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Jennifer R. Abrams

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NOTES

THE SUPREME COURT'S DISENFRANCHISEMENT OF THE AMERICAN ELECTORATE: ADVOCATING THE APPLICATION OF STRICT SCRUTINY WHEN REVIEWING STATE BALLOT ACCESS LAWS AND POLITICAL GERRYMANDERING

The United States Constitution guarantees the right to speech and association, two integral components of the constitutionally protected right to vote. The fundamental right to vote ensures a

1 See U.S. CONST. amend. I (providing “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .”); see also Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 221 (1989) (striking down California laws prohibiting political parties from endorsing candidates in party primaries); Palko v. Connecticut, 302 U.S. 319, 327 (1937) (describing free speech as right which makes every other guaranteed freedom possible).

2 See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958) (stating that right to associate is inextricably linked with freedom of expression), rev’d, 360 U.S. 240 (1959); see also Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) (noting that implied right “not to associate” can be exercised without discriminating against suspect classes). See generally LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-11 (1978) (recognizing right to associate as “a right to join with others to pursue goals independently protected by the First Amendment”).

3 See U.S. CONST. amend. XII (stating that “[t]he electors shall meet in their respective states; and vote by ballot for President and Vice-President . . . .”); U.S. CONST. amend. XIV, § 2 (denying representation to those states who deny qualified citizens right to vote by
sufficient electorate and an unrestricted pool of candidates who are actively concerned about substantive issues. As the framework for a republican form of government, the Constitution provides for state sovereignty in the areas of state elections and representative apportionment. This independence, however, has opened the door for state legislators to create state ballot access laws and political gerrymanders.

decreasing amount of representation “in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state); U.S. CONST. amend. XV, § 1 (forbidding right to vote being “denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude); U.S. CONST. amend. XIX (preventing gender discrimination in voting rights); U.S. CONST. amend. XXIV, § 1 (eliminating financial restrictions on right to vote by stating that failure to pay poll taxes or any other tax is not grounds to deny right to vote); U.S. CONST. amend. XXVI, § 1 (prohibiting voting laws based on age for those over age eighteen); see also Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626 (1969) (stating that right to vote is fundamental right and, therefore, subject to strict scrutiny); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966) (noting that right to vote in state elections is implicit, though not expressly stated in Constitution); United States v. Mosley, 238 U.S. 383, 385 (1915) (observing “[w]e regard it as equally unquestionable that the right to have one’s vote counted is as open to protection by Congress as the right to put a ballot in the box”); Ex parte Yarbrough, 110 U.S. 651, 662-63 (1884) (stating Congress has power to punish states that violate election laws as well as protect congressional elections from violence, corruption, or fraud); Minor v. Happersett, 88 U.S. 162, 164 (1875) (finding that states conferred right to vote, but federal government protects this right). But see Tribe, supra note 2, § 13-10 (noting that some restrictions on right to vote actually serve interests of democracy). See generally Richard Claude, The Supreme Court and the Electoral Process 23-36 (1970) (discussing derivation of right to vote).

4 See Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (noting fundamental character of right to vote stating “[t]he right to vote is the right of the people to choose their own representatives”); see also Jackson Williams, The Courts and Partisan Gerrymandering: Recent Cases on Legislative Reapportionment, 18 S. ILL. U. L.J. 563, 595 (1994) (noting how gerrymandering can “stifle debate” in districts where incumbents face no opposition). See also Oregon v. Mitchell, 400 U.S. 112, 125 (1970). The Court stated that “[n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county and municipal offices and the nature of their own machinery for filling local public offices.” Id.; Todd J. Zywicki, Federal Judicial Review of State Ballot Access Regulations: Escape from the Political Thicket, 20 T. MARSHALL L. REV. 87, 92-94 (1994). The power of the states to govern their own elections is fundamental and only through the Republican Guarantee Clause may the federal government interfere. Id.

5 See U.S. CONST. art. IV, § 4. This section provides that “[t]he United States shall guarantee to every State in this Union a Republican form of Government . . . .” Id.; see also Oregon v. Mitchell, 400 U.S. 112, 125 (1970). The Court stated that “[n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county and municipal offices and the nature of their own machinery for filling local public offices.” Id.; Todd J. Zywicki, Federal Judicial Review of State Ballot Access Regulations: Escape from the Political Thicket, 20 T. MARSHALL L. REV. 87, 92-94 (1994). The power of the states to govern their own elections is fundamental and only through the Republican Guarantee Clause may the federal government interfere. Id.

6 See U.S. CONST. amend. XIV, § 2 (mandating that number of representatives be in proportion to population); see also U.S. CONST. art. II, § 1 (providing guidelines for number of representatives in Congress); Williams v. Rhodes, 393 U.S. 23, 29 (1968) (commenting on power of states under Article II to pass laws regulating selection of electors, but with caveat that laws must conform with other Constitutional provisions). See generally Tribe, supra note 2, § 13-10 (noting Constitution confers to states, in Art. I, certain powers regarding federal elections and because such powers are conferred upon Congress regarding state elections these are solely in hands of states).

7 See, e.g., ARIZ. REV. STAT. §§ 16-341C-6 (1997) (limiting time in which petition signatures may be collected to ten days); CAL. ELEC. CODE § 6430 (West 1997) (requiring that those who sign petition swear their affiliation to party named on petition); DEL. CODE ANN. tit. 15, § 300(c)(2) (1997) (requiring social security number to accompany petition signa-
Ballot access laws limit a political opponent’s opportunity to challenge incumbents, while political gerrymandering thwarts the ability of the voter to challenge the incumbent party. As a result, state legislators have unwittingly compromised this fundamental right to vote. In light of this legislative encroachment, there have been numerous judicial challenges. The Supreme Court, however, has not ruled in this area, nor has the appropri-
ate standard of review been resolved. The Court's hesitance to consistently apply strict scrutiny to both state ballot access laws and state legislative redistricting is attributed to its desire to preserve a republican form of government. In upholding this notable goal, however, the Court has allowed the states to infringe upon freedom of speech and association and, as a result, the right to vote. Due to the failure to apply one standard of review, confusion has manifested among state legislators and judges, keeping the door open to litigation. Consequently, the American people have suffered from vote dilution and political discrimination.

13 See Samuel Issacharoff, Regulating the Electoral Process: Judging Politics: The Elusive Quest for Judicial Review of Political Fairness, 71 Tex. L. Rev. 1643, 1646-47 (1993) (arguing that Court's standard in Davis v. Bandemer is "fundamentally unworkable and incorporate such ambiguous and unclear commands as to be unfit for any manageable form of judicial application"); Smith, supra note 9, at 193 (arguing that Supreme Court relies on political theory rather than impact state ballot access laws have); Stephen J. Thomas, The Lack of Judicial Direction in Political Gerrymandering: An Invitation to Chaos Following the 1990 Census, 40 Hastings L.J. 1067, 1068 (1989) (noting court decisions have not provided sufficient guidance to state legislatures).

14 See e.g., Storer v. Brown, 415 U.S. 724, 730 (1974) (noting that states are entitled to regulate elections to make them fair and honest and free from chaos); Gaffney, 412 U.S. at 751 (recognizing that state reapportionment is better handled by local legislatures or other state entities selected to perform such tasks).

15 U.S. CONST. amend I.

16 See U.S. CONST. amend I. (providing freedom of association); see also U.S. CONST. amend XIV (applying federally guaranteed rights to states); Williams, 393 U.S. at 30 (recognizing that right to political association and right to vote are "among our most precious freedoms").

17 See Storer, 415 U.S. at 729 (referring to Williams-Kramer-Dunn rule which states that any "burdens on the right to vote or associate for political purposes are constitutionally suspect and invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless essential to serve a compelling state interest").

18 See Davis v. Bandemer, 478 U.S. 109, 172-73 (1986) (Powell, J., dissenting) (stating that Court's failure to articulate clear doctrine in area of political gerrymandering serves to open floodgates of litigation); see also Brian L. Porto, The Constitution and the Ballot Box: Supreme Court Jurisprudence and Ballot Access for Independent Candidates, 7 BYU J. Pub. L. 281, 282 (1993) (noting that legal commentators shared belief that state ballot access cases were reviewed with different standards of scrutiny and thus failed to articulate clear and consistent standard); Smith, supra note 9, at 186-87 (noting that confusion engendered by two Supreme Court cases using different standards of review); Terry Smith, Election Law: Election Laws and First Amendment Freedoms—Confusion and Clarification by the Supreme Court, 1988 Ann. Surv. Am. L. 597, 610, 621-22 (1988) (arguing that Supreme Court's failure to use one standard of scrutiny in examining state ballot access laws has created confusion in lower courts).

19 See Avery v. Midland County, 390 U.S. 474, 483 (1968) (extending idea of "one person, one vote" to local governmental units with "general responsibility"); Reynolds v. Sims, 377 U.S. 533, 567 (1964) (stating vote is diluted when it does not have same weight as someone else's vote in same state); see also Tribe, supra note 2, §§ 13-14 (explaining that Reynolds v. Sims brought cases dealing with state legislative districts within "compass of one person, one vote").

20 See generally Michael E. Lewyn, When is Cumulative Voting Preferable to Single-Member Districting?, 25 N.M. L. Rev. 197, 201 (1995) [hereinafter Cumulative Voting] (re-
This Note argues that despite the goals of a republican form of government, the Supreme Court must take the steps necessary to ensure that all Americans are free from the political discrimination present jurisprudence permits. Part One analyzes the Supreme Court’s review of state ballot access laws and its effect on recent lower court decisions. Part Two examines the Supreme Court’s review of alleged political gerrymanders and the continued allowance of political discrimination by the lower courts. Part Three presents arguments demonstrating that the Supreme Court should take affirmative steps that will not usurp the power of the individual states, but will provide a measuring stick for both legislators and judges. Finally, this Note concludes that the Supreme Court, using the right to vote as a basis, should invoke strict scrutiny as the standard of review when faced with challenges to state ballot access laws and political gerrymandering.

I. ANALYSIS OF SUPREME COURT CASES REVIEWING STATE BALLOT ACCESS LAWS

The Supreme Court has not provided meaningful guidance for reviewing state ballot access laws. In reviewing these laws, the Court has applied varying standards of scrutiny including rational basis, strict scrutiny and a multi-factor balancing test. Most cases brought before the Court relating to state ballot access


21 See Zywicki, supra note 6, at 89 (arguing that Supreme Court decisions regarding state regulation of access to ballot are random "both with regards to the level of review to be applied and with regard to how various fact patterns are related"); see also Comment, Fusion Candidacies, Disaggregation and Freedom of Association, 109 Harv. L. Rev. 1302, 1310 (1996) [hereinafter Fusion Candidacies] (noting Supreme Court's lack of guidance in electoral regulation cases).


23 See generally Burdick v. Takushi, 504 U.S. 428, 434 (1992) (applying "flexible" standard imposed in Anderson); Jenness, 403 U.S. at 442 (finding state duty to protect political processes from frivolous or fraudulent candidacies); Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626 (1969) (holding right to vote may only be denied to class of voters where there is compelling state interest). See, e.g., Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (establishing multi-factor balancing test which weighs character and magnitude of asserted injury protected by First and Fourteenth Amendments against state interest).
laws involved political parties attempting to get on the state ballot for primary elections.24 The various standards of review utilized reveal the Court's inability to determine whether multiple candidates to choose from or a limited number of political parties espousing the traditional, and seemingly similar rhetoric, is best for the people.25 It appears to be in the best interest of the American political system for the Supreme Court to open up the ballot to more candidates. With more choices, it seems logical that the electorate's right to vote becomes meaningful. If the Court continues to perpetuate the status quo by not utilizing a single standard of review, Americans are left without meaningful choices.

A. History of the Supreme Court's Review of State Ballot Access Laws

Storer v. Brown26 was an early Supreme Court case in which the Court utilized a low level of scrutiny with respect to California election laws that allegedly placed an unconstitutional burden on independent candidates' access to the ballot.27 The Storer Court

24 See Norman, 502 U.S. at 279 (requiring 25,000 voters to sign petition for establishment of new political party in Illinois); Anderson, 460 U.S. at 789 (requiring independent candidate to file nominating petition in March to appear on ballot in November); Storer v. Brown, 415 U.S. 724, 724 (1974) (forbidding independent candidate from appearing on ballot in California if she/he was registered with another political party within one year immediately preceding primary election); Jenness, 403 U.S. at 432 (holding Georgia law requiring nominee of political body to gather signatures from five percent of eligible voters to gain admission to ballot unconstitutional); Williams, 393 U.S. at 24-25 (requiring new party to obtain petitions signed by fifteen percent of qualified voters who voted in previous Ohio gubernatorial election). See generally Darla L. Schaffer, Ballot Access Laws, 73 DENV. U. L. REV. 657, 659-64 (1996) (discussing evolution of Anderson test); Thomas H. Dupree, Jr., Note, Exposing the Stealth Candidate: Disclosure After McIntyre v. Ohio Elections Commission, 63 U. CHI. L. REV. 1211, 1223 (1996) (stating that election regulation laws are subject to balancing test); Fusion Candidacies, supra note 21, at 1310-13 (arguing that Anderson test is more conceptual than empirical).

25 See Mark E. Rush, Voters' Rights and the Legal Status of American Political Parties, 9 J.L. & Pol. 487, 500 (1993) (conflicting views of Court range from "the right to choose among diverse, ideologically distinct options on election day" to having few select candidates that have opportunity to win); Rick G. Strange, Application of Voting Rights Act to Communities Containing Two or More Minority Groups - When is the Whole Greater than the Sum of the Parts?, 20 Tex. Tech. L. Rev. 95, 103, 121 (1989) (discussing consequences of Supreme Court's failure to provide trial courts with meaningful guidance in apportionment cases); Fusion Candidacies, supra note 21, at 1317-18 (criticizing Sixth Circuit decision banning use of independent party designation as infringing on voting rights of supporters of independent candidates).


27 See id. at 729-30 (noting that restrictions on voting rights are not per se unconstitutional); see also William Kirschenr, Fusion and the Associational Rights of Minor Political Parties, 95 COLUM. L. REV. 683, 690 (1995) (reviewing recent Supreme Court definition of political party autonomy); Dominic A. Iannicola, Jr., Note, People v. Constitution: The Congressional Term Limit Debate and a Constitutional Definition of Qualification, 1994 U. ILL.
reasoned that the state's interest in preventing "splintered parties and unrestrained factionalism" was integral to providing a meaningful election. The Court acknowledged, however, that up to that point (1974) it had failed to provide any sort of "litmus-paper test" for determining the validity of these restrictions.

The first attempt by the Court to provide a more concrete test came a decade later in Anderson v. Celebrezze. The Anderson Court introduced a multi-factor balancing test which was a form of intermediate scrutiny. The Court held that an Ohio law imposing early filing dates on independent candidates excluded political late-comers and thus infringed upon the fundamental right to vote. Anderson required courts to consider the character

L. Rev. 683, 690 (1994) (evaluating holding in Storer for its relevant value to term limit debate); Jacqueline Ricciani, Note, Burdick v. Takushi: The Anderson Balancing Test to Sustain Prohibitions on Write-In Voting, 13 Pace L. Rev. 949, 959-60 (1994) (discussing Court's distinction of Storer from other cases evaluating voting statutes using "totality approach").

See Storer, 415 U.S. at 736 (concluding that state's interest in preventing splintered parties compelling and outweighed interest of candidate postponing their decision to run for office); see also Fusion Candidacies, supra note 21, at 1324 (advocating preservation of two party system); Michele Logan, Note, The Right to Write-In: Voting Rights and the First Amendment, 44 Hastings L.J. 727, 749 (1993) (contending that ban on write-in votes does not avoid splintering of parties).

See Storer, 415 U.S. at 730 (noting rule created is not "self-executing" and does not really enable Court to predict outcome of any specific case); see also Kusper v. Pontikes, 414 U.S. 51, 59-61 (1973) (striking down provisions similar to those upheld in Rosario, with only difference being deadline for changing party registration); Rosario v. Rockefeller, 410 U.S. 752, 761-62 (1993) (upholding provision requiring primary voters to register as party members in specified time frame to prevent interparty raiding); Dunn v. Blumstein, 405 U.S. 330, 353-60 (1972) (invalidating Tennessee's one-year residence requirement to vote); Bullock v. Carter, 405 U.S. 134, 145 (1972) (recognizing that state has legitimate interest in regulating number of candidates on ballot); Jenness v. Fortson, 403 U.S. 431, 442 (1971) (concluding that important state interest support requiring challengers show "significant modicum of support" before getting on ballot in order to prevent frivolous or fraudulent candidacies).


See Anderson v. Celebrezze, 460 U.S. 780, 792, 794 (1983) (filing deadline for non-party candidates result in election campaigns being "monopolized by existing political parties").

See id. at 790 (noting impact of early filing deadline on "independent-minded voters").
and magnitude of the asserted injury and the constitutional rights that were allegedly violated.\(^{34}\) In conjunction with this, courts must also evaluate the interests asserted by the state to justify the burden imposed.\(^{35}\) Since this standard of review is so cumbersome in its application,\(^{36}\) courts must engage in a fact intensive analysis for each case, often leading to inconsistent results.\(^{37}\)

1. *Norman v. Reed*\(^{38}\) - The Supreme Court's Application of Strict Scrutiny

Although many lower courts and legal scholars contend that the multi-factor balancing test announced in *Anderson* is the prevailing standard,\(^{39}\) the Supreme Court has not adhered to it. In *Norman v. Reed*,\(^{40}\) the Court applied a strict scrutiny analysis to test the validity of an Illinois ballot access law requiring the state to show a compelling interest in limiting access of new political parties to the ballot.\(^{41}\) The challenged law required new political parties to obtain a certain number of signatures before a candidate could be placed on the ballot.\(^{42}\) The Court held that the state failed to meet its burden of proving a compelling state interest

\(^{34}\) See id. at 789 (denoting first part of multi-factor balancing test).

\(^{35}\) See id. (denoting second part of multi-factor balancing test).

\(^{36}\) See Chase, supra note 31, at 28-30 (asserting that lower courts are unable to decide which standard of review to apply regarding independent candidates in state elections); Zywicki, supra note 5, at 116 (remarking on lack of certainty with respect to appropriate standard of review and how various state interests should be weighed).

\(^{37}\) See Storer v. Brown, 415 U.S. 724, 730 (1973) (indicating that even courts cannot predict results in these cases); Bullock v. Carter, 405 U.S. 134, 143 (1972) (stating that "[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters"); see also Chase, supra note 31, at 31 (noting that Supreme Court's failure to establish coherent standard has resulted in inconsistent standard of review).

\(^{38}\) See id. at 279 (1992).

\(^{39}\) See Zywicki, supra note 5, at 116 (noting *Anderson* multi-factor balancing test has become main test applied to both state and federal regulations).

\(^{40}\) See Norman, 502 U.S. at 279.

\(^{41}\) See id. at 228-94 (holding that state must show compelling interest to limit access of new political parties to ballot); see also Morse v. Republican Party of Virginia, 116 S. Ct. 1186, 1210 (1996) (applying strict scrutiny to registration fee imposed by Republican Party); Eu v. San Francisco Democratic Cent. Comm., 489 U.S. 214, 214 (1989) (holding California did not have compelling interest in infringing First Amendment rights when it imposed restrictions on internal policy of political parties); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (finding that imposition for new political parties to be placed on Ohio state ballots violate equal protection).

\(^{42}\) See Norman, 502 U.S. at 282 (referring to Illinois statute requiring new political party to obtain signatures of either 25,000 voters or 1% of number of votes at preceding election in order to appear on election ballot); see also Kirchner, supra note 27, at 689-90 (analogsing statute struck down in *Norman* to those banning fusion); *Fusion Candidacies*, supra note 21, at 1337 n.98 (discussing facts in *Norman*); Ricciani, supra note 27, at 977-979 (suggesting *Norman* was threshold test to trigger strict scrutiny analysis).
and, therefore, the statute was unconstitutional. The Court reasoned that state limitations on the ability to organize by those with similar political ideologies must be justified by a compelling state interest, as these organizations enable voters to "express their own political preferences." Additionally, if the restriction was "severe", the Court required that the restriction be narrowly tailored to achieve that compelling interest.

The Norman Court continued this activist approach by suggesting how to deal with states' interests. The Court found that the avoidance of voter confusion and ensuring that new parties have some degree of support were compelling state interests. Strict scrutiny combined with the belief that a multitude of candidates creates a meaningful vote renders the Court's approach the most amenable to protecting the right to vote. It is asserted that invoking strict scrutiny analysis forces legislators to open up the political process to more contenders so that the people, and not those who currently hold political power, decide who is a qualified candidate.

43 See Williams, 393 U.S. at 31. This was the first case to apply strict scrutiny to state ballot access laws. Id. The Court believed that if there are only majority party candidates on the ballot then the right to vote is "heavily burdened." Id. There is a denial of equal protection when a new political party is required to obtain fifteen percent of the amount of ballots cast in the prior year's gubernatorial election in order to get on the ballot. Id. See Norman, 502 U.S. at 288 (noting Court has required severe restrictions to be narrowly drawn to serve compelling state interest).

44 See Norman, 502 U.S. at 288 (noting Court has required severe restrictions to be narrowly drawn to serve compelling state interest).

45 See id.; see also Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) (noting case where Supreme Court first required any severe restriction imposed by ballot access laws to be narrowly tailored to achieve compelling state interest).

46 Norman, 502 U.S. at 290 (proposing methods for how to avoid electoral confusion).

47 See id. at 290 (suggesting that Illinois require its candidates get permission from established party they seek to represent to use party name to avoid "suppressing the growth of small parties").

48 See id. at 293-94 (suggesting that Illinois might have employed alternatives to challenged statute).

49 Id. at 280 (stating that right to create and develop new political parties derives from First and Fourteenth Amendments and "advances the constitutional interest of like-minded voters to gather in pursuit of common political ends, thus enlarging all voters' opportunities to express their own political preferences"); see also Morse v. Republican Party of Virginia, 116 S. Ct. 1186, 1210 (1996) (recognizing that right for members of political party to associate is basic constitutional freedom); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626-27 (1969) (addressing restriction on voting rights); Reynolds v. Sims, 377 U.S. 533, 565 (1964) (proclaiming that every citizen has inalienable right to participate in political process of their state).
2. **Burdick v. Takushi**\(^{50}\)

Shortly after *Norman*, the Supreme Court ruled on Hawaii's prohibition on write-in voting.\(^{51}\) In *Burdick v. Takushi*,\(^{52}\) the Court upheld this prohibition by elaborating on the *Anderson* multi-factor balancing test which seemingly combined the standards used in *Norman* and *Anderson*.\(^{53}\) The Court stated that if a severe burden was imposed on First and Fourteenth Amendment rights, the law would be subject to strict scrutiny.\(^{54}\) If, however, the restriction imposed by the election law was reasonable and nondiscriminatory, the state may put forth a mere important regulatory interest as justification.\(^{55}\) This dual standard coupled with inconsistent analysis serves to exacerbate the uncertainty faced by lower courts as to the appropriate standard of review.

**B. Lower Court Treatment of State Ballot Access Laws**

Recent cases reviewing state ballot access laws exemplify the confusion over which standard of review should be utilized.\(^{56}\) In *Rockefeller v. Powers*,\(^{57}\) the Second Circuit reviewed a New York State ballot access law for a violation of the Equal Protection Clause.\(^{58}\) The law required Republican candidates, who were not officially endorsed by the state supported Republican leadership, to collect the lesser of five percent or 1,250 signatures of registered voters. The court found that these requirements imposed a severe burden on First Amendment rights and therefore subjected the law to strict scrutiny.\(^{59}\) The court held that the state's interest in ensuring party unity was not a compelling one, and thus the law was invalid.

\(^{50}\) 504 U.S. 428 (1992).

\(^{51}\) Id.

\(^{52}\) Id.

\(^{53}\) See id. at 434-36 (stating standard to be applied depends upon extent to which challenged regulation burdens First and Fourteenth Amendment rights); see also Fishbeck v. Hechler, 85 F.3d 162, 166 (4th Cir. 1996) (calling such test "sliding scale analysis"). See generally Benjamin D. Black, *Developments in the State Regulation of Major and Minor Political Parties*, 82 CORNELL L. REV. 109, 146 (1996) (noting that issue of whether electoral system provides voters with adequate choices among candidates did not factor in court's determination of whether right to vote was infringed).

\(^{54}\) See *Norman*, 502 U.S. at 289.

\(^{55}\) See *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (recognizing reasonable restrictions imposed by states are those aimed at maintaining fair, honest, and orderly elections).


\(^{57}\) 74 F.3d 1367, 1367 (2d Cir. 1995) (reviewing New York State ballot access law).

\(^{58}\) See id. at 1370 (noting gravaman of plaintiff's complaint).
Republicans to gain access to the primary ballot.\(^5^9\) In applying a rational basis level of scrutiny, the Second Circuit ruled the law was constitutional, noting that the state's burden of proving an "important" interest was met when it required assurances that the challenging candidates have "a modicum of support."\(^6^0\)

A year later, the same parties came before the court, but this time with respect to the unanswered issue of whether the New York ballot access rules constituted an undue burden on the right to vote in violation of the First and Fourteenth Amendments.\(^6^1\) The Court held that New York's ballot access law did in fact pose significant difficulties for certain candidates to gather a sufficient number of registered Republicans to sign the requisite petition.\(^6^2\) The court changed the focus of its review by examining whether the New York ballot access rules "unduly" burdened the right to vote, thus violating the First and Fourteenth Amendments.\(^6^3\)

The 1996 case of *Fishbeck v. Heckler*\(^6^4\) demonstrated how the multi-factor balancing test set forth in *Anderson* leads to undesirable results.\(^6^5\) In *Fishbeck*, the Fourth Circuit concluded that a West Virginia law requiring qualifying petitions to be filed on the eve of the primary election was constitutional.\(^6^6\) The court, in find-

\(^5^9\) See N.Y. ELECTION LAW § 6-136 (McKinney 1996) (requiring that petitions for any office must be signed by fifteen thousand signatures or five percent, whichever is less, of enrolled voters of party in New York).

\(^6^0\) See Rockefeller, 74 F.3d at 1382-83 (stating that if there is no proof of invidious discrimination nor deprivation of right to vote, strict scrutiny should not be applied); see also Jenness v. Fortson, 403 U.S. 431, 442 (1971) (finding important interest of states in requiring preliminary showing of significant modicum of support before placing candidate on ballot); McDonald v. Board of Elections, 394 U.S. 802, 807 (1969) (applying rational basis because right to vote was not infringed); Hewes v. Abrams, 884 F.2d 74 (2d Cir. 1989) (stating case law of Second Circuit has established rational basis review as appropriate for review of state ballot access laws). See, e.g., Burdick v. Takushi, 504 U.S. 428, 432-34 (1992) (noting petitioner's erroneous assumption that laws imposing burden on right to vote are automatically subject to strict scrutiny, instead asserting that flexible standard applies).

\(^6^1\) See Rockefeller, 78 F.3d at 45 (holding that New York ballot access rules are far more burdensome than those adopted by virtually every other state).

\(^6^2\) See id. at 46 (concluding that contacting sufficient number of registered Republicans was made difficult by New York requirements).

\(^6^3\) See id. (addressing First Amendment issues); see also Rockefeller v. Powers, 917 F. Supp. 155 (E.D.N.Y. 1996) (referring to *Storer* test as "simple and sensible", yet advocating need for compelling state interest when such schemes infringe upon right to vote).

\(^6^4\) See Fishbeck v. Hechler, 85 F.3d 162, 162 (4th Cir. 1996) (reviewing West Virginia ballot access law).

\(^6^5\) See id. at 165; see also Texas Indep. Party v. Kirk, 84 F.3d 178, 187 (5th Cir. 1996) (distinguishing between ballot access and voter registration deadlines).

\(^6^6\) See *Fishbeck*, 85 F.3d at 168-69. The majority, in upholding the ballot access restrictions at issue, ignored the fact that independent candidates achieved diminished success getting onto the primary ballot ever since the state imposed ballot access restrictions. *Id.* There was an abundance of non-historical, non-statistical evidence, which showed the se-
ing that the restriction was not severe enough to warrant strict scrutiny, applied the *Anderson* multi-factor balancing test.\(^6\) The court weighed the plaintiff's alleged injury against the state's interest in requiring third party and independent candidates to demonstrate some support from the community.\(^6\) The court found the restrictions were not unduly burdensome in light of the state's valid interest.\(^6\)

The dissent argued that the majority did not properly apply the *Anderson* test because it imposed a burden of proof on the plaintiffs that required a showing greater than a severe burden.\(^7\) The dissent found the ballot access restrictions were severe and did not agree that the justification by the state correlated with the burden imposed.\(^7\) These decisions illustrate the confusion which prevents consistent application of one standard to voter access laws.\(^7\)

II. LEGISLATIVE REDISTRICTING

A. Political Gerrymandering - The Supreme Court's "Double Standard"

The fundamental right to vote has also been affected by the Supreme Court's failure to provide a consistent standard of review for legislative redistricting.\(^7\) These cases are often based on claims that electoral districts are politically gerrymandered.\(^7\)

\(^6\) See Fishbeck, 85 F.3d at 164 (applying *Anderson* balancing test).

\(^7\) See, e.g., Davis v. Bandemer, 478 U.S. 109, 114 (1986) (finding that 1981 Indiana reapportionment plans constituted political gerrymander intended to disadvantage Democrats); Gaffney v. Cummings, 412 U.S. 735, 735 (1973) (noting that despite appearance of political gerrymandering, redistricting plan was valid); Kirkpatrick v. Friesler, 394 U.S. 526, 526 (1969) (believing Missouri's congressional districts were politically gerrymandered).
This phenomenon involves the legislature's creation of voting districts which unfairly enhance the election of a political group's candidate, usually the incumbent.\textsuperscript{75} The major dilemma with respect to political redistricting rulings is the same as that for state ballot access laws - the application of various levels of scrutiny.\textsuperscript{76} The Supreme Court consistently applies strict scrutiny for congressional redistricting plans, but fails to apply this standard for state plans.\textsuperscript{77} The failure to apply a single standard to all cases involving redistricting prevents consistent constitutional protections.\textsuperscript{78} As Justice Brennan noted in his dissenting opinion of \textit{Gaffney v. Cummings}, varying standards allow legislators to stop striving for perfection when redistricting.\textsuperscript{79}

1. Apportionment of Congressional Districts v. Apportionment of State Legislative Districts

A comparison of cases challenging the apportionment of congressional districts and those challenging the apportionment of

\textsuperscript{75} See Evan Geldzahler, Davis v. Bandemer: Remedial Difficulties in Political Gerrymandering, 37 EMORY L.J. 443, 443 n.4 (1988) (quoting Supreme Court Justice Powell's dissent in \textit{Davis}); see also \textit{Kirkpatrick}, 394 U.S. at 538 (Fortas, J., concurring) (defining gerrymandering as "deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes"); Thomas, supra note 13, at 1068 (defining political gerrymandering as "purposeful discrimination by one political party against another for partisan purposes").


\textsuperscript{77} See \textit{Kirkpatrick}, 394 U.S. at 533 (noting justification of history, economic or group interests were not sufficient reasons for disparities in population-based representation); see also \textit{Wells}, 394 U.S. at 546 (noting population variances to create districts with specific interest orientations is antithetical to mandate of Constitution).

\textsuperscript{78} See Peter Schuck, Partisan Gerrymandering: A Political Problem Without a Judicial Solution, in Political Gerrymandering, supra note 10, at 240. Schuck advocates that a proportional representation standard be adopted when adjudicating political gerrymandering claims. \textit{Id.} Proportional representation is defined as the "attempt to secure a representative assembly reflecting with more or less mathematical exactness the various divisions in the electorate." \textit{Id.} at 243 (quoting \textit{Hanna Pitkin, The Concept of Representation} 243 (1967). \textit{But see} Gordon E. Baker, The Unfinished Reapportionment Revolution, in Political Gerrymandering, supra note 10, at 11. The author believes that the Supreme Court's ruling in \textit{Reynolds v. Sims} was intended to provide some flexible guidelines. \textit{Id.} at 14. Baker also finds that this standard of judicial scrutiny in turn would serve to lessen the amount of litigation in this area "now that guidelines of tolerable constitutional limits were reasonably clear." \textit{Id.} at 17.

\textsuperscript{79} See \textit{Gaffney}, 412 U.S. at 779 (concluding that certain range of variances in population de minimus because encourages "legislators to strive for that range rather than for equality as nearly as practicable.") (quoting \textit{Kirkpatrick}, 394 U.S. at 531).
state legislative districts illustrates the Court’s inconsistency ("double standard") in its application of strict scrutiny. 80

a. Congressional Districting

The Constitution mandates the principle of proportional representation which, in turn, forces courts to examine redistricting plans with the highest degree of scrutiny. 81 In the companion cases of Kirkpatrick v. Preisler 82 and Wells v. Rockefeller, 83 the Supreme Court struck down congressional districting plans in Missouri and New York, respectively. The Court held that the states must comply with the constitutional mandate to provide equal representation for equal numbers of people and justify each variance. 84 In Kirkpatrick, the Court found that any variance to the equal population principle contradicted that mandate. 85 The Court applied strict scrutiny and stated that the desire to avoid the fragmentation of political subdivisions does not justify population disparities. 86 In Wells, the Court stated that population vari-

80 See Kirkpatrick, 394 U.S. at 531 (using strict scrutiny in challenge of equal representation in congressional districts noting that Art. I § 2 "permits only the limited population variances... for which justification is shown"); see also Tribe, supra note 2, § 13-16 (stating that strict adherence to population equality goes so far as to not see the need to keep political subdivisions intact); Abner J. Mikva, Justice Brennan and the Political Process: Assessing the Legacy of Baker v. Carr, 1995 U. ILL. L. REV. 683, 691 n.35 (1995) (advocating adoption of "judicially manageable" standard for adjudicating political gerrymandering cases); cf. Reynolds v. Sims, 377 U.S. 533, 565 (1964) (combining concepts of "fair and effective representation for all citizens" and "one person, one vote" for state legislative redistricting plans).

81 See U.S. CONST. art I, § 2 (requiring that elected officials are to be proportional with population of respective state); see also Kirkpatrick, 394 U.S. at 531 (stating that Constitution allows for only limited population variances in creation of congressional districts because states are to strive for equal representation); Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964) (requiring congressional districts be drawn in compliance with Constitutional mandates, so that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's").

82 See, e.g., Kirkpatrick, 394 U.S. at 533 (reviewing Missouri's 1967 congressional redistricting statute and holding it failed to satisfy constitutional standard because state did not justify population variances among districts).


84 See Kirkpatrick, 394 U.S. at 530-31 (rejecting Missouri's de minimus approach stating that it does not adhere to principle of equal representation); see also Wells v. Rockefeller, 394 U.S. 542, 546 (1969) (stating basis for strict scrutiny is to equalize population in all districts of State, which is not satisfied by equalizing population only within defined substates). But see also Mikva, supra note 80, at 689 (finding fault with Justice Brennan's strict compliance to numerical equality of district sizes, stating "[t]he Court's exclusive concentration upon arithmetic blinds it to the realities of the political process...").

85 See Kirkpatrick, 394 U.S. at 533 (finding that acceptance of population variances would result in certain interests being underrepresented).

86 See id. at 534 (rejecting argument that consideration of practical politics can justify population disparities); see also Reynolds v. Sims, 377 U.S. 533, 581 (1964) (allowing for
ances could not be created in order to form districts with specific interest orientations. Here too, the Court was strict in its adherence to "the command of Art. I, § 2" permitting only limited and unavoidable population variances.

b. State Legislative Districts

In contrast to federal redistricting plans, cases dealing with state legislative districts have not followed any consistent standard of review. In some cases, the Supreme Court has invalidated a state apportionment plan because, in creating it, the legislature failed to use equal population as the guiding force. In other cases, however, the Court abandoned this principle, noting that so long as the principle of "one person, one vote" was met, it was irrelevant that votes were being diluted. Justice Brennan has warned that when courts openly tolerate a wide margin of error it only serves to undermine the principle of equal representation.

In *Reynolds v. Sims*, the Supreme Court held an Alabama state legislative plan to be invalid, noting the failure to apportion voting districts in accordance with the population. The Court applied strict scrutiny and established two important concepts for evaluating an equal protection challenge to redistricting. The Court reasoned that apportionment plans must provide for "fair and effective representation for all citizens" as well as be equi-

some deviations from population based representation due to political subdivisions, but warns this should not be taken too far).

See Wells, 394 U.S. at 546 (noting schemes like this one allow groups of districts with defined interest orientations to be overrepresented at expense of districts with different interest orientations).

See id. at 546.


See *Reynolds*, 377 U.S. at 568-571 (upholding district court's invalidation of Alabama apportionment scheme as not based on population).

See *Bandemer*, 478 U.S. at 168-169 (Powell, J., dissenting) (finding problems with plurality solely basing its finding of validity on "one person, one vote" doctrine).

See Gaffney v. Cummings, 412 U.S. 772, 779 (1973) (noting equal representation is designed to prevent debasement of voting).

377 U.S. 533, 579 (1964) (holding apportionment plan created by Alabama Legislature unconstitutional since it deprived plaintiffs and other voters rights under Equal Protection Clause of Fourteenth Amendment and Alabama Constitution).

See id. at 568-71.

See id. at 565-66 (concluding Equal Protection Clause guarantees all voters in state elections equal participation).
populous, following the doctrine of “one person, one vote.” The Court’s demand for adherence to population was not extended to matters relating to political subdivisions. This exclusion was offered with the caveat that legislation can affect political subdivisions only when the equal population principle is not compromised.

The Court reasoned that since the average citizen’s greatest degree of political participation is the exercise of her right to vote, everyone must have an “equally effective voice in the election of members of his or her state.” The case illustrates that the courts should take strong protective measures when analyzing suspect redistricting plans when the force of one’s vote is threatened.

In a plurality opinion, the Supreme Court in Davis v. Bandemer upheld Indiana’s 1981 state apportionment plan. The Court held that as long as the apportionment plan followed the doctrine of “one person, one vote”, the state legislature did

96 See id. at 558. Underneath many of these decisions is the notion that every voter is equal to every other voter in their state. Id. The Court required that every state “make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable.” Id. at 577; see also Swann v. Adams, 385 U.S. 440, 444 (1967). The Court demanded that there be no deviations from strict equality, and threatened sanctions if there were more than de minimus variances or if there was no justifiable state policy. Id. at 444; Tribe, supra note 2, § 13-15. The Court in Reynolds v. Sims failed to set forth the “requisite degree of equality”. Id.

97 See Reynolds, 377 U.S. at 578 (establishing that state legislative districts may require use of political subdivision lines).

98 See id. at 561. The Court does allow some voice to political subdivisions, as such subdivisions may prevent gerrymandering. Id. It is noted, however, that this type of redistricting can subvert the equal population principle. Id.

99 See id. at 565; see also Richard Clau, The Supreme Court and the Electoral Process 136 (1970) (citing Donald Matthews & James Prothro, Negros and the New Southern Politics 234 (1966)) (stating that right to vote at that time was greatest asset blacks in America could have as they had few other resources with respect to politics).

100 See generally Davis v. Bandemer, 478 U.S. 109, 109 (1986) (finding Indiana’s 1981 state apportionment plan was not discriminatory); Gaffney, 412 U.S. at 740-44 (finding Connecticut reapportionment plan valid).


102 See id. at 114-15 (explaining method legislature established districts). But see Political Gerrymandering, supra note 10, at 4-5 (questioning how Supreme Court held partisan gerrymandering was justiciable, yet failed to find Indiana’s apportionment plan unconstitutional).

103 See Davis, 478 U.S. at 118 (noting “one person, one vote” principle is enforced in adjudicating equal protection claims regarding inequalities in populations between legislative plans); see also Baker v. Carr, 369 U.S. 186, 186 (1962) (holding that apportionment was justiciable question); District of Columbia v. United States Dept. of Commerce, 789 F. Supp. 1179, 1182-83 (D.D.C. 1992) (noting this case not distinguishable from apportionment cases where Supreme Court held that issues are justiciable).
not violate the Equal Protection Clause. Here, the redistricting plan appeared to be designed solely to preserve the power of the dominant political party. Nevertheless, the Court held the law constitutional, applying a two part test which required the plaintiffs prove both discriminatory intent and effect. Since this test was not met, the Court did not even address the issue of the appropriate standard of review. As its rationale, the Court asserted that regardless of election results, the elected officials will represent minority interests. This rationale appears to be at odds, however, with jurisprudence suggesting that only with constitutional protection of voting rights is there fair representation.

The Supreme Court has seemingly taken a “hands off” approach to issues of state redistricting. In Gaffney v. Cummings, both Connecticut’s General Assembly and a bipartisan commission had difficulty agreeing on an adequate reapportionment plan after the decennial census. The District Court for the District of Connecticut found inequalities in both of the plans, and thus devised one

104 See Davis, 478 U.S. at 133 (noting that mandate of one person, one vote often results in deviation from equal representation).

105 See id. at 161-62 (Powell, J., dissenting). The dissent found that the plurality could only have taken into consideration the doctrine of “one person, one vote”, despite uncontradicted proof that certain key districts were grossly gerrymandered to make it more likely for Republican candidates to get elected. Id.

106 Id. at 141-42 (failing to reach issue of which standard of review to apply).

107 See id. at 142 (noting Court did not reach question of state interests served by particular districts).

108 See id. at 132. Justice Powell, in his dissent, argued that there are reasons other than the small likelihood of winning that makes an apportionment plan unjust. Id. Powell had a problem with the Court’s presumption that the elected candidate will pay heed to those who did not elect him. Id. He also found the plurality’s reasoning dubious in thinking that members of a losing political party are going to have as much influence in state government as those in power. Id. “...no one doubts that partisan considerations play a major role in the passage of legislation and the appointment of state officers.” Id. at 168; see also Charles Backstrom et al., Establishing a Statewide Electoral Effects Baseline, in POLITICAL GERRYMANDERING, supra note 10, at 145. The authors called the theory of minority voters being represented by majority party officeholders “virtual representation.” Id. They found the opinion in Bandemer to be “dubious” as legislators cannot possibly give as much weight to the views of their opponents as they do to their supporters. Id. But see Anderson v. Celebrezze, 460 U.S. 780, 793 n.15 (1983) (quoting LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 774-775 (1978)). Those who make it onto the ballot will “adequately reflect the perspective of those who might have voted for a candidate who has been excluded.” Id.


of its own.\textsuperscript{112} The Supreme Court held that this kind of judicial activism was outside the scope of a federal court's authority,\textsuperscript{113} preferring instead that the states maintain a plan with minor population variances rather than have the courts get involved.\textsuperscript{114}

The aforementioned cases suggest that the Constitution has a built in check against political gerrymandering on the congressional level, but not on the state level.\textsuperscript{115} This creates an anomaly because state governments are permitted to do that which the federal government is prevented from doing by the Constitution.\textsuperscript{116} To avoid this inconsistent result, the Supreme Court must invoke a higher level of scrutiny to state legislative redistricting plans to bring them into conformity with federal plans.

2. Political Gerrymandering v. Racial Gerrymandering

The manner in which the Supreme Court treats political gerrymandering cases is also different from the Court's analysis of racial gerrymandering cases.\textsuperscript{117} In \textit{Shaw v. Reno},\textsuperscript{118} a districting plan created two majority black congressional districts, which were challenged by a group of white voters.\textsuperscript{119} The Court applied strict scrutiny\textsuperscript{120} because the alleged discrimination was race-

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\textsuperscript{112} See \textit{Gaffney}, 412 U.S. at 750.
\textsuperscript{113} See \textit{id.}. The Court stated that "this very case represents what should not happen in the federal courts." \textit{Id.}
\textsuperscript{114} State reapportionment is a job delegated to the individual state and local legislatures. \textit{Id.}
\textsuperscript{115} See \textit{id.} at 751.
\textsuperscript{116} See \textit{id.} at 749-50 (noting that political considerations are part of redistricting and apportionment); \textit{Kirkpatrick v. Priesler}, 394 U.S. 526, 531 (1969) (stating Constitution mandates equal representation with respect to congressional districts).
\textsuperscript{117} See \textit{id.} at 778 (noting decision in \textit{Kirkpatrick v. Preisler} is applicable to state legislative apportionment).
\textsuperscript{118} See \textit{Shaw v. Reno}, 509 U.S. 630, 647 (1993) (noting precedent has not held racial and political gerrymanders up to same scrutiny); see also Williams, \textit{supra} note 4, at 564 ( remarking Supreme Court has taken more lenient position with respect to political gerrymandering than they have with racial gerrymandering by requiring population equality and racial fairness).
\textsuperscript{119} 509 U.S. 630 (1993).
\textsuperscript{120} See \textit{Bush v. Vera}, 116 S. Ct. 1941, 1960 (1996) (deciding whether racial classifications resulting from voting districts were narrowly tailored to further compelling state interest); \textit{Shaw}, 509 U.S. at 643 (holding state legislation distinguishing citizens based solely on race must be narrowly tailored to further compelling governmental interest); \textit{Wygant v. Jackson Bd. of Educ.}, 476 U.S. 267, 277-278 (1986) (stating that in affirmative action context, racial classifications must be justified by compelling state interest); \textit{Arlington Heights v. Metropolitan Hous. Dev. Corp.}, 429 U.S. 252, 266 (1977) (holding that when race is distinguishing factor in state legislation it must be narrowly tailored to further compelling government-
based. The Shaw Court refused to address the political gerrymandering issue, instead going directly to the racial gerrymandering question. The Court’s desire to eliminate racial classifications was the reason behind finding the plan unconstitutional under the Equal Protection Clause. The Court reasoned that elected officials from a racially gerrymandered district would have a tendency to represent only the members of the group that supported them. This is contradictory to the holding in Davis where the Court believed that an entire constituency would be fairly represented by the winning candidate of a politically gerrymandered district. Therefore, there is incongruous reasoning with respect to the Court’s confidence in the ultimate representation of a constituency of a politically gerrymandered district. The Court appears to make no attempt at reconciling these opposing rationales.
Congressional redistricting is subject to the mandates of equal representation.\(^{127}\) Racial gerrymandering is monitored using the highest standard of review because it involves "suspect" classifications.\(^{128}\) It appears that the rationale justifying the high standard of review for congressional redistricting plans and racial gerrymandering may also be used to invoke this standard for state redistricting plans, even at the expense of compromising the notion of a republic.

**B. Lower Court Treatment of Political Gerrymandering**

*Marylanders for Fair Representation, Inc. v. Schaefer*\(^{129}\) further exemplifies the disadvantage faced by challengers of state legislative redistricting due to the low standard of review applied to such challenges.\(^{130}\) In upholding the plan at issue, the Maryland District Court recognized that although the objective for congressional districts is absolute population equality, the Supreme Court allows the states to be more flexible by requiring only "substantial" population equality.\(^{131}\)

The *Schaefer* court distinguished congressional redistricting from state legislative redistricting cases in which the applicable test is analogous to rational basis.\(^{132}\) The Court applied the *Bandemer* test of requiring proof of intentional discrimination and discriminatory effect to determine whether there was unconstitutional political gerrymandering.\(^{133}\) The court held that although plaintiffs were able to overcome the fairly low standard for establishing discriminatory intent they failed to demonstrate discriminatory effect.\(^{134}\) The requirement that a discriminatory effect be


\(^{128}\) See *Shaw*, 509 U.S. at 643 (holding Fourteenth Amendment requires state legislation that expressly distinguishes citizens on basis of race to be narrowly tailored to achieve compelling governmental interest); *see also Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (noting that "the policy of separating races is usually interpreted as denoting the inferiority of the Negro group").


\(^{130}\) See id. at 1033 (applying rational basis standard to state legislative redistricting cases).

\(^{131}\) See id. at 1030.

\(^{132}\) See id. at 1033 (noting some deviations from population equality are permissible with respect to apportionment of seats in state legislature).

\(^{133}\) See id. at 1038 (utilizing requirements announced in *Davis v. Bandemer*).

\(^{134}\) See id.
shown is at odds with the guiding principles of voting rights jurisprudence; therefore it is asserted that this test be abandoned.\textsuperscript{135} The Fourth Circuit, however, in\textit{Republican Party v. Martin},\textsuperscript{136} found such facts to be sufficient.\textsuperscript{137} The\textit{Martin} court found several consequences resulting from a party having difficulty getting elected.\textsuperscript{138} Such negative manifestations included Republicans less inclined to run for office because of the high likelihood of losing\textsuperscript{139} and the diminishing of campaign contributions as people did not want to contribute to candidates perceived as almost certain losers.\textsuperscript{140} The\textit{Martin} court noted that despite the fact that judges may adequately represent minority interests, this is an insufficient rationale to validate political gerrymandering.\textsuperscript{141} To require that the challenging party have absolutely no voice in the political process, as\textit{Bandemer} does and as lower courts follow, seems to be severe. It is suggested that the problem goes deeper than having a voice, but that of not being heard.\textsuperscript{142}

In\textit{Republican Party of North Carolina v. Hunt},\textsuperscript{143} one of the latest lower court decisions in the area of political gerrymandering, the problem with the Supreme Court's failure to put forth a coherent theory of constitutional adjudication of political gerrymandering was revealed.\textsuperscript{144} Rulings such as these send the message to the electorate that the Court is protecting those legislators who create apportionment plans in their favor.\textsuperscript{145} Numeral

\textsuperscript{136} 980 F.2d 943 (4th Cir. 1992).
\textsuperscript{137} See\textit{id.} at 954 (finding RPNC's complaint offered sufficient allegations of intentional political discrimination to withstand dismissal).
\textsuperscript{138} See\textit{id.} at 957 (noting RPNC presented disproportionate election results in its attempt to prove discriminatory effect).
\textsuperscript{139} See\textit{id.} The RPNC presented data showing the decreasing likelihood of Republicans running for office.\textit{Id.} For example, in the 1984 and 1986 elections, only four Republican candidates contested the 40 judgeship positions.\textit{Id.}
\textsuperscript{140} See\textit{id.} at 957.
\textsuperscript{141} See\textit{id.} at 958 (noting courts should not presume those elected will ignore interests of underrepresented groups).
\textsuperscript{142} See\textit{id.} at 1043 (identifying distinction between having voice and being heard).
\textsuperscript{143} 77 F.3d 470, available in 1996 WL 60439 at *4 (4th Cir. 1996) (presenting proof of consistent, pervasive discrimination in state's election of superior court judges was not sufficient to rule in plaintiff's favor).
\textsuperscript{144} See Bernard Grofman, \textit{Unresolved Issues in Partisan Gerrymandering Litigation}, in \textit{POLITICAL GERRYMANDERING}, supra note 10, at 4 (stating, in response to\textit{Davis}, that Supreme Court gave "disgruntled political groups a hunting license for redistricting plans they dislike, but left them in the dark as to how to bag one") (quoting\textit{CONGRESSIONAL QUARTERLY}, July 19, 1986, at 1641).
\textsuperscript{145} See Kristen Silverberg, \textit{The Illegitimacy of the Incumbent Gerrymander}, 74\textit{TEX. L. REV.} 913, 929 (1996) (noting courts have actively participated in protecting incumbents by deferring to political gerrymanders).
ous scholars believe that the Court can set up a standard similar to the one used in racial gerrymandering and apply it to allegations of political gerrymandering.\textsuperscript{146} In fact, the Court in \textit{Davis} went so far as to state that these two claims regarding political and racial gerrymandering were not distinguishable in terms of justiceability.\textsuperscript{147}

\textbf{III. Affirmative Steps Must Be Taken by the Supreme Court}

\textbf{A. State Ballot Access Laws Mandate Strict Scrutiny}

It is a contradiction of the democratic process to have courts flounder in the face of challenges to state ballot access laws.\textsuperscript{148} The random denial of potential candidates to appear on election ballots due to inconsistencies regarding the proper standard of review is unacceptable.\textsuperscript{149} The Supreme Court does not appear to have confidence in the American electorate as revealed in its rationale that avoiding voter confusion, by limiting candidates on the ballot, is a legitimate state interest.\textsuperscript{150} Courts should review electoral regulations that potentially limit constitutionally protected freedoms with the highest degree of scrutiny.\textsuperscript{151}

In a dissenting opinion, Justice Brennan advocated the application of strict scrutiny to state ballot access law challenges, stating that "when legislation burdens such a fundamental constitutional

\begin{footnotes}
\item[146] See Hamilton, \textit{supra} note 10, at 1554 (advocating that Supreme Court has already equated racial and political gerrymandering in cases dealing with latter, such as \textit{Reynolds v. Sims} where Court stated that "diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race"); see also Bernard Grofman, \textit{Toward a Coherent Theory of Gerrymandering: Bandemer and Thornburg, in POLITICAL GERRYMANDERING, supra note 10, at 53 (suggesting that three part test applied in racial gerrymandering case of \textit{Thornburg v. Gingles}, 478 U.S. 30 (1986) also be applied in political gerrymandering cases because both deal with group rights).}


\item[148] See generally \textit{Baker v. Carr}, 369 U.S. 186, 225-26 (1962) (holding political gerrymandering was justiciable in order to protect Fourteenth Amendment rights).


\item[150] See, \textit{e.g.}, Burdick v. Takushi, 504 U.S. 428, 434 (1992) (remarking that state's system of limiting field of candidates may be necessary to ensure efficient elections); Anderson v. Celebreeze, 460 U.S. 780, 780 (1983) (evaluating interests asserted by state in ballot access law).

\item[151] See, \textit{e.g.}, \textit{Bush v. Vera}, 116 S. Ct. 1941, 1960 (1996) (holding racial redistricting subject to strict scrutiny review); Porto, \textit{supra} note 18, at 285 (recommending Supreme Court adopt strict scrutiny in ballot access cases as utilized in \textit{Williams v. Rhodes}).
\end{footnotes}
right, it is not enough that the legislative means rationally promote legitimate governmental ends." The Supreme Court is in the best position to set up such a standard because, in theory, it is the only apolitical governmental branch. Furthermore, federal and state legislators, who benefit directly from these laws, have no real incentive to change the status quo.

The multi-factor balancing test announced in Anderson v. Celebrezze is inadequate as it leaves too much discretion to individual courts, resulting in inconsistent applications. This is apparent in cases like Fishbeck v. Hechler, where rational basis review was applied because the majority found the state restriction to be reasonable, while the dissent noted the severity of the restrictions based upon a factual analysis.

The Supreme Court must invoke strict scrutiny, as was done in Norman v. Reed, once the constitutional right to vote is burdened. This would place responsibility on state legislatures to prove that there are no other alternatives to meet the state's interest and protect voting rights. A strict scrutiny analysis would compel courts to identify a compelling state interest; and then determine whether there are any less burdensome alternatives.

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152 See Storer v. Brown, 415 U.S. 724, 756 (1974) (Brennan, J., dissenting) (stating governmental action may only withstand constitutional scrutiny upon clear showing that burden imposed is necessary to protect compelling and substantial governmental interest).

153 See generally U.S. Const. art. II, § 2, cl. 2 (noting president and not electorate is responsible for nominating federal judges); Tribe, supra note 2, § 3-1 (noting role of federal judiciary is to "interpret and enforce the Constitution as law while confined by limitation of having power to resolve only "cases" or "controversies").

154 See Hamilton, supra note 10, at 1544 (noting incumbents have high re-election rates because they are able to manipulate voting districts to maintain their own support); Silverberg, supra note 145, at 920-21 (according to social choice theory, those who are responsible for redistricting will most likely do so to their own political advantage).


156 See Rockefeller v. Powers, 74 F.3d 1367, 1367 (2d Cir. 1995) (dealing with New York ballot access law preventing Steve Forbes from getting onto ballot); see also Fishbeck v. Heckler, 85 F.3d 162, 162 (4th Cir. 1996) (reviewing West Virginia ballot access law).

157 See Fishbeck, 85 F.3d at 168 (Payne, J., dissenting) (reviewing historical data from West Virginia regarding ballot access laws and characterizing them as severe).


159 See id. at 760.
B. Redistricting - Strict Scrutiny as the Most Logical "Check" Against Political Gerrymandering

Traditional guidelines, which legislators must consider when redistricting, are already in place. Justice Powell's dissent in Davis v. Bandemer remarks on the "pressing need for the Court to enunciate standards" so that state legislators and judges may have some guidance when creating and reviewing apportionment plans. The factors Justice Powell favored included: the shapes of voting districts, adherence to established political subdivision boundaries and the nature of legislative procedures by which apportionment laws were adopted. When using this neutral and legitimate criteria, the states should not take into consideration the political beliefs or party affiliations of its voters, and legislative history reflecting contemporaneous goals. Justice Powell did not find it sufficient for a court to validate a plan solely on the doctrine of "one person, one vote." Justice Powell also noted a significant flaw in the discriminatory intent and effect test put forth by the majority. By having election results be the determining factor, there is the possibility that a neutral redistricting

160 See Davis v. Bandemer, 478 U.S. 109, 161-185 (1986) (Powell, J., dissenting) The dissent believed the majority should have set out a readily identifiable redistricting principle. See, e.g., Charles Backstrom, et al., Establishing a Statewide Electoral Effects Baseline, in POLITICAL GERRYMANDERING, supra note 10, at 151-53. The traditional factors mentioned in Davis were procedural and structural indicators, with the latter being broken down into four structural measures: (1) multimember districts - "when inconsistently used" it can be a discriminatory practice in and of itself; (2) uncompactness - when people see an oddly shaped district they assume the lines were manipulated for a political reason; (3) cutting subdivision lines - usually done for partisan reasons, and; (4) breaking communities of interest - can lead to the breakup of a majority. Id. These factors, however, are not dispositive of discriminatory political gerrymandering. Id.; Bernard Grofman, Criteria for Redistricting: A Social Science Perspective, 33 UCLA L. Rev. 77, 78-93 (1985). Grofman goes through criteria for districting, which he divides into the five categories of formal, racial intent, political intent, racial outcome/anticipated outcome, and political outcome. Id.

161 See Davis, 478 U.S. at 166 (noting that aside from applying strict scrutiny, courts should guide legislatures on how to effectuate proper redistricting plans).

162 See id. at 176 (describing factors which Powell believes should guide both legislators who redistrict along with judges who test redistricting plans against constitutional challenges).

163 See id.

164 See id.

165 See id. at 168. Powell lists two potential problems with a court relying solely upon the doctrine of "one person, one vote". Id. First, it may lead to "undue emphasis on mathematical exactitude". Id. Second, it may allow for, as this case has shown, intentional discriminatory gerrymandering. Id.

166 See id. at 173 n.10.
plan may be deemed unconstitutional if a group consistently loses an election.¹⁶⁷

CONCLUSION

Since the right to vote is a fundamental right protected by the Constitution, this Note contends that the Supreme Court should apply a strict standard of scrutiny to state ballot access laws and state legislative redistricting. The most efficient way to deal with state ballot access laws and political gerrymandering is to set forth a solid and consistent standard, which will put state legislators and judges on notice as to what is constitutionally acceptable. The Supreme Court dared to enter into the “political thicket” in *Baker v. Carr*; now it must find its way out so that those who create and review these state ballot access laws and apportionment plans may follow. This Note presents an opportunity for the Court to become the forerunner and champion of the people’s right to vote. Ultimately, the result will be a myriad of political contenders with platforms that espouse more than the traditional rhetoric. The application of strict scrutiny to state ballot access laws and political gerrymandering has the potential to change the American political system as we know it so that it conforms with a true democracy.

*Jennifer R. Abrams*

¹⁶⁷ See *id.* at 173 n.13.