PENNSYLVANIA'S FREEDOM OF EXPRESSION CLAUSE AND PARTISAN GERRYMANDERING*

I. INTRODUCTION

Partisan gerrymandering[1] is anathema to American democracy. It undermines democratic legitimacy, entrenches political power, and contributes to increased polarization in politics.[2] Those symptoms have worsened as mapmakers combine increasingly powerful computer models with granular voter data to create congressional districts that heavily favor their chosen political party.[3] The effect is long-lasting—the political party in power at the time of the decennial census can draw congressional districts that allow the party to stay in power even when a majority of voters back its opponents.[4] Indeed, in four congressional elections since 2010, Republicans enjoyed an additional seventeen, twenty-eight, twenty, and twenty-five seats in the House of Representatives solely on the account of partisan gerrymandering.[5]

In those eight years, few states were as gerrymandered as Pennsylvania.[6] In 2012 Pennsylvania House Republicans won 72% of the House seats despite

---

* Nick Kato, J.D. Candidate, Temple University Beasley School of Law, 2019. Thank you to Professor Mark Rahdert and Dave Nagdeman for providing critical guidance and feedback. Thank you to Lee Begelman, Tim Gilbert, Peter Hyndman, Linda Levinson, Forrest Lovett, Brandon Matsnev, Alek Smolij, and Lilah Thompson for editing this piece and providing much-needed support throughout the writing process. Thank you to *Temple Law Review* staff for improving the precision and cohesion of this piece.

1. The term *gerrymander*, a portmanteau of *salamander* and former Massachusetts Governor Elbridge Gerry's last name, was the caption of a political cartoon depicting a serpentine voting district created in 1812. Emily Barasch, *The Twisted History of Gerrymandering in American Politics*, ATLANTIC (Sept. 19, 2012), http://www.theatlantic.com/politics/archive/2012/09/the-twisted-history-of-gerrymandering-in-american-politics/262369/#slide2 [http://perma.cc/N6SV-FTJL].

2. *See* D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 683–84 (2013); *see also* CHRISTOPHER WARSHAW, AN EVALUATION OF THE PARTISAN BIAS IN PENNSYLVANIA'S CONGRESSIONAL DISTRICT PLAN AND ITS EFFECTS ON REPRESENTATION IN CONGRESS 3–4, 25 (2017), http://www.brennancenter.org/sites/default/files/legal-work/LWV_v_PA_Warshaw_Expert_Report_Updated_2_11.27.17.pdf [http://perma.cc/3JGH-TLSN]; Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 605–11 (2002) (describing partisan gerrymandering as group-based discrimination that harms democratic accountability and individual rights). Professor Warshaw was an expert witness for the plaintiffs in *League of Women Voters of Pa. v. Commonwealth* (*League I*), 178 A.3d 737 (Pa. 2018), discussed *infra*. He produced his study as part of his expert testimony. WARSHAW, *supra*, at 1.

3. DAVID DALEY, RATF**KED, at xxiv–xxv (2016); *see* Daniel P. Tokaji, *Gerrymandering and Association*, 59 WM. & MARY L. REV. 2159, 2160 (2018).

4. Tokaji, *supra* note 3, at 2160.

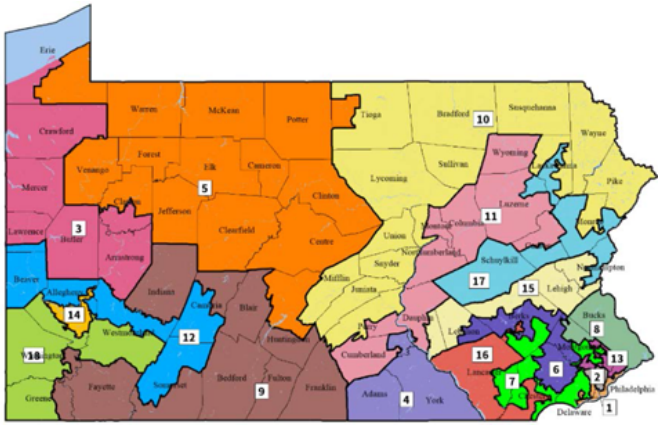
5. Jeffrey S. Buzas & Gregory S. Warrington, Gerrymandering and the Net Number of US House Seats Won Due to Vote-Distribution Asymmetries 8 (Aug. 8, 2017) (unpublished manuscript), http://arxiv.org/pdf/1707.08681.pdf [http://perma.cc/S978-RMBN].

6. *See* LAURA ROYDEN & MICHAEL LI, BRENNAN CTR. FOR JUSTICE, EXTREME MAPS 6–9 (2017), http://brennancenter.org/publication/extreme-maps [http://perma.cc/Q6UY-LH5A].

winning only 49% of the statewide popular vote.[7] And in both the 2014 and 2016 congressional races, Republicans continued to win the same number of seats with approximately 54% of the statewide vote.[8] The outcome was not just disproportionate congressional representation. One recent study found that the extreme partisan gerrymandering in Pennsylvania has eroded Pennsylvania voters' trust in their elected representatives and allowed Pennsylvania's representatives to be less responsive to Pennsylvania Democrats' policy preferences.[9]

Pennsylvania's woes followed the passage of the Congressional Redistricting Act of 2011.[10] The Act created a congressional districting map designed to "undermine[Democratic] voters' ability to exercise their right to vote."[11] The resulting eighteen voting districts included one that appeared "Rorschachian."[12] The legislation split twenty-eight counties and sixty-eight municipalities, creating a map that contained sprawling tentacles and isthmuses.[13] One district was drawn so narrowly that at one location it contained only a steakhouse and at another only a medical building.[14] Figure 1 depicts Pennsylvania's voting districts as they existed in 2012.

FIGURE 1[15]



7. *See League I*, 178 A.3d at 764–65; DALEY, *supra* note 3, at 23.

8. *League I*, 178 A.3d at 764–65.

9. *See* WARSHAW, *supra* note 2, at 3–4, 25 ("[P]artisan gerrymandering has a large effect on representation. That is, it has a substantial effect on the congruence between citizens' views and legislators' roll call votes on important policy issues.").

10. Congressional Redistricting Act of 2011, No. 2011-131, 2011 Pa. Laws 598, *invalidated by League I*, 178 A.3d 737 (Pa. 2018).

11. *See League I*, 178 A.3d at 821.

12. *See id.* at 819.

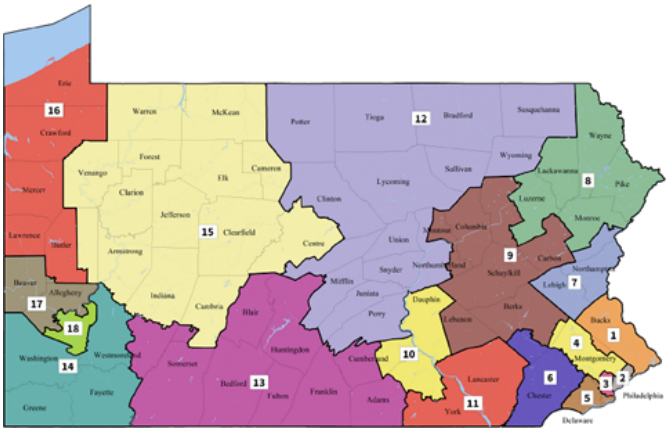
13. *Id.* at 818–19.

14. *Id.* at 819.

15. League of Women Voters of Pa. v. Commonwealth (*League II*), 181 A.3d 1083, 1089 (Pa. 2018).

In *League of Women Voters of Pennsylvania v. Commonwealth* (*League I*),[16] the Pennsylvania Supreme Court ruled that the districts created by the Act violated the free and equal elections clause of the Pennsylvania Constitution.[17] Following that ruling, the court fashioned a congressional districting plan to comply with its new mandate in *League of Women Voters of Pennsylvania v. Commonwealth* (*League II*).[18] Figure 2 depicts Pennsylvania's new congressional districting plan.

FIGURE 2[19]



In *League I*, the Pennsylvania Supreme Court held that the free and equal elections clause required voting districts to follow "the neutral criteria of compactness, contiguity, minimization of the division of political subdivisions, and maintenance of population equality among congressional districts."[20] If the legislature subordinates those neutral principles "for unfair partisan political advantage," the voting plan will be deemed unconstitutional.[21]

Whether the *League II* remedy alleviates the voter dilution problem remains to be seen. Preliminary analysis of the 2018 congressional election—the first election using the newly-drawn congressional districts—revealed that Democrats and Republicans each won nine congressional seats, with Democrats winning 54% of the statewide vote and Republicans winning 46%.[22] The new

16. 178 A.3d 737 (Pa. 2018).

17. *League I*, 178 A.3d at 801–02.

18. 181 A.3d 1083, 1086–87 (Pa. 2018). The court created the new congressional districting plan because the legislature was unable to come up with an alternative plan by the court's deadline. *Id.*

19. *League II*, 181 A.3d at 1089.

20. *League I*, 178 A.3d at 817. The free and equal elections clause reads, "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." PA. CONST. art. I, § 5.

21. *League I*, 178 A.3d at 817.

22. David A. Lieb, *Election Shows How Gerrymandering Is Difficult To Overcome*, U.S. NEWS (Nov. 17, 2018, 3:59 PM), http://www.usnews.com/news/politics/articles/2018-11-17/midterm-elections-

map enjoys visual appeal because it avoids dividing political subdivisions and requires districts to be compact and contiguous. It may be possible, however, to draw districts that comply with those principles while still reducing the efficacy of the minority party's vote.

To eliminate this possibility, partisan gerrymandering claims in Pennsylvania should be litigated under Pennsylvania's expansive free expression protections found in sections 7 and 20 of article I of the Pennsylvania Constitution.[23] The reason is twofold. First, the injury caused by partisan gerrymandering—discrimination based on political affiliation—is best recognized as implicating free expression and association.[24] Second, the Pennsylvania Supreme Court reads its constitution's free speech and association protections more broadly than the Federal Constitution's.[25] Accordingly, those protections could provide Pennsylvania with a strict scrutiny-based test that looks beyond the shape of the congressional voting districts. Such a test would forbid gerrymandered congressional voting districts that unreasonably burden political speech.[26]

This Comment begins by providing an overview of the United States Supreme Court's application of the Fourteenth Amendment's Equal Protection Clause to partisan gerrymandering claims.[27] Part II concludes that, barring a seismic shift in the United States Supreme Court's reasoning, this jurisprudence has failed to avert partisan gerrymanders because it has not produced a judicially manageable standard.[28] Drawing from New Federalism political philosophy, this Comment looks to the Pennsylvania Constitution for a state law source of constitutional protection against partisan gerrymanders.[29] Then, this Comment argues that Pennsylvania's rich history and case law upholding strong freedom of expression rights is a complementary source of protection to the free and equal elections clause.[30] This Comment concludes by offering a framework based on Pennsylvania's speech protections that would prohibit partisan gerrymanders that burden the expressive value of the vote.[31]

---

reveal-effects-of-gerrymandered-districts [http://perma.cc/3VEA-BHVP].

23. *See* PA. CONST. art. I, §§ 7, 20.

24. Tokaji, *supra* note 3, at 2162–63 ("[Expressive association] best captures the character of the injury, which inheres in party-based discrimination—more specifically, the dominant political party's entrenchment of itself at the expense of the rival major party and its supporters.").

25. See *infra* Part III.A for a discussion of the Pennsylvania Constitution's free speech and association protections.

26. See *infra* notes 339–64 for a discussion of burdens on political speech.

27. *See infra* Part II.A.

28. *See infra* Part II.B.

29. *See infra* Part II.C.

30. *See infra* Part II.D.

31. *See infra* Section III.

II. PARTISAN GERRYMANDERING JURISPRUDENCE TODAY

Following every decennial census, congressional seats are apportioned among the states according to each state's share of the total population.[32] In turn, state governments are responsible for drawing the boundaries of their own congressional districts.[33] Thirteen states, including Pennsylvania, draw congressional districts or state legislative districts using bipartisan or independent commissions, arguably mitigating the role and impact of politics.[34]

Politics, however, is pervasive in the redistricting process.[35] Because lines can be drawn to one group's advantage over another's, politicians have seized this opportunity to systematically entrench themselves in their positions, increase their party's overall control, and reduce the likelihood that their opponents get elected.[36] This is true in Pennsylvania, where congressional voting districts are drawn and approved by the state legislature.[37]

A federal solution to partisan gerrymandering has eluded the Supreme Court.[38] In the thirty-three years since the Court has held that partisan gerrymandering claims are justiciable under the Fourteenth Amendment's Equal Protection Clause,[39] no justiciable standard has surfaced that distinguishes natural political groupings from unconstitutional partisan gerrymanders.[40] In that vacuum, state legislatures have drawn voting districts with the explicit purpose of diluting minority parties' voting strength.[41] In turn, state constitutional protections can stymie partisan efforts, but only within each state's borders.

---

32. *See* U.S. CONST. art. I, § 2, cl. 3.

33. *Id.* art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.").

34. *Creation of Redistricting Commissions*, NAT'L CONFERENCE OF STATE LEGISLATURES (Apr. 6, 2018), http://www.ncsl.org/research/redistricting/creation-of-redistricting-commissions.aspx [http://perma.cc/GYJ6-CWJ8].

35. *See Partisan Gerrymandering*, BRENNAN CTR. FOR JUSTICE, http://www.brennancenter.org/partisan-gerrymandering [http://perma.cc/PQJ5-YHBV] (last visited Feb. 15, 2019).

36. *See* ROYDEN & LI, *supra* note 6, at 3.

37. *See* DALEY *supra* note 3, at 17–32 (describing how Republicans used their majority in the Pennsylvania state legislature to redraw congressional voting district to "carve itself a lasting domination of [Pennsylvania's] congressional delegation").

38. *See* Vieth v. Jubelirer, 541 U.S. 267, 281 (2004) (plurality opinion) ("[N]o judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable . . . .").

39. *See* Davis v. Bandemer, 478 U.S. 109, 143 (1986) (plurality opinion) ("[W]e hold that political gerrymandering cases are properly justiciable under the Equal Protection Clause.").

40. *See* Gill v. Whitford, 138 S. Ct. 1916, 1926 (2018) ("Our previous attempts at [deciding the Constitutional limits of partisan gerrymandering] have left few clear landmarks for addressing the question.").

41. *See, e.g.*, David A. Graham, *North Carolina's Landmark Ruling Against Partisan Gerrymanders*, ATLANTIC (Jan. 9, 2018), http://www.theatlantic.com/politics/archive/2018/01/north-carolina-partisan-gerrymander/550139/ [http://perma.cc/V26C-23RK]. After North Carolina's voting districts were struck down as a racial gerrymander, the legislature turned to partisanship as their justification for the redrawn map's lines. *Id.* "'I acknowledge freely that this would be a political

This Section examines how federal courts and Pennsylvania courts have attempted to solve the partisan gerrymandering problem. A string of Supreme Court plurality decisions left the federal partisan gerrymandering landscape unclear.[42] For twenty-six years, Pennsylvania was more than willing to lash its interpretation of its state equal protection clauses to their federal analogue and adopted identical equal protection tests to evaluate partisan gerrymanders.[43]

That ended in 2018 when the Pennsylvania Supreme Court found independent state grounds to regulate partisan gerrymandering in *League I*. Rather than relying on the Pennsylvania Constitution's equal protection clause, *League I* relied on the Pennsylvania Constitution's free and equal elections clause.[44] As interpreted, the clause required Pennsylvania congressional districting plans to adhere to neutral districting criteria—compactness, contiguousness, and respect for political subdivisions—to pass constitutional muster.[45] But *League I* affirmatively declined to consider the free speech and association implications of partisan gerrymandering.[46] This left a gap in Pennsylvania's judicial solution to partisan gerrymandering because congressional districting plans can comport with neutral districting criteria but still dilute the vote.[47] In Section III this Comment provides a recommendation to fill that gap based on Pennsylvania's strong and independent free speech and association protections. That recommendation is to apply strict scrutiny to congressional districting plans that burden the expressive value of the vote, regardless of that plan's conformity to neutral districting principles.

A. The Evolution of the Partisan Gerrymandering Problem

The Federal Constitution does not expressly confer an individual right to vote.[48] Rather, Article I, Section 4 provides states with the power to control the

---

gerrymander, which is not against the law,' said [North Carolina State] Representative David Lewis, the chair of the state House redistricting committee." *Id.*

42. *See* Michael S. Kang, *When Courts Won't Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 OHIO ST. L.J. 1097, 1097–98 (2007) ("[E]ven as the Court insists that partisan gerrymandering claims are justiciable, it nonetheless refuses to offer a collective answer about what standard should apply for adjudicating gerrymandering claims going forward.").

43. See *infra* Part II.C for a discussion of Pennsylvania's adoption of the federal equal protection standards for partisan gerrymandering cases.

44. *See League I*, 178 A.3d 737, 802 n.63, 821 (Pa. 2018).

45. *Id.* at 815–16.

46. *Id.* at 802 n.63 ("Given that we base our decision on the Free and Equal Elections Clause, we need not address the free expression or equal protection arguments advanced by Petitioners.").

47. *See id.* at 817 ("We recognize, then, that there exists the possibility that advances in map drawing technology and analytical software can potentially allow mapmakers, in the future, to engineer congressional districting maps, which, although minimally comporting with these neutral 'floor' criteria, nevertheless operate to unfairly dilute the power of a particular group's vote for a congressional representative.").

48. Rodriguez v. Popular Democratic Party, 457 U.S. 1, 9 (1982) ("[T]he Constitution 'does not confer the right of suffrage upon any one,' and . . . 'the right to vote, *per se*, is not a constitutionally protected right.'" (citation omitted) (first quoting Minor v. Happersett, 88 U.S. 162, 178 (1875); then quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973))); *see also* Joshua A.

time, place, and manner for holding elections for senators and representatives, and the Fifteenth Amendment prohibits burdening the right to vote on account of race.[49] In this absence of an explicit voting right, the Supreme Court declared that the right to vote was simply "the essence of a democratic society."[50] Indeed, before the Voting Rights Act of 1965,[51] there was little federal oversight of the redistricting process, and state legislators were able to redraw voting districts virtually whenever or however they wished.[52] As a result, legislators in the nineteenth century used redistricting as a tool to swing competitive elections in their favor, which sometimes resulted in disproportional shifts in congressional representation.[53] Through the mid-twentieth century, the Supreme Court refused to hear challenges to congressional redistricting plans.[54] In *Colegrove v. Green*,[55] the Court explained that challenges to congressional redistricting plans were "of a peculiarly political nature" and could not be resolved by judicial decision.[56]

This hands-off approach ended sixteen years later in 1962, when the Court concluded that challenges to congressional voting plans were justiciable under the Equal Protection Clause.[57] In *Baker v. Carr*,[58] Justice Brennan, writing for the majority, held that challenges to congressional voting plans presented justiciable questions under the Equal Protection Clause.[59] Then, in *Reynolds v.*

Douglas, *The Right To Vote Under State Constitutions*, 67 VAND. L. REV. 89, 93 (2014) ("[U]nlike virtually every state constitution, the U.S. Constitution does not actually confer the right to vote on anyone. Instead, the right to vote stems from the general language of the Fourteenth Amendment's Equal Protection Clause and the negative mandates on who the government may *not* disenfranchise." (emphasis in original) (footnote omitted)).

49. U.S. CONST. art. I, § 4, cl. 1; *id.* amend. XV.

50. Reynolds v. Sims, 377 U.S. 533, 555 (1964); *see also* Douglas, *supra* note 48, at 97. Professor Douglas also points out that the lack of an explicit right to vote resulted in significant swings in the United States Supreme Court's protection of the right to vote—in some instances describing it as a fundamental right at the heart of representative government and in others subjecting law restricting the right to only a lenient balancing test. *See id.* at 97–98.

51. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (current version at 52 U.S.C. §§ 10101–10702).

52. *See* ERIK J. ENGSTROM, PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY 8 (2013).

53. *See id.* at 9. For example, in 1888 Pennsylvania Republicans used last-minute redistricting to ensure they maintained a House majority. *Id.* That shortsightedness can backfire and result in large swings in elections. *Id.* In 1874 Republicans lost a 33% share of the House despite their national vote dropping by only 7%. *See id.*

54. *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 552 (1946), *abrogated by* Evenwel v. Abbott, 136 S. Ct. 1120 (2016).

55. 328 U.S. 549 (1946).

56. *Colegrove*, 328 U.S. at 550–52.

57. Baker v. Carr, 369 U.S. 186, 194–95, 237 (1962); *see also* Daniel Tokaji & Owen Wolfe, Baker*,* Bush*, and Ballot Boards: The Federalization of Election Administration*, 62 CASE W. RES. L. REV. 969, 976–77 (2012) (noting that the *Baker* Court departed from the usual list of factors that define a political question by excluding the factor from *Luther v. Borden*, 48 U.S. 1 (1849), that defers to the state courts' judgments on government).

58. 369 U.S. 186 (1962).

59. *Baker*, 369 U.S. at 237 ("We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a

Sims,[60] the Court articulated the general redistricting principle that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[61] The equal population distribution was aimed at preventing vote dilution, because "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."[62]

After *Reynolds* and the passage of the Voting Rights Act of 1965, the United States Supreme Court began hearing cases alleging racial gerrymandering.[63] Those cases were similarly decided under the Equal Protection Clause of the Fourteenth Amendment.[64] Partisan gerrymandering claims were often folded into racial gerrymandering claims, and as a result, the Supreme Court applied an equal protection analysis to partisan gerrymandering cases as well.[65]

Davis v. Bandemer[66] was the first case to hold that standalone partisan gerrymandering claims were justiciable under the Equal Protection Clause.[67] In *Bandemer*, the plaintiffs alleged that Indiana's 1981 redistricting plan discriminated against Democrats on a statewide basis by redrawing the state's voting districts to favor Republicans.[68] A majority of the Court, while agreeing partisan gerrymandering claims were justiciable under the Equal Protection Clause, could not agree on a manageable standard with which to measure partisan gerrymandering.[69] A plurality opinion by Justice White said that in

---

trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment.").

60. 377 U.S. 533 (1964).

61. *Reynolds*, 377 U.S. at 568.

62. *See id.* Vote dilution reduces the effectiveness of an elector's vote in order to manipulate the outcome of an election. *See* AMY G. GORE ET AL., 25 AM. JUR. 2D *Elections* § 34 (2018). In the redistricting context, vote dilution is "accomplished by drawing district lines either to disperse the votes of one faction so that they cannot influence the outcome of elections or to concentrate those votes in as few districts as possible, thus wasting their strength." *Id.*

63. *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55, 58–59 (1980).

64. *See, e.g.*, *id.* at 65–75.

65. *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 409 (2006) (discussing that the plaintiffs brought claims alleging an unconstitutional partisan gerrymander and violations of the Voting Rights Act). Standing requirements for racial gerrymandering claims, however, differ from the requirements for partisan claims. In racial gerrymandering claims, standing is district specific and depends on whether "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." Miller v. Johnson, 515 U.S. 900, 916 (1995); *see* Shaw v. Reno, 509 U.S. 630, 649–50 (1993) ("Classifying citizens by race . . . threatens . . . harms that are not present in our vote-dilution cases.").

66. 478 U.S. 109 (1986).

67. *Bandemer*, 478 U.S. at 118–25 (reviewing Court precedent before concluding that the case at hand was justiciable).

68. *See id.* at 113–15 (plurality opinion).

69. *Id.* at 113. A majority of the Court held that claims of partisan gerrymandering were justiciable under the Equal Protection Clause. *Id.* at 125 (majority opinion). Only three Justices, however, joined Justice White's plurality opinion arguing that the appropriate test required both discriminatory intent and discriminatory effect. *Id.* at 113, 127 (plurality opinion).

order to show unconstitutional discrimination, plaintiffs had to prove (1) "intentional discrimination against an identifiable political group and" (2) "an actual discriminatory effect" on a voter's ability to participate in and influence the political process.[70] That effect, the plurality concluded, had to be dramatic.[71] That is, congressional voting districts must produce "evidence that excluded groups have 'less opportunity to participate in the political processes and to elect candidates of their choice,'" and a "lack of responsiveness by those elected to the concerns of the relevant groups."[72] Rather than hew to a mathematical formula to decide whether a redistricting scheme strayed too far from statewide party affiliation, the plurality focused on whether the group was *denied* its chance to influence the political process.[73] Indeed, the plurality explained that plaintiffs could not make out an equal protection claim based only on slight interference with the ability to influence an election because a low threshold would allow challenges to all reapportionment plans.[74] Not a single plaintiff has successfully challenged a congressional districting plan using the *Bandemer* test in the thirty-three years following that decision.[75]

B. The Federal Failure To Regulate Partisan Gerrymandering

The United States Supreme Court's partisan gerrymandering jurisprudence has a tortured history. In 2004 the Supreme Court revisited the standard for partisan gerrymandering claims in *Vieth v. Jubelirer*.[76] Another plurality opinion, written by Justice Scalia, reflected on the eighteen-year gap since the Supreme Court had last considered partisan gerrymandering in *Bandemer* and noted that lower courts that had applied the *Bandemer*-plurality standard had consistently refused to find any congressional districting plan unconstitutional.[77] The plurality concluded that this lack of successful challenges meant not only that *Bandemer*

70. *See id.* at 127, 132 (plurality opinion) ("[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.").

71. *See id.* at 134 (requiring a prima facie case to show that the discriminatory effects were "sufficiently serious").

72. *See id.* at 131 (quoting Rogers v. Lodge, 458 U.S. 613, 624 (1982)).

73. *See id.* at 132–33.

74. *Id.* at 133. The plurality opinion based its reluctance to lower the threshold showing on the fear of inviting nonstop attacks on every reapportionment scheme and of taking away from the legislature what had traditionally been a political task. *See id.*

75. *See* Michael J. Pitts, *What Has Twenty-Five Years of Racial Gerrymandering Doctrine Achieved?*, 9 UC IRVINE L. REV. 229, 260 (2018) ("To date, the Supreme Court has yet to strike down a redistricting plan as an unconstitutional partisan gerrymander."). Voting rights activists continue to litigate partisan gerrymandering claims under the Equal Protection Clause by relying on the efficiency gap and other statistics to prove impermissible discrimination. *See, e.g.*, Gill v. Whitford, 138 S. Ct. 1916 (2018) (vacating and remanding a Western District of Wisconsin decision that invalidated a Wisconsin state legislative redistricting plan as an impermissible partisan gerrymander under the Equal Protection Clause).

76. 541 U.S. 267 (2004).

77. *Vieth*, 541 U.S. at 278–80 (plurality opinion).

was wrongly decided but also that partisan gerrymandering claims were not justiciable.[78]

Justice Kennedy concurred in the judgment but raised significant First Amendment concerns.[79] He noted:

> The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.[80]

Likewise, Justice Stevens compared excluding voters from a congressional district on the basis of their political affiliation to hiring or firing government officials because they belonged to a particular political party.[81] According to Justice Stevens, such exclusions were "discriminatory governmental decisions that burden fundamental First Amendment interests [and] are subject to strict scrutiny."[82]

Justice Scalia's plurality opinion also addressed Justice Stevens's First Amendment approach, stating that if *Vieth* had been argued as a First Amendment claim, the plaintiff's desired solution would result in "render[ing] unlawful *all* consideration of political affiliation in districting, just as it renders unlawful *all* consideration of political affiliation in hiring for non-policy-level government jobs."[83]

Subsequent partisan gerrymandering cases under the Federal Equal Protection Clause failed to articulate a clearer test and failed to invalidate maps on the basis that they were allegedly drawn solely to gain partisan advantage.[84] Not one challenger has been able to overcome the two-part test set out in *Bandemer*,[85] which required (1) intentional discrimination against an identifiable political group and (2) actual discriminatory effect.[86] This dearth of results led Justice Scalia and a plurality of the Court to declare partisan gerrymandering claims nonjusticiable.[87]

---

78. *Id.* at 281.

79. *Id.* at 314 (Kennedy, J., concurring).

80. *Id.*

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

82. *Id.* at 324.

83. *Id.* at 294 (plurality opinion) (emphasis in original).

84. *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 412–13, 416–17, 442 (2006) (discussing the partisan effect of a Texas redistricting plan, but ultimately invalidating the plan on racial grounds without addressing the First Amendment implications).

85. *See Vieth*, 541 U.S. at 279 (plurality opinion) (stating that, as of 2004, federal courts denied relief to all plaintiffs who alleged unconstitutional partisan gerrymandering); *see also* Pitts, *supra* note 75, at 260.

86. Davis v. Bandemer, 478 U.S. 109, 127 (1986) (plurality opinion).

87. *See Vieth*, 541 U.S. at 281 (plurality opinon) ("Lacking [discernible and manageable standards for adjudicating political gerrymandering claims], we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.").

The most recent federal challenge to congressional voting districts, *Gill v. Whitford*,[88] combines *Bandemer*'s equal protection test with Justice Kennedy's First Amendment concerns from *Vieth*.[89] The *Gill* plaintiffs argued that in 2011, the Wisconsin legislature redrew the state's voting districts with the goal of entrenching Republican control over the state legislature.[90] To that end, the legislature "packed and cracked" Democratic voters in the state's ninety-nine voting districts.[91] Republicans were expected to receive 50% to 60% of the vote in forty-two of the newly drawn districts while Democrats were only projected to win that amount in seventeen districts.[92] But Democrats were expected to receive more than 80% of the vote in eight districts.[93] Republicans were not expected to win by such a wide margin in any of the districts.[94] The following election in 2012 fulfilled those expectations: Republicans won fifty-nine out of ninety-nine seats in the General Assembly despite winning only 48.2% of the statewide vote.[95]

A three-judge district court panel found that the Wisconsin plan violated the Equal Protection Clause and the First Amendment.[96] The district court reasoned that the Equal Protection Clause and the First Amendment prohibited a plan that "(1) is intended to place a severe impediment on the effectiveness of

---

88. 138 S. Ct. 1916 (2018).

89. *See* Brief for Appellees at 1, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161) (arguing that partisan gerrymanders violate both the Equal Protection Clause by discriminating against voters and the First Amendment as a form of viewpoint discrimination that dilutes votes based on the voter's association with a political party or political views).

90. *Id.* at 5–7. One of the drafters of the redistricting plan, labeled Act 43, said, "The maps we pass will determine who's [elected] 10 years from now. . . . We have an opportunity and an obligation to draw these maps that Republicans haven't had in decades." *Id.* at 10 (omission in original).

91. *See id.* at 3, 6. "Packing" is when the party controlling the redistricting process moves voters of the opposing party into congressional districts that the opposing party is already poised to win. *See* Buzas & Warrington, *supra* note 5, at 3. Packed votes are considered wasted because they do not have an impact on the outcome of their district's election. *See id.* at 3. "Cracking" is when the controlling party spreads voters of the opposing party among districts held safely by the controlling party. *See id.* Cracked votes are considered wasted because they too have no impact on the outcome of their district's election. *See id.*

92. Brief for Appellees, *supra* note 89, at 7.

93. *Id.*

94. *Id.* The *Gill* plaintiffs also noted that

> [p]roportional representation is not a catch-all label for every analysis that relies in some way on statewide seat and vote shares. If it were, the Court would not have cited these statewide statistics over and over in its partisan gerrymandering cases. Rather, proportional representation has a specific, universally accepted definition: a share of legislative seats that is *equal* to a party's share of the jurisdiction-wide vote. As the Court has explained, proportional representation means that a party "win[s] the number of seats that *mirrors* the proportion of its vote."

Id. at 39 (second alteration in original) (citations omitted) (quoting Vieth v. Jubelirer, 541 U.S. 267, 291 (2004) (plurality opinion) (emphasis added)). Likewise, this Comment does not advocate for proportional representation.

95. *Id.* at 10.

96. Whitford v. Gill, 218 F. Supp. 3d 837, 843, 910–30 (W.D. Wisc. 2016), *vacated*, 138 S. Ct. 1916 (2018).

the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds."[97] The district court's First Amendment analysis appeared to rest heavily on Justice Kennedy's concurring opinion in *Vieth*.[98] Its "severe impediment" requirement echoed Justice Kennedy's explanation that the First Amendment prohibited states from placing burdens on a political group's representational rights.[99]

The Supreme Court has not yet decided the merits of *Gill*. Rather, it remanded the case to cure a standing issue.[100] Nine days after the remand, Justice Kennedy announced his retirement.[101] Thus, the Court will hear the merits of *Gill* without Justice Kennedy's input.

C. Regulation Under the Pennsylvania Constitution's Equal Protection Guarantees

In turn, the Pennsylvania Supreme Court's partisan gerrymandering jurisprudence tracked the United States Supreme Court's. As a result, Pennsylvania failed to find a manageable solution in its constitution's equal protection clause.[102]

For example, in the wake of the United States Supreme Court's *Bandemer* plurality decision—which rendered partisan gerrymandering claims justiciable[103]—the Pennsylvania Supreme Court heard *In re 1991 Pennsylvania Legislative Reapportionment Commission*.[104] There, the plaintiffs claimed that a plan to redistrict the state legislature "reflect[ed] political gerrymandering which deprive[d] two aspirants of their rights to run for office in their former districts."[105] The Pennsylvania Supreme Court first analyzed the gerrymandering claim by adopting *Bandemer*'s test,[106] which required (1) intentional

97. *Id.* at 884.

98. *See id.* at 874–76 (discussing Kennedy's concurring opinion).

99. *Compare id.* at 884 (establishing the "severe impediment" standard), *with* Vieth v. Jubelirer, 541 U.S. 267, 315 (Kennedy, J., concurring) ("The inquiry . . . is whether political classifications were used to burden a group's representational rights. 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. Of course, all this depends first on courts' having available a manageable standard by which to measure the effect of the apportionment . . . .").

100. *Gill*, 138 S. Ct. at 1934.

101. *See* Letter from Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, to Donald J. Trump, President, United States of America (June 27, 2018), http://www.supremecourt.gov/publicinfo/press/Letter_to_the_President_June27.pdf [http://perma.cc/J6SS-KTF6].

102. See *infra* notes 115–23 for a discussion of Pennsylvania's adoption of the multipart *Bandemer* test and its failure to provide relief under the Pennsylvania Constitution.

103. Davis v. Bandemer, 478 U.S. 109, 127 (1986) (plurality opinion).

104. 609 A.2d 132 (Pa. 1992), *abrogated by* Holt v. 2011 Legislative Reapportionment Comm'n, 38 A.3d 711 (Pa. 2012).

105. *See In re 1991 Pa. Legislative Reapportionment Comm'n.*, 609 A.2d at 135.

106. *See id.* at 142 ("This Court is persuaded by the holding of the Supreme Court of the United States [in *Bandemer*] with regard to the elements of a *prima facie* case of political gerrymandering.").

discrimination against an identifiable political group and (2) actual discriminatory effect.[107] In addition, the court required the plaintiffs to show a "history of disproportionate results appear[ing] in conjunction with strong indicia of lack of political power and the denial of fair representation."[108] The plaintiffs failed on their federal claim because they could not prove they were part of an identifiable group that lacked political power.[109] Further, the Pennsylvania Supreme Court concluded that there was "no precedent in this state nor in the Federal Courts for a claim arising from the deprivation of an individual's right to run for a particular office nor of a citizens' right to vote for a specific individual."[110] Turning to the Pennsylvania Constitution, the court concluded for the first time that article I, section 5 (the free and equal elections clause) could be an independent source of protection from partisan gerrymandering.[111] It interpreted section 5 as follows:

> [E]lections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, . . . and when no constitutional right of the qualified elector is subverted or denied him.[112]

The Pennsylvania Supreme Court, however, held that the reapportionment plan did not violate section 5 because, as a threshold matter, a political candidate's interest in a specific office was too circumscribed.[113] Because the political candidate could still run for office, section 5 did not require the legislature to tailor the district lines so that candidates could challenge a specific incumbent.[114]

In 2002 the Pennsylvania Supreme Court revisited state constitutional protections against partisan gerrymandering in *Erfer v. Commonwealth*.[115] Following the 2000 census, the General Assembly passed Act 1 to redraw voting districts for the upcoming congressional election.[116] The plaintiffs argued that

---

107. *Id.*

108. *Id.* (quoting *Bandemer*, 478 U.S. at 139).

109. *Id.*

110. *Id.*

111. *See id.* at 141–42; Samuel Issacharoff & Pamela S. Karlan, *Where To Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 556 n.65 (2004) ("In a prior decision, the Pennsylvania Supreme Court had held that political gerrymandering claims were justiciable under two provisions of the Pennsylvania Constitution—the equal protection guarantee and the free and equal elections clause. *In re 1991 Reapportionment* adopted, as a construction of the state constitution, the plurality view in [*Bandemer*]." (citations omitted)).

112. *In re 1991 Pa. Legislative Reapportionment Comm'n*, 609 A.2d at 142 (alteration in original) (omission in original) (quoting City Council of City of Bethlehem v. Marcincin, 515 A.2d 1320, 1323 (Pa. 1986)).

113. *See id.* (quoting Sweeney v. Tucker, 375 A.2d 698, 713 (Pa. 1977)).

114. *Id.*

115. 794 A.2d 325 (Pa. 2002), *abrogated by League I*, 178 A.3d 737 (Pa. 2018).

116. Act of Jan. 2, 2002, No. 2002-1, 2002 Pa. Laws 1; *see* Erfer v. Commonwealth, 794 A.2d 325,

although each party had a roughly equal number of registered voters, the lines were deliberately drawn such that it was likely that Republicans would win thirteen or fourteen of the nineteen congressional districts.[117] This, the plaintiffs claimed, violated the Pennsylvania Constitution's equal protection guarantee and the free and equal elections clause.[118]

Neither argument persuaded the Pennsylvania Supreme Court. It affirmed that the equal protection guarantee in the Pennsylvania Constitution was "coterminous with its federal counterpart."[119] As a result, the court relied on the Supreme Court's *Bandemer* test that required plaintiffs to show (1) intentional discrimination against an identifiable political group, and (2) actual discriminatory effect.[120] In order to prove actual discriminatory effect, the plaintiffs had to show that the group (here, Democrats) had lacked political power and had been denied fair representation.[121] Denial of fair representation required a showing that the group had "essentially been shut out of the political process."[122] Because Democrats were projected to have at least five "safe" districts and could not show that Republicans would "'entirely ignore the interests' of those citizens . . . who voted for the Democratic candidate," the court concluded that Act 1 did not violate equal protection under the Pennsylvania Constitution.[123]

Erfer also declined to read additional protections into Pennsylvania's free and equal elections clause.[124] It explained that the plaintiffs failed to explain why the clause contained protections independent of those contained in the Fourteenth Amendment.[125]

Chief Justice Zappala dissented.[126] He explained that the plan violated the Fourteenth Amendment because it "was formulated so as to intentionally discriminate and dilute the vote of an identifiable political group and had an actual discriminatory effect on that group."[127] For Chief Justice Zappala, intentional discrimination was proved by looking to the predicted election

328 (Pa. 2002).

117. *Erfer*, 794 A.2d at 328. In 2002 Republicans went on to win twelve of the nineteen congressional elections and received 56.2% of the statewide vote. *See* JEFF TRANDAHL, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 5, 2002, at 39–40 (2003), http://history.house.gov/Institution/Election-Statistics/2002election/ [http://perma.cc/5YLC-93M7].

118. *Erfer*, 794 A.2d at 328; *see also* PA. CONST. art. I, §§ 1, 26 (equal protection guarantee); *id.* § 5 (free and equal elections clause).

119. *Erfer*, 794 A.2d at 332 (citing Love v. Borough of Stroudsburg, 597 A.2d 1137 (Pa. 1991)).

120. *Id.* at 332.

121. *Id.* at 333.

122. *Id.* (quoting Davis v. Bandemer, 478 U.S. 109, 139 (1986) (plurality opinion)).

123. *Id.* at 333–34 (quoting *Bandemer*, 478 U.S. at 132).

124. *Id.* at 332.

125. *See id.* ("Petitioners provide us with no persuasive argument as to why we should, at this juncture, interpret our constitution in such a fashion that the right to vote is more expansive than the guarantee found in the federal constitution.").

126. *Id.* at 335 (Zappala, C.J., dissenting).

127. *Id.*

outcome[128]: out of the nineteen congressional seats, the plan was projected to result in thirteen or fourteen Republican wins in 2002, even if Republicans received less than half of the statewide vote.[129] Chief Justice Zappala expected the results to continue past the 2002 election.[130] He believed the issue with the plan was not whether an elected official could represent his or her constituents but whether the plan "denied voters of a fair chance to influence the political process."[131]

The upshot of *Erfer* was simple: the Pennsylvania Constitution's equal protection guarantees were no different than the Federal Constitution's. Accordingly, partisan gerrymandering claims brought under Pennsylvania's equal protection clauses would face the same test as provided by the Equal Protection Clause—a test later condemned as misguided, unmanageable, and arbitrary.[132]

D. The Pennsylvania Constitution's Free and Equal Elections Clause

Recently, in *League I*, the Pennsylvania Supreme Court departed from its equal protection track and struck down a 2011 congressional voting plan on the ground that it violated the free and equal elections clause of the Pennsylvania Constitution.[133] Following the 2010 census, Pennsylvania's representation in the U.S. House of Representatives dropped from nineteen to eighteen seats.[134] Republicans in the General Assembly led the effort to draw new congressional voting districts.[135] On September 14, 2011, Republicans introduced Senate Bill 1249.[136] The initial version of the bill contained no information describing the proposed congressional boundaries.[137] Details of the boundaries were withheld until December 14—the same day the bill passed the Senate.[138] On December 20—six days later—the House passed an identical bill, and on December 22, 2011, Governor Tom Corbett signed the bill into law as Act 131 (the 2011 Plan).[139] The 2011 Plan contained two remarkable departures from traditional redistricting principles. First, it divided twenty-eight of Pennsylvania's sixty-

128. *See id.* at 339–40.

129. *Id.* at 341 (quoting from the findings of fact made by Commonwealth Court Judge Dante Pellegrini).

130. *See id.* at 340.

131. *Id.*

132. Vieth v. Jubelirer, 541 U.S. 267, 283 (2004) (plurality opinion).

133. *See League I*, 178 A.3d 737, 821 (Pa. 2018).

134. *See id.* at 743.

135. *See id.* ("[T]he Republican-led General Assembly was tasked with reconstituting Pennsylvania's congressional districts, reducing their number by one, and adjusting their borders in light of population changes reflected by the 2010 Census.").

136. S.B. 1249, 195th Gen. Assemb., 2011–12 Reg. Sess. (Pa. 2011) (Printer's No. 1520).

137. *See id.*; *see also League I*, 178 A.3d at 743.

138. *See League I*, 178 A.3d at 743.

139. Congressional Redistricting Act of 2011, No. 2011-131, 2011 Pa. Laws 598, *invalidated by League I*, 178 A.3d 737 (Pa. 2018); *see also League I*, 178 A.3d at 744.

seven counties between at least two congressional districts.[140] Second, it divided sixty-eight municipalities among multiple congressional districts,[141] whereas in prior plans, no municipalities were divided.[142] In each of the three elections following the 2011 Plan, Democrats won five districts with large majorities, while Republicans won the remaining thirteen districts by slimmer margins.[143]

In *League I*, the plaintiffs argued that the 2011 Plan violated federal and state constitutional protections and was one of the most extreme gerrymanders in the country.[144] Their state constitutional claims rested on the Pennsylvania Constitution's expression and association clauses,[145] equal protection clauses, and free and equal elections clause.[146] The plaintiffs argued that the 2011 Plan was an overt and systematic effort to dilute the voting strength of Democratic voters.[147] For example, Pennsylvania's 7th District, nicknamed "Goofy kicking Donald Duck" due to its warped and noncontiguous shape,[148] underwent significant changes, arguably to pack Democrats into the neighboring 1st District.[149] Further, the plaintiffs argued that the new lines ignored traditional districting criteria—compactness, contiguity, and preservation of political subdivisions[150]—to achieve what had been dubbed the "Gerrymander of the

140. *See* Congressional Redistricting Act of 2011; *see also League I*, 178 A.3d at 761–62.

141. *See* Congressional Redistricting Act of 2011; *see also League I*, 178 A.3d at 761–62.

142. *See League I*, 178 A.3d at 761–62.

143. *See* KAREN L. HAAS, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION FROM OFFICIAL SOURCES FOR THE ELECTION OF NOVEMBER 8, 2016, at 62–64 (2017), http://history.house.gov/Institution/Election-Statistics/2016election/ [http://perma.cc/4NRD-EUMA]; KAREN L. HAAS, STATISTICS OF THE CONGRESSIONAL ELECTION FROM OFFICIAL SOURCES FOR THE ELECTION OF NOVEMBER 4, 2014, at 40–41 (2015), http://history.house.gov/Institution/Election-Statistics/2014election/ [http://perma.cc/V9U4-7DKE]; KAREN L. HAAS, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 6, 2012, at 53 (2013), history.house.gov/Institution/Election-Statistics/2012election/; *see also League I*, 178 A.3d at 763.

144. Petition for Review at 3, *League I*, 178 A.3d 737 (No. 261 M.D. 2017); *see also League I*, 178 A.3d at 765–66.

145. Petition for Review, *supra* note 144, at 44–47; *see League I*, 178 A.3d at 765; *see also* PA. CONST. art. I, §§ 7, 20.

146. Petition for Review, *supra* note 144, at 47–50; *see League I*, 178 A.3d at 766; *see also* PA. CONST. art I, §§ 1, 26 (equal protection guarantees); *id.* § 5 (free and equal elections clause).

147. *See* Petition for Review, *supra* note 144, at 15–18; *see also League I*, 178 A.3d at 765–66. Indeed, the Republican State Leadership Committee's national redistricting plan (codenamed "the REDistrict MAjority Project" or "REDMAP") intended to "[c]ontrol[] the redistricting process in . . . states [that] would have the greatest impact on determining how both state legislative and congressional district boundaries would be drawn." *2012 REDMAP Summary Report*, REDISTRICTING MAJORITY PROJECT (Jan. 4, 2013, 9:25 AM), http://www.redistrictingmajorityproject.com/?p=646 [http://perma.cc/Z6V8-NQLR]. To that end, "[d]rawing new district lines in states with the most redistricting activity presented the opportunity to solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade." *Id.*

148. *See* Aaron Blake, *Name That District Contest Winner: 'Goofy Kicking Donald Duck*,' WASH. POST (Dec. 29, 2011), http://www.washingtonpost.com/blogs/the-fix/post/name-that-district-contest-winner-goofy-kicking-donald-duck/2011/12/29/gIQA2Fa2OP_blog.html [http://perma.cc/K3LX-ACZR]; *supra* Figure 1.

149. *See* Petition for Review, *supra* note 144, at 25–26; *see also League I*, 178 A.3d at 766.

150. *See* Petition for Review, *supra* note 144, at 33; *see also League I*, 178 A.3d at 775.

Decade."[151] Indeed, Montgomery County, itself populous enough to be a single district, was split into five separate voting districts.[152]

As a result of the 2011 Plan, the plaintiffs argued, Democrats suffered from the highest efficiency gap[153] in the country: 24%.[154] In the 2012 election, Democrats wasted slightly more than 2.40 million votes, compared to Republicans wasting 1.09 million votes.[155] In the Pennsylvania elections following the 2011 redistricting, Republicans repeatedly won a disproportionate number of congressional races compared to their statewide vote share.[156] In the 2012 election, Republicans won thirteen out of eighteen congressional seats (72%) with only 49.2% of the statewide vote.[157] In 2014 they won the same seats with only 55.5% of the vote.[158] And in 2016 they won the same seats again with only 54.1% of the vote.[159]

The Commonwealth Court recommended denying relief.[160] According to the court, a partisan gerrymandering claim under article I, section 7 could succeed by showing the government retaliated in response to the plaintiffs' protected speech.[161] The court concluded that the retaliation claim failed.[162] It explained that the plaintiffs failed to show that the 2011 Plan precluded them from participating in the political process and that it was passed with any motive to retaliate based on the plaintiffs' political beliefs.[163]

On appeal to the Pennsylvania Supreme Court, Justice Todd, writing for the majority, held that the 2011 Plan violated the Pennsylvania Constitution's free and equal elections clause.[164] The court opened its opinion by stating that "[t]he

---

151. *See* Sean Trende, *In Pennsylvania, the Gerrymander of the Decade?*, REAL CLEAR POLITICS (Dec. 14, 2011), http://www.realclearpolitics.com/articles/2011/12/14/in_pennsylvania_the_gerrymander_of_the_decade_112404.html [http://perma.cc/7PMC-5ZRS].

152. *See* Petition for Review, *supra* note 144, at 21; *see also League I*, 178 A.3d at 775.

153. See *infra* notes 349–53 and accompanying text for a discussion of the efficiency gap statistic.

154. *See League I*, 178 A.3d at 777–78.

155. *See* Petition for Review, *supra* note 144, at 36.

156. *See League I*, 178 A.3d at 764.

157. *Id.*

158. *See id.*

159. *Id.*

160. Recommended Findings of Fact and Conclusions of Law at 119, 126, *League I*, 178 A.3d 737 (No. 261 MD 2017). The Commonwealth Court made such recommendations at the direction of the Pennsylvania Supreme Court; with a congressional election looming, the Pennsylvania Supreme Court directed the Commonwealth Court to "create an evidentiary record on which Petitioners' claims may be decided." Order at 2, *League I*, 178 A.3d 737 (No. 159 MM 2017).

161. Recommended Findings of Fact and Conclusions of Law, *supra* note 160, at 118 ("[T]o maintain the [free speech and association retaliation] action Petitioners bear the burden of proving: (1) that Petitioners were 'engaged in a constitutionally protected activity'; (2) that the General Assembly caused Petitioners 'to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity'; and (3) that 'the adverse action was motivated at least in part as a response to the exercise of' Petitioners' constitutional rights." (quoting Uniontown Newspapers, Inc. v. Roberts, 839 A.2d 185, 198 (Pa. 2003))).

162. *See id*. at 118–19.

163. *Id.* at 118.

164. *League I*, 178 A.3d at 821.

people of this Commonwealth should never lose sight of the fact that, in its protection of essential rights, our founding document *is the ancestor, not the offspring*, of the federal Constitution"[165] and that the free and equal elections clause "provides a constitutional standard, and remedy, even if the federal charter does not."[166]

The court explained that the free and equal elections clause stood in a unique position compared to other state constitutional provisions—it had no counterpart in the Federal Constitution; and, moreover, its inclusion in the Pennsylvania Declaration of Rights meant that it was part of the inviolate social contract between the government and its people.[167] Thus, the right to vote was among the enumerations "of the fundamental individual human rights possessed by the people of this Commonwealth that are specifically exempted from the powers of Commonwealth government to diminish."[168]

The court began its analysis with the plain meaning of the free and equal elections clause.[169] The court interpreted the "free and equal" provision to apply to the greatest possible extent to every aspect of elections and to guarantee the right to equal participation in the process.[170] This interpretation, the court explained, was consistent with Pennsylvania's colonial history[171] and case law.[172]

The majority relied heavily on Pennsylvania's colonial history and the development of Revolutionary-era protections that would later become the free and equal elections clause.[173] In the 1770s, Pennsylvania's "colonial government remained dominated by the counties of Philadelphia, Chester, and Bucks, even though they had been eclipsed in population by the western regions of the colony and the City of Philadelphia."[174] This underrepresentation of Pennsylvania's western region continued until 1776 when, in the same year the Continental Congress signed the Declaration of Independence, Benjamin Franklin presided over Pennsylvania's own constitutional convention.[175] The subsequent document, the Pennsylvania Constitution of 1776, contained a declaration that "all elections ought to be free; and that all free men having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or to be elected into office."[176] Despite this declaration, two sources of tension persisted: First, Quakers, Episcopalians, and Germans who did not

165. *Id.* at 741 (emphasis added).

166. *Id.*

167. *Id.* at 802–03.

168. *See id.*

169. *Id.* at 803–04. In full, the clause reads: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." PA. CONST., art. I, § 5.

170. *League I*, 178 A.3d at 804.

171. *Id.* at 804–09.

172. *Id.* at 809–13.

173. *See id.* at 804–09.

174. *See id.* at 806.

175. *See id.*

176. *Id.* at 806–07 (quoting PA. CONST. of 1776, art. I, § 7).

participate in the Revolutionary War felt excluded from the political process.[177] Second, certain voters were excluded from the political process through the administration of test oaths.[178] According to the court, those tensions led to another constitutional convention and the subsequent Pennsylvania Constitution of 1790.[179] That constitution "remove[d] all prior ambiguous qualifying language" in article I, section 5 to state simply that "elections shall be free and equal."[180] This history indicated to the court that article I, section 5's purpose was to prevent "the dilution of the right of the people of this Commonwealth to select representatives to govern their affairs based on considerations of the region of the state in which they lived, and the religious and political beliefs to which they adhered."[181]

The *League I* court also explained that prior case law supported the view that the free and equal elections clause prohibited any voting system that "impermissibly dilute[ed] the potency of an individual's vote for candidates for elective office relative to that of other voters."[182]

The *League I* court also expounded on how partisan gerrymandering harms Pennsylvania's democracy:

> [P]artisan gerrymandering dilutes the votes of those who in prior elections voted for the party not in power to give the party in power a lasting electoral advantage. By placing voters preferring one party's candidates in districts where their votes are wasted on candidates likely to lose (cracking), or by placing such voters in districts where their votes are cast for candidates destined to win (packing), the non-favored party's votes are diluted. It is axiomatic that a diluted vote is not an equal vote, as all voters do not have an equal opportunity to translate their votes into representation. This is the antithesis of a healthy representative democracy. Indeed, for our form of government to operate as intended, each and every Pennsylvania voter must have the same free and equal *opportunity* to select his or her representatives.[183]

Those harms, according to the court, were best protected by the free and equal elections clause rather than the free expression clauses of the Pennsylvania Constitution.[184]

As a remedy, the court prescribed the use of "neutral criteria" to create voting districts.[185] Those criteria were (1) that the population of each district be

177. *See id.* at 807.

178. *Id.*

179. *Id.* at 807–08.

180. *Id.* at 808 (quoting PA. CONST. art. I, § 5, cl. 1).

181. *Id.* at 808–09.

182. *Id.* at 809.

183. *Id.* at 814.

184. *See id.*

185. *See id.* ("[S]ince the inclusion of the Free and Equal Elections Clause in our Constitution in 1790, certain neutral criteria have, as a general matter, been traditionally utilized to guide the formation of our Commonwealth's legislative districts in order to prevent the dilution of an individual's vote for a representative in the General Assembly.").

as close to equal as possible (compactness), (2) that district boundaries create compact and contiguous territory (contiguousness), and (3) that each district respect existing political subdivisions and split as few subdivisions as possible (avoidance of political subdivision splits).[186] A congressional voting district violates the free and equal elections clause when it subordinates those standards to gain political advantage.[187]

Critically, the court did not require challengers to show that mapmakers *intentionally* subordinated neutral criteria for other impermissible considerations.[188] Instead, the court intimated that compactness, contiguousness, and avoidance of political subdivision splits count as the state constitutional "floor" by which all maps must abide.[189] Thus, the plaintiffs could rely on statistical models to show that the contested plan could not be explained using neutral criteria.[190]

The plaintiffs' expert, Dr. Jowei Chen, testified that he compared the 2011 Plan against five hundred computer-generated plans that employed neutral districting criteria and found that the 2011 Plan fell well outside the average range of any of the statistical measurements for compactness and division of political subdivisions.[191] The court found those statistics fatal to the Plan's constitutionality: "The fact that the 2011 Plan cannot, as a statistical matter, be a plan directed at complying with traditional redistricting requirements is sufficient to establish that it violates the Free and Equal Elections Clause."[192]

The *League I* majority recognized mapmakers could manipulate congressional voting districts to adhere to its neutral criteria yet still achieve an impermissible partisan end.[193] By basing its decision only on the free and equal elections clause,[194] the court left open the possibility that the challenger's other claim—grounded in the free expression and association protections in the Pennsylvania Constitution[195]—could provide additional protections in the future.

III. A SPEECH-CENTERED ALTERNATIVE

It is too early to tell whether the *League I* standard under the free and equal elections clause will do enough to mitigate the harms of partisan gerrymandering. One problem with such a geography-based standard is that it is

186. *See id.* at 815.

187. *Id.* at 817.

188. *Id.*

189. *See id.*

190. *Id.* at 819–20.

191. *Id.* at 768, 818.

192. *Id.* at 820.

193. *See id.* at 817 ("We recognize . . . that there exists the possibility that advances in map drawing technology and analytical software can potentially allow mapmakers, in the future, to engineer congressional districting maps, which, although minimally comporting with these neutral 'floor' criteria, nevertheless operate to unfairly dilute the power of a particular group's vote for a congressional representative.").

194. *Id.* at 821.

195. *Id.* at 765.

palliative. It focuses on treating the symptoms of partisan gerrymandering: districts that lack compactness, contiguousness, and respect for political subdivisions. But making voting districts *look* appropriate does not make them so. This is because a geography-based standard elides the systemic harm at the center of partisan gerrymandering: the inability of disfavored political parties to overcome the ruling party's entrenchment.

A curative solution would address this central harm. The Pennsylvania Supreme Court could adopt such a solution by treating partisan gerrymandering cases as speech retaliation claims under article I, section 7 of the Pennsylvania Constitution. And it would have ample support to do so. Pennsylvania's history is rich with instances of protecting political speech and association.[196] Further, the Pennsylvania Constitution's speech and assembly protections exceed the protections provided by the Federal Constitution.[197]

Relying on article I, section 7 would provide additional protection against partisan gerrymandering compared to Pennsylvania's free and equal elections clause for two reasons: First, free speech frameworks are well tested and already used in Pennsylvania.[198] Second, applying a free speech framework would impose a clearer and more exacting standard than compact and contiguous voting districts by applying strict scrutiny to any plan that impermissibly impacted the expressive nature of the vote.[199] As the *League I* court recognized, it may be possible for partisan mapmakers to draw compact and contiguous districts that still diminish the voting power of political minorities.[200] Part III.A describes the Pennsylvania history of and case law on free speech and association. Part III.B provides a free speech framework for analyzing partisan gerrymandering claims under article I, section 7. That framework applies strict scrutiny to congressional districting plans that burden the vote's expressive value on the basis of political affiliation.

A. Pennsylvania's Free Expression Protections

1. Historical Roots

Pennsylvania, William Penn's "Holy Experiment," was founded by Quakers fleeing religious persecution in England.[201] Penn believed that an open exchange of ideas—the "Quaker Meeting"—would form a community governed by moral consensus.[202] Penn believed this freedom of expression would provide the

196. See *infra* Part III.A.1. for a discussion of the history of Pennsylvania's free expression protections.

197. See *infra* Part III.A.2. for a comparison of the Pennsylvania Constitution's and the Federal Constitution's free expression protections.

198. See *infra* Part III.A.2 for a discussion of Pennsylvania's free speech protections.

199. See *infra* Part III.B.3 for an application of Pennsylvania's free speech protections to partisan gerrymandering.

200. *See supra* Part II.D for a discussion of the Pennsylvania constitution's free and equal elections clause.

201. *See* HANS FANTEL, WILLIAM PENN 150–51 (1974).

202. *Id.* at 154.

vehicle for political and social change without the violence that plagued similar movements in England.[203] This new Quaker society would derive political authority from the people's voice.[204] By removing "official or unconscious restraint on thought and expression," the society would depend on "all its members to recognize and articulate their needs rather than having their needs pre-defined and their rewards limited by the prevailing orthodoxy embedded in government."[205]

These ideals would inform Penn's Frame of Government, Pennsylvania's structural blueprint and the predecessor to the Pennsylvania Constitution.[206] Pennsylvania's free speech and association protections predate the Federal Constitution and Bill of Rights.[207] These protections trace from an early history of quashing individual expression.[208] From the late 1690s into the mid-1750s, colonial Pennsylvania brought seditious libel cases against printers, threatened to censor publications of economic policy, and arrested academics for criticizing the legislature's defense policies.[209] Additionally, the electoral power of Philadelphians began to erode.[210] Individual voter eligibility decreased and the western voters lacked proportional representation compared to their counterparts in eastern counties.[211]

Benjamin Franklin presided over Pennsylvania's constitutional convention of 1776, which resulted in a new state constitution that contained two provisions analogous to the future First Amendment.[212] Article XII stated: "[T]he people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained."[213] Article XVI protected the freedom of association: "[T]he people have a right to assemble together, to consult for their common good, to instruct their

---

203. *Id.*

204. *See id.*

205. *Id.* at 155.

206. *See id.* at 156–57.

207. Steven G. Calabresi et al., *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1479 (2012).

208. *See* Seth F. Kreimer, *The Pennsylvania Constitution's Protection of Free Speech*, 5 U. PA. J. CONST. L. 12, 16–18 (2002). The adoption of the Declaration of Rights during the Constitutional Convention of 1790 was preceded by numerous libel prosecutions against political speech. *See id.* at 16–17 (discussing how *Republica v. Oswald*, 1 Dal. 319 (Pa. 1788), a 1788 libel case against a newspaper editor brought by his political opponents, led to greater speech protections being written into the Pennsylvania Constitution of 1790); *see also* John K. Alexander, *Pennsylvania: Pioneering in Safeguarding Personal Rights* (discussing the circumstances leading up to *Oswald*), *in* THE BILL OF RIGHTS AND THE STATES 308, 325–27 (Patrick T. Conley & John P. Kaminski eds., 1992).

209. *See* Alexander, *supra* note 208, at 317–18.

210. *See id.* at 320.

211. *See id.* In 1775 although eastern and western Pennsylvania had roughly equal populations, the western counties had fifteen assemblymen and the eastern counties had twenty-four. *Id.*

212. *Id.* at 321–23.

213. PA. CONST. of 1776, art. XII.

representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance."[214]

Those protections made Pennsylvania something of an anomaly and a comparative safe haven for free speech, as other state constitutions did not contain similar speech provisions.[215] As a result, the Philadelphia press faced an "'almost total absence of political libel suits' during the 1780s and 1790s."[216] According to Professor Seth Kreimer, these protections are rooted in Pennsylvania's independent commitment to political, epistemic, and libertarian speech.[217] As early as 1735, Pennsylvanians viewed political speech as a "bulwark against lawless power" and the way "to remonstrate the abuses of power in the strongest terms."[218]

Still, protections for individual speech rights did not compare with modern standards.[219] Critics argued that the 1776 Pennsylvania Constitution gave so much power to the majority that Pennsylvania was transformed into a "mobocracy" where laws were based only on "the spirit of town meetings and porter shops."[220] In 1790 Pennsylvania adopted a new constitution and a revised Declaration of Rights, which created the predecessor of today's free speech and association protections.[221] The first clause of section 7 of the Declaration of Rights provided that "the printing-presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of government, and no law shall ever be made to restrain the rights thereof."[222] The second clause provided that "[t]he free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty."[223]

---

214. *Id.* art. XVI.

215. *See* Alexander, *supra* note 208, at 323 ("Linking open, popularly controlled government directly to participation in politics, Pennsylvania became the first colony or state to guarantee the people's rights to assemble and to petition.").

216. *See* Kreimer, *supra* note 208, at 16 n.16 (quoting NORMAN L. ROSENBERG, PROTECTING THE BEST MEN 60 (1986)).

217. *Id.* at 19.

218. *Id.* (quoting Andrew Hamilton's closing argument in defense of John Peter Zenger, who had been charged with publishing seditious libels in New York (available at http://www.famous-trials.com/zenger/87-home [http://perma.cc/J9GY-8FQR])). Philadelphia lawyer Andrew Hamilton's address in John Peter Zenger's libel trial in 1735 "has long been cited in Pennsylvania's Supreme Court as a part of Pennsylvania's constitutional heritage." *Id.* at 19 n.26.

219. Kreimer, *supra* note 208, at 16 n.17 (citing ROBERT L. BRUNHOUSE, THE COUNTER-REVOLUTION IN PENNSYLVANIA 1776–1790, 16–21, 40–41, 127, 147 (1971)) (noting that during the same time period, Pennsylvania required loyalty oaths, mandated the death penalty for secessionists, and proscribed theater entertainment in Philadelphia).

220. Alexander, *supra* note 208, at 325 (quoting Dr. Benjamin Rush, a critic of the 1776 Pennsylvania Constitution).

221. *See id.* The 1790 Pennsylvania Constitution substantially altered the structure of Pennsylvania's government by reestablishing the governor's office, creating a bicameral legislature, and establishing an independent judicial branch. *See id.* The right to vote, however, remained unchanged. *See id.*

222. PA. CONST. of 1790, art. IX, § 7, cl. 1.

223. *Id.* art. IX, § 7, cl. 2.

Today, two sections of the Pennsylvania Constitution protect the right to speech and association. Article I, section 7 reads, in relevant part:

> The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.[224]

Article I, section 20 reads, in relevant part, "The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance."[225]

2. The Pennsylvania Supreme Court and Article I, Section 7

The Pennsylvania Supreme Court has given significant weight to the historical roots of article I, section 7.[226] Given its strong roots that predate the Federal Constitution, article I, section 7 has been relied on by the Pennsylvania Supreme Court as a source of free speech protections independent from the Federal Constitution.[227] For example, in *William Goldman Theatres, Inc. v. Dana*,[228] the Pennsylvania Supreme Court invalidated a film censorship law as a prior restraint on speech, despite the United States Supreme Court's holding that such a restraint did not violate the First Amendment.[229] And while the Pennsylvania Supreme Court has found more expansive expression protections under article I, section 7,[230] the discussion below focuses on two aspects of speech jurisprudence that voting implicates: expressive speech and political speech.

The Pennsylvania Supreme Court reaffirmed the independent strength of article I, section 7 in *Pap's A.M. v. Erie* (*Pap's II*),[231] a case that the United States Supreme Court heard once and the Pennsylvania Supreme Court heard

224. PA. CONST. art. I, § 7.

225. *Id.* art. I, § 20.

226. *See* Kreimer, *supra* note 208, at 24 ("The Pennsylvania Supreme Court has viewed the earlier colonial excursions into the suppression of free expression as vices against which Pennsylvania's constitution sought to guard.").

227. *Id.* at 12–13. Indeed, *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), which provides guidance for when the state court should depart from federal jurisprudence and develop independent state constitutional protections, echoes Justice Brennan's call "that state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

228. 173 A.2d 59 (Pa. 1961).

229. *See William Goldman Theatres*, 173 A.2d at 65.

230. *See* Kreimer, *supra* note 208, at 28–37 (discussing Pennsylvania's judgment on prior restraint, injunctions, and permit requirements).

231. 812 A.2d 591 (Pa. 2002).

twice.[232] In 1994 the City of Erie enacted an ordinance prohibiting people from appearing in a "state of nudity."[233] To comply with the ordinance, women had to wear, at a minimum, pasties and a G-string.[234] Pap's A.M., a nude dancing establishment, challenged the ordinance and claimed it violated the First and Fourteenth Amendments of the Federal Constitution and article I, section 7 of the Pennsylvania Constitution.[235] The Pennsylvania Supreme Court first decided that nude dancing "is an expressive act entitled to First Amendment protection."[236] The court then looked at the Supreme Court's plurality opinion in *Barnes v. Glen Theatre, Inc.*[237] and concluded that the Court did not squarely address whether ordinances prohibiting nudity were content neutral.[238] The Pennsylvania Supreme Court's independent analysis of the ordinance resulted in a determination that the ordinance was content based because the rationale for the ban "was inextricably linked with the suppression of speech for the negative secondary effects were related to the content of the expressive message."[239] The Pennsylvania Supreme Court then applied strict scrutiny and found the ordinance was not narrowly tailored to meet the compelling governmental interest of deterring sex crimes.[240]

The City of Erie appealed to the United States Supreme Court.[241] A plurality of the Court, led by Justice O'Connor, held that banning nudity was a content-neutral restriction.[242] The Court then applied the *United States v. O'Brien*[243] intermediate scrutiny test and concluded that the nudity ban furthered Erie's interest in preventing the crime, health, and safety problems that stem from nude dancing establishments.[244] Because "[t]he ordinance regulate[d] conduct, and any incidental impact on the expressive element of nude dancing [was] *de minimis*," the Court reversed and remanded to the Pennsylvania Supreme Court.[245]

On remand, the Pennsylvania Supreme Court, led by Justice Castille, abandoned the United States Supreme Court's First Amendment analysis in

---

232. *Pap's II*, 812 A.2d at 591–93.

233. *Pap's I*, 719 A.2d 273, 275–76 (Pa. 1998).

234. *Id.* at 276.

235. *Id.*

236. *Id.* (citing Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)).

237. 501 U.S. 560 (1991).

238. *Pap's I*, 719 A.2d at 277–79.

239. *Id.* at 279.

240. *See id.* ("T]he negative secondary effects associated with nude dancing are inextricably linked to the erotic message of the dance. Thus, . . . we find that a content-neutral reason is insufficient to save the Ordinance since it is inextricably linked with a content-based motivation for the restriction.").

241. Erie v. Pap's A.M., 529 U.S. 277, 286–87 (2000) (plurality opinion).

242. *Id.* at 294.

243. 391 U.S. 367, 383 (1968) (instructing that the First Amendment requires laws burdening expressive conduct to serve a substantial government interest and to be sufficiently tailored to serve that interest).

244. *Pap's A.M.*, 529 U.S. at 300–01.

245. *See id.* at 301–02.

favor of a free speech analysis under article I, section 7 of the Pennsylvania Constitution.[246] The Pennsylvania Supreme Court noted that under *Commonwealth v. Edmunds*,[247] the court is not bound by the United States Supreme Court's interpretation of the Pennsylvania Constitution and may find greater protection for individual rights when the issue falls under the umbrella of the state constitution.[248]

Using the *Edmunds* framework, the Pennsylvania Supreme Court considered (1) the text of the Pennsylvania Constitution, (2) the text's history and discussion in case law, (3) policy considerations, and (4) relevant cases from other jurisdictions.[249] Applying the *Edmunds* factors, the Pennsylvania Supreme Court found that Pennsylvania's "Declaration of Rights was the 'direct precursor of the freedom of speech and press.'"[250] The court also noted that the structure of the Pennsylvania government impacted the protection[251]: whereas the Federal Constitution provided limited and enumerated powers to the federal government, Pennsylvania possesses general powers "with the exception of certain matters as to which the powers of the state are limited and the rights of the people are declared inviolable."[252] The court also recognized that freedom of expression has had a special meaning given Pennsylvania's history and recognized that article I, section 7 was "an ancestor, not a stepchild, of the First Amendment."[253] The court then turned to case law and noted that even before the Fourteenth Amendment applied the First Amendment to the states, Pennsylvania had its own freedom of expression protections under article I, section 7.[254] The court also noted that prior case law showed that "[t]he independent constitutional path that has been forged under Article I, § 7 has been comprehensive. It has not been confined to freedom of speech, the press, or expression."[255] As a policy matter, the court noted that because "the fundamental rights guaranteed by the Pennsylvania Declaration of Rights 'cannot lawfully be infringed, even momentarily,'"[256] the Pennsylvania Supreme

246. *See Pap's II*, 812 A.2d 591, 593 (Pa. 2002).

247. 586 A.2d 887 (Pa. 1991).

248. *Pap's II*, 812 A.2d at 601.

249. *Id.* at 603 (citing *Edmunds*, 586 A.2d at 895).

250. *Id.* at 601, 603 (quoting *Edmunds*, 586 A.2d at 887).

251. *See id.* at 604 (quoting W. Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co., 515 A.2d 1331, 1334 (Pa. 1986) (plurality opinion)).

252. *Pap's II*, 812 A.2d at 604 (quoting *W. Pa. Socialist Workers*, 515 A.2d at 1340 (Zappala, J., concurring)).

253. *Pap's II*, 812 A.2d at 604–05. See *supra* Part III.A.1 for a discussion of Pennsylvania's early adoption of free speech rights.

254. *Pap's II*, 812 A.2d at 605–06 (citing Respublica v. Dennie, 4 Yeates 267 (Pa. 1805)).

255. *Id.* at 606 (quoting Spayd v. Ringing Rock Lodge No. 665, 113 A. 70, 72 (Pa. 1921)). *Spayd* also stands for the proposition that article I, section 7 protects against not only government intrusion on the freedom of expression but also "private attempts to stifle political expression." *See* Kreimer, *supra* note 208, at 43.

256. *Pap's II*, 812 A.2d at 607 (quoting *Spayd*, 113 A. at 72).

Court should find independent state constitutional grounds to protect individual rights when the relevant federal law and interpretation is in a state of flux.[257]

Based on its application of *Edmunds*, the *Pap's II* court looked to article I, section 7 for the appropriate standard in expressive conduct cases.[258] The court found that under article I, section 7, strict scrutiny was appropriate because nude dancing counted as communication within Pennsylvania's free speech protections.[259] Thus, the court required the City of Erie to prove (1) a compelling state interest in the ban and (2) that the law was narrowly tailored to achieve that interest.[260] In keeping with its determination in *Pap's I*, the court held that the nudity ban was connected to Erie's compelling state interest in preventing sex crimes.[261] But the court then held, as it did in *Pap's I*, that the ban was not narrowly tailored, as "it [is] highly circuitous to prevent rape, prostitution, and other sex crimes by requiring a dancer in a legal establishment to wear pasties and a G-string before appearing on stage."[262] Thus, the Pennsylvania Supreme Court essentially restated its conclusion in *Pap's I*, but did so by relying exclusively on the broad protections of the Pennsylvania Constitution.[263]

3. The Pennsylvania Supreme Court Has Found Independent Protections for Political Speech Under Article I, Section 7

In *Commonwealth v. Tate*,[264] activists at Muhlenberg College in Allentown, Pennsylvania, were arrested and charged with defiant trespass after distributing leaflets protesting then-FBI Director Clarence Kelley, a visiting speaker at the college.[265] The activists sought and the college denied permission to distribute the leaflets the day before Director Kelley's visit.[266] The college did not have an

257. *See id.* at 611 ("As a matter of policy, Pennsylvania citizens should not have the contours of their fundamental rights under our charter rendered uncertain, unknowable, or changeable, while the United States Supreme Court struggles to articulate a standard to govern a similar federal question.").

258. *See id.* at 603–11 (stating that after review of the four *Edmunds* factors, "the distinct history of Article I, § 7, as well as the Pennsylvania policy concerns we have touched on above, convinces [the court] that there is nothing that requires, or even counsels [it], to view this ordinance in the light adopted by the U.S. Supreme Court plurality").

259. *Id.* at 612. The court also noted that strict scrutiny is appropriate for nude dancing, even though it was not political speech, indicating that political speech restrictions would almost certainly be subjected to strict scrutiny under article I, section 7. *See id.*

260. *See id.*

261. *Id.* at 612–13.

262. *Id.* at 613 (quoting *Pap's I*, 719 A.2d 273, 280 (Pa. 1998)).

263. *See id.* ("Since the legitimate governmental goals in this case may be achieved by less restrictive means, without burdening the right to expression guaranteed under Article I, § 7, we hold, as we did in *Pap's I*, that this ordinance is unconstitutional, albeit our holding now rests exclusively upon the Pennsylvania Constitution.").

264. 432 A.2d 1382 (Pa. 1981).

265. *Tate*, 432 A.2d at 1383–84.

266. *Id.* at 1384–85.

established system for permitting groups to distribute literature on campus, and college officials believed they could exercise that discretion arbitrarily.[267]

The court began its legal analysis by distinguishing First Amendment protections from the protections in article I, section 7, citing *William Goldman Theatres* for the proposition that prior restraints permitted under the First Amendment may still violate the Pennsylvania Constitution.[268] The court explained that First Amendment jurisprudence informed its article I, section 7 analysis because both clauses protect the free exchange of ideas and the ability to bring about political change:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. . . . [T]he alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.[269]

To determine whether the college's actions impermissibly infringed on the activists' article I, section 7 rights, the Pennsylvania Supreme Court reasoned that under "both this Commonwealth's great heritage of freedom and the compelling language of the Pennsylvania Constitution, . . . in certain circumstances, the state may reasonably restrict the right to possess and use property in the interests of freedom of speech, assembly, and petition."[270] Although the college could assert its property rights to regulate public access to its buildings, those regulations had to be reasonable; the college's regulations, however, were not.[271] The court explained that the college's terse regulation—that it could grant or deny permission at its discretion—was "governed by no articulated standards."[272] Such arbitrary regulations violated article I, section 7 because they provided those attending the event no guidance on whether their activity would be constitutionally protected speech or subject to a criminal trespass charge.[273]

---

267. *Id.* at 1386–87. The court then discussed *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). *Tate*, 432 A.2d at 1389. In *PruneYard*, the United States Supreme Court said that state constitutional provisions that permit speech on publicly accessible private property did not violate the Federal Takings Clause. *See PruneYard*, 447 U.S. at 82–83. Thus, the test is that the speech activity is allowed so long as it does not unreasonably impair the value or use of the private property. *See Tate*, 432 A.2d at 1389–90.

268. *See Tate*, 432 A.2d at 1388.

269. *See id.* (alteration in original) (quoting Cox v. Louisiana, 379 U.S. 536, 551–52 (1965)). The court pointed out one other remarkable difference between the two sources of protection: the First Amendment acted as a restriction on the power of the federal government, whereas "the rights of freedom of speech, assembly, and petition have been guaranteed . . . as inherent and 'invaluable' rights of man." *See id.*

270. *Id.* at 1390.

271. *See id.* at 1390–91.

272. *Id.*

273. *See id.* ("[T]he college could not, consistent with the invaluable rights to freedom of speech, assembly, and petition constitutionally guaranteed by this Commonwealth to its citizens, exercise its

The Pennsylvania Supreme Court again found independent state grounds to protect political speech in *DePaul v. Commonwealth*.[274] In *DePaul*, the Pennsylvania Supreme Court analyzed a statute banning individuals associated with licensed gambling from contributing to any political candidate, political campaign, or any group associated with a political candidate.[275] The plaintiff, Peter DePaul, held an ownership interest in Foxwoods Casino and actively supported political candidates in Bucks and Montgomery Counties.[276] DePaul sought relief under article I, section 7 because the federal constitutional authority on campaign contribution regulation was conflicted and Pennsylvania offered greater protection for expressive conduct than the Federal Constitution.[277] The Commonwealth argued that while article I, section 7 does offer broader expression protections than the First Amendment, the Pennsylvania Supreme Court should be persuaded by the United States Supreme Court's decisions *Nixon v. Shrink Missouri Government PAC*[278] and *Buckley v. Valeo*[279] and conclude that limits on campaign contributions could survive strict scrutiny.[280]

The *DePaul* court relied on article I, section 7 of the Pennsylvania Constitution to first hold that "political contributions are a form of non-verbal, protected expression."[281] Thus, in Pennsylvania, "legislative restriction upon the expressive conduct represented by political donations is subject to strict scrutiny."[282] The Commonwealth argued that preventing gambling licensees from contributing to political campaigns served the compelling state interest of preventing corruption.[283] To support this contention, the Commonwealth drew on decisions from Louisiana and New Jersey: both states' appellate courts upheld limitations on contributions from gambling licensees after conducting a strict scrutiny analysis.[284] The *DePaul* court disagreed and decided that a ban on campaign contributions was not narrowly tailored to prevent actual corruption

right of property to invoke a standardless permit requirement and the state's defiant trespass law to prevent appellants from peacefully presenting their point of view to this indisputably relevant audience in an area of the college normally open to the public.").

274. 969 A.2d 536 (Pa. 2009).

275. *DePaul*, 969 A.2d at 537–38.

276. *Id.* at 538–39.

277. *See id.* at 542. Under *Buckley v. Valeo*, 424 U.S. 1 (1976), intermediate scrutiny applies to limitations, rather than bans, on campaign contributions. *Buckley*, 424 U.S. at 633. Conversely, under *Pap's II*'s interpretation of the Pennsylvania Constitution, strict scrutiny applies to expressive conduct. *See Pap's II*, 812 A.2d 591, 612 (Pa. 2002).

278. 528 U.S. 377 (2000).

279. 424 U.S. 1 (1976).

280. *DePaul*, 969 A.2d at 544.

281. *Id.* at 548.

282. *Id.*

283. *Id.* at 545.

284. *Id.* at 545–46 (noting that the Commonwealth invoked *Casino Ass'n of Louisiana v. State*, 820 So.2d 494 (La. 2002), and *In re Petition of Soto*, 565 A.2d 1088 (N.J. Super. Ct. App. Div. 1989), to support its argument).

or the appearance of corruption because the Commonwealth could have simply limited contributions to a small amount.[285]

More recently, in *Working Families Party v. Commonwealth*,[286] the Commonwealth Court interpreted article I, section 7 and applied *DePaul* to uphold Pennsylvania's antifusion laws,[287] which prohibit political candidates from appearing on the ballot multiple times under more than one party.[288] The *Working Families Party* plaintiff was nominated by the Democratic Party as its candidate in the race for the General Assembly's 200th Legislative District.[289] Subsequently, the Working Families Party nominated the plaintiff as its candidate for the same race.[290] After the Pennsylvania Department of State rejected the second nomination paperwork, the Working Families Party filed suit.[291]

The Pennsylvania Commonwealth Court, after rejecting the Working Family Party's equal protection argument, turned to the claim that the antifusion laws violated article I, sections 5, 7, and 20 of the Pennsylvania Constitution.[292] After confirming that freedom of speech and association were fundamental rights,[293] the court said that the Commonwealth may "enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner."[294] This, the court explained, amounted to a balancing test that "weigh[s] the character and magnitude of the burden imposed by the provisions against the interests proffered to justify that burden."[295] On the one hand, the Working Families Party argued that the antifusion law denied it freedom of expression by preventing it from nominating the most attractive candidate and that voters were denied their freedom of expression rights by not being able to vote for the candidate as assigned to the Working Family Party.[296] On the other hand, the Commonwealth justified its antifusion law as necessary "to determine proper designations of political organizations in the next election cycle" and to prevent party raiding.[297]

---

285. *Id.* 552–53.

286. 169 A.3d 1247 (Pa. Commw. Ct. 2017).

287. *Working Families Party*, 169 A.3d at 1262. Fusion is the support of one political candidate by two or more parties, which typically involves a temporary alliance of two weaker parties against a stronger party and helps ensure that a dissenting citizen's vote will be more than mere protest. *See* Peter H. Argersinger, *"A Place on the Ballot": Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287, 288 (1980).

288. *Working Families Party*, 169 A.3d at 1251.

289. *Id.* at 1249.

290. *Id.*

291. *See id.* at 1250.

292. *Id.*

293. *Id.* at 1260.

294. *Id.* (quoting Banfield v. Cortés, 110 A.3d 155, 176–77 (Pa. 2015)).

295. *Id.* (citing Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997)).

296. *Id.*

297. *Id.* at 1263. The term party raiding refers to "when voters sympathetic with one party switch party allegiance and vote in the primary election of another party in order to influence or

The Pennsylvania Commonwealth Court, however, did not rely on Pennsylvania free expression jurisprudence to uphold the antifusion law.[298] While recognizing that the Pennsylvania Constitution provided greater speech and association protections than the Federal Constitution,[299] the court relied exclusively on *Timmons v. Twin Cities Area New Party*,[300] a United States Supreme Court decision that upheld a Minnesota antifusion law because (1) preventing a particular individual from appearing on the ballot as a particular party's candidate did not severely burden that party's associational rights and (2) political parties did not have "a right to use the ballot itself to send a particularized message, to its candidate and to the voters, . . . [because] [b]allots serve primarily to elect candidates, not as forums for political expression."[301] Applying *Timmons*, the Pennsylvania Supreme Court analyzed the antifusion law under a "less exacting review" that amounted to heightened—but not strict––scrutiny.[302]

B. An Article I, Section 7 Framework for Partisan Gerrymandering

With these background principles of Pennsylvania's free expression and association guarantees in mind, an article I, section 7 analysis could apply in instances of partisan gerrymandering that facially comply with the free and equal elections clause. This is because partisan gerrymandering (1) burdens free speech if voting is expressive conduct and (2) burdens Pennsylvanians' associational rights by diluting the strength of a citizen's vote based on their political party identity. To be clear, neither the Pennsylvania Supreme Court nor the United States Supreme Court has made such a connection.[303] But even the *League I* court recognized that its new free and equal elections protections may one day be insufficient to mitigate sophisticated instances of partisan gerrymandering.[304] A section 1, article 7 analysis solves that problem by targeting directly one of the

---

determine the outcome of that party's primary." William R. Kirschner, Note, *Fusion and the Associational Rights of Minor Political Parties*, 95 COLUM. L. REV. 683, 710 n.194 (1995).

298. *See Working Families Party*, 169 A.3d at 1260–64 ("Pennsylvania's Constitution provides greater protection of speech and associational rights than does its federal counterpart, but we are guided by the teachings of the United States Supreme Court on these rights. Further, where a party to litigation 'mounts an individual rights challenge under the Pennsylvania Constitution, the party should undertake an independent analysis' to explain why 'state constitutional doctrine should depart from the applicable federal standard.'" (citation omitted) (quoting DePaul v. Commonwealth, 969 A.2d 536, 541 (Pa. 2009))).

299. *Id.* at 1262.

300. 520 U.S. 351 (1997).

301. *Timmons*, 520 U.S. at 359, 362–63.

302. *See Working Families Party*, 169 A.3d at 1262 (quoting *Timmons*, 520 U.S. at 358).

303. *See League I*, 178 A.3d 737, 802 n.63 (Pa. 2018) (leaving open the question of whether partisan gerrymandering implicates Pennsylvania's free speech protections); Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL'Y REV. 471, 485 (2016).

304. *League I*, 178 A.3d at 817 ("We recognize, then, that there exists the possibility that advances in map drawing technology and analytical software can potentially allow mapmakers, in the future, to engineer congressional districting maps, which, although minimally comporting with these neutral 'floor' criteria, nevertheless operate to unfairly dilute the power of a particular group's vote for a congressional representative.").

principle harms of partisan gerrymandering: the frustration of democratic responsibility via the targeted erosion of individual rights.[305] This Part begins by describing how expressive conduct jurisprudence can apply to the act of voting.[306] After arguing that partisan gerrymandering is also a form of viewpoint discrimination, this Part offers a two-step framework for deciding when to apply strict scrutiny in challenges to congressional voting plans.[307] This Part then recommends using the efficiency gap statistic to measure the speech impact of partisan gerrymanders.[308] Finally, it outlines the doctrinal framework the Pennsylvania Supreme Court could use to expand its article I, section 7 jurisprudence beyond the federal protections guaranteed by the First Amendment.[309]

1. Voting as Expressive Conduct

The United States Supreme Court and the Pennsylvania Supreme Court consider voting a fundamental right.[310] Further, federal jurisprudence supports using the First Amendment to protect voters.[311] The Pennsylvania Supreme Court can and should use these federal principles as a framework for expanding article I, section 7 protection.[312] *Williams v. Rhodes*,[313] *Buckley v. Valeo*,[314] and *Doe v. Reed*[315] illustrate how the United States Supreme Court used the First Amendment to analyze issues related to ballot access, campaign contributions, and referendum petitions.

In *Williams*, the Supreme Court held that the Equal Protection Clause prohibited Ohio from passing laws that essentially prevented third parties from appearing on voting ballots.[316] As it did so, the Court made important gestures

---

305. *See* Issacharoff, *supra* note 2, at 605–09.

306. *See infra* Part III.B.1.

307. *See infra* Part III.B.2.

308. *See infra* Part III.B.3.

309. *See infra* Part III B.4.

310. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (describing the right to vote as a "fundamental political right" because it is "preservative of all rights"); *League I*, 178 A.3d 737, 803 (Pa. 2018) (describing the Pennsylvania Constitution's Declaration of Rights, which includes the right to vote, as "an enumeration of the fundamental individual human rights possessed by the people of this Commonwealth").

311. *See* Derfner & Hebert, *supra* note 303, at 485 ("The Court has repeatedly characterized the fundamental right to vote in terms of 'voice' and expression."); *see also, e.g.*, Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.").

312. *See* DePaul v. Commonwealth, 969 A.2d 536, 547 (Pa. 2009) (stating that First Amendment jurisprudence remained instructive for construing article I, section 7).

313. 393 U.S. 23 (1968).

314. 424 U.S. 1 (1976).

315. 561 U.S. 186 (2010).

316. *See Williams*, 393 U.S. at 30–34. The Court further stated that Ohio so heavily favored Republicans and Democrats that the pair enjoyed a virtual monopoly at the polls. *Id.* at 32. This monopoly troubled the Court, which wrote, "Competition in ideas and governmental policies is at the core of the electoral process and of the First Amendment freedoms." *Id.* In a concurring opinion,

tying the equal protection violation to the right to freely associate.[317] The case came to the Court after the Ohio American Independent Party and the Socialist Labor Party raised an equal protection claim challenging election laws that required political parties to submit petitions signed by at least 15% of the state's electorate before candidates from either party could appear on the ballot.[318] The majority decided the equal protection claim while recognizing that the election law also implicated the First Amendment.[319] It explained that laws regulating a political party's access to appear on the ballot burdened "two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."[320]

Further, the Supreme Court's decisions on campaign finance shed light on how the First Amendment is tied to voting and elections. In *Buckley*, the Court said that a "restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression."[321] Likewise, limitations of campaign contributions restrict the contributor's First Amendment right to association.[322] First Amendment rights providing such broad protections for campaign contributions should logically extend to the right to vote.[323]

The Supreme Court's First Amendment analysis on referendum petitions is perhaps the most illuminating. In *Reed*, signers of an anti-same-sex-marriage referendum in Washington State sought an injunction to keep their names from being released to the public following a public records request to the secretary of state.[324] In the course of holding that their names could be released, the Court said that the "compelled disclosure of signatory information on referendum petitions is subject to review under the First Amendment. *An individual expresses a view on a political matter when he signs a petition* . . . ."[325] And in a referendum context, where the petition may ultimately result in a change of law,

---

Justice Harlan said he would have rested his decision solely on the fact that Ohio's statute violated "the basic right of political association assured by the First Amendment." *Id.* at 41 (Harlan, J., concurring).

317. *See id.* at 34 (majority opinion) ("[T]he totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause.").

318. *Id.* at 24–26.

319. *See id.* at 30.

320. *See id.*

321. Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam).

322. *Id.* at 24–25.

323. *See* Derfner & Hebert, *supra* note 303, at 471 ("It seems like an obvious proposition that a citizen registering to vote or casting a ballot is engaging in free speech, a fundamental right entitled to full protection under the First Amendment to the United States Constitution. This simple proposition is especially fitting in light of the broad First Amendment protection extended to the dollars spent in political campaigns to influence votes.").

324. Doe v. Reed, 561 U.S. 186, 190–191 (2010). In Washington State, citizens can challenge laws directly by signing a petition to get a referendum on the statewide ballot. *Id.* at 190.

325. *Id.* at 194 (emphasis added).

the fact that an individual vote could be viewed simply as a vehicle for achieving a legal effect does not "deprive[] that activity of its expressive component."[326]

Reed is critical to understanding the dual nature of voting. On one hand, casting a secret ballot or signing a petition could be construed as not being speech because it is simply a functional way to tally the will of the majority and achieve a legislative end; that is, it is less an act of "interactive communication" and more a single message conveying a single fact in a legislative process.[327] On the other hand, the very nature of voting is an expression of a particular viewpoint or an expression of support for an individual or idea.[328] In participatory politics, the decision to vote by itself can be viewed as an expression of civic engagement and pride.[329] Armand Derfner and J. Gerald Herbert explained this duality: "Voting is therefore both a means of *achieving a particular end* and of *expressing an opinion* as to both the process and the desired end."[330]

2. Partisan Gerrymandering Is a Form of Viewpoint Discrimination

Although the previous discussion is by no means an expansive survey of the interplay between speech rights and election law, these federal cases should influence how the Pennsylvania Supreme Court analyzes challenges to congressional voting districts.[331] Should it do so, partisan gerrymandering claims should be decided under the existing federal viewpoint discrimination framework. Creating congressional voting districts that intentionally disfavor one political party is a form of viewpoint discrimination because it favors certain political parties by drawing voting districts that dilute the vote of other parties' supporters.[332] That is, illicitly drawn congressional voting districts impose burdens on voters of one party but not on voters of another party.[333] Those

326. *See id.* at 195. Washington State's argument was that signing a petition was "a legally operative legislative act" that did not raise any expressive conduct concerns. *Id.* That narrow view, which the Court dismissed, would also fail in the context of voting for congresspeople. *See id.*

327. *See id.* at 216 (Stevens, J., concurring) (quoting Meyer v. Grant, 486 U.S. 414, 422 (1988)).

328. *See* Derfner & Hebert, *supra* note 303, at 487.

329. *Id.* at 488.

330. *Id.*

331. *See* Working Families Party v. Commonwealth, 169 A.3d 1247, 1262 (Pa. Commw. Ct. 2017) ("Pennsylvania's Constitution provides greater protection of speech and associational rights than does its federal counterpart, but we are guided by the teachings of the United States Supreme Court on these rights.").

332. *See 2012 REDMAP Summary Report*, *supra* note 147 ("Drawing new district lines in states with the most redistricting activity presented the opportunity to solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade.").

333. *See* Lori A. Ringhand, *Voter Viewpoint Discrimination: A First Amendment Challenge to Voter Participation Restrictions*, 13 ELECTION L.J. 288, 291 (2014) ("[I]t is unexceptional to say that a law that on its face imposes burdens on Democratic voters but not on Republican voters would raise grave First Amendment concerns . . . [because] the First Amendment protects citizens from 'official retaliation based on their political affiliation,' and the freedom of 'belief and association' embodied in that Amendment, at the very least, prevents states from penalizing citizens because of their participation in the electoral process, or their association with a political party." (footnotes omitted)

burdens manifest in an individual's or political party's inability to meaningfully express their political views through voting.[334] Adopting a viewpoint discrimination framework would effectively extend Pennsylvania's independent speech protections to prohibit congressional districting plans that impose those burdens.

Generally, viewpoint discrimination occurs when a government regulation controls speech based on whether the government approves of the speech's content.[335] This is expressly prohibited by existing United States Supreme Court jurisprudence: "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."[336]

3. Application of Free Speech to Gerrymanders

With those background principles in mind, an article I, section 7 analysis would provide protection against partisan gerrymandering where the free and equal elections clause may not. This is because, as the *League I* court noted, partisan gerrymanders and vote dilution may still occur while adhering to neutral districting principles.[337] If voting is considered expressive conduct and partisan gerrymandering is a form of viewpoint discrimination, Pennsylvania courts can apply existing free speech jurisprudence to congressional voting districts that burden a voter's expressive conduct. In Pennsylvania, the *Pap's II* decision provides an independent state framework to analyze laws that burden expressive conduct. Indeed, if *Pap's II* stands for the protection of nude dancing as expressive conduct, it can also be a foundation for expressive conduct that is arguably more political: voting.

Under the *Pap's II* framework, laws that burden expressive conduct are subject to strict scrutiny, even in instances when the law is facially neutral. In the context of partisan gerrymandering, the framework applies strict scrutiny to congressional districting plans that burden the expressive value of the vote. The

---

(quoting League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 461 (2006) (Stevens, J., concurring in part and dissenting in part))).

334. *See* Issacharoff, *supra* note 2, at 605–09.

335. RODNEY A. SMOLLA, 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 3:9 (2018).

336. Matal v. Tam, 137 S. Ct. 1744, 1757 (2017) (alteration in original) (quoting Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993)); *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("Government action that stifles speech on account of its message . . . pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."); Hand v. Scott, 285 F. Supp. 3d 1289, 1294 (N.D. Fla. 2018) (stating that a process that allows elected officials the discretion to disenfranchise Republican felons while allowing Democratic felons to keep their right to vote would violate the First Amendment). *Hand* continued to discuss a common thread among association cases: a "deep[] avers[ion] to state laws, regulations, and schemes that threaten political associations by favoring one association—or political party—over others." *Id.* at 1296.

337. *See League I*, 178 A.3d 737, 817 (Pa. 2018) ("We recognize, then, that there exists the possibility that advances in map drawing technology and analytical software can potentially allow mapmakers, in the future, to engineer congressional districting maps, which, although minimally comporting with these neutral 'floor' criteria, nevertheless operate to unfairly dilute the power of a particular group's vote for a congressional representative.").

question then becomes: When does a congressional voting district impose such burdens? Below, this Comment offers a two-step test that identifies congressional districting plans that should be subject to strict scrutiny. Step one looks at legislative intent. Congressional districting plans drawn with overt partisan intent are subject to strict scrutiny. Step two looks beyond the legislative intent to partisan effects. Under step two, congressional districting plans displaying objective indicia of partisan intent are also subject to strict scrutiny.

a. Step One

The first step looks at express legislative intent. Legislative voting districts drawn with the express purpose of diluting a minority party's vote are subject to strict scrutiny. Express legislative intent would be drawn from the legislative record or from the plain language of the bill. For example, North Carolina state representative David Lewis told the North Carolina General Assembly that he thought "electing Republicans is better than electing Democrats" and proposed "draw[ing] the maps to give a partisan advantage to 10 Republicans and 3 Democrats."[338] To justify this overt discrimination, the legislature would have to show a compelling government interest in the burden, then show that the government action is narrowly tailored to achieve that interest.[339] Conversely, the 2011 Plan would pass step one because it did not containe language expressly targeting a political party, and its Republican sponsors say that the districts were drawn to disfavor Democrats.[340] To the contrary, Senator Hughes described Act 1249 as "a plan that is fair and balanced and creates opportunity on both sides of the political spectrum."[341]

b. Step Two

But what if a congressional districting plan is facially neutral? Step two applies when there is no evidence of the mapmakers' overt partisan intent but partisan effects remain. Suppose, for example, that congressional districting plans facially conform to neutral districting criteria. The hypothetical mapmakers may even tout their adherence to neutral, nonpartisan standards.

---

338. Robert Barnes, *Supreme Court Sends Case on North Carolina Gerrymandering Back to Lower Court*, WASH. POST (June 25, 2018), http://www.washingtonpost.com/politics/courts_law/supreme-court-sends-case-on-north-carolina-gerrymandering-back-to-lower-court/2018/06/25/03c1119e-787e-11e8-93cc-6d3beccdd7a3_story.html [http://perma.cc/4UVB-ZAQ8]. In the following election, Republicans won ten of thirteen congressional seats in North Carolina despite winning 50% of the statewide vote. Graham*, supra* note 41.

339. *Cf. Pap's II*, 812 A.2d 591, 612 (Pa. 2002) (holding that under article I, section 7, strict scrutiny applies to content-based burdens on expressive conduct).

340. *See* Congressional Redistricting Act of 2011, No. 2011-131, 2011 Pa. Laws 598, *invalidated by League I*, 178 A.3d 737 (Pa. 2018); 88 Pa. H. Leg. J. 2725, 2734 (2011); 74 Pa. S. Leg. J. 1361, 1405 (2011). Although Pennsylvania Republicans were careful to avoid making their intentions clear while passing the 2011 Plan, a step one analysis may apply in other voting contexts. *See* DALEY *supra* note 3, at 31. For example, ahead of the 2012 presidential election, Pennsylvania State Senate Majority Leader Dominic Pileggi (a Republican) advocated for a voter ID law by promising that such a law would "allow Governor Romney to win the state of Pennsylvania." *See id.*

341. 74 Pa. S. Leg. J. 1361, 1405 (2011).

Yet Democrats win 70% of Pennsylvania's congressional seats but only 49% of the statewide vote. This category contains the maps that the *League I* test and the free and equal elections clause do not reach. In the absence of overt partisan discrimination, the court would need to rely on other indicators that the map is suspect.

The court should look to other objective indicia of partisan intent. Professor Lori Ringhand offered four relevant objective indicia of improper voter discrimination masquerading as election laws: (1) self-dealing, (2) context, (3) outliers, and (4) discriminatory effects.[342]

Self-dealing occurs when one party enacts election laws to inure its own power at the cost of its opponent's power.[343] In the congressional redistricting context, self-dealing occurs when the party that creates the voting map benefits by amplifying its members' votes at the expense of the minority party.[344]

The context indicator applies when the standard legislative practices are abandoned to pass an election law.[345] The 2011 Plan is an apt example for weighing the context of the law. Republicans waited until the eve of the bill's vote to reveal the boundaries of each voting district.[346] This provided the minority party no chance to review the implications of the voting districts and no ability to amend the districts in any meaningful way.

The outlier indicator compares the challenged election law to others like it.[347] Historically, outlier voting districts featured unusual shapes that could not be explained using neutral districting principles.[348] This indicator may be relevant in Pennsylvania if neutral districting standards are bent but not broken. That is, a court may find the compactness, contiguousness, and respect for political subdivisions suspect but not unconstitutional under the free and equal elections clause.

The discriminatory effect indicator echoes the analysis from equal protection cases.[349] Rather than being required to show a party was completely shut out of the political process, a discriminatory effect can be shown by comparing how efficiently each party translates votes into congressional seats. This statistic, known as the efficiency gap, can capture in a single number the

342. Ringhand, *supra* note 333, at 306–08.

343. *See id.* at 306–07.

344. *Cf.* Rave, *supra* note 2, at 683 ("When insiders use the power of the state to manipulate the rules and institutions governing the political process, the resulting distortion of election outcomes undermines the democratic legitimacy of those institutions and the outcomes they produce.").

345. *See* Ringhand, *supra* note 333, at 307.

346. *League I*, 178 A.2d 737, 743 (Pa. 2018).

347. *See* Ringhand, *supra* note 333, at 307.

348. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 635, 657–58 (1993) (invalidating two North Carolina congressional districts that resembled a "bug splattered on a windshield" as impermissible racial gerrymanders).

349. *See* Ringhand, *supra* note 333, at 307–08. The analyses under the Equal Protection Clause and Pennsylvania's constitutional analogue are the same. *See supra* notes 145–68 and accompanying text.

extent of the discriminatory effect of a voting map.[350] Nicholas Stephanopoulos and Eric McGhee suggested measuring the efficiency gap between the voting power of the two major political parties.[351] According to Stephanopoulos and McGhee, the efficiency gap

> represents the difference between the parties' respective wasted votes in an election—where a vote is wasted if it is cast (1) for a losing candidate, or (2) for a winning candidate but in excess of what she needed to prevail. Large numbers of votes commonly are cast for losing candidates as a result of the time-honored gerrymandering technique of "cracking." Likewise, excessive votes often are cast for winning candidates thanks to the equally age-old mechanism of "packing." The efficiency gap essentially aggregates all of a district plan's cracking and packing choices into a single, tidy number.[352]

One of the benefits of the efficiency gap calculation is that it is based on actual election data, rather than hypothetical election results.[353]

The presence of some or all of the indicia provides an objective measure of when the map's speech and association burdens go too far.[354] In such situations, the map loses its presumption of constitutionality.[355] The mapmaker must show that the proposed districts further important government interests and do so by a means substantially related to that interest. An intermediate scrutiny approach has the doctrinal benefit of being congruent with how expressive conduct cases are analyzed by the United States Supreme Court.[356]

4. The Pennsylvania Supreme Court Should Apply Article I, Section 7 to Intentional Partisan Gerrymandering Cases

The Pennsylvania Supreme Court has embraced the New Federalism emphasis on state constitutions as a source of protection for individual rights.[357]

---

350. Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 834 (2015).

351. *See id.*

352. *Id.* (footnote omitted).

353. *See id.* at 834–35. The alternative measurement, partisan bias, uses hypothetical elections to determine how many seats each party would win if they each won exactly 50% of the statewide vote. *Id.* Chief Justice John Roberts, less than impressed during oral arguments in *Gill*, described the efficiency gap as "sociological gobbledygook." *See* Transcript of Oral Argument at 40, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161).

354. *See* Ringhand, *supra* note 333, at 308.

355. *See id.* at 309 (explaining that in cases "of legislative reliance on a constitutionally unacceptable consideration . . . the legislature forfeits the presumption of constitutional[ity] its laws usually enjoy and must demonstrate under a more skeptical judicial eye that the content neutral, non-discriminatory, constitutionally proper justifications offered in defense of the challenged law are in fact necessary to advance the law's non-suspect purpose").

356. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 377 (1980) (holding that the First Amendment requires laws burdening expressive conduct to serve a substantial government interest and to be sufficiently tailored to serve that interest).

357. *See* Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991); *see also* Thomas M. Hardiman, *New Judicial Federalism and the Pennsylvania Experience: Reflections on the* Edmunds *Decision*, 47 DUQ. L. REV. 503, 507–27 (2009) (describing the history of New Federalism in

In a 1991 decision, the Pennsylvania Supreme Court introduced a four-part framework for when to favor state constitutional rights rather than their federal counterparts.[358] This was considered transformative in Pennsylvania constitutional law.[359] As a result, Pennsylvania has repeatedly, though not universally, departed from federal jurisprudence to extend individual rights beyond the federal floor.[360] For example, *Edmunds* itself departed from federal Fourth Amendment doctrine by holding that the "'good faith' exception" to the exclusionary rule did not apply to article I, section 8 of the Pennsylvania Constitution.[361] Other post-*Edmunds* decisions depart from Sixth Amendment,[362] self-incrimination,[363] and double jeopardy jurisprudence.[364] Critically, the Pennsylvania Supreme Court has departed from its federal counterpart in interpreting speech rights[365] and interpreting campaign contribution limitations.[366]

The factors that were present in *Pap's II* and *DePaul* are present in claims of partisan gerrymandering. The first factor looks to the text of the Pennsylvania Constitution.[367] As the *Pap's II* court discussed, when compared to the First Amendment,

---

Pennsylvania). Judge Hardiman noted that although judges and academics historically touted the principle that states could interpret their constitutions independently from the Federal Constitution, many states did not start applying those principles until the Burger Court began to retreat from the earlier Warren Court-era protections of individual rights. *Id.* at 505–06.

358. *See Edmunds*, 586 A.2d at 895.

359. *See* Hardiman, *supra* note 357, at 509.

360. *See* Ken Gormley, *The Pennsylvania Constitution After* Edmunds, 3 WIDENER J. PUB. L. 55, 60–62 (1993); Hardiman, *supra* note 357, at 517. On the other hand, "Pennsylvania has been most active in departing from Supreme Court precedent in search and seizure cases arising under Article I, Section 8, while adhering to federal interpretations in most other areas of state constitutional law, including the Pennsylvania Constitution's analogues to the Fifth and Sixth Amendments." *Id.*

361. *Edmunds*, 586 A.2d at 905–06.

362. *Compare* Commonwealth v. One (1) 1984 Z–28 Camaro Coupe, 610 A.2d 36, 41 (Pa. 1992) (holding that property owners had a right under the Pennsylvania Constitution to a jury trial in civil forfeiture actions), *with* Libretti v. United States, 516 U.S. 29, 49 (1995) ("[T]he nature of criminal forfeiture as an aspect of sentencing compels the conclusion that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection.").

363. *Compare* Commonwealth v. Lewis, 598 A.2d 975, 981 (Pa. 1991) (holding that under the Pennsylvania Constitution, a failure to provide a "no-adverse-inference" jury instruction when a criminal defendant chooses not to testify will always amount to harmful error), *with* Carter v. Kentucky, 450 U.S. 288, 304 (1981) (declining to decide whether the refusal to provide a no-adverse-inference instruction will never be harmless).

364. *See* Commonwealth v. Smith, 615 A.2d 321, 326 (Pa. 1992) ("[I]t is arguable that the test enunciated by the United States Supreme Court . . . would bar appellant's retrial . . . . Regardless of what may be required under the federal standard, however, our view is that the prosecutorial misconduct in this case implicates the double jeopardy clause of the Pennsylvania Constitution.").

365. *See Pap's II*, 812 A.2d 591, 612–13 (Pa. 2002). See *supra* Part III.A.3 for a discussion about the Pennsylvania Supreme Court's departure from First Amendment jurisprudence on expressive conduct.

366. *See* DePaul v. Commonwealth, 969 A.2d 536, 545–48 (Pa. 2009). See *supra* Part III.A.3 for a discussion about the Pennsylvania Constitution's independent grounds for striking down limitations on campaign contributions.

367. Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991).

> Article I, § 7 is broader than the First Amendment in that it guarantees not only freedom of speech and the press, but specifically affirms the 'invaluable right' to the free communication of thoughts and opinions, and the right of 'every citizen' to 'speak freely' on 'any subject' so long as that liberty is not abused.[368]

Further, where the Pennsylvania Constitution contains an affirmative right to vote, the Federal Constitution is silent.[369]

The second factor looks at the "history of the provision, including Pennsylvania case-law."[370] The history of article I, section 7 shows that Pennsylvania has repeatedly found independent state constitutional grounds for protecting freedom of expression.[371] The third factor looks at "related case-law from other states."[372] On voting rights, states with constitutions remarkably similar to Pennsylvania's have provided more protection than mandated by the Federal Constitution.[373] Both Wisconsin and Pennsylvania passed voter identification laws, both had similar constitutional provisions guaranteeing the right to vote,[374] and both had their laws invalidated by their state courts as impermissible under their state constitutions.[375] Similarly, states have staked out political speech protections beyond the First Amendment's floor.[376] For

368. *Pap's II*, 812 A.2d at 603.

369. *Compare* PA. CONST. art. I, § 5 ("Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."), *and id.* art. VII, § 1, cl. 1 ("Every citizen 21 years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact."), *with* U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

370. *Edmunds*, 586 A.2d at 895.

371. *See Pap's II*, 812 A.2d at 605 ("The protections afforded by Article I, § 7 thus are distinct and firmly rooted in Pennsylvania history and experience. The provision is an ancestor, not a stepchild, of the First Amendment."); Kreimer, *supra* note 208, at 57 ("Pennsylvania's courts have elaborated their own written guarantees into a fabric which both provides independent protection, and illuminates the underpinnings of free expression in a democratic society.").

372. *Edmunds*, 586 A.2d at 895.

373. *See* League of Women Voters of Wis. Educ. Network, Inc. v. Walker, No. 11 CV 4669, 2012 WL 763586, at *4–5 (Wis. Cir. Ct. Mar. 12, 2012) (rejecting a statute that mandated photographic identification as a condition to voting as unconstitutional under the Wisconsin Constitution); *see also* Douglas, *supra* note 48, at 92–93 (noting that both Pennsylvania's and Wisconsin's constitutions provide greater voting rights than the Federal Constitution).

374. *See* Douglas, *supra* note 48, at 92–93. *Compare* WIS. CONST. art. III, § 1 ("Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district."), *with* PA. CONST. art. VII, § 1 ("Every citizen 21 years of age, possessing the following qualifications, shall be entitled to vote at all elections . . . .").

375. *See* Applewhite v. Commonwealth, No. 330 M.D.2012, 2014 WL 184988, at *18–24 (Pa. Commw. Ct. Jan. 17, 2014) (finding that Pennsylvania's voter identification law violated the Pennsylvania Constitution's article I, section 5 fundamental right to vote); *League of Women Voters of Wis.*, 2012 WL 763586, at *5 (finding that Wisconsin's voter identification law unconstitutionally abridged the right to vote found in article III, section 2 of the Wisconsin Constitution).

376. *See, e.g.*, Price v. State, 622 N.E.2d 954, 967 (Ind. 1993) (holding that free speech protections in the Indiana Constitution narrowed the interpretation of the state's disorderly conduct statute more than the First Amendment). For further discussion of state grounds for protecting

example, in *Price v. State*,[377] the Indiana Supreme Court invalidated the state's disorderly conduct statute to the extent that it burdened a protester's political speech—thus confirming that its state constitution "enshrine[d] pure political speech as a core value."[378]

The fourth *Edmunds* factor is "policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence."[379] Pennsylvania—once one of the most gerrymandered states in the country[380]—has an interest in preventing the harmful political entrenchment caused by partisan gerrymandering.[381] Further, Pennsylvania has a policy interest in ensuring democratic accountability—that is, the legitimacy of governmental power is rooted "in the fairness and propriety of the electoral process itself."[382] Because all the *Edmunds* factors are met, the Pennsylvania Supreme Court should find an independent state constitutional source to combat partisan gerrymandering.

IV. CONCLUSION

Pennsylvania must remain vigilant. Without meaningful federal protection, Pennsylvania can rely only on its state constitution as the source of a judicial solution for partisan gerrymandering. *League I*'s reliance on the free and equal elections clause is a promising first step—the newly drawn congressional districts resulted in a 9% drop in the pro-Republican efficiency gap during the 2018 congressional election.[383] But, as mapmaking technology becomes more sophisticated and as mapmakers gain access to greater voter information, reliance on neutral districting principles may not prevent intentional partisan gerrymandering. If future election data reveal that congressional voting districts result in the viewpoint discrimination of either political party, the court should revisit the possibility of a free expression solution. Not only would such a solution be consistent with, and responsive to, the free expression injury caused

political speech, see Stanley H. Friedelbaum, *Expressive Liberties in the State Courts: Their Permissible Reach and Sanctioned Restraints*, 67 ALB. L. REV. 655, 659–66 (2004).

377. 622 N.E.2d 954 (Ind. 1993).

378. *Price*, 622 N.E.2d at 963 (footnote omitted).

379. Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991).

380. *See* Emily Previti, *Why Pennsylvania Is Home to Some of the Nation's Worst Gerrymanders*, WITF (Nov. 13, 2017, 11:09 AM), http://www.witf.org/news/2017/11/why-pennsylvania-is-home-to-some-of-the-nations-worst-gerrymanders.php [http://perma.cc/SXG4-764F]; *see also* ROYDEN & LI, *supra* note 6, at 1 ("Michigan, North Carolina, and Pennsylvania consistently have the most extreme levels of partisan bias. Collectively, the distortion in their maps has accounted for seven to ten extra Republican seats in each of the three elections since the 2011 redistricting, amounting to one-third to one-half of the total partisan bias across the states we analyzed.").

381. Tokaji, *supra* note 3, at 2196 ("[O]ne can define partisan gerrymandering as the intentional manipulation of district lines to entrench one party and subordinate the other . . . ."); *see* Issacharoff, *supra* note 2, at 624 ("[T]his pattern of incumbent entrenchment has gotten worse as the computer technology for more exquisite gerrymandering has improved and political parties have ever more brazenly pursued incumbent protection.").

382. *See* Issacharoff, *supra* note 2, at 605–06.

383. Lieb, *supra* note 22.

by partisan gerrymandering, it would also find support in Pennsylvania's constitution, history, and established free expression jurisprudence.