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring).

66. See Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 *U. CHI. L. REV.* 831, 832–33 (2015) ("Since 1986, not a single plaintiff has managed to persuade a court to strike down a plan on this basis. By our count, claimants' record over this generation-long period is roughly zero wins and fifty losses.").

67. *Davis v. Bandemer*, 478 U.S. 109 (1986).

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

Citizens (LULAC) v. Perry,⁶⁹ with similar results. In all three cases, the Court was badly fractured and there was no majority opinion. In all three cases, some of the Justices thought that political gerrymandering was a nonjusticiable political question because of the absence of judicially discoverable and manageable standards.⁷⁰ In all three cases, a majority of Justices thought that such claims were justiciable, but could not agree on a standard for assessing them. And in all three cases, the claims failed because a majority of Justices either thought the claim was nonjusticiable or rejected the claim on the merits.

As a result, the doctrine concerning political gerrymandering is in a state of total confusion.⁷¹ Under *Davis*, such claims are justiciable, but there is no established standard for adjudicating them. As one court observed, “the two most recent decisions on the issue from the Supreme Court—*Vieth* and *League of United Latin American Citizens (LULAC) v. Perry*,—are cobbled-together plurality opinions that place district courts in the untenable position of evaluating political gerrymandering claims without any definitive standards.”⁷² Accordingly, while courts continue to hold out the possibility that political gerrymandering might be unconstitutional in some extreme cases, it is widely tolerated as a nearly ubiquitous feature of our political landscape.⁷³

69. *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). I regard *LULAC* as less significant than *Davis* and *Vieth* because it focused on the narrow question whether some sort of rule against mid-census redistricting (i.e., between decennial censuses) represented a workable standard for assessing political gerrymandering claims.

70. Under the leading case, *Baker v. Carr*, which paved the way for judicial review of one person, one vote claims, there are six grounds for finding that a particular issue presents a nonjusticiable political question:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962). The Justices who thought political gerrymandering is a political question relied primarily on the lack of judicially manageable standards. *See Vieth*, 541 U.S. at 268 (plurality opinion of Scalia, J.) (“The second is at issue here.”); *Davis*, 478 U.S. at 148–55 (O'Connor, J., joined by Chief Justice Burger and Justice Rehnquist, concurring) (discussing the lack of manageable standards); *see also LULAC*, 548 U.S. at 511 (Scalia, J., concurring in the judgment and dissenting in part) (“As I have previously expressed, claims of unconstitutional partisan gerrymandering do not present a justiciable case or controversy [citing the plurality opinion in *Vieth*]. Justice KENNEDY's discussion of appellants' political-gerrymandering claims ably demonstrates that, yet again, no party or judge has put forth a judicially discernible standard by which to evaluate them.”).

71. *See, e.g., Henderson v. Perry*, 399 F. Supp. 2d 756, 760 (E.D. Texas 2005) (three judge court), *rev'd in part on other grounds*, *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) (“The light offered by *Vieth* is dim, and the search for a core holding is elusive.”).

72. *Randogno v. Illinois State Bd. of Elections*, 2011 WL 5025251, at *4 (N.D. Ill. 2011) (unreported decision of three judge district court) (citation omitted).

73. *See, e.g., Perez v. Texas*, 2011 WL 9160142 (W.D. 2011) (dismissing political gerrymandering claim because the plaintiffs failed to articulate a workable standard); *Randogno v. Illinois State Bd. Of Elections*, 2011 WL 5025251 (N.D. Ill. 2011) (dismissing political

Indeed, the Justices cannot even agree whether *Vieth* treated partisan political advantage as a legitimate districting consideration. Recently, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,⁷⁴ Justice Ginsberg's opinion for the Court asserted that *Vieth* "recognized" that partisan gerrymanders "[are incompatible] with democratic principles."⁷⁵ She cited the *Vieth* plurality's statement that it did not "disagree" with Justice Stevens' contention (in dissent) regarding the "incompatibility of severe partisan gerrymanders with democratic principles,"⁷⁶ and Justice Kennedy's statement in his *Vieth* concurrence that "I do not understand the plurality to conclude that partisan gerrymandering that disfavors one party is permissible."⁷⁷ In contrast, Justice Scalia has asserted that "in *Vieth*, all but one of the Justices agreed [political bias] is a traditional [redistricting] criterion, and a constitutional one, so long as it does not go too far."⁷⁸

To be honest, I am simply baffled by the Court's difficulty with this issue. It seems to me plain that partisan political gerrymandering is incompatible with free and fair elections and thus violates both the First Amendment and equal protection. The Court has struggled to find a workable line only because it is unwilling to treat partisan political advantage as an inherently illegitimate consideration when drawing district boundaries. To me the line is simple and straightforward, and it is not difficult to discern: political gerrymandering should be treated like racial gerrymandering. Once it is determined that political gerrymandering has occurred, then the districting should be invalid unless it can survive strict scrutiny.⁷⁹ Put differently, legislative districts should be drawn only with traditional districting considerations in mind, such as compactness, contiguity, preserving natural boundaries, or political subdivision, and the like. Districts that depart from these criteria, as reflected in odd shapes or strange combinations of single and multimember districts, should be considered presumptively invalid unless they can be explained by nonpartisan (and nonracial) considerations.

Apparently, however, the Court believes that it is impossible to separate partisan from nonpartisan considerations for drawing district boundaries. Certainly, in the current state of affairs, political considerations are so prevalent

gerrymandering claim); *Henderson v. Perry*, 399 F. Supp. 2d at 773 (concluding that the "Texas plan is not more partisan in motivation or result, including the impact on the number of competitive districts, than the Pennsylvania plan upheld in *Vieth*"); *Kidd v. Cox*, 2006 WL 1341302 (N.D. Ga. 2006) (three judge court) (rejecting political gerrymandering challenge to redistricting plan); *Johnson-Lee v. City of Minneapolis*, 2004 WL 2212044 (D. Minn. 2004) (unreported decision applying the rational basis test to political gerrymandering claims).

74. *Arizona State Legis. V. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

75. *Id.* at 2658 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion) (citing *id.*, at 316 (Kennedy, J., concurring in judgment))).

76. *Vieth*, 541 U.S. at 292.

77. 541 U.S. at 316.

78. *Cox v. Larios*, 542 U.S. 947, 952 (2004). In *Cox*, the Court affirmed without opinion a lower court decision invalidating a redistricting plan as a violation of the one person, one vote principle.

79. *See, e.g., Shaw v. Reno*, 509 U.S. 630 (1993) (applying strict scrutiny to invalidate racially gerrymandered district).

that strict enforcement of the nonpartisanship principle might require pervasive redrawing of legislative districts. To the extent that such upheaval follows from the nonpartisanship principle, however, it serves to underscore just how incompatible current districting practices are with democratic principles.⁸⁰ Any disruption caused by a per se rule against political gerrymandering would be justified by the restoration of representational structures—in this case legislative districts—consistent with democratic principles.

B. The Impact of Political Gerrymandering

Tolerance of partisan political gerrymandering has a significant practical effect on our representational structures and the integrity of our political process. In this part of the essay, I will discuss two examples to illustrate this problem. The first example is the divergence between the votes cast for the two main parties in congressional elections for the House of Representatives and the number of seats won by those parties. The second is the dramatic change that resulted from *Essex v. Kobach*,⁸¹ in which a three judge federal district court was forced to redraw district boundaries in Kansas after the 2010 census.

1. The House of (Not So) Representatives

In a properly functioning representative system, we would expect the composition of the House of Representatives to correspond (more or less) to the aggregate results of the popular vote in the national elections for its members. Unlike the Senate, in which states with smaller populations get an equal number of Senators, seats in the House of Representatives are allocated proportionally according to population.⁸² To be sure, there are some variations in the size of districts from state to state, but comparisons between popular votes and representation in the House are meaningful because the number of districts in each state is proportional to the respective state's population and the populations of districts within a state must be nearly equal.

Through gerrymandering, however, the Republican Party enjoys a disproportionate advantage in the House. This difference was perhaps most dramatic in the 2012 election,⁸³ in which the Democratic Party actually won a larger plurality of the popular vote (59,214,910 voters cast ballots for

80. See *infra* notes 92–95 and accompanying text (discussing impact of judicial redistricting in Kansas).

81. *Essex v. Kobach*, 874 F. Supp. 2d 1069 (D. Kan. 2012).

82. Insofar as many “red” states are located in sparsely populated parts of the country, we might expect representation in the Senate to skew Republican. This departure from the one person, one vote principle and the attendant representational distortions are built in to Article I of the Constitution. A similar, but less dramatic distortion arises in presidential elections, in which the Electoral College confers representation according to the number of Senators and Representatives in each state.

83. KAREN L. HAAS, OFFICE OF THE CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 6, 2012 (2013) <http://history.house.gov/Institution/Election-Statistics/Election-Statistics/> (providing comprehensive statistics on the 2012 elections to the House of Representatives).

Democratic candidates for the House, while 57,622,827 voters cast ballots for Republican candidates),⁸⁴ but the Republicans won a significant majority of the seats (200 Democratic Representatives compared to 234 Republican Representatives).⁸⁵ A similar, but less dramatic, effect was observable in other recent elections, in which the Republicans won a majority of the popular vote, but had a more substantial majority of the seats in the House.⁸⁶

There is some disagreement about the extent to which the disproportionate results in the House of Representatives are the product of partisan political gerrymandering. They may be attributable, at least to some degree, to demographic forces that naturally pack Democratic voters into urban districts.⁸⁷ Nonetheless, we might also expect a certain degree of packing in the reverse direction, with disproportionate numbers of Republican voters concentrated in deeply red states, like Kansas. In any event, the disparity in the 2010 elections seems to me too stark to be the product of natural forces,⁸⁸ and even skeptics acknowledge that political gerrymandering has some effect.⁸⁹

More broadly, however, the success of partisan gerrymandering in securing disproportionate representation is reflected in the political parties' deep commitment to it.⁹⁰ Thus, for example, the Republican State Leadership

84. *Id.* at 73.

85. *Id.* at 74.

86. In the 2014 elections to the House of Representatives, for example, the Republicans won just over 50% of the popular vote (compared to 44% for democrats), but controlled 247 house seats (compared to 188 for the democrats). See KAREN L. HAAS, OFFICE OF THE CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 4, 2014 (2015), 54–55, <http://history.house.gov/Institution/Election-Statistics/Election-Statistics/>.

87. See, e.g., John Sides & Eric McGhee, *Redistricting Didn't Win Republicans the House*, WASHINGTON POST (Feb. 17, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/02/17/redistricting-didnt-win-republicans-the-house/> (“Political science research on redistricting has confirmed that control of the line-drawing process does yield some benefits. The challenge is in estimating what those benefits are. We have tried to show that the answer is far more complicated, and that the magnitude of the redistricting effect is probably smaller than many have assumed.”); Barbara Sinclair, *Is Congress Now the Broken Branch?*, 2014 UTAH L. REV. 703, 722–23 (“When Democrats won more popular votes but Republicans won the majority of seats in the House in the 2012 elections, many commentators attributed it to gerrymandering. Yet, in fact, the geographical distribution of Democratic and Republican identifiers was the primary cause.”).

88. See Sundeep Iyer, *Redistricting and Congressional Control Following the 2012 Election*, BRENNAN CTR. FOR JUST. (Nov. 28, 2012), <https://www.brennancenter.org/analysis/redistricting-and-congressional-control-following-2012-election> (analyzing data to identify districts in which gerrymandering may have affected the outcome of the election); Sam Wang, *The Great Gerrymander of 2012*, N.Y. TIMES (Feb. 2, 2013), <http://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html?pagewanted=all&r=0> (“Using statistical tools that are common in fields like my own, neuroscience, I have found strong evidence that this historic aberration arises from partisan disenfranchisement.”).

89. See *supra* note 87.

90. Although this example points to gerrymandering by Republicans, Democrats are equally willing to use their control of state legislatures to engage in gerrymandering. The 2012 elections skewed in favor of the Republican Party because it controlled more state legislatures, not because it was more likely to engage in partisan gerrymandering. See Iyer, *supra* note 88, at 1 (“Democrats also used redistricting to their advantage, but Republicans redrew the lines for four times as many districts as Democrats.”).

Committee proudly proclaimed that its “Strategy of Targeting State Legislative Races in 2010 Led to a Republican U.S. House Majority in 2013,” because the strategy allowed the party to control the redistricting process in those states.⁹¹ Even if the effect of partisan gerrymandering is less dramatic than this claim would suggest, it is difficult to see why we tolerate a redistricting process that has the avowed purpose and effect of distorting electoral outcomes.

2. Judicial Redistricting in Kansas

Moving closer to home, recent litigation in Kansas served to highlight the extent to which our state’s legislative districts had been gerrymandered over the years. As a result of a political impasse, the Kansas Legislature was unable to agree on redistricting after the 2010 census. Without a new map, however, population shifts meant that existing districts were no longer equal in population, placing the state in violation of the one person, one vote principle. In *Essex v. Kobach*,⁹² a three judge federal district court found a constitutional violation and redrew district boundaries to bring the state into compliance with the one person, one vote principle.

Unlike the State Legislature, the court was not moved by partisan considerations, and the resulting districts represented a dramatic change from the previous district boundaries.⁹³ As described by Joseph Aistrup:

Compared to both the existing district configurations and all of the proposed new district line boundaries, the federal judges’ maps went the extra mile to create compact and equally populated districts that protect communities of interest and minority voters. Most districts now look like shapes we might recognize; moreover, they don’t arbitrarily divide urban and suburban communities to advantage the reelection of incumbent legislators. The district line boundaries have not shifted this much since the mid-1960s, when U.S. Supreme Court enforced one-man, one-vote principles on all state legislatures, including Kansas.⁹⁴

To be sure, other political considerations, such as protecting incumbents, often influence legislative redistricting and may have distorted the pre-*Essex* districting maps as well. Indeed, one result of *Essex* was that a number of incumbents were placed in the same district, while many other districts were

91. Admin, 2012 REDMAP Summary Report, REDISTRICTING MAJORITY PROJECT (Jan. 4, 2013, 9:23 AM), <http://www.redistrictingmajorityproject.com/> (capitalization in original).

92. *Essex v. Kobach*, 874 F. Supp. 2d 1069 (D. Kan. 2012).

93. See generally James B. Cottrill & Terri J. Peretti, *Gerrymandering from the Bench? The Electoral Consequences of Judicial Redistricting*, 12 ELECTION L.J. 261, 262 (2013) (conducting an empirical examination of judicial redistricting claims and concluding that (1) “judicial redistricting does, in fact, enhance competition”; and (2) “our tests of partisan effects do not reveal evidence of partisan favoritism” when judges draw districts).

94. Joseph A. Aistrup, *Who Won, Lost in Redistricting*, THE WICHITA EAGLE (June 17, 2012), <http://www.kansas.com/opinion/opn-columns-blogs/article1093865.html>; see also John Celock, *Kansas Redistricting: Federal Court Redraws All Legislative Districts, Pushes 'Re-set Button'*, HUFFINGTON POST (June 8, 2012), http://www.huffingtonpost.com/2012/06/08/kansas-redistricting-federal-courts_n_1582026.html (“Kansas politics is in chaos Friday after a federal court redrew state legislative district lines, ‘pushing a re-set button’ on the state’s political structure.”).

without any incumbent.⁹⁵

Overall, the dramatic change that resulted from nonpartisan districting by the district court serves to underscore just how much partisan political gerrymandering distorts our representational structures. As a matter of constitutional principle, this sort of distortion is contrary to democracy, violates First Amendment and equal protection values, and should not be tolerated.

III. VOTER ID AND OTHER REQUIREMENTS

A second area in which the United States Supreme Court has failed to enforce the nonpartisanship principle is in relation to voter ID and proof of citizenship requirements that tend disproportionately to suppress some Democratic voters.⁹⁶ These sorts of requirements are defended as measures to prevent voter fraud, but it is pretty much an open secret that their true purpose is to discourage voting by groups that tend to vote for Democratic candidates.⁹⁷ Although the main focus here is voter ID requirements, other rules and practices have been adopted with similar purpose and effect.⁹⁸ These issues are especially significant for Kansas, as a result of recent legislation requiring proof of citizenship to register to vote and an approved photo ID for in-person voting.⁹⁹

95. See Celock, *supra* note 94 (describing “placement of 46 incumbent House members in districts with each other” and observing that “25 of the districts do not have incumbents living in them”).

96. In contrast to partisan gerrymandering, in which both parties engage, these efforts are promoted by the Republican Party and opposed by the Democratic Party. Both parties recognize that voter ID and similar requirements tend to suppress Democratic voters. To be sure, the Democratic Party seeks political advantage by maximizing voter turnout, but these efforts are, in my view, less problematic from a constitutional perspective because they promote the exercise of the right to vote, rather than imposing burdens on it. To the extent that the Democratic Party’s efforts to maximize turnout result in unqualified voters casting ballots, that too is a threat to the integrity of the elections. But as will be developed more fully below, there is little or no evidence that this sort of voter fraud is significant or threatens the integrity of the elections.

97. For example, a video surfaced of Pennsylvania House Majority Leader Mike Turzai (R) claiming to Republican activists that “Voter ID . . . is going to allow Governor Romney to win the state of Pennsylvania.” Robert Barnes, *Pennsylvania Voter-ID Law Shouldn’t be Enforced This Time, Judge Rules*, WASH. POST (Oct. 2, 2012), https://www.washingtonpost.com/politics/decision2012/pennsylvania-voter-id-law-enforcement-halted-by-judge/2012/10/02/bf240ffc-0c9d-11e2-bb5e-492c0d30bff6_story.html. Although this prediction did not prove true, as President Obama won the state, the leader of the state’s Republic Party subsequently indicated that the law nonetheless helped reduce President Obama’s margin of victory. See Amy Worden, *Commonwealth Confidential, PA GOP chair says voter ID helped cut Obama margin*, PHILA. INQUIRER (Oct. 18, 2013), http://www.philly.com/philly/blogs/harrisburg_politics/PA-GOP-chair-says-voter-ID-helped-cut-Obama-margin.html.

98. These include elimination of same day registration, restrictions on advance voting, and reducing the hours in which the polls are open.

99. See Kansas Secure and Fair Elections (SAFE) Act, ch. 56, 2011 Kan. Sess. Laws 795; see generally Chelsea A. Priest, *Dual Registration Voting Systems: Safer and Fairer?*, 67 STAN. L. REV. ONLINE 101 (2015) (concluding that “while such systems are unlikely to be struck down by the courts, they impose immense costs with little, if any, offsetting benefits given the dearth of actual voter fraud”); The validity of the Act and the Secretary of State’s implementation of it have been challenged in court. See Complaint for Declaratory and Injunctive Relief, Cromwell v.

A. *The Constitutional Framework*

As noted above, measures like voter ID requirements and proof of citizenship requirements are potentially vulnerable to two kinds of legal challenge—challenges based on improper discrimination and challenges based on burdens on voting rights. In the first type of challenge, specific constitutional amendments and general equal protection doctrine indicate that voting rules, regulations, and requirements may not discriminate on the basis of prohibited classifications such as race. Even when there is no improper classification, laws that impose excessive burdens on the right to vote are also invalid. In light of the precedents in this area, constitutional doctrine provides little protection against the adoption of these measures for partisan political purposes.

1. **Prohibited Racial Discrimination**

For voting rights purposes, discrimination on the basis of race,¹⁰⁰ sex (or gender),¹⁰¹ and age,¹⁰² are prohibited.¹⁰³ The principal issue in this context is racial discrimination, because voter ID and proof of citizenship requirements, as well as other measures that make it more difficult to vote, often tend to disproportionately burden minority groups.¹⁰⁴ Nonetheless, establishing

Kobach, No. 2:15-cv-09300-JAR-GLR (D. Kan. Sept. 30, 2015) 2015 WL 5731924; *Belenky v. Kobach*, 2014 WL 1374048 (D. Kan. 2014). In addition, on January 28, 2016, the Kansas Advisory Committee of the United States Commission on Civil Rights held hearings on the impact of the Act on voting rights. A transcript of the hearing, as well as copies of written testimony, are available at *Meeting Documents*, FACA DATABASE, <https://database.faca.gov/committee/meetingdocuments.aspx?flr=135169&cid=249>.

100. Racial discrimination in voting is expressly prohibited by the Fifteenth Amendment, and racial classifications trigger strict scrutiny under equal protection doctrine. *See, e.g., Johnson v. California*, 543 U.S. 499, 505 (2005) (“Under strict scrutiny, the government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling governmental interests.’”) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

101. The Nineteenth Amendment prohibits sex-based discrimination in voting and sex-based classifications trigger intermediate scrutiny. *See Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”). Nonetheless, sex-based discrimination is not generally an issue for voter ID laws and similar requirements.

102. Although the Twenty-Sixth Amendment prohibits the denial or abridgment of the right to vote on account of age (for those 18 years old or older), the Supreme Court has declined to treat age as a suspect classification for general equal protection purposes. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976).

103. Other classifications that might be implicated by voter ID laws and other requirements, such as wealth or disability, are neither prohibited nor subject to heightened scrutiny. *See Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (discussing disability); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (discussing wealth); *Dandridge v. Williams*, 397 U.S. 471 (1970) (discussing wealth).

104. There is no suggestion that these laws discriminate on the basis of sex or gender. Although there might be some disproportionate impact on younger voters (who may find it harder to obtain IDs or, especially, prove citizenship), I will not discuss this issue because such challenges have been rare and generally unsuccessful. *See Nashville Student Org. Comm. v. Hargett*, --- F.Supp.3d ---, 2015 WL 9307284 (M.D. Tenn. 2015) (concluding that the state’s refusal to accept a student ID as sufficient for purposes of its photo ID law did not violate the Twenty-Sixth Amendment because it did not deny or abridge the right to vote); North Carolina State Conference,

discrimination may be difficult, and racial discrimination claims are not designed for the problem of partisan political advantage.¹⁰⁵

As a constitutional matter, a law is treated as racially discriminatory only if it reflects intentional discrimination. Thus, when a facially neutral law—such as a voter ID or proof of citizenship requirement—is challenged because of its disproportionate impact on minority groups, the plaintiff must prove discriminatory intent; i.e., that the law was adopted because of (not in spite of) its racially disproportionate impact.¹⁰⁶ In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,¹⁰⁷ the Court indicated that discriminatory intent may be shown by a variety of factors, such as a stark pattern of disproportionate impact that is otherwise inexplicable,¹⁰⁸ the sequence of events leading to the adoption of the measure,¹⁰⁹ or statements in the record that reflect a discriminatory intent.¹¹⁰

of the NAACP v. McCrory, 997 F. Supp. 2d 322 (M.D.N.C. 2014) (finding it unnecessary to resolve the issue because the plaintiffs failed to meet the requirements for a preliminary injunction), reversed and remanded on other grounds sub nom.; League of Women Voters of North Carolina v. North Carolina, 769 F.3d 224 (4th Cir. 2014) (concluding that district court had improperly analyzed plaintiffs' racial discrimination claim under § 2 of the VRA); See also American Association of People with Disabilities v. Herrera, 580 F. Supp. 2d 1195 (D.N.M. 2008) (denying preliminary injunction against restrictions on third party voter registration that imposed burdens on young voters, but not raising or discussing Twenty-Sixth Amendment).

105. In practice, there is a substantial correlation between Democratic voters and minority voters, because minority voters tend to vote Democratic. Likewise, there is a significant correlation between race and the urban poor, who also tend to vote Democratic. As a result, laws that tend to discourage poor, Democratic voters also have a disproportionate impact on racial minorities. Nonetheless, the intent to suppress poor, Democratic voters is not the same as the intent to suppress voting by racial minorities.

106. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976) (upholding use of high school diploma and test scores to determine promotions notwithstanding racially disproportionate impact); *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45 (1959) (upholding English literacy requirement for voting in the absence of proof of discriminatory intent or application).

107. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

108. *Id.* at 266 (“Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.”) (citing, inter alia, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)). As reflected in the Court’s citation to *Gomillion*, this sort of analysis is especially relevant in gerrymandering claims. See *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (“What appellants object to is redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification.”); see also *Miller v. Johnson*, 515 U.S. 900, 903 (1995) (“In *Shaw v. Reno*, . . . we held that a plaintiff states a claim under the Equal Protection Clause by alleging that a state redistricting plan, on its face, has no rational explanation save as an effort to separate voters on the basis of race.”). As will be discussed above, this sort of analysis could also be applied to political gerrymandering claims.

109. *Arlington*, 429 U.S. at 267 (observing that “[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes” and highlighting “[d]epartures from the normal procedural sequence” and “[s]ubstantive” departures as relevant considerations).

110. *Id.* at 268 (“The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.”).

In practice, proof of discriminatory intent is difficult and most claims of racial discrimination are brought under the Voting Rights Act of 1965,¹¹¹ which provides greater protection against voting requirements, rules, and practices that disproportionately burden minority voters. Until recently, § 5 of the Act required many southern states to obtain “preclearance” from the Justice Department before adopting such requirements, which deterred most of those states from adopting voter ID laws. After *Shelby County v. Holder*¹¹² invalidated the coverage formula in § 4 of the VRA, thereby rendering § 5 inoperative, several of these states acted quickly to adopt voter ID laws and to otherwise make it more difficult to vote.¹¹³

Even after the demise of preclearance requirements, voter ID laws and other rules that make it more difficult for minority groups to vote are vulnerable to a challenge under § 2 of the Voting Rights Act, which applies to all states and was not affected by the ruling in *Shelby County*. Under § 2, moreover, proof of intent is not required. Any requirement that “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color” is prohibited.¹¹⁴ The details of how § 2 has been interpreted and applied are not important here;¹¹⁵ what does matter is that voter ID laws and other restrictions on voting are vulnerable to a § 2 challenge if they disproportionately burden racial minorities.¹¹⁶

111. Pub. L. No. 89–110, 79 Stat. 437 (1965).

112. *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

113. See, e.g., William Yeomans, *After Shelby County*, 40 ABA HUMAN RIGHTS MAGAZINE, (2014), http://www.americanbar.org/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_2_civil_rights/after_shelby_county.html (“The sudden demise of section 5 invited previously covered jurisdictions to test their wings.”).

114. 52 U.S.C. § 10301(a) (2012). Section (b) further specifies that:

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id. § 10301(b). Subsection (b) also adds a proviso that “nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.” *Id.*

115. In practice, courts analyze § 2 claims using a two-part framework in which plaintiffs must show (1) that members of a protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice; and (2) the burden is linked to social and historical conditions that have produced or currently produce discrimination against members of the protected class. See, e.g., *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015) (upholding district court’s determination that Texas photo ID law violated § 2); see also *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014), cert. denied, 135 S. Ct. 1735 (2015) (granting preliminary injunction against some parts of North Carolina elections reform law and affirming the denial of a preliminary injunction against other parts of the law because the plaintiffs had not shown irreparable harm). In making these determinations, courts often consider several factors identified in the Senate Report accompanying the VRA, which the Supreme Court endorsed in *Thornburg v. Gingles*, 478 U.S. 30, 36–37 (1986) (quoting S. Rep. No. 97-417, at 28–29 (1982)).

116. See, e.g., *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015) (upholding district court’s

The availability of § 2 as the basis for challenging voter ID and citizenship requirements, however, does not eliminate concerns about the adoption of such measures for partisan political advantage. First, to establish a § 2 violation, it is necessary to focus on and prove that the measure has the effect of denying or abridging the right to vote on account of race. This requirement means that partisan efforts to burden voting rights are only protected under § 2 if there is also a racial component. Given the close correlation between race and voting patterns, there is often an overlap between the two concerns, but this may not always be true. More broadly, a successful § 2 claim requires plaintiffs to plead and prove elements that should not be necessary to establish a violation of voting rights when burdens on voting rights are imposed for partisan purposes.¹¹⁷

2. Burdens on Voting Rights

As discussed above, the United States Supreme Court has also recognized that the right to vote is fundamental for purposes of the First Amendment and equal protection, although laws burdening this right do not always trigger strict scrutiny.¹¹⁸ The Supreme Court rejected a facial challenge to an Indiana voter ID law in *Crawford v. Marion County*,¹¹⁹ concluding that the law did not impose a severe burden on voting rights so as to trigger strict scrutiny and that it was a reasonable measure to ensure the integrity of elections. The decision was narrowly reasoned, emphasizing (1) that facial challenges must satisfy an especially high burden; (2) that the law permitted many forms of voter ID and could be easily satisfied; and (3) that there was no evidence that anyone's vote would be suppressed.

Nonetheless, *Crawford* has largely been interpreted as giving a “green light” for measures that make it more difficult to vote (unless racial discrimination can be established).¹²⁰ In short, although some voter ID laws are much more difficult to satisfy than the Indiana statute upheld in *Crawford* and some challenges might be “as applied” rather than facial, in practice the lower courts have interpreted *Crawford* as precluding the conclusion that these laws impose severe burdens that trigger strict scrutiny. Although I have some concerns about the Court's framework for analyzing these laws and its

determination that Texas photo ID law violated § 2); *see also* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224 (4th Cir. 2014), cert. denied, 135 S. Ct. 1735 (2015) (granting preliminary injunction against some parts of North Carolina elections reforms and affirming the denial of a preliminary injunction against other parts of the law because the plaintiffs had not shown irreparable harm).

117. It is also doubtful that nonminority members who challenge voter ID requirements or similar rules would have standing to bring a § 2 claim.

118. *See supra* notes 41–43 and accompanying text.

119. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

120. *See, e.g.*, *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), cert. denied, 135 S. Ct. 1551 (2015) (Wisconsin voter ID law did not violate equal protection or the VRA); *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (holding that proof of citizenship requirement for registration was preempted by federal statute, but upholding voter ID); *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009) (upholding Georgia Voter ID law); *Nashville Student Org. Comm. v. Hargett*, --- F.Supp.3d ---, 2015 WL 9307284 (M.D. Tenn. 2015) (refusal to accept student IDs did not violate right to vote).

conclusion that the burdens they impose are not severe, that is not my focus here.¹²¹

Instead, my concern relates to the Court's conclusion that such laws are reasonable restrictions intended to preserve the integrity of elections. Certainly, preventing fraud is a legitimate, even compelling state interest. But the context and effects of these laws give us cause to doubt that preventing fraud, as opposed to securing partisan political advantage, is their true purpose. Although *Crawford* apparently recognized that partisan political advantage would not be a legitimate purpose for such a law, it casually dismissed that possibility, effectively precluding this sort of challenge.

B. Partisanship and Requirements that Burden the Right to Vote

Even if a requirement, rule, or practice imposes only incidental burdens on the right to vote, those burdens must be justified by legitimate governmental interests related to the conduct of fair elections. Thus, for example, the Court was unmoved by the state's defense of a poll tax argument in *Harper v. Virginia State Board of Elections*,¹²² concluding that even if a voter could afford to pay the tax, the burden was not justified because it bore no relationship to voter qualifications.¹²³ As noted above, the *Crawford* plurality acknowledged that partisan advantage would not be a legitimate purpose for a voter ID law.¹²⁴

Nonetheless, although the plurality conceded that "[i]t is fair to infer that partisan considerations may have played a significant role in the decision to enact [the voter ID law],"¹²⁵ it set an impossibly high bar for proving that the law was adopted for impermissible purposes:

If such considerations had provided the only justification for a photo identification requirement, we may also assume that [the law] would suffer the same fate as the poll tax at issue in *Harper*. But if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators.¹²⁶

In practice, this sort of requirement immunizes voter ID laws and similar restrictions on voting from any challenge based on the nonpartisanship principle. It is impossible to show that partisan advantage is the *only* motivation for such laws, even if partisan advantage is the predominant or principal motive.

The Court's refusal to acknowledge the partisan motives fueling the adoption of voter ID and proof of citizenship requirements endorses fiction over fact. Judge Posner, who joined the lower court opinion upholding the Indiana

121. See *supra* note 43 (discussing how *Crawford* borrowed this framework from cases dealing with ballot access).

122. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

123. *Id.* at 668.

124. See *supra* notes 44–46 and accompanying text.

125. *Id.* at 203.

126. *Id.* at 203–04.

law in *Crawford*, has acknowledged as much in a recent dissent from the denial of rehearing en banc in *Frank v. Walker*.¹²⁷ He argued that much had changed since *Crawford* and criticized the panel decision for its failure to recognize important differences between the Indiana statute and the Wisconsin statute at issue in *Frank*.¹²⁸ More importantly for purposes of this essay, he aptly summarized the overall pattern of voter ID laws as follows:

The data imply that a number of conservative states try to make it difficult for people who are outside the mainstream, whether because of poverty or race or problems with the English language, or who are unlikely to have a driver's license or feel comfortable dealing with officialdom, to vote, and that liberal states try to make it easy for such people to vote because if they do vote they are likely to vote for Democratic candidates. Were matters as simple as this there would no compelling reason for judicial intervention; it would be politics as usual. But actually there's an asymmetry. There is evidence both that voter-impersonation fraud is extremely rare and that photo ID requirements for voting, especially of the strict variety found in Wisconsin, are likely to discourage voting. This implies that the net effect of such requirements is to impede voting by people easily discouraged from voting, most of whom probably lean Democratic.¹²⁹

Judge Posner's conclusions seem to be confirmed by unguarded statements of some politicians who acknowledge that partisan advantage is a primary goal of voter ID laws.¹³⁰

Of course, taking the risk of partisanship seriously in such cases would not necessarily mean that plaintiffs could prove that voter ID laws or other restrictions are motivated by partisan political advantage. Once it becomes clear that such purposes are illegitimate, politicians are more likely to be guarded in their statements and finding proof of partisan intent may be difficult. Nonetheless, it seems to me that the Court's precedents concerning naked preferences suggest an appropriate means of probing the legitimacy of such laws. When the fit between a law's effects and the asserted justifications for the law are especially bad, we may reasonably infer that those purposes are a pretext intended to mask an impermissible purpose.¹³¹

Applying this sort of reasoning to voter ID laws, the conclusion is inevitable that the purported purpose of preventing fraud is a pretext. First, although preventing voter fraud is clearly a compelling purpose, voter ID laws and proof of citizenship requirements target only a very specific type of fraud. There is no evidence that this sort of fraud is widespread or threatens the integrity of elections, just as there is no evidence that illegal voting by

127. *Frank v. Walker*, 773 F.3d 783 (7th Cir. 2014) (dissenting from denial of rehearing en banc by an equally divided court).

128. *See id.* at 784–88 (describing differences between the two statutes and the evidence in the record indicating that the Wisconsin statute imposed significant burdens on some voters).

129. *Id.* at 791.

130. *See supra* note 97 and accompanying text.

131. *See, e.g., Romer v. Evans*, 517 U.S. 620, 635 (1996) (“The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them.”).

noncitizens is a significant problem. Indeed, no evidence that this sort of fraud is a problem was presented in *Crawford*, in *Frank*, or in any of the other cases. In contrast, these laws do nothing to combat other forms of fraud that may be a more serious problem. It is striking, for example, that our politicians are concerned about proof of citizenship for registration and photo IDs for voting, even though there are few, if any, documented examples of this kind of fraud. In contrast, however, these same officials seem unconcerned about statistical analysis suggesting that electronic voting machines may not be accurately recording votes.¹³²

There is evidence that these laws do in fact impose burdens on otherwise qualified voters that tend to prevent or deter them from voting. In Kansas, for example, tens of thousands of voters have had their registrations held in suspense because they failed to provide proof of citizenship.¹³³ Analysis of those included on the suspense list indicates that few, if any, of them are noncitizens attempting to register improperly; instead, those on the list appear to consist primarily of younger voters who did not have ready access to documents establishing their citizenship.¹³⁴ When a statute imposes burdens on the right to vote that are so disproportionate to the legitimate governmental interest said to support it, the inevitable inference arises that those legitimate purposes are a pretext that masks an improper purpose, such as voter suppression.¹³⁵

IV. CONCLUSION

Although I believe that there are strong constitutional arguments to support the nonpartisanship principle and that the Supreme Court's decisions declining to enforce it are wrong, there is little indication that the Court will change direction on issues of political gerrymandering, laws that impose incidental burdens for partisan purposes, or similar matters. Instead, it may be time for us to revisit the ways in which we structure and manage our elections.

In this regard, our willingness to give control over our electoral processes to partisan political operatives is another example of American exceptionalism.¹³⁶ Indeed, it is hard to imagine that we would advise emerging democracies to place control over districting in the hands of partisan legislators or to vest the oversight of the conduct of elections in the hands of partisan elected officials.¹³⁷ I think most observers would agree that this arrangement is

132. See, e.g., Beth Clarkson, *Audits of Paper Records to Verify Electronic Voting Machine Tabulated Results*, 25 KAN. J.L. PUB. POL'Y 365 (2016).

133. See, e.g., Justin Weingartner, *Voter 'Suspense List' Prompts League of Women Voters Initiative*, Topeka Cap. J. (Dec. 15, 2015), <http://cjonline.com/news/2015-12-15/voter-suspense-list-prompts-league-women-voters-initiative> (stating that "[t]he suspense list swelled to more than 36,000 people before a recent purge").

134. See *id.*

135. *Romer v. Evans*, 517 U.S. 620, 635 (1986) ("The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them.").

136. See Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769 (2013) (comparing United States election law to the election law of other democracies).

137. In most states, like Kansas, oversight of elections is vested in the Secretary of State.

inherently unfair—just as having the referees in a sporting event be controlled by one team or the other would be.

Instead, we want the rules for the conduct of elections to be consistent with a Rawls' veil of ignorance; they should be rules that we all would accept from an original position in which we did not know whether we would be Republicans, Democrats, Independents, or members of another party.¹³⁸ It is unrealistic to expect that a system controlled by partisan officials would adopt such rules. Legislatures do not draw districts or adopt voter ID laws behind a veil of ignorance.¹³⁹ While the veil of ignorance is impossible to replicate in the real world, we can attempt to minimize the extent to which those who make the rules have a partisan interest in the outcome.

One obvious example of such a change would be the use of nonpartisan commissions to draw legislative districts, a change that was advocated over ten years ago in this journal.¹⁴⁰ This sort of change, however, is unlikely to be championed by state legislatures, insofar as they would be giving up their ability to influence the process for partisan advantage. Accordingly, efforts to adopt such commissions are more likely to require voter initiatives to succeed.¹⁴¹ Recently, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,¹⁴² the Court upheld the use of voter initiatives to confer redistricting authority on nonpartisan commissions.¹⁴³

While there may at one time have been a tradition of nonpartisanship in these offices, in our hyperpartisan times that tradition has long since disappeared.

138. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

139. See, e.g., Akhil Reed Amar, Note, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283, 1294 (1984) ("The problem is that new district lines are not drawn behind a Rawlsian 'veil of ignorance.'"); Michelle D. Deardorff, *Constructing the Franchise: Citizenship Rights Versus Privileges and their Concomitant Policies*, 33 MISS. C. L. REV. 161, 179 (2014) ("If people determining the privilege of voting want to be certain that a privilege is being asserted in a way that benefits democracy by allowing the best voters to govern and not merely reinforce the powerful in retaining the status quo, we must be careful in our articulation of what attributes will be valued in voters. In Rawls' hypothetical schema, those who are making decisions regarding power cannot know their own individual situation (intelligence, fortune, class position, race, gender) to ensure the subsequent determinations are fair.").

140. Christopher C. Confer, *To Be About the People's Business: An Examination of the Utility of Nonpolitical/Bipartisan Legislative Redistricting Commissions*, 13 KAN. J.L. & PUB. POL'Y 115 (2004). Many others have advocated such a change. See, e.g., Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553, 602-03 (2011); Justin Levitt, Essay, *Weighing the Potential of Citizen Redistricting*, 44 LOY. L.A. L. REV. 513, 532-42 (2011); Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 337-42 (2007); Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837 (1997). Of course, the success or failure of such commissions in reducing partisanship depends in large measure on how they are structured. See generally Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808 (2012) (discussing features of commissions that contribute to or detract from their nonpartisan character).

141. See Stephanopoulos, *Reforming Redistricting*, *supra* note 140.

142. *Arizona State Legis. v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

143. *Id.* at 2671 ("[W]e hold that the Elections Clause permits the people of Arizona to provide for redistricting by independent commission."). The issue was whether the use of a voter initiative process violated the Elections Clause, which provides that "The Times, Places and

I shall not attempt here to detail the possible structural and procedural reforms that might be adopted to further the nonpartisanship principle. My point instead is a far more basic one: attention to the nonpartisanship principle is a necessary and desirable step to promote the integrity of our electoral processes.

Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof” U.S. CONST., Art. I, § 4, cl. 1 (emphasis added) The majority concluded that term “Legislature,” as used in that clause, encompassed citizen initiatives. As in many other cases involving electoral issues, the Court was sharply divided, with a 5-4 majority consisting of Justice Ginsburg, who wrote the majority opinion, and Justices Breyer, Kagan, Kennedy, and Sotomayor.

