UNSAFE HARBORS: ONE PERSON, ONE VOTE AND PARTISAN REDISTRICTING

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INTRODUCTION

Every ten years, throughout America, state and local government officials reapportion voting districts to bring them into line with the new population figures revealed by the national Census. Reapportionment is a highly potent political tool, enabling those who draw districting lines to further their goals by manipulating the makeup of various constituencies. There are two ways they do it. One is by manipulating the shape of the districts—namely, gerrymandering. The other is by manipulating the size of district populations—creating population differences among districts, thus establishing deviations from the one person, one vote ideal. Both means of furthering political objectives have frequently come under constitutional attack—often when racial motivations were thrown into the picture, but also, on many occasions, when pure politics was the motivating factor. In the wake of the Supreme Court's recent split decision in Vieth v. Jubelirer, in which a majority essentially held that virtually all forms of political gerrymandering are permissible exercises of legislative power that do not violate the Equal Protection Clause, it seems odd that the

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1 It is true that even districts of perfect population equality hardly ever have the exact same number of voters, since districts are typically reapportioned according to total population rather than by the number of eligible, registered, or actual voters. The courts have generally preferred using total population counts for apportionment. See Burns v. Richardson, 384 U.S. 73, 91-93 (1966) (expressing a preference for the use of total or citizen population over registered or actual voter numbers). But see Garza v. County of Los Angeles, 918 F.2d 763, 780-86 (9th Cir. 1990) (Kozinski J., concurring in part and dissenting in part) (arguing that apportionment according to number of voters, rather than total population, may be preferable).


3 U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). Numerous commentators have addressed the question of whether, and to what degree, partisan gerrymandering is constitutionally permissible. See generally Bruce E. Cain, Perspectives on Davis v. Bandemer: Views of the Practitioner, Theorist and Reformer, in POLITICAL GERRYMANDERING AND THE COURTS 117, 128 (Bernard Grofman ed., 1990) (examining the political gerrymandering jurisprudence and discussing issues that remain unre-
Supreme Court has yet to opine on whether partisan politics can be a legitimate justification for deviations from one person, one vote equality.

Although landmark decisions by the Warren Court established the constitutional vitality of the one person, one vote principle, over the past thirty years the Supreme Court has chipped away at this ideal, allowing so-called "minor deviations" in population between voting districts—particularly in state and local apportionment plans—when

solved); Adam Cox, Partisan Fairness and Redistricting Politics, 79 N.Y.U. L. REV. 751 (2004) (arguing for the adoption of a rule limiting the frequency of redistricting as a means of promoting partisan fairness); John Hart Ely, Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?, 56 U. MIAMI L. REV. 489, 490 (2002) (criticizing the Supreme Court's decision in Easley v. Cromartie, 532 U.S. 234 (2001) (holding that the district court's finding that race rather than politics was the predominant factor in a state legislature's congressional redistricting plan was clearly erroneous), as an "offhand approval" of partisan gerrymanders and racial stereotypes); Luis Fuentes-Rohwer, Doing Our Politics in Court: Gerrymandering, "Fair Representation" and an Exegesis into the Judicial Role, 78 NOTRE DAME L. REV. 527 (2003) (arguing that the Supreme Court should adopt a "minimalist" approach to racial and political gerrymandering so as to allow the appropriate political actors to carry out their policymaking duties); Samuel Issacharoff, Gerrymandering and Political Cartels, 116 HARV. L. REV. 594 (2002) (proposing that authority to redistrict be taken away from insider political operatives, thus promoting a more competitive political process and rendering all purposeful redistricting suspect); Daniel R. Ortiz, Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself, 4 J.L. & POL. 653 (1998) (arguing that court-imposed remedies cannot protect incumbents, providing legislators with an incentive to redistrict legally so as not to involve the courts); Nathaniel Persily, In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders, 116 HARV. L. REV. 649 (2002) (arguing that redistricting authority should remain with incumbent politicians and that judges should not strike down politically-motivated redistricting plans); Peter H. Schuck, The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics, 87 COLUM. L. REV. 1325, 1329 (1987) (suggesting that political gerrymandering perpetuates the majority's political advantage and therefore raises serious issues concerning the legitimacy of government, but arguing that a judicial remedy would be a greater evil).

4 See generally Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713, 715 (1964) (holding that the apportionment of the Colorado Senate under a newly adopted scheme substantially departed from population-based representation and therefore violated the Equal Protection Clause); Roman v. Sincock, 377 U.S. 695 (1964) (holding that neither house of the Delaware General Assembly was apportioned substantially on a population basis); Davis v. Mann, 377 U.S. 678, 690 (1964) (holding that neither house of the Virginia General Assembly was sufficiently apportioned on a population basis to satisfy constitutional requirements); Md. Comm. for Fair Representation v. Tawes, 377 U.S. 656, 673 (1964) (holding that Maryland's legislative representation scheme violated the Equal Protection Clause because it created gross disparities from population-based representation in the apportionment of Senate seats); WMCA, Inc. v. Lomenzo, 377 U.S. 633, 653-54 (1964) (holding that New York's apportionment plan violated the Equal Protection Clause because it had a built-in bias against voters residing in more populous counties); Reynolds v. Sims, 377 U.S. 553, 561-68 (1964) (holding that the Equal Protection Clause requires substantially equal representation for all citizens in a state regardless of where they reside); Wesberry v. Sanders, 376 U.S. 1, 7-8, 18 (1964) (holding that the constitutional requirement in Article I, Section 2, that Representatives be chosen "by the People of the several States" means that as nearly as is practicable, one person's vote in a congressional election is to be worth as much as another person's vote); Baker v. Carr, 369 U.S. 186, 237 (1962) (holding that an equal protection challenge to a Tennessee apportionment statute presented a justiciable constitutional cause of action).
adequately justified by legitimate state policies. Vieth affirmed that, in virtually every case, political motivations may be the driving force in the shape of districts, and redistricters may create districts of utterly bizarre shapes for blatantly partisan reasons without running into Equal Protection trouble. But can the creators of legislative reapportionment maps manipulate the size of districts for partisan reasons? Is it permissible for map drawers to create population deviations between voting districts to further partisan ends? As Justice Scalia recently put it, the Supreme Court has never weighed in on this issue with anything but “grand generalities” in cases that did not directly address this question. The real action on this question has taken place in the lower courts, which have come to varying—and often highly questionable—conclusions.

The political effects of population deviations in redistricting are real and substantial. Although current deviations do not approach the hundred-to-one population ratios that led to the Supreme Court’s early one person, one vote decisions, they still can often make the difference in which party has majority control over a legislature. Map drawers are well aware of this fact, and are now able to use new redistricting technologies to draw up new maps that maximize their political advantages, with population deviations being among their most potent tools. Consequently, a Supreme Court ruling on the permissibility of partisan-inspired population deviations in reapportionment could have a major impact on the political balance of power in many states and localities.

As this Article will demonstrate, 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. This analysis is based on several corollary findings: (1) the Court has subjected population deviations in apportionment plans to far greater scrutiny than it has to gerrymanders; (2) it has been exceedingly critical of racially and regionally motivated deviations from perfect population equality; (3) the justifications it has allowed for de minimis population deviations in congressional districts do not include partisan considerations; and (4) it has upheld lower courts that have overturned state and local reapportionment plans that deviated from perfect equality for political reasons. Despite this case law, the majority of lower courts that have addressed challenges to population de-

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5 See infra Parts I.A.2-3.
6 124 S. Ct. at 1792.
7 Cox v. Larios, 124 S. Ct. 2806, 2809 (2004) (summarily affirming a district court judgment that Georgia’s legislative reapportionment plans violate the one-person, one-vote principle).
8 See infra Part I.B.
viations in redistricting maps have given state and local officials a virtual carte blanche to create deviations for just about any reason, as long as the deviations do not total more than ten percent.

Part I of this Article performs the first comprehensive survey of the case law relating to politically motivated deviations from one person, one vote equality, both in the Supreme Court and in the lower courts. This review of the case law concludes that politics is a highly suspect cause of even minor population deviations in reapportionment plans. Part I also looks at the extent and political impact of the population deviations that currently exist in state legislatures across the country. Part II offers a constitutional standard for evaluating challenges that allege that population deviations in reapportionment plans are the result of partisan motives. This proposed standard—based on an extrapolation from other areas of equal protection law—addresses both the degree of influence that politics may have on redistricting plans and the proper methods of proving that a plan exceeds the constitutional limits.

I. THE CASE LAW

A. Supreme Court Cases

The Supreme Court has developed a one person, one vote jurisprudence that gives more leeway to state and local redistricting plans than it does to congressional reapportionments, the latter of which are also under state control pursuant to Article I of the Constitution. This Section looks at the Supreme Court's cases that have dealt with population disparities in reapportionment, to determine how the Court might treat population deviations that are the product of partisan motives. The Court has fully acknowledged that politics inevitably play a major role in district reapportionment. However, this section demonstrates that although the Court allows "minor deviations" resulting from efforts to further legitimate state policies in reapportionment, partisan politics is not such a legitimate motive.

1. First Principles

As the Supreme Court has offered no direct guidance on the permissibility of using partisan considerations as a motivation for deviations from one person, one vote, it is important to go back to the ear-

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9 See U.S. CONST. art. I, §§ 2, 3 & amend. XVII.
10 See Vieth v. Jubelirer, 124 S. Ct. 1769, 1771 (2004) (saying that "[a] determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied").
liest one person, one vote cases to see how the Court's treatment of population disparities in state and local reapportionments has evolved. Though most of us view the right to an equally weighted vote as central to our self-conception as citizens of a democracy, for a long time the Supreme Court did not accept challenges to statutes and apportionment plans in which some citizens' votes weighed far more heavily than others. Until the early 1960s, the Supreme Court never interfered in legislative redistricting challenges, deeming them to be nonjusticiable political questions. This changed with *Baker v. Carr,* the Warren Court's seminal one person, one vote case, in which the Court held for the first time that challenges to voting districting plans based on the Equal Protection Clause of the Fourteenth Amendment were justiciable in federal courts.

Two years later, in *Reynolds v. Sims* and its companion cases, the Court struck down various state legislative districts for their unequal
Chief Justice Warren's Reynolds opinion stressed the individual nature of voting rights:

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.\(^{18}\)

Chief Justice Warren emphasized how the individual right to vote is impaired if some votes count more than others, as they do when some districts with equal legislative clout have unequal populations:

\[\text{If a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical.}^{19}\]

Chief Justice Warren went on to say that "[f]ull and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less."\(^{20}\) In a statement that seems eerily at odds with the Court's subsequent treatment of partisan gerrymandering,\(^{21}\) Chief Justice Warren declared:

\[\text{[I]n a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to}

\[\text{menzo, 377 U.S. 633 (1964) (New York); see also Wesberry v. Sanders, 376 U.S. 1, 18 (1964) (requiring U.S. congressional districts within a state to be drawn on an equal population basis); Gray v. Sanders, 372 U.S. 368, 381 (1963) (holding that a "county unit" system for counting votes in Georgia's statewide Democratic primaries constituted unequal weighing of votes that violated the Equal Protection Clause).}\]

\(^{18}\) 377 U.S. at 562.

\(^{19}\) Id. at 562-63.

\(^{20}\) Id. at 565.

sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. 22

In perhaps the most forceful and audacious language of the opinion, Chief Justice Warren stated that deviations from the principle of one person, one vote for any reason were as constitutionally offensive as racial restrictions on voting: "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 or economic status." 23 According to the Court, "The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races." 24 The Reynolds Court also seemed to deny that state policies and goals other than equal population representation can override the constitutional need for equality:

We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us. 25

In justifying what opponents might call this intrusion on state sovereignty, the Court responded by quoting from its decision in Gomillion v. Lightfoot: 26 "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." 27

After stating these fundamental principles, the Reynolds Court set forth a legal rule that was forceful but not hopelessly idealistic:

By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." 28

Perfect population equality is not required: "We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Math-

22 Reynolds, 377 U.S. at 565.
24 Id. at 565.
25 Id. at 566.
27 Id. at 347.
28 Reynolds, 377 U.S. at 577.
matical exactness or precision is hardly a workable constitutional requirement."\(^9\)

What are the lessons of *Reynolds*? The opinion set out a strict standard for state legislative apportionments: every districting scheme has to be as close to perfect population equality as is possible under the circumstances, no competing state policies are sufficient justification for deviations, and any violation of this principle is as violative of the Equal Protection Clause as denying a person the right to vote on account of his race.\(^{10}\) If *Reynolds*—and no subsequent cases—were applied in evaluating a redistricting plan with a total deviation of just short of ten percent, and it was evident that a concerted effort was made to reach ten percent deviation rather than perfect equality, then the most likely result would be to jettison the plan as a Fourteenth Amendment violation as egregious as the postbellum Grandfather Clauses. But, in deciding whether plans pass constitutional muster, it is necessary to examine to what extent the post-*Reynolds* one person, one vote cases have chipped away at the strict ideals set forth by the Warren Court in 1964.

In *Roman v. Sincock*,\(^{31}\) decided the same day as *Reynolds*, the Court rejected the idea that a strict mathematical formula can be used to decide whether an apportionment plan violates the Equal Protection Clause:
The problem does not lend itself to any such uniform formula, and it is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause. Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.32

It is this warning against "arbitrariness or discrimination," along with Reynolds's mandate of creating plans as close to perfect equality as is practicable, that set the standard for evaluations of deviations from the one person, one vote ideal.

2. Limitation of the One Person, One Vote Ideal

In cases since Reynolds, the Court has appeared to widen the range of deviation in district population size that it permits. It has not only allowed some deviation from perfect population equality, but has also allowed considerably larger deviations in state and local legislative districts than it has allowed in congressional districts.33 In Reynolds

32 Id. at 710.
33 In contrast to the "ten percent" burden-shifting rule for state and local redistricting plans discussed infra Part I.A.3, the Court has continued to hold congressional redistricting maps to a very high standard of near-perfect equality. Karcher v. Daggett, 462 U.S. 725 (1983), established that "there are no de minimis population variations [for congressional reapportionment plans], which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2, [sic] without justification." Id. at 734. For any deviation above zero, "no matter how small," the state must justify it as furthering some legitimate state policy. Id. at 730 (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969)). The Court struck down a New Jersey reapportionment plan with a total deviation of 0.6984% from the average district because the state failed to offer any legitimate justification for these deviations. See id. at 738, 742 (refusing to accept the proffered justification of preserving the voting strength of racial minority groups). The Court rejected the argument that the plan's deviation was "the functional equivalent of zero" since the population deviation in the plan exceeded the margin of inaccuracy in the Census itself. Id. at 735; see also Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964) (striking down a Georgia congressional apportionment plan in which the largest district had a population more than three times that of the smallest one, and saying that congressional plans must be drawn on the principle that "as nearly as is practicable one person's vote in a congressional election is to be worth as much as another's"); Hastert v. State Bd. of Elections, 777 F. Supp. 634, 644-45 (N.D. Ill. 1991) (holding that proponents of a congressional plan with a total population deviation of seventeen people out of an ideal district population of 571,530 failed to adequately justify this deviation, rendering their plan unconstitutional). But see Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws, 781 F. Supp. 394, 397 (D. Md. 1991) (upholding a congressional plan with a deviation of ten people, considered to be a very small numerical variance among congressional districts, but only because the court found that the deviation was justified by an effort to give an incumbent congressman a safe seat and provide a majority black population in the same area a chance to choose a representative). Since Karcher, state congressional redistricting plans have had much more precise population equality, with extremely small dif-
and some of its companion cases, the population deviations at issue were truly immense, with some legislative districts having several times as many people as others did. However, when the population deviations in state and local plans were smaller, the Court allowed some leeway when the defendant offered adequate justification for the deviations that did exist. In Abate v. Mundt, the Court approved a reapportionment plan for the legislature of Rockland County, New York that deviated by a total of 11.9% from perfect population equality. The Court found that the deviations in the plan furthered a "long tradition of overlapping functions and dual personnel in Rockland County government" and did not "contain a built-in bias tending to favor particular political interests or geographic areas." Two years later, in Mahan v. Howell, the Court allowed a reapportionment statute for the Virginia House of Delegates to remain in place, even though its total population deviation was 16.4%. The Court found that this deviation was justified by an effort to maintain the integrity of town and county lines.

Later that year, Gaffney v. Cummings established that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." In Gaffney, the Court reversed a lower court's holding that the Connecticut legislative apportionment plans violated the Equal Protection Clause when the maximum deviation was 7.83% in the State Assembly and 1.81% in the Senate. A suit was brought alleging that too many towns were split by the plan in an effort to achieve a smaller deviation from perfect population equality, and to ensure that the two parties' representation in the state legislature

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403 U.S. 182 (1971).
40 Id. at 184.
41 Id. at 187.
43 Id. at 319.
44 See id. at 327 (rejecting the argument that traditional adherence to these lines is no justification for legislative reapportionment, and noting that the "[s]tate can scarcely be condemned for simultaneously attempting to move toward smaller districts and to maintain the integrity of its political subdivision lines").
46 Id. at 745.
47 Id. at 737.
would be close to their overall support levels in the state. The three-judge district court found for the plaintiffs, holding that “the deviations from equality of populations of the Senate and House districts [was] not justified by any sufficient state interest and that the Plan denote[d] equal protection of the law to voters in the districts of greater population.” The lower court found that the “partisan political structuring... cannot be approved as a legitimate reason for violating the requirement of numerical equality of population in districting.”

In reversing, the Supreme Court recognized that politics are an inevitable and ubiquitous aspect of redistricting:

The very essence of districting is to produce a different—a more “politically fair”—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. Politics and political considerations are inseparable from districting and apportionment. . . . It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. . . . The reality is that districting inevitably has and is intended to have substantial political consequences.

The Court warned against making the constitutional standard of redistricting so tough that it must always be taken out of the hands of state legislatures and performed by courts: “[T]he goal of fair and effective representation [is not] furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurring removed from legislative hands and performed by federal courts . . . .”

Daniel Hays Lowenstein and Rick Hasen interpret (and state that most practitioners interpret) Gaffney as stating that such deviations “at the state level require no justification at all.” However, a close reading of the Gaffney opinion merely states that minor deviations fail to constitute prima facie evidence of unconstitutionality, suggesting that the burden falls to the plaintiffs in such cases rather than automatically precluding finding an Equal Protection violation. Furthermore, the unusual nature of the plan challenged (it was designed to create bipartisan fairness) in Gaffney makes it questionable whether it applies fully in challenges to plans designed to favor one party over another.

45 Id. at 739–40 (quoting Cummings v. Meskill, 341 F. Supp. 193, 148 (D. Conn. 1972)).
46 Id. at 740 (quoting Cummings, 341 F. Supp. at 150).
47 LOWENSTEIN & HASEN, supra note 13, at 121.
3. The Ten Percent Rule

Three subsequent cases established the so-called "ten percent rule"—the notion that plans with total population deviations from perfect equality of less than ten percent possess only "minor deviations." The rule is not one that the Supreme Court declared definitively at any specific time, but rather one that it gradually backed into through a series of several opinions. The Court arrived at the ten percent benchmark without explicitly explaining why this was a logical number to use in determining minor deviations in state and local districting plans. In *Brown v. Thompson*, the Court said that "[o]ur decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations." In making this statement, the Court referred back to two previous cases: *Connor v. Finch* and *White v. Regester.* In *Connor*, the Court, citing *Gaffney* and *White*, stated that

The maximum population deviations of 16.5% in the [Mississippi] Senate districts and 19.3% in the House districts can hardly be characterized as *de minimis*; they substantially exceed the 'under-10%' deviations the Court has previously considered to be of prima facie constitutional validity only in the context of legislatively enacted apportionments.

The original establishment of the ten percent line really occurred in *White*, the other case cited in *Brown*. There, the Court held that a 9.9% deviation in a Texas legislative districting plan failed to make out a prima facie Equal Protection Clause violation. The Court stated:

Larger differences between districts would not be tolerable without justification 'based on legitimate considerations incident to the effectuation of a rational state policy,' but here we are confident that appellees failed to carry their burden of proof insofar as they sought to establish a violation of the Equal Protection Clause from population variations alone.

Looking at that sentence in isolation might give the impression that the Court was stating flat-out that deviations above 9.9% would require further justification by the state, while deviations of 9.9% or less would not (or would at least shift the burden of demonstrating an Equal Protection Clause violation to the plaintiffs). However, the

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49 *Id.* at 842.
52 *Connor*, 431 U.S. at 418.
53 *White*, 412 U.S. at 762.
54 *Id.* at 764 (quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964)).
next sentences in the White opinion make it clear that the Court had a more complicated calculus in mind:

The total variation between two districts was 9.9%, but the average deviation of all House districts from the ideal was 1.82%. Only 23 districts, all single-member, were overrepresented or underrepresented by more than 3%, and only three of those districts by more than 5%. We are unable to conclude from these deviations alone that appellees satisfied the threshold requirement of proving a prima facie case of invidious discrimination under the Equal Protection Clause. In other words, it was not just the 9.9% deviation that led the Court to conclude that the Texas plan was not prima facie unconstitutional. Instead, it was a 9.9% maximum deviation, combined with a 1.82% average deviation and the fact that only a relatively small number of the districts had significant deviations that created the presumption of constitutionality.

So what are we to make of this ruling? Is a districting plan prima facie unconstitutional if it has a maximum deviation over 9.9% and an average deviation above 1.82%, or is just the former necessary? Or is there some sort of two dimensional spectrum, with higher maximum deviations corresponding to lower average deviations, and vice versa, in constitutional determinations? It is not clear what the Court intended, but perhaps its statement in Brown that previous cases had created the hard ten percent standard was a deliberate misreading or oversimplification of the previous holdings.

The ten percent line appears to be something other than a safe harbor below which all deviations are permissible. Rather, it is a burden-shifting line, as Daly v. Hunt recognized: “The 10% de minimis threshold recognized in Brown does not completely insulate a state’s districting plan from attack of any type. Instead, that level serves as the determining point for allocating the burden of proof in a one person, one vote case.” That court concluded that “[t]o survive summary judgment, the plaintiff would have to produce further evidence to show that the apportionment process had a ‘taint of arbitrariness or discrimination.’” The ten percent line was put in place as a means of allocating the burden of proof: deviations above ten percent are presumed unconstitutional, but this presumption is rebuttable; deviations below ten percent are presumed constitutional, and plaintiffs cannot simply point to the deviation and get a court to hold that the plan is unconstitutional unless they can make some other showing. This reading is backed up by a passage in Connor,
which made clear that even minor deviations must be the result of an effort to promote a legitimate state policy, and may not be created willy-nilly or for plainly illegitimate reasons: "even a legislatively crafted apportionment with deviations of [less than ten percent] could be justified only if it were 'based on legitimate considerations incident to the effectuation of a rational state policy.'"

4. Is Partisan Politics an Acceptable Cause of Deviations?

It is uncertain and debatable what exactly opponents of a districting plan must prove to win an Equal Protection Clause challenge. The Supreme Court, by its own admission, has never ruled on the question of whether partisan politics is itself a legitimate state interest that can justify some deviation from perfect population equality. Some hints of how it might come down on this question can be gleaned from several of its cases, however. Recently, in Cox v. Larios, the Court summarily affirmed a Georgia district court's decision striking down that state's House and Senate plans. As the sole dissenter from the summary affirmance, Justice Scalia argued that the case should have been heard at oral argument because the district court's opinion "assume[d] 'politics as usual' is not itself a 'traditional' redistricting criterion." Thus, in his view, the rest of the Court erred in refusing to give more consideration to an appeal from an opinion that struck down a plan due to politically motivated deviations. However, because the Court affirmed the lower court without discussion, it is impossible to know the reason why: was it because a majority believed that politics is an illegitimate consideration in redistricting (at least as it leads to population deviations) or because it read the district court's decision as striking down the plans not for their partisan motivation, but rather for other illegitimate reasons?

One way of looking at the question is to look at what the Court has said are permissible justifications for the creation of population deviations. In Karcher v. Daggett, the Court stated that "[a]ny number of consistently applied legislative policies might justify some variance [in district population size], including, for instance, making districts compact, respecting municipal boundaries, preserving the cores

60 124 S. Ct. 2806 (2004), aff'd 300 F. Supp. 2d 1320 (N.D. Ga. 2004). The district court decision, on which I worked as clerk to one of the judges on the panel, is discussed at length infra.
61 Id. at 2809 (Scalia, J., dissenting).
62 See Larios v. Cox, 300 F. Supp. 2d at 1351 (stating that "it is unnecessary in this case to decide whether partisan advantage alone would have been enough to justify minor population deviations, although the Supreme Court has never sanctioned partisan advantage as a legitimate justification for population deviations").
of prior districts, and avoiding contests between incumbent Repre-
sentatives." This nonexclusive list includes ones, such as the protec-
tion of incumbents, that seem to have little obvious public benefit, and yet the Court approves of them as reasons for deviations from perfect population equality. Citing Gomillion v. Lightfoot, the Karcher Court said that "as long as the criteria are nondiscriminatory, these are all legitimate objectives that on a proper showing could justify minor population deviations." The qualifier "as long as the criteria are not discriminatory" is an interesting one, as it raises the question of which kinds of discrimination the Court is talking about. Gomillion was about race, so that’s easy. But does discrimination against voters or candidates from one political party count? And even if it does not, are partisan motives even among the "consistently applied legislative policies" that Karcher permitted as a reason behind district population deviations?

Karcher, it is true, was a congressional apportionment case, rather than a state or local reapportionment challenge. As discussed above, state and local legislative plans get more leeway in population equality than do congressional plans. However, this does not mean that Karcher’s list of permissible motives is not a proper one for use in state legislatures. The constitutional principle of one person, one vote remains the same whether the reapportionment in question is federal, state, or local—the only distinction the Court has drawn is in the size of deviation that is permissible, not the permissible cause of the deviation.

Although the list of permissible policies in Karcher was clearly meant to be a nonexhaustive one, the lack of any mention of partisan politics on this list is striking, and may well have been an intentional omission. Certainly, the Court was aware that population deviations could be exploited for partisan gain, and it did mention other motives of a political character with dubious public value: "preserving the cores of prior districts, and avoiding contests between incumbent Representatives." In addition, all the policies mentioned in the Karcher list are ones that typically appear as priorities in the redistricting guidelines that states and localities themselves publish—and efforts to undermine the other party never appear on such guidelines.

64 Id. at 740.
66 Karcher, 462 U.S. at 740.
67 See supra text accompanying note 64.
68 Karcher, 462 U.S. at 740.
69 The Alabama Reapportionment Committee Guidelines for Legislative and Congressional Redistricting, for example, mandate that state legislative and congressional districts "will not have either the purpose or the effect of diluting minority voting strength;" "will be composed of contiguous and reasonably compact geography;" "should attempt to preserve communities of
Language in *Abate v. Mundt* also suggests that the Court considers political favoritism in reapportionment to be on a par with regional favoritism, and therefore an unconstitutional cause of population deviations. The Court acknowledged that "local governments may need considerable flexibility," thus "lend[ing] support to the argument that slightly greater percentage deviations may be tolerable for local government apportionment schemes." However, the Court cautioned against "the danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political interests or which necessarily will tend to favor, for example, less populous districts over their more highly populated neighbors." The *Abate* Court approved of the reapportionment plan it was evaluating, but only because it saw "no such indigenous bias; there is no suggestion that the Rockland County plan was designed to favor particular groups." This language is, of course, pure dicta. Although *Abate* has never been repudiated, it is far from clear that the later Courts that showed so much tolerance for politically driven reapportionment plans in *Davis v. Bandemer* and *Vieth v. Jubelirer* would stand by the suggestion that population deviations cannot be created to favor certain "political interests."

In sum, a comprehensive review of the Court's indirect statements, implications, and omissions on the subject suggests that, for a number of years, a majority has considered political manipulation to be a suspect motive behind population deviations, even when the deviations are "minor." As the next section demonstrates, however, most of the lower courts that have been asked to read between the lines to determine the permissibility of partisan one person, one vote deviations have not taken this view.


403 U.S. 182 (1971) (holding that a proposed plan which, under apparently good faith practices, produced a total deviation from equality of 11.9% did not deny equal protection).


B. The Lower Courts

Since the Supreme Court has never directly opined on the permissibility of using population deviations for partisan ends, the lower courts have been left to sort through which motives are permissible and which are not. In the past fifteen years, the vast majority of lower courts addressing recent challenges to state, county, or local district maps with population deviations under ten percent have upheld the plans. Most courts have granted quite a bit of leeway to plans that stayed within a ten percent maximum deviation, with only a few exceptions.

1. Decisions Upholding Sub-Ten Percent Plans

In Fund for Accurate and Informed Representation, Inc. v. Weprin, the Northern District of New York rejected a one person, one vote challenge to a redistricting plan for the New York State Assembly with a total population deviation of 9.43%. Interestingly, the court seemed to equate a prima facie constitutional apportionment plan with an irrebuttable constitutional plan. The court said that the plaintiffs' "concession [that the total deviation was less than ten percent] is fatal to the 'one person, one vote' claim because, absent credible evidence that the maximum deviation exceeds 10 percent, plaintiffs fail to establish a prima facie case of discrimination under that principle sufficient to warrant further analysis by this Court." The court's logic appeared to misunderstand the very definition of "prima facie," since it clearly gave the impression that it believed the inquiry ended with the finding that the deviation was under ten percent. The court did not say that the plaintiffs failed to offer convincing evidence that the cause of the 9.43% deviation was illegitimate; rather, it simply assumed that ten percent created a safe harbor.

Similar reasoning prevailed in Gorin v. Karpan, an opinion seemingly divided against itself. A three-judge court upheld Wyoming's Apportionment Act, which created a population deviation of 9.602% for the state Senate and 9.973% for the state House of Representatives. In determining the proper standard to apply to plans with

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78 See id. at 668 ("[A]bsent credible evidence that the maximum deviation exceeds 10 percent plaintiffs fail to establish a prima facie case of discrimination under that principle sufficient to warrant further analysis by this Court.").
79 Id.
80 See BLACK'S LAW DICTIONARY 1228 (8th ed. 2004) (defining "prima facie" as meaning "[a]t first sight; on first appearance but subject to further evidence or information" (emphasis added)).
82 See id. at 1201 ("The range of relative population deviation for the Senate is 9.602%. . . . The range of relative population deviation for the House is 9.973%.").
under-ten percent deviations, the court seemed to contradict itself. First, it quoted its own previous decision in an earlier incarnation of the same case, saying that for plans with deviations under ten percent, "the State must demonstrate a rational policy supported by legitimate considerations in the effectuation of that policy." But then, just five paragraphs later, the court appeared to give sub-ten percent plans a safe harbor saying that "[t]he ten percent de minimis rule provides the state need only justify relative population deviation ranges greater than 10%." The court did not even acknowledge, let alone explain, this apparent self-contradiction. Instead, it simply concluded that because "[t]he maximum ranges of deviation under the 1992 plan clearly fall below" the ten percent line, the Apportionment Act "achieved the overriding constitutional objective of substantial equality of population among the various legislative districts—the vote of any citizen is approximately equal in weight to that of any other citizen in Wyoming" and was therefore constitutional. In fact, the court went so far as to laud the drafters of the plans for their conscientiousness, saying that "[w]e appreciate the enormity and inherent difficulty of legislative reapportionment and we commend the Wyoming Legislature for its efforts."

Twelve years later, *Marylanders for Fair Representation, Inc. v. Schaefer* established a standard for evaluation of sub-ten percent population deviations that several district courts have since followed. A three-judge court upheld Maryland's redistricting plans for both the state Senate, which had a deviation of 9.84%, and the state House of

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84 *Id.*

85 *Id.*

86 *Id.* Chief Judge Brimmer, though he concurred in the result, was not so kind. He wrote that his "concurrence should not be construed as even half-hearted approval of the 1992 Apportionment Act, for the Wyoming State Legislature was mighty careless of justice, to say the very least." *Id.* at 1202 (Brimmer, C.J., concurring). He felt that in passing the plans, the legislature "closed its eyes to the geographic realities and the practical needs of vast areas of our State by its late-night passage of" an amendment to the Act that was "deliberately indifferent to the voters of" several counties. *Id.* He rather understatedly opined that "I hope that aroused voters will properly sear and baste those who drafted, promulgated and passed the [amendment in question]; they richly deserve it." *Id.* at 1203. He only concurred with the majority opinion because "the record before us (which doesn't have the strength of Pablum) leaves no alternative." *Id.* at 1202.

87 494 F. Supp. 1022, 1048 (D. Md. 1994) (holding that showing a general pattern of racially polarized voting does not, by itself, require the redrawing of district lines to "maximize the number of majority-black districts").

88 Federal law prescribes that a district court of three judges—two federal district judges and one federal circuit judge—be convened to preside over any trial challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body. 28 U.S.C. § 2284(a), (b)(1) (2004).
Delegates, with a total deviation above ten percent (10.67%). Discussing the standard that must be met to successfully challenge a plan with a population deviation of less than ten percent, the court said that the plaintiffs "must prove the minor population deviation is not caused by the promotion of legitimate state policies" but by "unconstitutional or irrational" ones. For an example of an "unconstitutional or irrational state policy," the court offered "[r]acial discrimination or a state policy of purposefully disfavoring counties whose names begin with the letter 'C.'" In other words, the court seemed to be saying that only plans creating deviations either discriminating based on the most constitutionally suspect of characteristics or promoting utterly nonsensical goals would fail to pass muster if the deviations were less than ten percent.

The court also said it could strike down plans with deviations of less than ten percent only if the illegitimate policy is the sole reason for the population deviation. "To prevail," the court said, "the plaintiffs have the burden of showing that the deviation in the plan results

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89 Marylanders, 849 F. Supp. at 1033–36. As for the Senate plan, the court found unconvincing two arguments put forth for striking it down. First, the plaintiffs alleged, the drafters of the Senate plan did not even try to get an equal plan, but merely tried to keep it within "plus or minus five percent of the ideal population." Id. at 1034. The court said that there was nothing wrong with this, as "[t]he Supreme Court has expressly provided States with a degree of flexibility, i.e., a ten percent population deviation, in formulating a state legislative districting plan because of the legitimate state interests that might cause deviations from absolute population equality." Id. Second, the plaintiffs claimed that the Senate plan was unconstitutional because an objective of the creation of the deviations was to provide the City of Baltimore with at least eight Senate seats (a number that the city's population did not otherwise warrant). Id. at 1035. But the court discounted this allegation, because it was "unable to locate anywhere in the record any evidence, other than conclusory assertions, that the deviation in the senate plan was caused by this objective." Id. at 1036. In a footnote, the court looked at Reynolds, Abate, and Hudley and declared that it was "far from convinced that the Constitution prohibits a State from making the political determination that a region's or political subdivision's representation should be maximized." Id. at 1035 n.12. Ten years later, the Larios court would reach a very different result on this question, finding that population deviations in Georgia's state redistricting plans that deliberately favored certain regions of a state over others were impermissible and that the plans "must be struck down on this basis alone." Larios v. Cox, 300 F. Supp. 2d 1320, 1342 (2004).

The Marylanders court upheld the House of Delegates plan, despite its over-ten percent deviation, because the Director of the Maryland Office of Planning stated—and the plaintiffs never attempted to refute—that all four of the districts in the plan that had deviations greater than ±5 percent were created to further legitimate state policies. See Marylanders, 849 F. Supp. at 1037 ("MFR simply has advanced no evidence to refute that these deviations were based on legitimate considerations incident to the effectuation of rational state policies."). Namely, according to the Office of Planning Director, the deviations were caused by an effort to preserve county and town lines, natural boundaries, and the cores of prior districts. Id.

90 849 F. Supp. 2d at 1032.
91 Id. at 1032 n.8.
92 For population deviations above ten percent, the Marylanders court said that "[t]he State has the burden of demonstrating that the plan may reasonably be said to advance a rational state policy, such as those listed in the Karcher decision." Id. at 1032.
solely from the promotion of an unconstitutional or irrational state policy. Thus, apparently, the Marylanders standard would allow a defense if a legitimate policy was merely part of the cause of the population deviation.

Two years later, in Daly v. Hunt, the Fourth Circuit, in a case on appeal from the Western District of North Carolina, looked at a plan for the Board of Commissioners and the Board of Education of Mecklenburg County that had a maximum population deviation of 8.33%. After reviewing the general principle of one person, one vote as laid out in Reynolds v. Sims and the allowance of minor deviations in Gaffney v. Cummings, White v. Regester, and Brown v. Thompson, the court rejected the plaintiffs' assertion that the proper line for determining "minor deviations" was not necessarily ten percent in all cases. The court acknowledged that the ten percent line does not create a safe harbor; rather, it is a burden-shifting line below which the plaintiffs have the responsibility to establish a constitutional violation, and above which the defendant has to prove that the deviations were necessary to further a legitimate state goal.

Below ten percent, according to the Daly court, "the population disparity is considered de minimis and the plaintiff cannot rely on it alone to prove invidious discrimination or arbitrariness. To survive summary judgment, the plaintiff would have to produce further evidence to show that the apportionment process had a 'taint of arbitrariness or discrimination.' However, the court never spelled out its view of what such a "taint" could entail. It suggested that a sub-ten percent deviation plan could be challenged for violating the Voting Rights Act or for being an unconstitutional racial gerrymander, but of course these are completely separate rights of action that allow plaintiffs to challenge plans even with perfect population equality. The court did not mention any type of successful one person, one vote challenge to a sub-ten percent deviation plan that could conceivably succeed under its standard without also violating some other,

93 Id. (emphasis added).
94 93 F.3d 1212 (4th Cir. 1996).
95 377 U.S. 533 (1964).
99 Daly, 93 F.3d at 1220 ("Second, the Court's apportionment decisions... indicate the Court's willingness to recognize a de minimis level below which population variances are deemed acceptable.").
100 See id. ("The 10% de minimis threshold recognized in Brown does not completely insulate a state's districting plan from attack of any type. Instead, that level serves as the determining point for allocating the burden of proof in a one person, one vote case.").
101 Id. (quoting Roman v. Sincock, 377 U.S. 695, 710 (1964)).
102 Id. at 1220-21.
distinct constitutional standard. This calls into question whether the Daly court truly believed that ten percent is not a safe harbor. It left the question whether "the apportionment plan at issue here was the product of bad faith, arbitrariness, or invidious discrimination" to the district court on remand.\textsuperscript{105}

More recently, in Montiel v. Davis,\textsuperscript{104} a three-judge court upheld the Alabama state House and Senate plans, which had population deviations of 9.93% and 9.78%, respectively.\textsuperscript{105} The court's analysis of the challenge was relatively brief, relying largely on the Daly view that a sub-ten percent plan violates the Equal Protection Clause only if it has the "taint of arbitrariness or discrimination."\textsuperscript{106} The court quoted Marylanders' holding that plaintiffs in this type of case have "the burden of showing that the 'minor' deviation in the plan results solely from the promotion of an unconstitutional or irrational state policy,"\textsuperscript{107} and concluded that "[p]laintiffs have simply failed to carry their burden."\textsuperscript{108} The court did not, however, actually specify that what the plaintiffs alleged was the cause of the population deviations.

In upholding the plans, the court pointed out that the "[p]laintiffs have proffered no evidence to refute the abundant evidence submitted by the defendants and defendant-intervenors which establishes that...[the plans] were the product of the Democratic Legislators' partisan political objective to design Senate and House plans that would preserve their respective Democratic majorities."\textsuperscript{109} The court thus seemed to imply that partisan motivation was a defense against the one person, one vote (and gerrymandering) challenges. It never stated outright that partisan advantage was a permissible motivation for the population deviations, but this was clearly a central rationale of the opinion.

In 2003, the Eastern District of New York in Cecere v. County of Nassau articulated the clearest judicial statement yet, finding that baldly political considerations are a permissible cause of sub-ten percent population deviations in state and local redistricting plans.\textsuperscript{110} The Democrats of the Nassau County Legislature, which held a 10–9 majority, enacted a redistricting plan that, as the plaintiffs described it,
consisted of “a hodgepodge of misshapen districts in which various towns, villages and communities are unnecessarily divided.” The total population deviation of the districts in the Nassau County plan was 8.94%, and according to the plaintiffs, the plan dramatically increased the number of village, community, and town lines that were divided. Democrats admitted that the choice to create population deviations and irregular district shapes was “motivated by an effort to strengthen Democratic candidates in many districts” and “that the final map ‘gives us [the Nassau County Democratic Party] a more competitive chance and minimizes the impact of the Republican machine.’”

Ultimately, the court granted the County’s motion to dismiss. The court held that “rank partisanship by the Democratic majority with a resulting inordinate division of towns, villages and communities... is not violative of the Fourteenth Amendment.” A section heading of the opinion stated that “Even if Local Law 2-2003 was Promulgated for Political Reasons (i.e., to Benefit Democratic Candidates and Disadvantage Republican Candidates), as Plaintiffs Allege, That Alone is not Violative of the Fourteenth Amendment.”

The Cecere court’s reasoning was based largely on Gaffney, which acknowledged that “districting inevitably has and is intended to have substantial political consequences.” The Cecere court acknowledged that the plan at issue in Gaffney was different from the Nassau County plan because it was (1) designed to make the two parties’ representation in the legislature more closely match their relative support among voters in the state rather than the opposite goal of giving one party an extra advantage in the legislature beyond its overall popularity among voters, as in Cecere, and (2) “the primary focus of the challenge in Gaffney was upon the allegedly unnecessary division of so many towns. That argument was based on the anomalous proposition that the Board went too far in endeavoring to promote equality, i.e., the deviation rate was unnecessarily low.” Nonetheless, the New York court found Gaffney instructive because it

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111 Id. at 309.
112 Id. at 311.
113 Id. at 310.
114 Id. (alteration in original).
115 Id. at 310.
116 Id. at 313.
117 Id.
118 Id. at 315 (stating that Gaffney v. Cummings, 412 U.S. 735 (1973), is instructive because it “underscores that redistricting is essentially a political and legislative process”).
119 Gaffney, 412 U.S. at 755.
120 Cecere, 274 F. Supp. 2d at 315.
(1) underscores that redistricting is essentially a political and legislative process and (2) found that a maximum deviation rate of 7.83% in a non-congressional redistricting case was insufficient, as a matter of law, to establish a prima facie violation of the Fourteenth Amendment in the context of a pure ‘one person, one vote’ challenge. Of these two reasons, the latter is undoubtedly true: a population deviation of 7.83%, like any number below ten percent, is prima facie—though not irrebuttable—constitutional. But the first reason fails to convince because it reads Gaffney as taking a more radical position than it really did. Gaffney quite sensibly recognized that politics have been, and will always be, part of redistricting, and that this was made inevitable (and, for all we know, intentional) by Article I of the Constitution, which gave state legislatures the power to set congressional districts. But it did not say that there are absolutely no limits to partisan shenanigans, particularly in cases, as in Cecere (and most political gerrymandering cases), where the intent of the redistricting was not to make the resulting party split in the state legislature “more fair,” but rather quite the opposite. And Gaffney certainly did not deal with a plan whose one-sided partisan motivation was so egregious; on the contrary, that litigation was brought to contest a plan that bent over backwards to be fair to voters and politicians from both parties. The Gaffney decision did not contemplate plans with numerous Democratic districts 4.9% smaller than average and numerous Republican districts 4.9% larger (or vice versa), and nothing in the language of the opinion indicates that it covers such situations. Its broad statements about the inevitability of politics in redistricting do not give the impression that the Court was giving state parties carte

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121 Id.
122 See U.S. CONST. art. I, §§ 2–3. As Luis Fuentes-Rohwer argues, it is literally impossible to draw up a redistricting plan that is truly “apolitical”:

The claim is fairly undisputed: redistricting has intensely partisan qualities. Compounding matters, this is also a process with an implicit zero-sum, win-lose quality. Put another way, it is impossible to carve out districts in a politically “neutral” way. No matter which way we slice a given jurisdiction, neutral lines simply do not and will not exist; any one line drawn in any given place will benefit one party, hinder the other. This reality is inherent to any redistricting model under a two-party system.

Luis Fuentes-Rohwer, Doing Our Politics in Court: Gerrymandering, “Fair Representation” and an Exegesis into the Judicial Role, 78 NOTRE DAME L. REV. 527, 536–37 (2003) (footnotes omitted). Although this is true as far as it goes, all redistricting plans are not equally “political” in the sense that they do not all equally reflect a conscious intent to create a result that favors a particular party or individual politicians.

123 It is actually highly debatable whether a bipartisan agreement to split up a state is really more desirable and less constitutionally offensive than a situation in which one party rigs the system to favor itself over its rival. In a system of one party control, disillusioned voters at least have the hope that the other party will eventually gain control and turn things around. When both parties collude in splitting up power, there is no real chance of any change. For an explanation of this viewpoint, see Samuel Issacharoff, Gerrymandering and Political Cartels, 116 HARV. L. REV. 593, 598–99 (2002).
to do everything in the parties' power to maximize their partisan advantage as long as they kept deviations under ten percent.

Recently, in Rodriguez v. Pataki, the Southern District of New York upheld the New York State Senate redistricting plan against a one person, one vote challenge. The total population deviation in the plan was 9.78%, and the average deviation from the ideal district size was 2.22%. The court said that the proper legal standard to apply to sub-ten percent plans was the Marylanders standard—namely, whether "the plan was adopted based on 'unconstitutional or irrational' reasons." The court said that population deviations under ten percent are prima facie constitutional, but acknowledged that "[c]ompliance with Brown's 'ten percent rule' does not end the inquiry. There is still a question of how the 'ten percent rule' dovetails with Reynolds and its progeny, which require a 'good faith effort' by the state to achieve districts 'as nearly of equal population as is practicable.'" The court also cited Marylanders for the proposition that "the plaintiffs have the burden of showing that the deviation in the plan results solely from the promotion of an unconstitutional or irrational state policy." The court justified this rule by pointing out that

If the burden on the plaintiffs in minor-deviation cases were anything less than this substantial showing, then the plaintiffs would be able to challenge any minimally deviant redistricting scheme based upon scant evidence of ill will by district planners, thereby creating costly trials and frustrating the purpose of Brown's 'ten percent rule.'

Applying this standard, the court found that the New York Senate plan passed with flying colors. The court found that the plan "reflects traditional districting principles including: maintaining equality of population, preserving the 'cores' of existing districts, preventing contests between incumbents, and complying with the requirements of the Voting Rights Act." The court gave no weight to the argument that the drafters' plain desire to stay within ten percent, rather than to get to zero deviation, was an Equal Protection Clause violation, finding that "an express objective of staying within a ten-percent deviation while pursuing other legitimate goals provides

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125 Id. at 356.
126 Id. at 362 (citing Marylanders for Fair Representation, Inc. v. Schaefer, 849 F. Supp. 1022, 1032 (D. Md. 1994)).
127 Id. at 364 (quoting Reynolds v. Sims, 377 U.S. 533, 577 (1964)).
128 Id. at 365 (quoting Marylanders, 849 F. Supp. at 1032).
129 Id.
130 Id. at 352 (citing Marylanders, 849 F. Supp. at 1056, and Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (per curiam)).
no support to the plaintiffs' claim of invidious or arbitrary discrimination or of bad faith.131

The court also rejected the plaintiffs' argument that the Senate plan impermissibly discriminated against "downstate" New York by overpopulating districts in the southern part of the state and under-populating districts in the north. Most interestingly, the court discounted an advisory memorandum to the Republican co-chair of the reapportionment task force that suggested that creating a new, predominantly Democratic Senate district in Long Island would "combine politically undesirable areas."132 The court found no invidious discrimination in such tactics, saying that it was not "surprising that a memorandum to the Republican State Senate in control of redistricting would describe a potential Democratic district as comprised of 'undesirable' voters."133 In other words, the court again seemed to be saying, partisan favoritism is a defense against accusations of regional favoritism. The court pointed out that the plaintiffs should have made a gerrymandering claim if they were alleging political discrimination on this basis,134 though it seemed to discount the possibility that such a claim was not brought because the standard for partisan gerrymandering under Davis v. Bandemer135 was virtually impossible to meet, and the plaintiffs believed that partisan-inspired deviations from population equality are held to a tougher standard of justification than are partisan gerrymanders.

131 Id. at 367.

132 Id. The court had several other reasons for rejecting the regional argument. First, the court questioned the very credibility of the claim that this regional favoritism was a deliberate policy. See id. at 367–68 (noting that more is needed than a mere assertion of regional discrimination; some form of evidence is required). Second, the court said that other, clearly legitimate state goals were at least partly responsible for the deviations, saying that the creators of the plan were "interested in contiguity, compactness, preserving the cores of existing districts, desiring not to pit incumbents against one another, respecting then-current political subdivisions and county lines, and staying within the ten-percent-deviation parameter of Brown." Id. at 367. Third, the court said that "to the extent that the plaintiffs seek to use the regional aspect of their claim as a proxy for a claim to that a group of voters were systematically disadvantaged, their proposed definitions of 'upstate' and 'downstate' are self-serving and defective," because their definitions of these regions were unconvincing. Id. at 369. Fourth, even if the districts were all of perfectly equal population (but kept the same essential shapes), "the difference in 'downstate' representation from what was accorded under the enacted plan would be insignificant." Id.

133 Id. at 368.

134 See id. ("[W]e cannot understand what invidious discrimination this phrase supposedly signals: there is no political or racial gerrymandering claim embedded in this count . . . .").

2. Effect of Rulings Upholding Sub-Ten Percent Plans

Many of the cases detailed above seem to place politically motivated population deviations on a par with political gerrymandering, and therefore nearly impossible to strike down. With three exceptions discussed below, every other recent court to examine a redistricting plan with a total population deviation under ten percent has also upheld it.\(^{136}\) Part of this reluctance seems to be tied in with the "unconstitutional or irrational" standard for such deviations first pronounced in *Marylanders*,\(^{137}\) and cited by several courts since then.\(^{138}\) Where does this standard come from? The court cited *Karcher v. Daggett*\(^{139}\) as creating an "unconstitutional or irrational" standard.\(^{140}\) But that standard is nowhere to be found in the section of *Marylanders* that *Marylanders* cited.\(^{141}\) And it is certainly not obvious that *Karcher* said that partisan motives always got a pass under this standard as they are neither unconstitutional nor irrational. Reading *Karcher* gives the impression of a tougher standard of justification than the *Marylanders* and *Cecere* courts read into it. Nowhere does the *Karcher* opinion state that in cases of minor deviation, the plaintiffs have to show that the deviation is the result of an irrational or unconstitutional state policy. What it does say is that "we are willing to defer to state legislative policies, so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts."\(^{142}\) It also says that a state "could justify small variations in the census-based population of its congressional districts on the basis of some legitimate, consistently applied policy."\(^{143}\)

The "unconstitutional or irrational" standard also seems rather circular. Read literally, it means that a plan violates the Equal Protec-

\(^{136}\) See, e.g., Holloway v. Hechler, 817 F. Supp. 617, 623–24 (S.D. W. Va. 1992) (holding that the reapportionment plan for the West Virginia House of Delegates, with a total population deviation of 9.97%, did not violate the one person, one vote principle); Farnum v. Burns, 561 F. Supp. 83, 92–93 (D.R.I. 1983) (holding that a proposed reapportionment plan for the Rhode Island state Senate did not violate federal one person, one vote principles, and that the use of a "population window" in determining district size was permissible, although the plan did violate Rhode Island state constitutional principles).


\(^{138}\) See *Rodrigues*, 308 F. Supp. 2d at 362 ("[T]he plaintiffs must produce evidence that raises a genuine issue of fact as to whether the plan was adopted based on 'unconstitutional or irrational' reasons."); *Cecere* v. County of Nassau, 274 F. Supp. 2d 308, 312 (E.D.N.Y. 2003) (citing the "unconstitutional or irrational" language from *Marylanders*); Montiel v. Davis, 215 F. Supp. 2d 1279, 1284 n.6 (S.D. Ala. 2002) (same).

\(^{139}\) 462 U.S. 725 (1983).

\(^{140}\) *Marylanders*, 849 F. Supp. at 1032.

\(^{141}\) See *Karcher*, 462 U.S. at 740–44.

\(^{142}\) *Id.* at 740 (citing White v. Weiser, 412 U.S. 783, 795–97 (1983)).

\(^{143}\) *Id.* at 741.
tion Clause if it is unconstitutional, namely that it is unconstitutional if it is unconstitutional. It leaves out the money question, which is rather what kinds of motivations behind population deviations do not pass Equal Protection Clause muster.

3. **Rulings Striking Down Sub-Ten Percent Plans**

Only three lower courts in the era of the ten percent rule have struck down redistricting plans whose population deviations were politically motivated. Because these three cases had wildly varying reasoning, it is worth going into each of them in some detail to see how they contrast with the more numerous decisions that upheld such plans. First, in *Vigo County Republican Central Committee v. Vigo County Commissioners*,\(^\text{144}\) the Southern District of Indiana held that the redistricting plan for the county commission violated the Equal Protection Clause. The court acknowledged that it "treads carefully into this arena, given the principles of federalism and the separation of powers on which our republican form of government is founded."\(^\text{145}\) Nonetheless, the opinion said, "[i]f this court failed to act, some of the voters of Vigo County, Indiana would be in danger of losing the equality of voting promised to them by law."\(^\text{146}\)

The 1990 Census revealed that the existing district map for the county commission, which had been passed in 1974, had a total population deviation of thirty-seven percent.\(^\text{147}\) A suit was brought challenging the plans, and the defendant Commissioners admitted that the map violated the Equal Protection Clause.\(^\text{148}\) The Commissioners then hired a redistricting expert to redraw the maps, instructing him only to reduce the deviation below ten percent.\(^\text{149}\) He drew up a plan with a total deviation of 8.41%.\(^\text{150}\) The plaintiffs amended their complaint, alleging that the new plan "violated the Equal Protection Clause because the Commissioners did not make a good faith effort to create districts with the smallest population deviation possible."\(^\text{151}\) The Commissioners then went back and asked their expert to try to lower the population deviations still further, and he came up with a map with a 3.8% total deviation.\(^\text{152}\) The plaintiffs still were not

\(^{144}\) 834 F. Supp. 1080 (S.D. Ind. 1993).

\(^{145}\) Id. at 1082.

\(^{146}\) Id.

\(^{147}\) Id. at 1083.

\(^{148}\) Id.

\(^{149}\) Id.

\(^{150}\) Id.

\(^{151}\) Id.

\(^{152}\) Id.
satisfied, however, and presented to the court a proposed plan with a total deviation of 0.41%.\textsuperscript{153}

The court agreed that even the 3.8\% plan violated the Equal Protection Clause, citing the Court’s admonition in \textit{Gaffney v. Cummings} that a state or local governmental entity must make “an honest and good-faith effort to construct its districts ‘as nearly of equal population as is practicable,’ but . . . absolute equality [is] a ‘practical impossibility.’”\textsuperscript{154} Interestingly, the court \textit{denied} that the fact that the deviation was less than ten percent made the plan prima facie constitutional. Instead, the court said that “[i]f a state or local unit of government makes a \textit{good faith} effort to comply with federal and state redistricting laws, any plan with a population deviation of less than 10\% is presumed to be constitutional.”\textsuperscript{155} The court said that because the Vigo County plan was not the product of a \textit{good faith} effort to achieve equality, the plan was not even entitled to the initial presumption of constitutionality:

Notably, the Commissioners did not redistrict until they were forced to do so by this lawsuit. Had the Commissioners’ 1974 Plan been within the 10\% de minimis threshold when the Plaintiffs’ filed suit, the court would not have found, without more, a presumption of violation of the Equal Protection Clause. However, the threshold test does not apply when a case is already in court precisely because the reapportionment plan at issue was far beyond the de minimis threshold. In other words, because the court is engaged in active scrutiny of the Commissioners’ plan pursuant to an ongoing lawsuit, the Commissioners may not simply draw up a revised plan with less than a 10\% deviation and expect to be exempted from explaining why a plan with a lower deviation was not adopted.\textsuperscript{156}

Thus, the court found, because the plan was drawn up only to avoid the consequences of the suit, the plan “is not a good faith effort to make the population as equal as possible,” and was therefore prima facie \textit{un}constitutional even though its total deviation was less than ten percent.\textsuperscript{157} Consequently, according to the court, the burden was on the \textit{defendants} to demonstrate that the deviations were caused by legitimate state policies, and were no larger than necessary to support these policies.\textsuperscript{158} The court found that “[t]he Commissioners offered no explanation for the deviation,”\textsuperscript{159} and thus it had no reason to believe that the deviations were caused by the legitimate state interests of “[k]eeping districts contiguous, keeping them com-

\begin{footnotes}
\item[153] Id.
\item[154] Id. at 1084–85 (quoting \textit{Gaffney v. Cummings}, 412 U.S. 735, 743 (1973)).
\item[155] Id. at 1085 (citing \textit{Brown v. Thompson}, 462 U.S. 835, 842 (1983)).
\item[156] Id. (internal citation omitted) (citing Connor v. Finch, 431 U.S. 407, 414–18 (1977)).
\item[157] Id. at 1086.
\item[158] Id.
\item[159] Id.
\end{footnotes}
pact, following natural boundaries, not crossing precinct lines, and including whole townships. Even assuming the plan did evince an effort to promote these interests, however, the court also said that the defendants failed to show that the deviation was not larger than necessary to promote them. According to the court, "they cannot make such a showing if the Plaintiffs' Plan contains a smaller deviation and serves those state interests substantially as well." Thus, because the plaintiffs' plan had a smaller deviation (0.41%) than the existing plan, the defendant's plan was plainly unconstitutional.

The Vigo ruling was highly anomalous in several ways. First—unlike any other lower court ruling—it said that a plan with a population deviation under ten percent could still be prima facie unconstitutional if it was not a good faith effort to achieve population equality. This was in stark contrast to a number of other courts, which plainly held that sub-ten percent are prima facie permissible, period. The courts in Cecere, Weprin, Gorin, Marylanders, Holloway v. Hechler, Montiel, and Rodriguez all said that the sub-ten percent plans were prima facie constitutional, even though they were all looking at redistricting maps with significantly larger deviations than the Vigo County plan, and most of them were clearly drawn in an effort to stay within the ten percent window rather than to achieve a deviation of zero. Even the courts in Hulme v. Madison County and Larios v. Cox, discussed below, which struck down sub-ten percent plans, still acknowledged that plans with deviations under ten percent do enjoy presumptive validity. The Vigo court's only citation accompanying its assertion that a sub-ten percent deviation could still be prima facie unconstitutional was a page from Brown. However, Brown said no

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160 Id. (citing IND. CODE § 36-2-3-4 (1993)).
161 Id.
162 In all of the one person, one vote challenges to state and local redistricting plans that have come since Vigo, only one—Rodriguez—has even cited the case, and the Rodriguez court did so only to distinguish it. See Rodriguez v. Pataki, 308 F. Supp. 2d 346, 367 (S.D.N.Y. 2004) (per curiam) (noting that Vigo "arose under idiosyncratic facts").
170 See Larios v. Cox, 300 F. Supp. 2d 1320, 1340–41 (N.D. Ga. 2004) (noting that state legislative plans with population deviations of less than ten percent are presumptively constitutional but not immune to constitutional attack); Hulme v. Madison County, 188 F. Supp. 2d 1041, 1047 (S.D. Ill. 2001) ("It is . . . clear that a total population deviation of less than 10% enjoys a presumption of validity and will not, by itself, support a claim of invidious discrimination.").
such thing; it said precisely the opposite, quoting Gaffney's statement
that plans with "minor deviations" of less than ten percent "are insuffi-
cient to make out a prima facie case of invidious discrimination un-
der the Fourteenth Amendment so as to require justification by the
State."
Neither Brown nor Gaffney created an exception to this rule
for sub-ten percent plans whose deviations were created in bad faith;
rather, they suggested that the very fact that a total deviation is less
than ten percent creates the presumption of good faith.

The court in Rodriguez distinguished the use of a ten percent
"population window" in Vigo from its similar use in New York, saying
that merely trying to stay below ten-percent deviation could not be
considered a failure to make a good faith effort to achieve population
equality. According to the Rodriguez court,

Vigo arose under idiosyncratic facts, where the plan's total deviation when
the litigation started was 37%; only to avoid losing in court did the plan-
ners consciously try to eliminate pre-existing bad faith by drawing a plan
within the ten-percent parameter. The Vigo court essentially found that
the defendants there did too little too late—a finding inapposite here.

Rodriguez never fully explicated why the fact that there was a previous
plan with a thirty-seven percent deviation made the eventual, sub-ten
percent plan somehow worse than a plan always designed to stay just
under ten percent. Both plans evinced a determination to stay just
within the ten percent limit, with no apparent substantial effort to get
the deviation close to zero.

The second anomalous characteristic of the Vigo ruling was the court's willingness to find that an alternative plan's lower deviation
was itself proof of a lack of a good faith effort to achieve maximum equality. This willingness seems to fly in the face of Karcher, which
specifically warned against such minor second-guessing: "we [do not]
indicate that a plan cannot represent a good-faith effort whenever a
court can conceive of minor improvements." The fact that the
Karcher Court made this statement in evaluating a congressional plan
rather than a state or local plan—which have more leeway in popula-
tion deviations—only makes it more puzzling that the Vigo court did
not heed its caution.

172 Brown, 462 U.S. at 842 (quoting Gaffney v. Cummings, 412 U.S. 735, 745 (1973)).
173 Rodriguez v. Pataki, 308 F. Supp. 2d at 367 (citation omitted).
174 See Vigo, 834 F. Supp. at 1086 (finding that redistricting just until the population deviation is
less than ten percent, even though it is possible to achieve districts with significantly lower
population deviation, is not a good faith effort to make the population as equal as possible).
176 See also Larios v. Cox, 300 F. Supp. 2d 1320, 1355 (N.D. Ga. 2004) (citing this passage in
Karcher in explaining why a congressional apportionment map with a total deviation of seventy-
two persons was permissible even though "a 'better' plan might have been possible").
Only two other federal courts—both coming after the post-2000 Census reapportionments—have struck down redistricting maps containing “minor deviations.”\footnote{177} Both cases, however, had anomalous characteristics that call into question whether the Supreme Court’s approval of their results actually means that the Court is willing to apply tough standards to redistricting maps with deviations under ten percent. The first is the Southern District of Illinois’s decision in \textit{Hulme v. Madison County},\footnote{178} which struck down Madison County’s district reapportionment plan that had a maximum population deviation of 9.3\%.\footnote{179} The court found that “the 2001 apportionment process of the Madison County Board was unquestionably tainted with arbitrariness and discrimination.”\footnote{180} The court denied that “an apportionment plan with a maximum population deviation under 10\% is immune from Constitutional attack,” instead saying that “a total population deviation of less than 10\% enjoys a presumption of validity and will not, by itself, support a claim of invidious discrimination.”\footnote{181} But the court said that the burden shifts back to the defendant to show a rational government policy if the plaintiffs can show that the motives behind the deviations are illegitimate: “a plaintiff may prove a prima facie violation of the Fourteenth Amendment by an apportionment plan with a population deviation of less than 10\% if he can ‘produce further evidence to show that the apportionment process had a “taint of arbitrariness or discrimination.”’\footnote{182}

The \textit{Hulme} court found that the taint in the Madison County plan was palpable. Specifically, the court found this arbitrariness and discrimination in the fact that “[t]he apportionment process pursued in Madison County throughout the first half of 2001 was designed spe-
cifically to satisfy the political agenda of Wayne Bridgewater, the Chairman of the Legislative Committee."183 This might have been more permissible had Mr. Bridgewater’s behavior during the reapportionment process not bordered on the sociopathic. Mr. Bridgewater was less than civil in his dealings with his colleagues—for example, in discussing the apportionment plan with a Republican, he stated that “[w]e are going to shove [the map] up your f—g ass and you are going to like it, and I’ll f— any Republican I can.”184 To another County Board member, he said, “I hear you’re saying bad things about me, mother f—r. I’ll tell you right now mother f—r, if you open your mother f—g mouth, I’m gonna have your mother f—g a— moved out by the mother f—g police.”185

The court found that the redistricting plan produced by this process was illegitimate, and gave the following reasons for this finding:

[Bridgewater’s] primary objective was to construct a map with a population deviation within the “target” of less than 10%, regardless of the practicality of reaching a lower percentage of population deviation... Bridgewater’s coincidental goal was to create districts that would not simply disadvantage Republican members of the Board, but “cannibalize” their districts to the greatest extent possible... Bridgewater achieved his goal, in large part, through his threatening and coercive actions against other Board members. His behavior was not only boorish, but it clearly demonstrates the bad faith under which the Madison County Board districts were apportioned. Had he not pursued this agenda, or had the majority of the Board not acquiesced in this reapportionment plan, the state of technology readily available to the Board would have allowed it, with great practicability, to come much closer to an equal population in each district. The apportionment process described above, therefore, demonstrates a complete disregard for the Constitutional mandate that a legislative body make “an honest and good faith effort to construct districts... as nearly of equal population as practicable.”186

The court therefore held that the “plaintiffs have established a prima facie case of discrimination,” and that, therefore, “defendants must justify the population disparity.”187 It concluded that it would have to “decide whether the ‘plan may reasonably be said to advance the rational state policy’ advanced by the defendants. In this case, however,

183 Id. at 1051.
184 Id.
185 Id. at 1050–51; see also Note, A New Map: Partisan Gerrymandering as a Federalism Injury, 117 Harv. L. Rev. 1196, 1196 (2004) (quoting Bridgewater’s less-than-civil language and noting that “this is not how the distinguished Vice President of the United States and Governor of Massachusetts [Elbridge Gerry, namesake of the term ‘gerrymandering’] wanted to be remembered”).
186 Hulme, 188 F. Supp. 2d at 1051–52 (quoting Reynolds v. Sims, 377 U.S. 533, 577 (1964)).
187 Id. at 1052.
defendants have not offered any state (governmental) policy to justify the plan’s population disparity.\footnote{188}

In essence, the *Hulme* court stated that the county plan was tainted with blatant partisan political considerations, that no good faith effort was expended to achieve equality in the size of districts, as opposed to simply getting the deviation under ten percent, that the process of creating the plan was characterized by excessive rudeness and intimidation, and that no legitimate state policy was offered as justification for the plan.

What *Hulme* did not make entirely clear was whether the problem with the Madison County plan was the motivations or the process. Was the electoral map impermissibly tainted because it was drawn for the specific purpose of furthering the political goals of a party leader? Or was the problem that said party leader intimidated his colleagues using language straight out of a Martin Lawrence movie? If Bridge-water had gotten the same plan passed, but did so without resorting to *Scarface*-type threats, would it have been permissible? Or was the map inherently tainted, no matter how civil his behavior, because the population deviations were created to further partisan political goals rather than some loftier public purpose? Though the court suggests that the problem was simply that the plan was the product of Bridge-water’s partisan ambitions, the opinion’s exhaustive detailing of his obnoxious behavior implies that this behavior informed the result.\footnote{189}

*Larios v. Cox*\footnote{190} is the most recent case in which a federal court struck down a redistricting plan with a deviation under ten percent. A three-judge court\footnote{191} struck down the redistricting maps of the Georgia state Senate and House of Representatives, each of which

\footnote{188 } Id. (quoting Brown v. Thompson, 462 U.S. 835, 843 (1983)).

\footnote{189 } The *Cecere* court acknowledged and did not criticize the result in *Hulme*. Rather, the court distinguished *Hulme* not only for having been passed through the boorish bullying of the party boss, but also for the very fact that it was not “the work product of one person but rather of the Democratic majority of the Nassau County Legislature.” *Cecere v. County of Nassau*, 274 F. Supp. 2d 308, 319 (E.D.N.Y. 2003). This distinction fails on both prongs. First, the *Cecere* court acknowledged that there were “allegations in the complaint that defendants were rude to Republican legislators and gave short shrift, if any consideration to their proposals.” *Id.* Though these allegations may have been less egregious than that exhibited by Mr. Bridgewater, in *Hulme*, the court offered no metric for determining the level of partisan obnoxiousness necessary to establish a Fourteenth Amendment violation in redistricting (or an explanation of why the alleged rudeness to the Nassau County Republicans failed to reach this standard). Second, the plan at issue in *Hulme* was passed by a legislative majority, in a 21-7 vote by the Madison County Board. *Hulme*, 188 F. Supp. 2d at 1050. Although Mr. Bridgewater apparently exerted much personal and political pressure over the committee that recommended the plan to the full board, there were no allegations that he attempted to physically intimidate the majority of the board who passed the plan.


\footnote{191 } At the time of the *Larios* decision, I was a clerk to Judge Marcus, the designated Circuit Judge on the panel.
had a maximum population deviation of 9.98%.\footnote{Larios, 300 F. Supp. 2d at 1322.} Half of the 180 seats in the House plan were in districts that were over or underpopulated by at least four percent, twenty of them by at least 4.9%.\footnote{Id. at 1326.} In the Senate, thirty-seven of the fifty-six districts had deviations greater than four percent, sixteen of which had deviations greater than 4.9%.\footnote{Id. at 1327.} The court struck down the House and Senate plans, but explicitly disavowed the proposition that its decision was based on a finding that partisan motives, in and of themselves, are impermissible reasons for population deviations: "it is unnecessary in this case to decide whether partisan advantage alone would have been enough to justify minor population deviations, although the Supreme Court has never sanctioned partisan advantage as a legitimate justification for population deviations."\footnote{Id. at 1327.} Rather, the court hinged its decision on a holding that two other primary motivations—regional favoritism and Democratic incumbency protection—were impermissible causes for the deviations.\footnote{Id. at 1351.} The Court struck down the plans and, when the state government was unable to pass new plans, appointed a special master to do so.

The Georgia plans were the product of an effort by state Democrats to maintain majorities in the state House and Senate despite a Republican majority in the state that had been developing for the past few decades. The 2000 Census revealed that in the previous ten years, the population growth of the predominantly Republican suburban areas surrounding Atlanta had significantly outpaced that of rural southern Georgia and inner-city Atlanta, which tended to be Democratic.\footnote{Id. at 1322.} This meant that reapportionment would require creating new seats in the Republican parts of the state, and correspondingly taking them away from the Democratic parts. In an effort to stem this tide and allow rural southern Georgia and inner-city Atlanta—and their respective incumbent Democratic officeholders—to hold on to as many seats as possible, the drafters of the reapportionment plans systematically and deliberately underpopulated the bulk of the districts in rural and inner-city areas.\footnote{Id. at 1326–27.}

The Georgia plans were also designed to help ensure the electoral safety of Democratic incumbents. The districts in which Democratic officeholders lived were underpopulated so that they need not take on any more new—possibly electorally hostile—constituents than
necessary. By contrast, the court found, dozens of Republican incumbents were paired with one another in creatively drawn districts in an effort to "unseat as many of them as possible." Fully half the House Republicans were placed in new districts in which at least one other incumbent lived. Many of these incumbent-pairing districts were very oddly shaped and overpopulated, making plain that the pairings were deliberate rather than just incidental to other, politically benign redistricting policies.

The court found that regional bias and Democratic incumbency protection were major, and impermissible, motivations behind the population deviations in the Georgia plans. With respect to the former, the court said that "the Supreme Court has long and repeatedly held that favoring certain geographic regions of a state over other regions is unconstitutional." The court quoted Reynolds v. Sims: "The fact that an individual lives here or there is not a legitimate reason for over-weighting or diluting the efficacy of his vote. . . . A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm." Moreover, the court said that the Supreme Court "has never retreated from the firm command in Reynolds that '[d]iluting 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 or economic status." The court concluded that

if the southern and inner-city Atlanta areas of the State of Georgia are in need of some political protection in order to ensure that their economic and other interests are recognized on a statewide basis, that need must be met in some way that does not dilute or debase the fundamental right to vote of citizens living in other parts of the state.

As for the protection of Democratic incumbents, the court acknowledged that although incumbency protection is a legitimate goal of traditional redistricting that can potentially justify minor population deviations, the one-sided partisan manner in which the Georgia plan protected incumbents did not pass constitutional muster under the Fourteenth Amendment. This was because the policy of in-

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199 See id. at 1329 (finding that there had been "an intentional effort to allow incumbent Democrats to maintain or increase their delegation, primarily by systematically underpopulating the districts held by incumbent Democrats").

200 Id.

201 Id.

202 Id. at 1330.

203 Id. at 1332.

204 Id. at 1342.

205 Id. at 1342–43 (quoting Reynolds v. Sims, 377 U.S. 533, 567–68 (1964)).

206 Id. at 1344 (quoting Reynolds, 377 U.S. at 566).

207 Id. at 1347.

208 Id. at 1349.
cumbent protection in the plans was not consistently applied. Rather, the plans helped only Democrats while aggressively and deliberately pursuing the exact opposite goal against Republican incumbents by pairing dozens of them in the same districts. Karcher v. Daggett held that certain “consistently applied” redistricting criteria, including “avoiding contests between incumbent Representatives,” could justify minor population deviations. But because the incumbent protection in the Georgia plans was the virtual opposite of a consistently applied policy—it protected only Democratic incumbents—it was not a proper justification for the population deviations in the plans.

The contrast between the regionalism argument as presented in Larios, and the same one presented in Rodriguez v. Pataki, decided just two months later, is striking. In Larios, the state defended itself by arguing that the population deviations were motivated not by partisan considerations but rather by regional concerns. The court did not accept this argument, saying that regionalism is no more a legitimate policy than is partisan gain. In Rodriguez, the plaintiffs brought

209 Id. at 1347.
210 See id. ("[The policy] was applied in a blatantly partisan and discriminatory manner, taking pains to protect only Democratic incumbents.").
212 Larios, 300 F. Supp. 2d at 1349. The court also found that the incumbency protection in the Georgia plans was problematic because it went beyond merely avoiding incumbent pairings, but actually created population deviations to make incumbents’ seats safer even when there was no danger of pairing. Id. at 1348–49. The court said that this had never been a traditionally accepted redistricting criterion that justified population deviations, and found that many of the incumbent-protecting population deviations were caused not by the legitimate state interest in avoiding contests between incumbents, but, rather by the more aggressive goal of allowing incumbents to avoid taking on more new constituents than was absolutely necessary to stay within 5% of the ideal district size.

214 See 300 F. Supp. 2d at 1342 ("[T]he principal drafter of the House Plan, unambiguously said that an effort to allow rural south Georgia to keep as many seats as possible was a basic cause of the population deviations in the House."). Part of the reason why the state denied that partisan politics played a part in the deviations may have been that the Georgia plans had also been challenged as an unconstitutional political gerrymander, a challenge that had been terminated at summary judgment. Id. at 1322.

215 Id. at 1342. The Wyoming court in Gorin v. Karpan, 788 F. Supp. 1199 (D. Wyo. 1992), although it upheld the Wyoming reapportionment plans against one person, one vote challenge, seemed to be similarly suspicious of regional bias in redistricting. The court wrote:

What the legislature may not do, however, is elevate that pursuit above the pursuit of substantial equality among individual voters. Reapportionment according to regional interests, if achieved at the expense of significant intrusion upon individual voting rights, is intolerable. Counties do not stand on equal constitutional ground with citizens at the ballot box.

Id. at 1201 (quoting Gorin v. Karpan, 775 F. Supp. 1430, 1446 (D. Wyo. 1991)). The court nonetheless upheld the plan because it believed the Wyoming Legislature had made a conscientious effort to improve the equality of the districts. Id.
the regionalism charge, and the court did not accept it, in part because the court believed that "regionalism" was merely a proxy for partisan considerations and was therefore permissible. Put simply, the state in Larios believed that regionalism is a legitimate defense against charges of partisan bias, while Rodriguez held that partisan bias is a legitimate defense against regionalism. These competing interpretations of one person, one vote law reveal just how confusing the law in this area can be.

On appeal, the Supreme Court summarily affirmed the Larios decision without oral argument. The only member of the Court to dissent from the Court's summary affirmation was Justice Scalia, who argued that Vieth v. Jubelirer called the correctness of the ruling into question. "A substantial case can be made," Justice Scalia wrote, "that Georgia's redistricting plan did comply with the Constitution. Appellees do not contend that the population deviations—all less than five percent from the mean—were based on race or some other suspect classification." The problem with the Georgia court's analysis, according to Justice Scalia, "is that it assumes 'politics as usual' is not itself a 'traditional' redistricting criterion." The Larios standard, if followed elsewhere, would "invite allegations of political motivation whenever there is population disparity, and thus . . . destroy the 10% safe harbor our cases provide."

Justice Scalia's dissent seems to misread the lower court's actual holding. The court took pains to explain that it was striking down the Georgia plans because the population deviations were the product of two plainly illegitimate purposes: the regional preference of rural and inner-city areas over suburbs and exurbs, and the inconsistent protection of Democratic (but not Republican) incumbents against pairing. The court specifically said that it was not ruling on whether pure partisanship—in Justice Scalia's terms, "politics as usual"—was a permissible cause of the deviations.

218 Cox, 124 S. Ct. at 2809 (Scalia, J., dissenting).
219 Id.
220 Id.
221 Id. at 2810. Justice Stevens, joined by Justice Breyer, concurred with the Court's summary affirmation. Id. at 2806 (Stevens, J., concurring). The primary purpose of the concurrence seems to have been to note that "had the Court in Vieth adopted a standard for adjudicating partisan gerrymandering claims, the standard likely would have been satisfied in this case" because the partisan gerrymandering in the Georgia plans was so egregious. Id. at 2808.
222 Larios v. Cox, 300 F. Supp. 2d 1320, 1351 (N.D. Ga. 2004) (per curiam). In a recent article, Samuel Issacharoff and Pamela S. Karlan argue that the Supreme Court's Cox v. Larios decision allowed for "second-order" adjudication of political gerrymandering claims, even while the Court had recently foreclosed on "first-order" adjudications in Vieth. Samuel Issacharoff & Pamela S. Karlan, Where to Draw the Line?: Judicial Review of Political Gerrymanders, 153 U. Pa. L.
C. The Political Effects of Allowing Population Deviations

In the years since the establishment of the ten percent rule, drafters of state and local redistricting plans have interpreted ten percent as the maximum deviation they can create without running into constitutional problems. Believing that the Supreme Court has essentially given them carte blanche to create reapportionment maps with population deviations up to ten percent, plan drafters have consistently pushed the ten percent rule to the limit. According to data from the National Conference of State Legislatures, the majority of state houses now have total population deviations very close to ten percent.\(^2\) Out of ninety-nine state legislatures,\(^2\) fifty-eight have deviations of at least nine percent.\(^2\) Twenty are between 9.9 and exactly 10 percent.\(^2\)

Although minor deviations might not make much political difference in state legislatures in which one party enjoys heavy majorities, they can have a dispositive impact on control over closely divided state houses. For example, the 2002 elections in Georgia—which took place under a reapportionment plan with population deviations totaling 9.98% in each state House—resulted in a 30–26 Democratic

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\(^2\) Of the fifty states, Nebraska has the only unicameral state legislature. *Id.* The Nebraska Legislature is also the only state house whose membership is non-partisan; since 1934, Nebraska senators have not officially affiliated with political parties. *See* Nebraska Legislature, *The History of Nebraska’s Unicameral Legislature*, at http://www.unicam.state.ne.us/learning/history.htm (last visited Feb. 19, 2005).

\(^2\) Of the fifty-eight, six state houses have deviations greater than ten percent, led by the Hawaii state senate, with a deviation of 38.9%. *Nebraska Legislature, supra* note 224.

\(^2\) National Conference of State Legislatures, *supra* note 223. The North Dakota state legislature wins the prize for most aggressive pushing of the ten percent rule, as both its House and Senate round out to exactly ten percent. *Id.*
majority.\textsuperscript{227} In the Montana House, which has a population deviation totaling 9.85\%,\textsuperscript{228} Republicans enjoy a 53–47 majority. The GOP also holds a 61–59 majority in the North Carolina House, which has a deviation of 9.98\%, while the Democrats hold on to a 27–23 majority in the North Carolina Senate, with its deviation of 9.96\%.\textsuperscript{229} Their Democratic neighbors to the south hold a 25–21 majority in the South Carolina Senate, thanks in part to a 9.87\% deviation there.\textsuperscript{230} And in the Vermont House, with its deviation of 18.99\%, Republicans hold a 73–71 edge over the Democrats.\textsuperscript{231} In any of these state houses, it is easy to see how even slight population deviations—especially when created in a deliberately partisan manner—can make the difference between Democratic and Republican control. As John Hart Ely wrote,

given the capabilities of computers, a green light for partisan gerrymandering can easily undo the good that the Warren Court thought (correctly in those pre-computer days) its reapportionment decisions would accomplish. Give a latter-day Elbridge Gerry or Boss Tweed a modern computer, and one person/one vote will seem a minor annoyance.\textsuperscript{232}

D. Inevitable Politics?

Many of the courts that have upheld redistricting plans have commented not only on the fact that redistricting had traditionally been the province of legislators rather than courts, but also that politics is \textit{inevitable} in redistricting and legal barriers to politics in redistricting are doomed to failure.\textsuperscript{233} They often cite the statement in

\textsuperscript{227} The Republicans eventually gained the majority in the State Senate when four of the Senate’s Democrats switched parties, making it a 30–26 Republican majority. \textit{Larios}, 300 F. Supp. 2d at 1327.
\textsuperscript{228} National Conference of State Legislatures, \textit{supra} note 223.
\textsuperscript{229} \textit{Id.}
\textsuperscript{230} \textit{Id.}
\textsuperscript{231} \textit{Id.}
\textsuperscript{232} Ely, \textit{supra} note 3, at 505.
\textsuperscript{233} \textit{See, e.g., Daly v. Hunt}, 93 F.3d 1212, 1227 (4th Cir. 1996) ("Even if electoral equality were the paramount concern of the one person, one vote principle, the district court’s approach in this action would lead federal courts too far into the ‘political thicket.’") (internal citations omitted)); \textit{Rodriguez v. Pataki}, 308 F. Supp. 2d 346, 353 (S.D.N.Y. 2004) (per curiam) ("[P]olitics surely played a role in redistricting in New York in 2002—as it does in most every jurisdiction."); \textit{Cecere v. County of Nassau}, 274 F. Supp. 2d 308, 318 (E.D.N.Y. 2003) ("That the challenger bears the burden of proof when the deviation rate is under ten percent is largely irrelevant to the concern expressed in \textit{Gaffney} that federal courts not be drawn into the political and legislative redistricting thicket in scenarios involving ‘minor deviations from mathematical equality among state legislative districts.’") (quoting \textit{Gaffney} v. \textit{Cummings}, 412 U.S. 735, 745 (1973)); \textit{Marylanders for Fair Representation, Inc. v. Schaefer}, 849 F. Supp. 1022, 1043 (D. Md. 1994) (three-judge court) ("\textit{Bandemer} requires that Republicans have no voice in the political process, which, as demonstrated by MFR’s own witnesses, they clearly do. When, to what extent, and on which issues they are listened to are questions that are quite properly resolved by the political
Gaffney v. Cummings that "[p]olitics and political considerations are inseparable from districting and apportionment" and that "districting inevitably has and is intended to have substantial political consequences" in support of this proposition, although, as discussed above, the Gaffney opinion addressed an almost too-fair reapportionment plan that differed almost diametrically from the plans that are commonly challenged in federal court. Even more importantly, these statements in the Gaffney opinion were made not in the context of a one person, one vote discussion, but rather in the section of the opinion focusing on political gerrymandering. Thus, Gaffney's admonition about the inevitability of politics in redistricting is less a form of permission for politically motivated population deviations than it is a precursor of the broad latitude given to political gerrymanders in Davis v. Bandemer and Vieth, both of which cite this language.

Making a constitutional argument that the inevitability of politics in redistricting means that courts should just stay out of the redistricting business runs up against the fact that the Supreme Court has stepped in, or allowed lower courts to step in, when the political process has crossed some line. The Court struck down such plans in Reynolds v. Sims and Baker v. Carr, the racial gerrymandering cases, and more recently affirmed the Larios decision. And a majority of the Court also recently demonstrated its willingness to accept a legal intrusion into another area of election law tinged with constitutional questions: campaign finance reform. One constant criticism of the McCain-Feingold campaign finance law was that it was futile, because money will inevitably find its way into the political system no matter what regulations are enacted. The Court in McConnell v. FEC acknowl-

process, not by the courts.

234 Gaffney, 412 U.S. at 753.

235 See id. at 751-53 (defending the "political fairness principle" applied by the apportionment board).

236 See Vieth v. Jubelirer, 124 S. Ct. 1769, 1781 (2004) (stating that districting by political entities is not "root-and-branch" a matter of politics); Davis v. Bandemer, 478 U.S. 109, 129 (1986) ("The reality is that districting inevitably has and is intended to have substantial political consequences.").

237 377 U.S. 533 (1964) (holding that the Equal Protection Clause requires substantially equal representation for all citizens in a state regardless of where they reside).

238 369 U.S. 186 (1962) (holding that an equal protection challenge to an apportionment statute presented a justiciable constitutional cause of action).


240 Even supporters of the law made this concession. See, e.g., E.J. Dionne Jr., How the Money Talks, WASH. POST, Mar. 20, 2001, at A27 ("Money always has a way of finding new tributaries into politics. We know for certain that McCain-Feingold, all by itself, can't dam them all up."); Paula Dwyer et al., Campaign Reform: Where Do We Go From Here?, BUSINESS WEEK, Apr. 16, 2001, at 42 ("Inevitably,' sighs Senator Susan M. Collins, a Maine Republican and ardent reform backer, 'we'll have to come back and figure out how to close all the new loopholes.").
edged this reality: "We are under no illusion that [the McCain-Feingold law] will be the last congressional statement on the matter [of campaign finance]. Money, like water, will always find an outlet." But the Court nonetheless allowed most of the law to remain in place, as striking it down would improperly hamper efforts to combat (even if it can never completely eliminate) the corrupting influence of money in politics. The Court quoted *Burroughs v. United States*, which declared that "[t]o say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection." And just as the fact that money will always be in politics does not mean that efforts to push back its influence are doomed to immediate and total failure, the same can be said of politics and redistricting. Just because it would be futile to try to completely get rid of the impact of partisan motives on redistricting does not mean that partisan motives are always permissible no matter how far they are taken.

The *Cecere v. County of Nassau* court pointed out, quite rightly, that partisan motivation in districting has been invoked as a defense against racial gerrymandering claims. In *Hunt v. Cromartie*, the Court stated 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." In *Bush v. Vera*, the Court distinguished between racially based districting and political districting, suggesting that the latter is more permissible: "If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify . . .." In *Shaw v. Reno*, the Court stated that "redistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors."

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241 *McConnell*, 540 U.S. at 224.
242 290 U.S. 534 (1934).
243 *Id.* at 545.
244 *See* 274 F. Supp. 2d 308, 315 (E.D.N.Y. 2003) ("[T]he Supreme Court has recognized political motivation as a possible defense against a claim of racial gerrymandering.").
246 *Id.* at 551.
248 *Id.* at 968.
250 *Id.* at 646.
However, pointing out that partisan motivations are used as a defense against charges of racial gerrymandering does not prove that partisan motivations are always permissible in redistricting. Although *Davis v. Bandemer*[^251] and the *Vieth v. Jubelirer*[^252] majority set a very high standard for demonstrating an Equal Protection Clause violation in partisan gerrymandering, they did set a standard. They did not say that partisan motivations are *always* permissible, no matter how far they are taken. Additionally, one person, one vote deviations based on race, as discussed above, are held to *higher* scrutiny than are racial gerrymanders. Thus, it is simply false to say that *Gaffney* allows no limit to partisan motivations in redistricting. And even if it did, *Bandemer* and *Vieth* did place limits (albeit very high ones) on partisan redistricting.

We still must answer the most basic question in this area of the law that no Supreme Court decision has squarely addressed: is it constitutional to create deviations from one person, one vote equality for the purpose of advancing partisan goals, and if not, then how far may such efforts go? In light of *Gaffney*, it would seem unrealistic to expect that politics cannot have even a *de minimis* impact on deviations, when that case—a one person, one vote case, albeit a strange one—stated that politics is an inevitable part of redistricting. But at the same time, it seems equally farfetched that politics can always be used to push the deviation up to the ten percent limit. Doing so would effectively make ten percent a safe harbor in which deviations could be caused by any motive (except maybe race or ethnicity).

*Karcher* put forth a list of acceptable reasons for minor population deviations—"making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives"—but stated that they were only examples[^253]. The Court stated that other policies are also acceptable reasons for deviations, "[a]s long as the criteria are nondiscriminatory."[^254] Is a policy aimed at helping one political party at the expense of another an example of a discriminatory criterion?

One answer may be found in *Bandemer*. As easy to surmount as it was, the legal standard set forth in that case explicitly stated that it is possible for purely partisan acts in redistricting to constitute unconstitutional "discrimination": "[U]nconstitutional discrimination occurs . . . when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the

[^254]: *Id.*
political process as a whole." In other words, a redistricting plan can be "discriminatory" for Equal Protection Clause purposes even if the group it victimized is classified not by race, ethnicity, or other such suspect class but by political affiliation. And as discussed above, the standard for partisan one person, one vote challenges should be stricter than for partisan gerrymanders in the same sense (and to the same extent) that one person, one vote cases based on race have a higher standard than racial gerrymandering ones.

Furthermore, the very language used in Bandemer to describe the kind of effect that would be necessary to find unconstitutional discrimination works much better for one person, one vote claims than for gerrymandering claims. Someone whose vote counts less than those of others because he lives in a district with an unusually large number of voters will, by definition, have his vote "degraded." This degradation is more direct than those that result from gerrymandering, as it renders some votes and some voters literally less important the others. Voters in high-population districts are hurt not just in the sense that they are shoehorned into districts guaranteed to elect representatives they don’t like. Rather, one person, one vote deviations "degrade" in the sense that Webster's Dictionary defines the word: "to lower from a superior to an inferior level." Unlike in cases of gerrymandering, one person, one vote "degradation" to a person's voting power will remain as long as he lives in that district (unless its population drops). In any event, the various opinions and dissents in Vieth, discussed below, offered several other means of determining redressable harm in partisan gerrymandering cases.

Perhaps the most useful standard to use in assessing one person, one vote deviations is to consider Roman v. Sincock's determination of whether "there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." Roman is saying that even the minor deviations must be free of arbitrariness and discrimination. Is the desire for a partisan goal an example of an arbitrary or discriminatory goal in redistricting? It obviously is not arbitrary—indeed, it is quite deliberate and rational—but, as discussed above, it is quite possibly discriminatory for Equal Protection Clause purposes. But what does Roman mean by "tainted"? Webster's Dictionary gives a number of definitions of the word "tainted," two of which are relevant here: (1) "to touch or affect slightly with something bad or undesirable;" or (2) "to

255 Bandemer, 478 U.S. at 132.
256 Id.
contaminate morally."\(^{259}\) Determining which definition Chief Justice Warren was thinking of in writing *Roman* could have a substantial impact on the treatment of partisan gain in redistricting. The first definition requires only a small effect for something to be "tainted," while the latter requires serious moral decay.

It is unclear whether Chief Justice Warren was admonishing us against even the slightest hint of bad faith and nefariousness, or was concerned only about substantial transgressions. If it was the former, Chief Justice Warren might have been more likely to have used something like the phrase "free from any *hint* of arbitrariness or discrimination" rather than "free from any *taint* of arbitrariness or discrimination."\(^{260}\) The practical impact of this reading of *Roman* is that it effectively holds that even if partisan gain is an illegitimate motive for even minor deviations from perfect district equality, its contribution to the deviation has to be substantial for it to be held to violate the Equal Protection Clause.

II. FORMULATING A STANDARD FOR POLITICAL ONE PERSON, ONE VOTE CHALLENGES

As discussed above, so-called "minor deviations" in state and local districting plans matter. Indeed, the very fact that map drafters in so many states create plans with population deviations so close to ten percent indicates that they are well aware of the potential political benefits of such disparities. The Supreme Court's 8-1 summary affirmation of *Larios v. Cox*\(^{261}\) indicates a recognition that apportionment plans with population deviations under ten percent must still be justified by some legitimate state policy. And the case law suggests that naked partisan advantage is *not* such a motive, at least when it is divorced from any other justification.

Reading together the varying rules and principles laid out in *Reynolds*,\(^{262}\) *Brown*,\(^{263}\) *Roman*,\(^{264}\) *Karcher*,\(^{265}\) *Davis v. Bandemer*,\(^{266}\) and other relevant cases makes it possible to come up with a standard for evaluating the propriety of partisan motives in redistricting plans that have minor deviations in population between districts. In many states, the districting plans are close enough to a ten percent deviation that it seems obvious that ten percent, rather than *Reynolds*'s goal of perfect

\(^{259}\) Webster's, *supra* note 257, at 2329.
\(^{260}\) Roman, 377 U.S. at 710.
\(^{262}\) 377 U.S. 533 (1964).
\(^{266}\) 478 U.S. 109 (1986).
equality, was the true objective. In other words, the planners were trying to make the plan as unequal as they could get away with. Nonetheless, with deviations of less than ten percent, the burden is on the plaintiffs to prove... well, what exactly? This Part tries to answer that question, offering a constitutional standard for political one person, one vote cases that is both a prediction of what the Court might do, and a modest proposal for what it should do.

The case law reveals that there should be some standard for determining whether partisan manipulation of district populations violates the Equal Protection Clause. Is partisan advantage such a poisonous motive that it cannot be responsible for the tiniest fraction of any population deviation? Or is "politics as usual" such a generally permissible motive in reapportionment that it should only be seen as suspect in the most egregious cases of abuse, as is the case for political gerrymanders? Or is there some proper standard in between? Section A addresses this issue and argues that, based on existing case law, the most logical standard to apply is a form of the "predominance" standard that has been established for racial gerrymandering challenges.

And, apart from the degree to which politics may influence district population sizes without running into constitutional problems, how does a plaintiff go about proving that a violation has occurred? Is it through a mathematical analysis showing how much smaller the deviations could have been had politics not influenced the map drawing, as the court in Vigo County Republican Central Committee v. Vigo County Commissioners suggested? Or is it through testimonial and documentary evidence of the role politics played in the reapportionment process, which was the route the Hulme v. Madison County court took? Section B suggests that a balance of both of these methods is proper.

A. How Much Can Politics Influence Population Deviations?

If partisan motivations are not always a constitutional justification for one person, one vote deviations, then what is the standard to apply to them? This Section proposes that the question can be answered by looking at the constitutional standards applied in three other areas of reapportionment law where there is established Supreme Court case law, and extrapolating from them to figure out

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267 See supra text accompanying notes 223-25 (citing recent data from the National Conference of State Legislators that reveal that a majority of state houses have population deviations close to ten percent).


where the political one person, one vote doctrine fits along the spectrum of standards. The three other areas of law are political gerrymandering, racial gerrymandering, and racial one person, one vote cases.

1. The Political Gerrymandering Standard

The easiest feasible standard to use for partisan one person, one vote deviations is the standard set for partisan gerrymandering in Vieth v. Jubelirer\textsuperscript{270} and Davis v. Bandemer.\textsuperscript{271} Constitutionally speaking, gerrymandering is the closest cousin to one person, one vote violations, as they both involve the manipulation of voting districts toward a political end, and come under equal protection scrutiny as a result. If that standard is applied, then virtually every plaintiff challenging sub-ten percent deviations from perfect population equality will surely lose—as they would lose on their political gerrymandering claim—because they would have to “prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group,”\textsuperscript{272} such that the plaintiffs have “essentially been shut out of the political process.”\textsuperscript{273} Since Bandemer, no plaintiff has ever won an Equal Protection Clause challenge to a partisan gerrymander.

A sharply divided Supreme Court recently set out its thinking on partisan gerrymandering in Vieth, a challenge to Pennsylvania’s new congressional districting map.\textsuperscript{274} Justice Scalia, writing for a four-judge plurality consisting of himself, Chief Justice Rehnquist, and Justices O’Connor and Thomas, declared that partisan gerrymandering claims are nonjusticiable and that therefore no possible gerrymander, no matter how extreme, can be the basis for a challenge. The opinion criticized the Bandemer plurality’s holding, stating that it was “not persuaded” that partisan gerrymanders are nonjusticiable.\textsuperscript{275} According to Justice Scalia, the need to cobble together a six-judge majority in Bandemer led to an unsustainable result: “The clumsy shifting of the burden of proof for the premise (the Court was ‘not persuaded’ that standards do not exist, rather than ‘persuaded’ that they do) was necessitated by the uncomfortable fact that the six-Justice majority could not discern what the judicially discernable standards might

\textsuperscript{270} 124 S. Ct. 1769 (2004).
\textsuperscript{271} 478 U.S. 109 (1986).
\textsuperscript{272} Id. at 127.
\textsuperscript{273} Id. at 139.
\textsuperscript{274} For comprehensive analyses of Vieth, see Richard L. Hasen, Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims after Vieth, 3 ELECTION L.J. 626 (2004); Issacharoff & Karlan, supra note 222, at 554–64.
\textsuperscript{275} 124 S. Ct. at 1777 (quoting Bandemer, 478 U.S. at 123).
As such, according to Justice Scalia, *Bandemer* left it up to the lower courts to establish the standard for evaluating challenges to partisan gerrymanders, but, lacking guidance from the Supreme Court, "the lower courts have, over 18 years, [not] succeeded in shaping the standard that this Court was initially unable to enunciate." Instead, the lower courts simply adopted the standard set forth by the four-Justice *Bandemer* plurality: that for an electoral map to be unconstitutional, it must not just discriminate against an identified political group and defy proportional representation, but must also be "arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole," and there must be "evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.

According to Justice Scalia's opinion in *Vieth*, in the eighteen years since the *Bandemer* decision, the application of its plurality standard "has almost invariably produced the same result (except for the incurring of attorney's fees) as would have obtained if the question were nonjusticiable: judicial intervention has been refused." Justice Scalia noted that the two standards put forth in *Bandemer* differed from the three different separate standards proposed by the *Vieth* dissenters and concurrence and the one offered by the *Vieth* plaintiffs, and stated that this very variance suggests that no constitutionally mandated and workable standard exists. As such, Justice Scalia's

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276 Id.
277 Id.
278 *Bandemer*, 478 U.S. at 132-33.
279 *Vieth*, 124 S. Ct. at 1777.
280 Id. at 1784; see also id. at 1797-98 (Kennedy, J., concurring) (proposing a standard for evaluating partisan gerrymanders, discussed infra notes 282-96 and accompanying text); id. at 1810 (Stevens, J., dissenting) (arguing that a cause of action can exist in partisan gerrymander cases, but that partisanship can "be a permissible consideration in drawing district lines, so long as it does not predominate"); id. at 1817-19 (Souter, J., dissenting) (proposing a five-part test for proving a prima facie violation in a single-member district: (1) "the resident plaintiff would identify a cohesive political group to which he belonged"; (2) that the plaintiff's district "paid little or no heed to those traditional districting principles whose disregard can be shown straightforwardly: contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and mountains"; (3) "specific correlations between the district's deviations from traditional districting principles and the distribution of the population of his group"; (4) "a plaintiff would need to present the court with a hypothetical district including his residence, one in which the proportion of the plaintiff's group was lower (in a packing claim) or higher (in a cracking one) and which at the same time deviated less from traditional districting principles than the actual district"; and (5) "the plaintiff would have to show that the defendants acted intentionally to manipulate the shape of the district in order to pack or crack his group"). In his dissenting opinion, Justice Breyer observed:

At the same time, [certain constitutional and political] considerations can help identify at least one circumstance where use of purely political boundary-drawing factors can amount to a serious, and remediable, abuse, namely the *unjustified* use of political factors to entrench a minority in power. By entrenchment I mean a situation in which a party
plurality opinion concluded that "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that Bandemer was wrongly decided."  

However, to get the fifth vote against overturning the Pennsylvania plan, the four plurality justices were joined by Justice Kennedy's concurrence, which rejected the plurality's categorical denial of justiciability in gerrymandering challenges. Justice Kennedy refused to condone a blanket denial of relief to even the most egregious political gerrymanders, arguing optimistically that the fact "[t]hat no such standard has emerged in this case should not be taken to prove that none will emerge in the future."  

First of all, according to Justice Kennedy, allegations of discrimination in voting apportionment implicate important constitutional rights, and therefore "the impossibility of full analytical satisfaction is reason to err on the side of caution."  

Second, Justice Kennedy argued, the lower courts' inability to formulate a satisfying standard for partisan gerrymandering cases in the past eighteen years was caused by the fact that they were bound to follow Bandemer, which "formulated a single, apparently insuperable standard."  

And finally, Justice Kennedy argued, eighteen years was not really so long a time, because new technologies for reapportionment constitute "both a threat and a promise":  

On the one hand, if courts refuse to entertain any claims of partisan gerrymandering, the temptation to use partisan favoritism in districting in an unconstitutional manner will grow. On the other hand, these new
technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties. That would facilitate court efforts to identify and remedy the burdens, with judicial intervention limited by the derived standards. 286

Justice Kennedy countered Justice Scalia's claim that he "resolve[s] this case with reference to no standard" by saying "that is wrong. The Fourteenth Amendment standard governs; and there is no doubt of that." 287 Applying this Fourteenth Amendment standard, Justice Kennedy found that the Pennsylvania plan was permissible. He found "no authority" for the "principle appellants propose, which is that a majority of voters in the Commonwealth should be able to elect a majority of the Commonwealth’s congressional delegation." 288 He also rejected the proposition that district compactness and contiguity be used as criteria for determining whether a redistricting map burdens Fourteenth Amendment rights, because "[t]hey cannot promise political neutrality when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not." 289 Despite his claim that Justice Scalia was wrong to say that he applied no standard, this seemed to be the end of Justice Kennedy's Fourteenth Amendment analysis.

As for what a proper standard for partisan gerrymanders could be, Justice Kennedy suggested that future challenges might hinge not on Fourteenth Amendment equal protection, but rather on First Amendment speech and associational principles. 290 Citing Elrod v. Burns 291 and California Democratic Party v. Jones, 292 Justice Kennedy said that "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views." 293 As such, a First Amendment cause of action may arise when a partisan gerrymander "has the purpose and effect of burdening a group of voters' representational rights." 294 In such a case, the First Amendment standard would be to determine "whether the legislation burdens the

286 Id.
287 Id. at 1797.
288 Id. at 1793.
289 Id. at 1794.
290 See id. at 1797 ("If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest.").
293 124 S. Ct. at 1797 (Kennedy, J., concurring).
294 Id.
representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association.

The problem with Justice Kennedy's proposed First Amendment standard for political gerrymanders is that it seems every bit as malleable as a Fourteenth Amendment standard that prohibits "discrimination" against targeted political groups. The problem with the Fourteenth Amendment standard is that it can be read either as prohibiting all partisan gerrymanders because they all are meant to favor one group over another, or no partisan gerrymanders because no gerrymanders affect anyone's right to vote. Justice Kennedy's First Amendment standard can be read just the same way to permit no partisan gerrymanders since the virtual reapportionment map designed to advance the representational interests of one party over another is the virtual definition of a partisan gerrymander, or to permit all partisan gerrymanders because no voters' rights to vote are affected by gerrymanders. In effect, Justice Kennedy's First Amendment standard seems as difficult to define as any of the various Fourteenth Amendment tests.

At any rate, Vieth largely affirmed the Davis v. Bandemer plurality's holding that made it almost impossible to mount a successful challenge to a political gerrymander. In an oral argument before the district court, the Larios v. Cox plaintiffs stated that if the court was to deny their partisan gerrymandering claim (which was dismissed at summary judgment), it would render Bandemer a "joke case" because the Georgia Democrats' partisan gerrymander was so obvious and significant. Unfortunately for them, Bandemer was practically a joke case, denying relief in virtually all challenges to political gerrymandering. And Vieth, decided several months after the "joke case" comment, changed very little.

2. The Racial One Person, One Vote Standard

Partisan deviations from the one person, one vote standard should probably be held to a higher standard than partisan gerrymandering. The clearest reason for this is the fact that a racial deviation from the one person, one vote standard is held to a higher standard than racial gerrymandering is. Racial gerrymandering is not allowed when "race was the predominant factor" in drawing district lines. Indeed, the Pennsylvania plan that Justice Kennedy voted to uphold was a particularly egregious gerrymander, calling into question what type of political gerrymander could fail Justice Kennedy's First Amendment test.

295 See infra Part II.A.3 (discussing the Supreme Court's racial gerrymandering jurisprudence); see also Georgia v. Ashcroft, 539 U.S. 461, 491-92 (2003) (Kennedy, J., concurring) (arguing that "race cannot be the predominant factor in redistricting under the Court's juris-
Supreme Court cases do not state that race cannot be a factor at all in certain circumstances when drawing district shapes. By contrast, the Court has been quite clear that race cannot be a factor in determining district size. *Reynolds v. Sims* had strong words for those who would consider using race as a factor at all in decisions about the relative size of voting districts: "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." No case since then has so much as hinted that helping or hurting voters of a certain race can be considered a legitimate policy in creating even minor deviations in population districts. In *Karcher v. Daggett*, when listing "legitimate objectives that on a proper showing could justify minor population deviations," the Court cautioned that the motives are legitimate only "[a]s long as the criteria are nondiscriminatory." Though perhaps it is unclear whether this bar on discriminatory motives covers partisan political discrimination, there can be no question that it must cover racial discrimination, as race was the very basis for the passage of the Equal Protection Clause. Thus, it seems clear that race cannot ever be a motive for the creation of population deviations in reapportionment.

No similar statement of bedrock constitutional principles exists in the Court's gerrymandering cases. Rather, the racial gerrymandering cases merely admonished legislatures not to go too far by creating districts whose shapes are too bizarre. Nowhere in the gerrymandering decisions does the Court tell legislatures that they must create districts whose shapes are "as normally shaped as is practicable," in the
same way that *Reynolds* told legislatures to create districts that are "as nearly of equal population as is practicable."301

So if the standard to be applied to politically motivated one person, one vote deviations is tougher than that applied to political gerrymandering, then what, exactly, is the proper standard? Is it never permissible for a deviation to occur as a direct result of partisan motives; is it merely unacceptable for partisan considerations to trump all others in the redistricting plan, or does partisan redistricting only violate the Equal Protection Clause when it effectively rigs the system to make one party unable to compete—comparable to *Bandemer*’s political gerrymandering standard? The Supreme Court has not answered those questions.

3. The Racial Gerrymandering Standard

On the scale of acceptability based on equal protection principles, the Supreme Court’s racial gerrymandering jurisprudence puts that form of reapportionment manipulation somewhere in between the extreme permissiveness evident in the political gerrymandering and the extreme suspicion of racially motivated population deviations. The middle-ground standard that seems to have evolved for racial gerrymandering cases has been a *predominance* standard—namely, that race cannot be the predominant cause of strange district shapes.302

In *Miller v. Johnson*,303 the Court said that, in a racial gerrymandering challenge to an apportionment plan “[t]he plaintiff’s burden is to show, either through circumstantial evidence of a district’s shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.”304 When such “predominance” is evident, strict scrutiny applies.

301 377 U.S. at 577.
304 Id. at 916.
In *Shaw v. Hunt*, the Court upheld this standard, affirming a district court decision that had struck down districts whose "overriding purpose" and "principal reason" was to create two majority-black voting districts—by the admission of the state and the plan's principal drafter. In *Hunt v. Cromartie*, the Court said that "strict scrutiny applies if race was the 'predominant factor' motivating the legislature's districting decision." The most recent explication of the racial gerrymandering standard came in *Georgia v. Ashcroft*, the sister litigation to *Larios*. In *Ashcroft*, the Court stated that race cannot be "the predominant, overriding factor" in redistricting decisions.

The clear rule of the Court, then, is that districts drawn with race predominantly in mind are suspect and will be subjected to strict scrutiny. The courts will look both at testimonial evidence of motives and at the shape of the districts themselves. *Miller* said that when "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" are "subordinated to racial objectives," strict scrutiny applies.

### 4. Extrapolating from the Existing Standards

This grid lays out simplified versions of the standards of scrutiny for redistricting plans based on their perceived offenses:

<table>
<thead>
<tr>
<th>Racial</th>
<th>Gerrymandering</th>
<th>Population Deviation</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>&quot;race cannot be the predominant factor&quot;</td>
<td>never allowed</td>
</tr>
<tr>
<td>Political</td>
<td>cannot “shut out” one party or group</td>
<td>???</td>
</tr>
</tbody>
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506. Id. at 906.
507. Id.
508. Id.
510. Id. at 547.
512. Id. at 466 (citing *Miller v. Johnson*, 515 U.S. 900, 928 (1995)) (internal quotation marks omitted). In his concurrence, Justice Kennedy stated that "race was a predominant factor" in the state Senate redistricting plan. Id. at 491 (Kennedy, J., concurring) (emphasis added). It is not clear whether the distinction between requiring that race be a predominant factor rather than the predominant factor is at all meaningful. This author is inclined to think not.
513. The Court has not imposed different standards on "benign" (favoring minority groups) as opposed to "invidious" (favoring whites) racial motivations. See *Shaw v. Hunt*, 517 U.S. 899, 994–95 (1996) ("[A] racially gerrymandered districting scheme, like all laws that classify citizens on the basis of race, is constitutionally suspect. This is true whether or not the reason for the racial classification is benign or the purpose remedial." (Internal citations omitted)).
This chart makes evident that, according to the Supreme Court, racial motives are held to somewhat tougher scrutiny than partisan ones, and one person, one vote deviations are held to tougher scrutiny than gerrymandering. This, however, is an easy conclusion to make. The more difficult question is where along this spectrum the political population deviation standard should fall. Between the exceedingly easy Vieth v. Jubelirer standard, which virtually all plans would pass, and the Karcher v. Daggett standard, which a great many would fail (the plaintiff would only need to show that plans with smaller deviations could be drawn without sacrificing legitimate, nonpartisan redistricting criteria) lies a massive and very significant gap. Finding a middle ground between these two standards which may properly be applied to partisan deviations from one person, one vote is a difficult task.

Logic suggests that the proper standard for partisan one person, one vote deviations should be quite close, if not identical to, the standard for racial gerrymandering. The former combines the less suspect motive (politics) with the more suspect redistricting strategy (varying district sizes) while the latter combines the more suspect motive (race) with the less suspect strategy (gerrymandering). Thus, in essence, the differences cancel out—the difference between race and politics as suspect motives approximate the difference between gerrymandering and population disparities as suspect strategies. In other words, race is more suspect than partisanship and one person, one vote deviations are more suspect than gerrymanders, and the degree of difference is similar.

The overall concept is easiest to picture as a parallelogram, with each opposing pair of sides being of identical length, as racial gerrymanders are more suspect than partisan gerrymanders to the exact same extent that racial one person, one vote deviations are more suspect than partisan one person, one vote deviations:


At one end, the Court has never recognized any state’s right to use race as a motivation in varying the relative sizes of voting districts. At the other end, the Court has created a standard for political gerrymanders that is about as strict as Paris Hilton’s parents. In between them is the “predominance” standard for racial gerrymandering claims. By extrapolation—while acknowledging that mathematical precision is impossible in answering this kind of question (or, at least, equivalent to “how many angels on the head of a pin”-type inquiries)—the racial gerrymandering standard seems quite close to a midpoint between the totally restrictive racial one person, one vote standard and the highly permissive Vieth standard. Saying that a motive cannot be “predominant” seems to be a pretty good compromise between saying that it is never allowed and that it is almost always allowed. The most plausible way to interpret “predominance” is as meaning the majority of the reason—that it is responsible for more than half of the deviation.

Logically speaking, if the difference between race and partisanship as suspect motives equals the difference between one person, one vote deviations and gerrymandering as suspect redistricting actions, then the standard applied to political one person, one vote deviations should be exactly the same as the standard applied to partisan one person, one vote disparities. This is because changing one variable has the same effect on the value (the proper scrutiny level) as
changing the other. That being the case, the constitutional standard applied to political one person, one vote deviations should ironically most closely resemble the standard applied to racial gerrymandering, which is the suspect redistricting strategy to which partisan one person, one vote deviations otherwise bear the least resemblance.

It is unknown (and unknowable) whether the proper racial gerrymander standard is an exact midpoint between the political gerrymander and the racial one person, one vote deviation standard. If it is not the exact midpoint, it is further unclear whether it is closer to the former standard or the latter. Any judicial attempt to draw up a standard for partisan-inspired deviations from the one person, one vote ideal that uses only the calculus described above is likely to become an utter laughingstock, accused of being less grounded in constitutional principles than in elementary algebra and freshman philosophy seminars on Logic 101. Nonetheless, it does seem to be a useful way to conceive of the question, and to understand what the legal standard for evaluating partisan one person, one vote challenges should be in comparison with other types of legal challenges to electoral maps. Even though it would not be wise to explicitly promulgate a rule in the manner of a parallelogram, it is nonetheless useful to look at the question this way because it provides us with a good benchmark of how strict the standard should be, even if worded in a less mathematical way. This parallelogram strongly suggests that the proper standard to apply to politically motivated one person, one

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317 To put it in more stark algebraic terms, Reynolds minus Cromartie equals Cromartie minus Vieth, or R + V = 2C.

318 If the Cromartie standard is closer to Reynolds, then the standard for political one person, one vote (perhaps best referred to as "PlPIV") should be subject to less strict scrutiny than racial gerrymanders are under the Cromartie standard. If Cromartie is closer to Vieth, then P1P1V should be a tougher standard than the Cromartie one. The overall equation is P1P1V = Vieth + (Reynolds - Cromartie). In this author's view, concluding that P1P1V = Cromartie may not be perfectly accurate, but it is, as the cliché goes, close enough for government work. And there is no more quintessential form of government work than reapportionment.

319 The logical soundness lies in the relative equality of the differences as described: examining the relevant case law reveals that the Supreme Court considers one person, one vote deviations to be X worse than gerrymandering. It also considers racial gerrymandering to be Y worse than political gerrymandering. If X and Y are close in value—and a qualitative examination of the cases indicates that they seem to be pretty close—then the standard for partisan one person, one vote deviations should be close to the standard for racial gerrymandering.

The most obvious objection to this logic is that the combination of motives may affect the values. In other words, although racial gerrymandering may be Y worse than political gerrymandering, this does not mean that racial one person, one vote deviations are Y worse than political one person, one vote deviations (perhaps that difference is some other value Z, and Y ≠ Z). Although this is possible, neither constitutional principles nor anything in the case law leads to this conclusion. Rather, such a conclusion would require some actual evidence as to why one person, one vote deviations should have a bigger or smaller "gap" in standards between their racial and political varieties than gerrymandering.
vote violations is close or identical to the one that applies to racial gerrymanders—namely, the predominance standard.\(^{520}\)

**B. What Do Plaintiffs Need To Prove?**

Therefore, if a similar standard applies to political one person, one vote cases as applies in racial gerrymandering cases, then what should the standard look like? Applying the predominance standard would mean that partisan politics cannot be the predominant, overriding factor in deviations from one person, one vote equality. This would seem to imply that politics can be a factor, as fully acknowledged in *Gaffney* and elsewhere, as long as it does not overwhelm the other reasons for the way the redistricting map is drawn up.

1. *The Problem with Mathematical Determinations*

   In a real case, how would this standard be applied? Ideally, by determining whether the deviations are due *mostly* to the fact that the map drawers wanted to help members of one party—in other words, that the plan could have feasibly achieved, or at least come substantially closer to, perfect equality without sacrificing any goals *other than* partisan gain. For example, say that, in addition to partisan gain, the creators of a plan also wanted to avoid incumbent-versus-incumbent races and splitting up towns—two goals that the Courts have acknowledged as legitimate reasons for minor deviations from perfect equality.\(^{521}\) If it was technically possible to achieve perfect mathematical equality while still protecting incumbents and avoiding splitting up municipalities, then the deviation would be the sole result of the desire for partisan gain. Then, in that sense, partisan gain was the predominant, overriding factor in the deviation, and the plan would not pass constitutional muster under this standard.

   But what if these goals were *all* partly responsible for the deviation? Suppose there is a nine percent total deviation, and that perfect equality is possible only if the map drawers are willing to forgo any of the three goals: partisan gain, protecting incumbents, and preserving municipal boundaries. Furthermore, suppose that the deviation would be smaller, though not eliminated, if the map drawers forgo only the partisan gain goal, while keeping the others. Now, it is

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\(^{520}\) See Chen v. City of Houston, 206 F.3d 502, 506 (5th Cir. 2000) ("[T]he plaintiffs' burden in establishing racial predominance is a heavy one: 'To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices.'" (citing Miller v. Johnson, 515 U.S. 900 (1995))).

\(^{521}\) See Karcher v. Daggett, 462 U.S. 725, 740 (1983) (citing a line of precedent that supports districting and other legislative policies even though there are small differences in the population so long as they are consistent with constitutional norms).
not so clear. What if a nonpartisan plan that helps incumbents and protects town boundaries has a seven percent deviation? Then, in that case, the partisanship is responsible for some, though not all, of the nine percent deviation. In that sense, it is not the predominant cause of the deviation; it is only responsible for a part of it, which amounts to less than half. But what if the total deviation of nine percent would be only three percent if partisan goals were not a factor? Then, two-thirds of the deviation would be due to partisanship, thus making it the predominant cause of the deviation.

If this were the standard—saying that partisanship cannot be the cause of more than half of the deviation—what would be the result? In all likelihood, redistricting planners would be encouraged to “protect” the partisan goals by using other, less objectionable goals to increase the total deviation. For example, say that the plan’s creators are considering two options: a plan with a three percent deviation, due entirely to partisan politics, and a plan with a seven percent deviation, due both to partisan intentions and other goals (say, preserving district compactness). Now, the partisan intent is equally significant under both plans—but the Court would only uphold the latter plan under the “predominance” standard, because under it, partisan intentions are responsible for less than half of the deviation.

It is, of course, true that measuring the individual impact of each goal in creating the total deviation would not work so simply. For example, it is possible that a state’s demographic breakdown would cause a plan that only considers partisan goals in drawing up a plan to have a five percent deviation; one that only considers compactness to have a three percent deviation; but one that considers both to have a nine percent (or seven percent) deviation rather than an eight percent deviation. This is wholly possible and likely, as the two separate policy goals might complement one another—in the same way that you can pour a jar full of beads into a jar of marbles and have the total volume be less than in the two containers prior to the mix, because beads fill up the space between the marbles. They may also hinder each other—like Kobe Bryant and Shaquille O’Neal being less effective as teammates than if each had his own team. How would the courts deal with this likelihood in applying the predominance standard? The best way would be to compare the challenged plan with what it would look like without the partisan push, with other goals in place, even if the difference does not equal what the deviation would be when the districts pursue only partisan goals. To take the aforementioned example, if the total deviation is nine percent, the partisanship is responsible for six percent, because, otherwise, the deviation (if it only is due to compactness) would be just three percent, even though a plan that considered only partisanship but not compactness would have had a deviation of five percent rather than six percent.
Under such a system, the cases may cause a battle of the statistical experts on each side, each of whom would try to minimize or maximize the degree to which partisanship, as opposed to other goals, was responsible for the deviation in question. Sorting through the numeric arguments on both sides would be a daunting task, though perhaps not worse than sorting through the record to determine the credibility of the various witnesses over whether partisanship was a major goal of the plan for its creators.

Another result of such a standard would be that redistricting planners with partisan motives would have an incentive to lard up the plan with all the items on the Karcher laundry list of legitimate state policies. The purpose would be to minimize the relative importance of the portion of the deviation caused by partisanship—not by making it smaller, but by making other causes (compactness, incumbent protection, and so forth) more prominent. The result would be very large deviations, as planners make a push for a total deviation more than twice as large as the portion of the deviation due to partisanship.

How come these dire predictions do not occur as a result of the “predominance” standard as currently applied to racial gerrymandering cases? Mainly because gerrymandering is not as easily quantifiable as the subversion of democratic ideals. Deviations from one person, one vote equality are easy to measure by simply counting the number of people in each district, and it is feasible, with some statistical analysis, to determine the relative importance of the causes of the deviations. Gerrymanders, by contrast, involve geometry, not arithmetic. Judgments about the permissibility of various district shapes necessarily depend more on qualitative judgments—“How strange does this district look?”—than on quantitative determinations. Though there are mathematical techniques for measuring the irregularity of district shapes, they are more challenging and must occur at a higher level of expertise than the relatively simple task of measuring how much each district’s population differs from the average district’s size. Since straight mathematical judgments are difficult for gerrymanders, it is more acceptable to make subjective judgments as to whether race is a “predominant” cause of the oddly-shaped districts, or merely one among many. The Supreme Court and lower courts have frequently resorted to the eyeball test to evaluate the motivation behind different district shapes.

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32 Examples include the "smallest circle" technique, in which the area of the district is compared to the area of the smallest circle that would encompass the district (the smaller the ratio, the more irregular the shape); and measuring the ratio of the district’s area to the length of its perimeter (strange, serpentine districts have a low area-to-perimeter ratio, while normal-shaped squares, circles, and the like have higher ratios).

323 See, e.g., Shaw v. Reno, 509 U.S. 630, 635–36 (1993) (“The second majority-black district, District 12, is even more unusually shaped. It is approximately 160 miles long and, for much of
But with one person, one vote deviations, it is possible to figure out with reasonable accuracy just how much of the deviation was due to partisan concerns, simply by figuring out how equal the plan could have been without it while keeping the plan's other goals in place. Because it is easier to quantify district size disparities than it is to quantify odd district shapes, the Supreme Court was able to set forth a ten percent line for "minor deviations" from equality while it has never set a similar standard for deviations from geometric normalcy. For this reason, a "predominance" standard would be easier to apply in one person, one vote cases than in gerrymandering cases (while making reasonable allowances for Karcher's warning that "we [do not] . . . indicate that a plan cannot represent a good-faith effort whenever a court can conceive of minor improvements.")

In fact, in one person, one vote cases, a straight numbers analysis would therefore be possible not only with a "predominance" standard, but with any standard that assesses whether, and to what degree, the deviation was caused by partisan goals as opposed to more acceptable ones. Also, any application of a "but for" standard—one that says partisan motives are impermissible if they are responsible for the deviation being as large as it is—would be a very harsh standard indeed. It would essentially foreclose on any plan in which partisan goals increased the deviation, even by 0.1%, and even if they were only partly responsible for it.

Even though one person, one vote cases would seem to lend themselves relatively well to quantitative analysis of the impact of partisan gain on the deviation, no judicial opinion in a one person, one vote case to date—with the arguable exception of Vigo—has performed quantitative analysis to determine whether and to what degree partisan politics is responsible for the population deviations in a redistricting plan. This is because similar cases such as Cecere, Montiel, Marylanders, and Hulme have applied varying and non-specific standards and have frankly not analyzed the proper standard with particular rigor. None appear to have tried to make such a measurement. In Cecere, this was because the court flat-out stated that even if the deviation was one hundred percent due to partisanship, the plan was still perfectly acceptable.

The fact that one can feasibly measure the degree to which a restricted parameter such as race or politics influences a plan is actually...
a problem in applying a constitutional standard, because of the potential for abuse that could result. In a sense, wishy-washy legal standards are more desirable than hard-and-fast ones, because they provoke uncertainty on the part of those who might play around with hard-and-fast standards and therefore make it more risky to try to game the system. The proverbial Holmesian Bad Man drawing up a voting plan and facing a “predominance” standard of scrutiny might think to himself, “Okay, I want to create a deviation of four percent to promote my partisan goals. I had better use other goals such as compactness and incumbent protection to make the total deviation at least 8.01%, so that the partisan element does not predominate.” Such thinking by redistricters is not only likely, it is virtually guaranteed. The political incentives to push population deviations to the limit are so strong that those who draw district lines are likely to exploit such deviations as far as they can—just as huge numbers of state and local plans now have maximum deviations between 9.9 and 10 percent, because that is the perceived legal safe harbor. Legislatures across the country are filled with Holmesian Bad Men who will push the limits of whatever rule-based standard is created.

If an alternative standard is used—say, for instance, a standard that partisan goals cannot be a “significant” or “substantial” factor in the deviation—then at first, those who draw district lines will have little idea of how far they can go with partisanship, and will instead make conservative assumptions. But eventually, courts would mark off what degree of deviation due to political motives is “significant” enough to warrant invalidation, and from then on every plan will be drawn just to the left of that line, as is the case with so many current apportionment plans throughout the country with respect to the ten percent “minor deviation” standard.

The most obvious solution to the problem of dealing with redistricters who want to push the limits of any standard is to set forth a rule that no deviation due to partisanship is permitted. It has the advantage of simplicity, because it simply says that any deviation due to this factor is not allowed, and therefore, all deviations must be affirmatively justified by some other legitimate policy. It has the disadvantage, however, of being an improper standard to apply to partisan-inspired deviations in state legislative districting. For the reasons discussed above, it is likely that significant (albeit minor) deviations are permissible in such cases without violating the Equal Protection Clause, and the question is to what extent partisan concerns motivate legislative districting. It is also clear that for deviations under ten percent, the burden is on the plaintiffs to demonstrate that there is an Equal Protection Clause violation, and they must point to something other than the deviation itself in demonstrating that violation.
2. Process-Based Analysis

One way to deal with the problem of teasing out the degree to which partisan concerns were "predominant" or "substantial" causes of voting district deviations is to go beyond actual numeric analysis and examine the record to determine the subjective intent of the plan's creators. This way, there would be no bright-line rule about what percentage of the deviation must be the result of partisan motives for it to be impermissible. Rather, it would be a qualitative analysis of the process that led to the plan, instead of the actual numbers inherent in the plan that resulted. This was the clear method employed by the court in *Hulme v. Madison County*, which took the sociopathic behavior of the official who drew up the plan as evidence that it was motivated by nothing more or less than blatant partisanship.\(^{326}\) An advantage of this move away from a purely statistical examination is that it would be more difficult for those who draw district lines to take advantage of the rule by testing its limits, because courts would be making far more subjective judgments applying this rule than they would if they simply ran the numbers to see how much of the deviation was due to partisan motives. In addition, courts might be better equipped to answer this type of question and would be less beholden to the experts—courts are better at assessing motives and political processes than at performing regression analyses.

3. Electoral Impact of Deviations

In addition, a workable standard could also require that the plaintiffs demonstrate that the deviations in the plan actually did have or will have an electoral impact, as evidenced by how the victimized party is affected in subsequent elections. *Davis v. Bandemer* held that an examination of the effects was essential to the analysis of political gerrymandering claims—it was necessary to find not only intentional discrimination, but also an actual discriminatory effect.\(^{327}\) And certainly it makes sense not to overturn a plan that, whatever the intent of the planners, did not actually hurt their political opponents. It would be inappropriate to hold that the degree of effect required by *Bandemer*—that the plaintiffs have been "shut out" of the political process\(^{328}\)—should also be the standard for one person, one vote claims. Doing so would effectively guarantee that no major-party plaintiff in any state could ever survive summary judgment on a one

\(^{326}\) 188 F. Supp. 2d 1041 (S.D. Ill. 2001).

\(^{327}\) See *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (holding that, to succeed, the plaintiffs would have to prove "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.").

\(^{328}\) Id. at 139.
person, one vote claim, since for decades each party has had a significant presence in every state in the country, and there are no signs that this will change any time soon. Rather, some other less strict standard of actual effect should be used. For example, if ninety-five percent of the voters in a state are Democrats, but gerrymandering and differently sized districts lead them to control only forty percent of the seats in the state House, this clearly goes against the spirit of *Reynolds v. Sims*, which stated that,

> [1]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted.\(^3\)

If a plan’s population deviation is very close to ten percent, this is itself evidence of some kind of bad faith, in that there was no real effort to achieve perfect equality, and the only goal was to avoid the prima facie unconstitutionality that would result from a deviation of more than ten percent. Still, even if the effort to achieve equality was not as conscientious as it should have been, the plaintiffs must show that the causes of the deviation were not among the acceptable reasons that *Karcher* mentions, or comparable ones. Furthermore, as *Bandemer* suggests, partisan politics are not necessarily among these reasons.

4. Proportional Standards

Another important principle to remember is the one mentioned in *Karcher*:

The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State’s interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely.\(^3\)

The larger the deviation, the more compelling the justification for the deviation must be. While 9.99% may be a “minor deviation” for burden-of-proof purposes, it is certainly not an insubstantial one. In the legislatures of states with deviations close to ten percent, some representatives may represent thousands or tens of thousands more people than their colleagues across the aisle with equal voting power. The result is that the legislators who represent a minority of the

\(^3\) 377 U.S. 533, 562 (1964).

\(^3\) Karcher v. Daggett, 462 U.S. 725, 741 (1983). Although that statement occurred in the context of a discussion of congressional rather than state legislative redistricting, there is no reason to think that the Court did not intend it to be equally applicable in the latter case as well.
state's voters can command a majority of the state legislature—and unlike the partisan effects of trivially small deviations in congressional plans, this is not such a remote possibility.

In plans with deviations approaching (or exceeding) ten percent, the state policies justifying the deviation should be fairly compelling ones. Compactness, incumbent protection, and preserving natural and municipal boundaries are all ones that might qualify. Partisan politics and maintaining rural voter power are more suspect. The relative importance of each reason is important in judging the constitutionality of the plan. The most correct standard in finding the plan unconstitutional on the ground of excessive partisanship would be the predominance standard. Clearly, the standard for partisan one person, one vote deviations should be comparable to the standard for racial gerrymandering. It is arguable that partisan one vote deviations should be held to a higher standard of scrutiny than racial gerrymanders, because the individual constitutional principles at stake in one person, one vote cases are so much more obvious and direct than they are for gerrymandering cases. However, one should be cautious about saying the proper level of scrutiny is such that the plaintiffs only have to demonstrate that partisan gain was a "substantial" or "significant" cause of the deviation.331 This is because the Court has made clear that (1) because it is primarily the responsibility of the legislative branch of state governments, politics is an inevitable aspect of redistricting, both in practical reality and as codified in the Constitution332; and (2) courts should be reluctant to step in to overturn the redistricting plans of legislatures.333

At the same time, though, partisan gain is a suspect motive—if it were not, then a majority of the Court in Vieth v. Jubelirer334 would have held partisan gerrymanders are uniformly nonjusticiable. Even if partisan gain is an inevitable aspect of the redistricting process, the Karcher proportionality rule still applies to all population deviations, and it is not clear that partisan gains are a justification for a deviation

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331 This is similar to the standard currently applied in mixed motive Title VII cases, where "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (2000); see also Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (discussing this provision and the mixed motive in a Title VII case brought by a female warehouse worker).

332 See Gaffney v. Cummings, 412 U.S. 735, 753 (1973) ("District lines are rarely neutral phenomena . . . . The reality is that districting inevitably has and is intended to have substantial political consequences.").

333 See id. at 749 ("Nor is the goal of fair and effective representation furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurrently removed from legislative hands and performed by federal courts which themselves must make the political decisions necessary to formulate a plan . . . .").

as substantial as ten percent. If it were one of many factors that all added up to nearly ten percent, and most of those factors were more obviously acceptable ones, then the plan should probably pass muster. But, if plaintiffs are able to demonstrate that all or nearly all of the ten percent is due to partisanship—in the sense that all the “legitimate” goals of the plan could have been accomplished to the same or a greater degree with a much smaller or nonexistent deviation—then partisanship predominated and the plan violates the Equal Protection Clause.

5. The Case for a Guideline-Based Mixed Analysis

As mentioned above, there are two ways to assess the “predominance” of the plan, each with its own advantages and disadvantages. The first is to examine the record to figure out what the drafters had in mind when drawing up the plan. Numerous factors may have been considered, and partisan gain, if a factor at all, may have been a very minor one. If the plaintiffs are unable to refute that, then they will lose under a “predominance” standard. One way they might refute it would be by pointing to the most obviously damning partisan result of the plan: the fact that all the +4.9% districts are Republican-majority, and all the -4.9% districts are Democratic-majority, or vice versa. Even if the defense counters that the small districts were intended not for pure partisan gain but to protect incumbents, the plaintiffs may counter that it seems odd that all these small districts were meant to protect only incumbents from one party, or that some of the -4.9% districts were in areas favoring the drafting party but were open seats. In addition, the plaintiffs can retort, “Fine, that may explain why all the smallest districts are Democratic—but why are all the largest districts Republican? What reason, other than a naked desire to give the screwgie to the GOP, would explain such an improbable result?”

This predicted exchange (possibly more sophisticated than the way it is recounted here, though possibly not) is one way that a court can assess whether partisan goals were the predominant reason for population deviations. The other significant way is through quantitative analysis, of the type discussed earlier. In essence, this type of analysis would come down to a battle of experts, each trying to demonstrate why partisanship was or was not the primary cause of the 9.98% deviation. Even if their statistical methods are the same, each side’s experts will base their conclusions on a different set of assumptions. The plaintiff’s expert will say, “I can come up with a plan that protects incumbents and preserves municipal boundaries (and whatever other goals the planners say they want) to the same extent as the challenged plan did, and can do so with a deviation of much less than 9.99%. The planners had access to the same computer technology
for redistricting as I did. Therefore, it is obvious that partisan gain was a big part of the reason for the deviation.” The defense expert will respond, “You do not account for all the things we had to worry about. There were a hundred specific, personalized, and legitimate factors that contributed to the plan we drew up, and there is no way you can account for all those in drawing up your simplified plan.” It will be up to the court to assess the relative credibility and relevance of each expert’s testimony and studies. 555

Whether the court relies on the numeric analysis or the testimonial record or both, it will be necessary to sort out the relative importance of the factors that led to the deviation in the plan. This method therefore becomes a kind of mixed motive analysis. Mixed motive suits also occur in the areas of Title VII and Establishment Clause jurisprudence, but most usefully to us, courts have assessed mixed motives in racial gerrymandering cases. Bush v. Vera 336 may be the most useful of these cases. There, the Court was charged with addressing a defense argument that, in addition to creating majority-minority districts, the challenged Texas plan also considered other goals, primarily incumbency protection. 537 The Court analyzed the challenged districts individually to see whether race predominated as the motivation behind the shape they were given, and concluded that it did. With respect to one district, the Court concluded that “[t]he record discloses intensive and pervasive use of race both as a proxy to protect the political fortunes of adjacent incumbents, and for its own sake in maximizing the minority population of District 30 regardless of traditional districting principles.” 538 It rejected the claim that the shape of another district was meant to protect two “functional in-

555 The defense in partisan one person, one vote cases might also claim that the plans do not discriminate against voters from one party because voters from the other party comprise only a slight majority in many of the smallest districts, and voters from the disfavored party only have a small majority in the largest ones. This would be the likely result of any plan that gerrymanders in favor of one party. Here is where the two common defense arguments—the “we did not care about partisan gain” defense and the “many in the smallest districts are from the plaintiffs’ party” argument—would crash into one another. In reality, the fact that nearly half of the voters in the smallest districts are from the plaintiffs’ party would only point to the nakedness of the partisan grab. The most effective gerrymander is not one that guarantees the map-drawing party 100% of the vote in a given district, but is rather the one that guarantees the party 50.1% of the vote. That way, no more party voters are put into the district than the minimum amount necessary to ensure victory for the party in that district, allowing the rest of the party members to be put into districts that may be more competitive. The fact that nearly half of the voters in underpopulated districts are from the plaintiffs’ party does not point to the map drafters’ innocence of and obliviousness to partisan motives in drawing up the redistricting map; quite to the contrary, it shows knowledge of the best way to maximize the favored party’s representation in the state legislature through redistricting.

537 Id. at 959.
538 Id. at 972–73.
cumbents," finding that "such influences were overwhelmed in the
determination of the districts' bizarre shapes by the State's efforts to
maximize racial divisions." It also rejected claims that district
boundaries were drawn along partisan lines that happened to corre-
late with race, because both districts in question were solidly Demo-
cratic. In making these determinations that race predominated, the
Court used numerous means at its disposal: testimony of officials, as-
se ssment of the relative sophistication of the technologies used with
respect to race as opposed to other goals, and objective assessment of
the degree to which the Texas plan furthered the goal of majority-
minority districts as opposed to furthering the other state goals. This
was not a stark, number-crunching analysis, but rather a combi-
nation of methods that led the Court to its gestalt of a conclusion.

Justice Stevens's dissent in Shaw v. Hunt also contains an interest-
ing discussion of mixed motives in racial gerrymandering cases. Justice Stevens remarked that "legislative decisions are often the
product of compromise and mixed motives. For that reason, I have
always been skeptical about the value of motivational analysis as a ba-
sis for constitutional adjudication." Justice Stevens was, under-
standably, "particularly skeptical of such an inquiry in a case of this
 type, as mixed motivations would seem to be endemic to the en-
deravor of political districting." The majority did not have similar
reservations, however, and performed what was essentially a mixed
motive analysis (though they did not use that term) to find that the
North Carolina plan at issue did not withstand strict scrutiny.

The most effective way to conduct a "predominance" inquiry,
then, would be one that relies on record evidence about the motiva-
tions at play in the process that led to the adoption of a redistricting
map containing population deviations. Additionally, the inquiry
should rely on mathematical analysis showing that a plan could easily
have been drawn up that gets rid of most of the existing deviations
while still adhering to the other, nonpolitical policies that were be-
hind the deviations. The inquiry should also determine that the elec-
toral impact of the population deviations is significant. This is a
workable, feasible standard that conforms with both the one person,
one vote case law and the usual type of inquiries that courts have
made in similar areas of law.

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350 Id. at 975.
351 Id. at 959–63.
353 Id.
354 Id.
355 See id. at 918 (majority opinion) ("We hold, therefore, that District 12 is not narrowly tai-
lored to the State's asserted interest . . . .").
CONCLUSION

Partisan-inspired redistricting has always been a part of the political landscape in this country. It is as strong now as it ever has been, with new technologies that allow map drawers to maximize their partisan goals while keeping population deviations at 9.9%. According to one measure, partisan apportionment is the reason why there were only one quarter as many competitive congressional races in 2002 as there were in elections just a decade earlier.\textsuperscript{346} The creation of so many safe seats contributes to the polarization of American politics. This polarization does not mainly occur at the level of individual voters. Rather, it occurs because politicians who are elected to office only have to cater to voters from one party, and such politicians—either out of conviction or out of political prudence—tend to fall further from the ideological center than do politicians who have to reach out to voters from both parties to get elected. This is not to say that politicians with “extreme” views should not have a voice in American politics, but rather that such views are represented in government in considerably higher proportions than in the total voting population.

In every state, whoever can command a legislative majority controls the redistricting process. This is inevitable and was surely on the minds of the constitutional framers who gave state legislatures responsibility for districting. But there are limits to how far “politics” can go. It cannot be used as a blanket justification for all manner of questionable redistricting decisions. This principle is even more significant when apportionment results in the creation of voting districts with populations that vary significantly according to the best available census measures. One person, one vote is a bedrock constitutional principle, and although perfect equality is not required, it is necessary to point to a legitimate state policy when explaining why a plan did not reach perfect equality, especially when the available technology makes this goal wholly feasible. This Article has argued that although partisan politics may play some part in population deviations, it would probably violate the Equal Protection Clause if politics were solely or predominantly responsible for districts approaching a ten percent total deviation. The fact that a deviation is less than ten percent does not give map drawers a safe harbor, but it does place the burden of proof on the plaintiffs to demonstrate that such deviations as do exist were caused by illegitimate motives.

As such, the proper standard in a one person, one vote challenge based on partisan motives would require plaintiffs to demonstrate, through the case record and statistical analysis, that partisan advantage was both a predominant motivation for and a significant result of the population deviation. This may be a tall order for some plaintiffs, but it is not an insurmountable standard when the burden of proof is one of preponderance. Judicial opinions striking down such plans would have to emphasize that those who drew district lines pushed their luck by going so close to ten percent in so many districts that it called into question their commitment to perfect equality, as opposed to simply achieving a goal that would be easier to defend in court. If a number of plans are struck down for being overly partisan, it is possible that more states will turn to independent commissions to draw reapportionment maps. Or maybe they will simply resort to pure partisan gerrymandering that creates bizarre district shapes while keeping district populations equal. After all, creating population deviations between districts is by no means the only tool in partisan redistricters' bags of tricks, and is probably not even the most potent one. There is no doubt that a litany of manipulations is possible through gerrymandering even if district populations are identical. Even if this result occurs, however, it will still constitute progress because deviations from the one person, one vote ideal continue to undermine the voting power of citizens across the country.

347 For discussions of the benefits and pitfalls of these commissions, see 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 (2003-2004), and Samuel Issacharoff, Judging Politics: The Elusive Quest for Judicial Review of Political Fairness, 71 TEX. L. REV. 1643, 1693-1702 (1993).