

Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws

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American democracy is plagued by excessive partisanship, and yet constitutional law thus far has been incapable of redressing this ill. Gerrymandering is one clear example: the partisan distortion of legislative districts has accelerated dramatically in the last several decades, yet the federal judiciary has been unable to develop a constitutional standard for curbing this egregiously antidemocratic behavior. Likewise, state legislatures around the country in the last decade have been enacting statutes to cut back on voting opportunities, and federal courts have struggled with articulating appropriate standards for evaluating the constitutionality of these roll-back laws. A main reason for this struggle has been the judicial unwillingness to tackle directly the transparently partisan motives underlying these legislative cut-backs in voting opportunities.

This judicial difficulty with curtailing excessive partisanship stems from an attempt to rely on equal protection as the relevant constitutional standard for judicial review of election laws. Invocation of equal protection is understandable given the initial success of Warren Court precedents, like Reynolds v Sims and Harper v Virginia Board of Elections, in using equal protection to protect equal voting rights. But as the courts have subsequently discovered, equal protection is ill-suited to the

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problems of gerrymandering or legislation that cuts back on voting opportunities for all voters.

This Article offers a previously undeveloped alternative to equal protection: due process. In a wide range of areas, including civil and criminal procedure, the Supreme Court has long recognized that due process encompasses a principle of fair play. This fair play principle, well understood to apply in society to athletic competition, is suitable in the domain of politics for constraining excessive partisanship in electoral competition. In fact, the history of the Fourteenth Amendment's ratification reveals that this fair play principle played an essential role in constraining excessive partisanship that threatened to destabilize the Republic at the time the amendment's ratification was under consideration in Congress. Once the significance of this history is recognized, the Fourteenth Amendment's Due Process Clause is properly construed as constraining the partisan overreaching that currently threatens to undermine American democracy. In this way, the federal judiciary appropriately can invoke due process to directly redress excessive partisanship in the form of gerrymandering or rollbacks in voting opportunities.

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INTRODUCTION

Can the US Constitution, as currently written, handle the problem of excessive partisanship? Or, instead, does the Constitution

need to be amended to address this problem? That urgent issue is the focus of this Article.

Partisan overreaching takes different forms. Best known is the gerrymander: the deliberate manipulation of legislative district lines to increase a political party's chance of holding power in a legislative chamber.¹ But also pernicious is legislative alteration of voting rules, like eliminating the opportunity to register and cast a ballot at the same time—known as “same-day registration”—in the hope that this rule change will lower turnout of the opposing party's voters, thereby increasing the chances of electoral victory for one's own party.²

Partisan competition, as long as it stays within appropriate bounds, is a desirable feature of electoral democracy.³ Parties are

¹ For the history of congressional gerrymandering, see generally Erik J. Engstrom, *Partisan Gerrymandering and the Construction of American Democracy* (Michigan 2013). For a richly detailed study of gerrymandering as practiced in the Gilded Age after the Civil War, see generally Peter H. Argersinger, *Representation and Inequality in Late Nineteenth-Century America: The Politics of Apportionment* (Cambridge 2012). For a useful introductory survey of contemporary issues concerning gerrymandering in light of its historical development, still valuable despite now being somewhat dated, see generally David Butler and Bruce Cain, *Congressional Redistricting: Comparative and Theoretical Perspectives* (Macmillan 1992).

² These legislative changes to election laws are part of what has come to be known as the contemporary “voting wars.” Richard L. Hasen, *The Voting Wars: From Florida 2000 to the Next Election Meltdown* 41–73 (Yale 2012); Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 *Geo Wash L Rev* 1865, 1870–78 (2013). My own prior contribution to this topic includes Edward B. Foley, *Voting Rules and Constitutional Law*, 81 *Geo Wash L Rev* 1836 (2013). For a recent discussion of same-day registration (also called “election day registration” when referring specifically to simultaneous registration and voting on Election Day itself, in contrast to early voting), see Sean J. Young, *The Validity of Voter Registration Deadlines under State Constitutions*, 66 *Syracuse L Rev* 289, 291–95 (2016).

³ The Framers of the federal Constitution obviously did not think so. As is well-known to any student of American history, the Framers hoped that through the separation of powers they could prevent political factions from coalescing into the kind of entrenched two-party competition that occurred between Whigs and Tories in Britain. Of course, their constitutional design quickly failed in this respect, with two-party competition between Federalists and Jeffersonian Republicans becoming well-developed by the disastrous presidential election of 1800. Although Founders such as James Madison had become resigned to the presence of two-party competition by this time, they still did not view this two-party competition as a desirable feature of democracy. Rather, the goal of both Federalists and Jeffersonian Republicans was to obliterate the opposing party's existence, not merely defeat its candidates for office. It was not until the development of America's second party system, with the political competition now between Whigs and Jacksonian Democrats, that the leading participants accepted this two-party competition as a healthy feature of a robust electoral democracy. For the development of this acceptance, including President Martin van Buren's important role in its fruition, see Richard Hofstadter, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780–1840* 212–71

in the business of winning elections, and the existence of two (or more) parties vying vigorously for support among voters is a healthy sign of political freedom. Each party has different views on matters of public policy, and each hopes to convince voters that its views are preferable, at least for the immediate future. One would expect the fight between parties in the effort to prevail at the ballot box to be energetic and robust.⁴

But this partisan competition spills over into an unhealthy domain when one party is able to capture the operation of the electoral process itself and to use this control to give itself an advantage in the competition to win votes.⁵ This unfair advantage is a subversion of democracy because it interferes with the authentic electoral choice that the voters otherwise would make.⁶ Absent the unfair advantage, no party would have power over the electoral choice, and if the electoral system were otherwise working properly, voters would freely elect the candidates they most wished to represent them. Partisan control over the electoral process distorts this free choice, causing voters to elect candidates they would not have picked in the absence of this partisan distortion.

A well-designed constitution would prevent this kind of partisan control over the electoral process. It would do so through some sort of institutional arrangement whereby the government

(California 1970). I have recently explored this development in the specific context of disputes over electoral outcomes. See Edward B. Foley, *Ballot Battles: The History of Disputed Elections in the United States* 75–97 (Oxford 2016).

⁴ For a leading contemporary account of the essential role that political parties currently play in American democracy, see John H. Aldrich, *Why Parties? A Second Look* 163–292 (Chicago 2011). Professor Richard H. Pildes has prominently made a vigorous defense of political parties a key theme of his recent election law scholarship. See Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 *Yale L J* 804, 828–33 (2014). See also *Davis v Bandemer*, 478 US 109, 144–45 (1986) (O'Connor concurring in the judgment) (“There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government.”).

⁵ See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 *Harv L Rev* 593, 617–30 (2002) (employing an antitrust model to analyze the harm to electoral competition from excessive partisanship). See also Justin Levitt, *The Partisanship Spectrum*, 55 *Wm & Mary L Rev* 1787, 1793–1810 (2014) (distinguishing different forms of beneficial and pernicious partisanship in a democracy).

⁶ A well-functioning electoral democracy strives to “secur[e] the selection of representatives that as fully as possible stand for the ‘free and uncorrupted choice of those who have the right to take part in that choice.’” Issacharoff, 116 *Harv L Rev* at 648 (cited in note 5), quoting *Ex Parte Yarbrough*, 110 US 651, 662 (1884). For a theoretically sophisticated explication of this “alignment” principle—designing electoral rules so that the results of the electoral process align as much as possible with the inputs that the electorate submits in the form of ballots cast—see Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 *Colum L Rev* 283, 304–13 (2014).

bodies empowered to operate the electoral process would be structured in a way to prevent one party from controlling them.⁷ This arrangement might explicitly give two parties equal power over the electoral process, so that they mutually prevent each other from monopolizing the process.⁸ Or the arrangement might be more nonpartisan in nature, keeping the parties at arm's length from the levers of the electoral machinery.⁹ But whatever particular institutional arrangement would be employed, the constitution would block a party's ability to take over the procedures for running elections.

The US Constitution famously lacks an explicit institutional arrangement of this type. It does so because the Framers were hoping to avoid the development of political parties in the first place.¹⁰ No institutional check on a party's ability to control elections would be necessary if parties did not exist.

But of course it did not work out that way. Political parties very much do exist in America's system of electoral democracy. They have existed for almost as long as the ink has been dry on the original Constitution itself,¹¹ and they obviously are not going to disappear—at least not in the foreseeable future, and most likely not as long as the First Amendment guarantees political freedom.

Thus, the question arises: Is the US Constitution inherently flawed insofar as it contains no mechanism for constraining the

⁷ On the essential role of sound institutional design in the regulation of the electoral process, see Heather K. Gerken, *The Democracy Index: Why Our Election System Is Failing and How to Fix It* 11–37, 110–33 (Princeton 2009). See also Richard L. Hasen, Book Review, *Election Administration Reform and the New Institutionalism*, 98 Cal L Rev 1075, 1085–98 (2010); Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 Yale L & Pol Rev 125, 143–53 (2009). I have also explored these issues of institutional design. See Edward B. Foley, *The Separation of Electoral Powers*, 74 Mont L Rev 139, 146–62 (2013).

⁸ The Federal Election Commission is structured along this model, illustrating the problem of bipartisan control without a tiebreaking mechanism. See Eric Lichtblau, *F.E.C. Can't Curb 2016 Election Abuse, Commission Chief Says* (NY Times, May 2, 2015), online at <http://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html> (visited Sept 25, 2016) (Perma archive unavailable).

⁹ See, for example, Daniel P. Tokaji, *America's Top Model: The Wisconsin Government Accountability Board*, 3 UC Irvine L Rev 575, 577–78 (2013) (praising Wisconsin's Government Accountability Board for its nonpartisan structure). Regrettably, partisan conflict over voting in Wisconsin has overtaken the GAB, as the state legislature has replaced it with a more politically accountable institution. See Scott Bauer, *Wisconsin GAB in Final Days as State's Elections Authority* (Milwaukee Journal Sentinel, June 26, 2016), archived at <http://perma.cc/QD55-2C43>.

¹⁰ See note 3.

¹¹ Hofstadter, *The Idea of a Party System* at 1–39 (cited in note 3).

ability of a political party to capture control over the electoral process? Will the Constitution remain defective in this respect until it is amended to include the institutional mechanism that it has lacked since the outset? Or, alternatively, despite having no such explicit institutional mechanism, does the existing Constitution have the capacity to be interpreted in such a way as to make up for this apparent structural deficiency?

Over the last several decades there has been an effort to construe the Constitution's Equal Protection Clause to fill this gap. Equal protection has been invoked in an effort to constrain partisan gerrymanders.¹² Equal protection has also been invoked as grounds for invalidating legislation that alters voting rules to give one party an electoral advantage.¹³

But equal protection has run into difficulties when invoked in this way.¹⁴ In the context of partisan gerrymandering, Justice Antonin Scalia memorably intoned that equal protection was incapable of providing a judicially manageable standard.¹⁵ And equal protection has similarly stumbled when attempting to provide a principled standard for constraining partisan manipulation of voting rules.¹⁶

This Article offers an alternative to equal protection. Due process, instead, provides a more promising basis for constraining partisan overreach. Due process embodies the principle of fair play, and fair play is an appropriate concept to employ as a constraint on excessive partisanship. Moreover, a return to the historical circumstances in which the Fourteenth Amendment was added to the Constitution provides compelling justification for

¹² Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 *Cornell J L & Pub Pol* 397, 402–07 (2005); Samuel Issacharoff and Pamela S. Karlan, *Where to Draw the Line? Judicial Review of Political Gerrymanders*, 153 *U Pa L Rev* 541, 543–64 (2004).

¹³ Hasen, 81 *Geo Wash L Rev* at 1880–85 (cited in note 2). See also Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 *Harv CR–CL L Rev* 439, 442–47 (2015) (discussing § 2 of the Voting Rights Act as an alternative to equal protection as a basis for challenging these laws insofar as they are racially discriminatory in the burdens they impose).

¹⁴ See Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 *Tex L Rev* 1643, 1669–88 (1993).

¹⁵ See *Vieth v Jubelirer*, 541 US 267, 305 (2004) (Scalia) (plurality) (“We conclude that neither Article I, § 2, nor the Equal Protection Clause, nor (what appellants only fleetingly invoke) Article I, § 4, provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting.”).

¹⁶ See Foley, 81 *Geo Wash L Rev* at 1854–59 (cited in note 2) (discussing the difficulties that lower courts had in applying equal protection precedents to voting procedures litigation in 2012).

construing the Amendment's Due Process Clause as embodying a constraint against partisan overreaching. Once this history is understood, this Article shows how judicial enforcement of due process as fair play can work to invalidate both partisan gerrymanders and legislative changes to voting laws aimed at securing an unfair partisan advantage.¹⁷

At the outset, it is important to be explicit about what kind of exercise in constitutional interpretation this Article engages in. It is not a narrowly confined reading of the text, seeking the most limited reading that its words will bear, an approach Professor Ronald Dworkin called "conventionalism"¹⁸ and for which Scalia

¹⁷ This Article, broadly speaking, shares some basic goals with Professor Richard E. Levy's new essay. See generally Richard E. Levy, *The Nonpartisanship Principle*, 25 Kan J L & Pub Pol 377 (2016). But the approach here differs from Levy's in some important details. First of all, Levy states his nonpartisanship principle much too broadly when he writes, for example, "partisan electoral rules violate freedom of speech." Id at 378. On the contrary, much of American election law is structured according to party affiliation. For example, primary elections are inherently partisan, and state laws can, without violating the First Amendment, require candidates and voters to be party members in order to participate in the partisan primary. Indeed, it can violate the First Amendment if state law fails to honor a political party's wishes to limit participation to party members. See *California Democratic Party v Jones*, 530 US 567, 572–82, 586 (2000).

Similarly, state laws that regulate access to the general election ballot can distinguish between major-party and minor-party, or independent, candidates. See *Mandel v Bradley*, 432 US 173, 177–78 (1977) (per curiam) (holding that an early filing deadline that applied only to independent candidates was not per se unconstitutional). While it is true, as Levy observes, that state law cannot make ballot access unduly restrictive, there is no constitutional requirement of strict nondiscrimination between major and minor parties, and Levy's nonpartisanship principle is not sufficiently nuanced to distinguish between legitimate and illegitimate considerations of partisanship. See id, quoting *Storer v Brown*, 415 US 724, 742 (1974) (holding that the proper standard was whether "a reasonably diligent independent candidate [could] be expected to satisfy the . . . requirements"). The same point applies to a legislature's consideration of party membership when allocating seats on a legislative committee, for example. See generally Judy Schneider, *Committee Assignment Process in the U.S. Senate: Democratic and Republican Party Procedures* (Congressional Research Service, Nov 3, 2006), archived at <http://perma.cc/4XM3-UKQY>. It is simply too strong a statement to say that the government must be strictly nonpartisan in its regulation of political competition. See Levy, 25 Kan J L & Pub Pol at 382–86, 399–402 (cited in note 17).

Levy falters in this respect because, like others before him, he has attempted to rely on equal protection as well as free speech as the two constitutional sources for a constraint on partisanship. But neither of those constitutional sources provides a basis for distinguishing permissible from excessive partisanship. Levy does not consider due process as an alternative. It is the distinctive contribution of this Article to show that due process, and the principle of fair play that it embodies, provides a basis for constraining partisan overreaching. The idea of fair play accepts a large degree of partisanship in politics, but steps in when partisanship goes too far. In this respect, it is a more advantageous constitutional ground on which to proceed, rather than Levy's mistaken attempt to rely on either equal protection or the First Amendment. See id at 378–88.

¹⁸ Ronald Dworkin, *Law's Empire* 94–96 (Belknap 1986).

has arguably been the most influential advocate during the last quarter century. Nor does this Article advocate the kind of utopian approach to constitutional interpretation associated with Justice William Brennan and such theorists as Professors David Richards, Lawrence Sager, and James Fleming, among many others, which endeavors to identify philosophically pure principles of equality and liberty and then employ the “equal protection” and “liberty” clauses of the Constitution as vessels for imposing those philosophically pure principles on a reluctant Republic.¹⁹

Instead, the Article endeavors to provide a version of the middle ground approach that Dworkin labeled “law as integrity,”²⁰ which attempts to construct the best “fit” with the country’s historical record and trajectory, including the totality of its judicial precedents and the most sensible system of law to which those precedents collectively point.²¹ As Dworkin explained, finding the best “fit” requires viewing the existing historical record “in the best light” and thus bringing to that historical record some moral judgment about what understanding of that record would be most attractive.²² Yet at the same time, Dworkin insisted, for the exercise to be one of *interpretation*, the constraint of *fit* must be genuine. The interpretative understanding of the historical record must be authentic, true to the history itself, and not a distorted imposition of “presentist” values upon the historical record, which cannot bear the weight of that imposition.²³

The understanding of the Due Process Clause that this Article advances—that due process encompasses a principle of fair play that constrains excessive partisanship—is an exercise of Dworkin’s middle ground “law as integrity” approach. It is an

¹⁹ See, for example, James E. Fleming, *Securing Constitutional Democracy: The Case of Autonomy* 61–85 (Chicago 2006) (developing a “Constitution-perfecting theory”); Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* 42–57 (Yale 2004); David A.J. Richards, *Toleration and the Constitution* 296–303 (Oxford 1986). Fleming’s more recent work, however, is arguably more accepting of the necessary gap between what an ideal constitution would provide and what is properly justifiable as a matter of interpreting the actual Constitution that we have. See generally, for example, James E. Fleming, *Fidelity to Our Imperfect Constitution: For Moral Readings and against Originalisms* (Oxford 2015).

²⁰ Dworkin, *Law’s Empire* at 225 (cited in note 18) (describing the concept as one that “insists that legal claims are interpretive judgments and therefore combine backward- and forward-looking elements”).

²¹ See *id.* at 239 (“The judge’s decision—his postinterpretive conclusions—must be drawn from an interpretation that both fits and justifies what has gone before.”).

²² *Id.* at 256–57.

²³ See *id.* at 255 (noting that the “brute facts of legal history” will constrain the judge’s decision-making process).

interpretation of due process that emerges from the historical record itself and, constrained by the obligation of *fit*, aims at an authentic understanding of that record. At the same time, as an exercise of *interpretation*, it seeks to understand the totality of the historical record in its best light, and this understanding is not necessarily the same one that the historical actors themselves would have had at the moment they engaged in historically significant conduct. Due process as embodying a constraint against partisan overreaching is an interpretation we today make of the existing historical record, because it is an interpretation that makes the most sense of the Constitution we have been bequeathed and which we must use to conduct our politics for the foreseeable future, until we have the capacity to amend it for the better. This interpretative exercise pursuant to “law as integrity” does not yield the most just possible constitution for contemporary America, or even the most democratic possible constitution. Rather, it yields an interpretation that is true to the existing Constitution’s text and historical circumstances, with those historical circumstances seen in their best light given the use we must make of the Constitution to govern partisan competition as it exists today.

I. EQUAL PROTECTION AND PARTISANSHIP

A. Gerrymandering

After the Warren Court’s “reapportionment revolution,”²⁴ in which the Court used the Fourteenth Amendment’s Equal Protection Clause to require states to redistrict their legislatures every decade to maintain constituencies of roughly equal population, opponents of partisan gerrymandering thought that this equal protection jurisprudence could be extended to invalidate gerrymandered maps even if they complied with the Court’s equal population requirement. In seeking this jurisprudential extension, however, the antigerrymandering plaintiffs encountered difficulties not experienced by those who had achieved the initial reapportionment victories.

²⁴ See generally Michael E. Solimine, Book Review, *The Causes and Consequences of the Reapportionment Revolution*, 1 Election L J 579 (2002). The key case is *Reynolds v Sims*, 377 US 533, 577 (1964) (holding that “the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable”).

In *Davis v Bandemer*,²⁵ the Supreme Court fractured badly over how to handle a claim that the gerrymandering of Indiana's legislature violated equal protection. Four justices, led by Justice Byron White (and including Justices Brennan, Thurgood Marshall, and Harry Blackmun), were willing to consider in principle that gerrymandering might violate equal protection but articulated a standard so stringent that no plaintiff would have a realistic chance to prevail.²⁶ Three justices, led by Justice Sandra Day O'Connor (with Chief Justice Warren Burger and Justice William Rehnquist), were prepared to rule categorically that claims of partisan gerrymandering are "nonjusticiable political question[s]," meaning that as a matter of law no plaintiff ever would be entitled to prevail.²⁷ Only two justices—Justices Lewis Powell and John Paul Stevens—were prepared to adopt an approach that would cause the Equal Protection Clause to operate as a meaningful constraint on partisan gerrymandering.²⁸

Two decades later, in *Vieth v Jubelirer*,²⁹ the Court was even more fractured over the applicability of equal protection to the problem of partisan gerrymanders. This time four justices, with Justice Scalia writing (joined by Rehnquist, O'Connor, and Justice Clarence Thomas), thought that these claims were categorically precluded from judicial review as nonjusticiable political questions.³⁰ Four other justices (Stevens and Justices David Souter,

²⁵ 478 US 109 (1986).

²⁶ The standard that the *Bandemer* plurality articulated was that to prevail a plaintiff would need to show that "an electoral system has been arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 142–43 (White) (plurality) (quotation marks omitted). The plurality itself observed that proving this would be difficult, especially because redistricting every ten years would generate new maps, starting the clock all over again on whether a map resulted in "consistently degrad[ing]" electoral opportunities. *Id.* at 139–43 (White) (plurality). As Justice Scalia's plurality opinion observed in *Vieth v Jubelirer*, 541 US 267 (2004), no plaintiff was successful in winning a gerrymandering claim under this standard in the eighteen years between the two cases. *Id.* at 279–80 (Scalia) (plurality).

²⁷ *Bandemer*, 478 US at 144 (O'Connor concurring in the judgment) ("I would hold that the partisan gerrymandering claims of major political parties raise a nonjusticiable political question that the judiciary should leave to the legislative branch as the Framers of the Constitution unquestionably intended.").

²⁸ See *id.* at 165 (Powell concurring in part and dissenting in part) ("[T]he merits of a gerrymandering claim must be determined by reference to the configurations of the districts, the observance of political subdivision lines, and other criteria that have independent relevance to the fairness of redistricting."). The dissenters would have affirmed the district court's finding that the Indiana legislature had perpetrated an unconstitutional gerrymander. *Id.* at 184–85 (Powell concurring in part and dissenting in part).

²⁹ 541 US 267 (2004).

³⁰ See *id.* at 281 (Scalia) (plurality) ("[N]o judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them,

Ruth Bader Ginsburg, and Stephen Breyer) thought that these claims should be justiciable, but they could not agree on a standard for making them so and instead, among the four, wrote three separate opinions offering three different standards.³¹ Justice Anthony Kennedy, speaking solely for himself, wrote an eyebrow-raising opinion in which he said that he was unprepared to hold these claims categorically precluded as political questions but that at the same time he was unable to identify a principle by which to render them justiciable.³² Essentially, Kennedy was declaring that he was going to stay sitting on the fence, a position for which Scalia excoriated him on the ground that fence-sitting was not an available option for a federal judge, who instead is obligated to decide under Federal Rule of Civil Procedure 12(b)(6) whether a claim alleged in a complaint either has or lacks legal merit.³³

we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.”). In so holding, Scalia for the plurality did not disagree with Stevens’s conclusion that “severe partisan gerrymanders violate the Constitution”; he just insisted that courts were incapable of identifying “when a violation has occurred.” Id at 292 (Scalia) (plurality). The distinctive due process approach set forth in this Article, because it relies on a specifically historical measure for identifying unconstitutional gerrymanders (as explained in Part III), supplies the standard that Scalia found missing in the equal protection analysis conducted in *Vieth*.

³¹ Breyer would have adopted a statewide test to see if an entire legislative map perpetrated “unjustified entrenchment” of the mapmaking party. Id at 360–62 (Breyer dissenting). By contrast, Stevens and Souter offered different ways to challenge a specific district within an overall map. Compare id at 335, 339 (Stevens dissenting), with id at 347–53 (Souter dissenting). Scalia responded with extensive point-by-point critiques of all three alternatives offered by the dissenters. Id at 292–95 (Scalia) (plurality) (critiquing Stevens’s position); id at 295–98 (Scalia) (plurality) (critiquing Souter’s position); id at 299–301 (Scalia) (plurality) (critiquing Breyer’s position).

³² Id at 306–17 (Kennedy concurring in the judgment). First, Kennedy made clear that he agreed with the plurality that no one—not the plaintiffs, the dissenters, or the *Bandemer* justices—had yet been able to identify a judicially manageable standard for adjudicating a partisan gerrymandering claim, and accordingly, the plaintiff’s complaint must be dismissed: “Because, in the case before us, we have no standard by which to measure the burden appellants claim has been imposed on their representational rights, appellants cannot establish that the alleged political classifications burden those same rights.” Id at 313 (Kennedy concurring in the judgment). But then Kennedy went on to say that he was not ruling out the possibility of identifying such a judicially manageable standard in the future: “If workable standards do emerge to measure these burdens, however, courts should be prepared to order relief.” Id at 317 (Kennedy concurring in the judgment).

³³ *Vieth*, 541 US at 301–05 (Scalia) (plurality). One can easily imagine Scalia’s blood pressure rising as he wrote these words:

The first thing to be said about Justice Kennedy’s disposition is that it is not legally available. . . . [I]t is *our* job, not the plaintiffs’, to explicate the standard that makes the facts alleged by the plaintiffs adequate or inadequate to state a claim. We cannot nonsuit *them* for our failure to do so.

A couple of years after *Vieth*, despite Scalia's protestations, Kennedy continued to sit on the fence. In *League of United Latin American Citizens v Perry*³⁴ ("LULAC"), a case involving an equal protection challenge to Texas's decision to redistrict its legislative map in the middle of the decade, Kennedy agreed with Scalia and three others (Chief Justice John Roberts, Thomas, and Justice Samuel Alito) that the plaintiffs had failed to present a judicially feasible theory on which to invalidate Texas's partisan gerrymander.³⁵ At the same time, however, Kennedy joined with the four other justices (Stevens, Souter, Ginsburg, and Breyer) to announce that he was continuing to hold out hope that some sort of judicially feasible theory might be developed in the future.³⁶ Meanwhile, these four justices continued to offer alternative theories in dissent, although once again they could not agree on a theory to embrace. As in *Vieth*, these four justices produced three separate opinions, propounding three approaches that not only differed among themselves but significantly differed from the various alternatives that the same four justices had advanced only a couple of years earlier in *Vieth*.³⁷

The problem confronting these four justices, along with anyone else who wants to invalidate partisan gerrymandering on equal protection grounds, is conceptual.³⁸ What exactly is *unequal* about partisan gerrymandering? It is possible to achieve a partisan gerrymander with districts with precisely the same number

Id at 301 (Scalia) (plurality). Scalia went on to elaborate the legal impossibility of Kennedy's fence-sitting, ending with this crescendo: "We can affirm because political districting presents a nonjusticiable question; or we can affirm because we believe the correct standard which identifies unconstitutional political districting has not been met; we cannot affirm because we do not know what the correct standard is." Id at 305 (Scalia) (plurality).

³⁴ 548 US 399 (2006).

³⁵ See id at 423 (Kennedy) (plurality) ("We conclude that appellants have established no legally impermissible use of political classifications. For this reason, they state no claim on which relief may be granted for their statewide challenge."); id at 492 (Roberts concurring in part, concurring in the judgment in part, and dissenting in part, joined by Alito) ("I agree with the determination that appellants have not provided 'a reliable standard for identifying unconstitutional political gerrymanders.'"); id at 511 (Scalia concurring in the judgment in part and dissenting in part, joined by Thomas) (adhering to the view articulated in *Vieth* that "no party or judge has put forth a judicially discernible standard by which to evaluate" "claims of unconstitutional partisan gerrymandering").

³⁶ Writing for the Court, Kennedy asserted, "A plurality of the Court in *Vieth* would have held such challenges to be nonjusticiable political questions, but a majority declined to do so. We do not revisit the justiciability holding." Id at 414 (citations omitted).

³⁷ Id at 475–77 (Stevens concurring in part and dissenting in part); id at 483 (Souter concurring in part and dissenting in part, joined by Ginsburg); id at 492 (Breyer concurring in part and dissenting in part).

³⁸ See Issacharoff, 71 Tex L Rev at 1669–75 (cited in note 14).

of individuals (or voters) residing in each.³⁹ Thus, partisan gerrymandering is not an affront to the constitutional principle that each member of the legislature represents the same number of citizens.

In *LULAC*, relying on an amicus brief submitted on behalf of several political scientists, Stevens argued that a districting map with a built-in bias in favor of one of the two major political parties (and against the other major party) potentially violates equal protection.⁴⁰ The political scientists had proposed something called “the symmetry standard” as a way to measure a map’s built-in partisan bias.⁴¹ Essentially, a map is symmetrical if each party receives the same number of seats in the legislature as a result of receiving the same number of votes for its candidates.⁴² For example, if Democrats get 57 percent of legislative seats when Democratic candidates for these seats receive 52 percent of votes statewide, and Republicans get 57 percent of legislative seats when Republican candidates for these seats receive 52 percent of votes statewide (obviously in a different election from the one in which the Democrats win this same percentage), then the map is symmetrical with respect to both parties in terms of their ability to translate votes into seats. (In this example, both parties get a 5 percent boost in translating votes into seats when they receive 52 percent of the vote.) Conversely, if Democrats get 57 percent of legislative seats when their candidates receive 52 percent of the votes, but Republicans get only 48 percent of the seats when their candidates receive 52 percent of the votes, then the map is asymmetrical. Democrats do much better than Republicans in terms of legislative seats as a result of receiving the same percentage of votes: 57 percent of seats for Democrats, but only 48 percent of seats for Republicans.

The symmetry standard has obvious superficial appeal in the effort to tie gerrymandering to an equal protection violation. Asymmetry seems to be a form of inequality. Even Kennedy in his own *LULAC* opinion was willing to acknowledge that the symmetry standard might have some “utility in redistricting planning and litigation.”⁴³

³⁹ See Issacharoff and Karlan, 153 U Pa L Rev at 545–47 (cited in note 12).

⁴⁰ *LULAC*, 548 US at 466 (Stevens concurring in part and dissenting in part).

⁴¹ *Id.* (Stevens concurring in part and dissenting in part). See also Bernard Grofman and Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after LULAC v. Perry*, 6 Election L J 2, 6–20 (2007).

⁴² Grofman and King, 6 Election L J at 6 (cited in note 41).

⁴³ *LULAC*, 548 US at 420 (Kennedy) (plurality).

Nonetheless, as Kennedy also observed, “asymmetry alone is not a reliable measure of unconstitutional partisanship.”⁴⁴ The reason is that perfectly appropriate maps, without any trace of gerrymandering, might be asymmetrical. Given the way Democrats and Republicans sort themselves geographically in many states, with Democrats concentrated in urban areas and Republicans spread out in rural or exurban ones, a map reflecting this differential population density would make it more difficult for Democrats to translate votes into seats than for Republicans to do so.⁴⁵ When Democrats win 52 percent of the votes, these votes are confined to fewer urban districts, whereas when Republicans win 52 percent of the votes, they have the effect of winning a broader set of nonurban districts. In this situation, the map would be naturally asymmetrical, not the product of a partisan power grab.

This phenomenon of political geography need not hold true for all states for it to present a conceptual difficulty in interpreting the Equal Protection Clause to bar redistricting maps with built-in partisan asymmetry. As long as some redistricting maps may harbor partisan asymmetry for entirely innocent reasons of political geography, it makes no sense to hold a redistricting map unconstitutional just because it has this feature. Nor does it make sense to hold a redistricting map *presumptively* unconstitutional just because of partisan asymmetry, putting the burden on the government of proving that the asymmetry is caused by geography and not gerrymandering. The Constitution does not contain a command that redistricting maps be equally advantageous to each of the two major political parties (although perhaps it might be desirable, as a matter of political theory, for the Constitution to be amended to contain such a command). Instead, at most the Constitution as it exists prohibits the legislature’s *manipulation* of a redistricting map to give a political party an extra advantage that it otherwise would not have as a result of geography.⁴⁶ Thus,

⁴⁴ Id (Kennedy) (plurality).

⁴⁵ Jowei Chen and Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q J Polit Sci 239, 242–47 (2013). See also Nicholas Goedert, *Gerrymandering or Geography? How Democrats Won the Popular Vote but Lost the Congress in 2012*, 1 Rsrch & Polit *1–5 (Apr–June 2014) (summarizing relevant social science literature); Nicholas Goedert, *The Case of the Disappearing Bias: A 2014 Update to the “Gerrymandering or Geography” Debate*, 2 Rsrch & Polit *1–3 (Oct–Dec 2015) (updating research in light of 2014 elections).

⁴⁶ This point flows from adopting Professor Dworkin’s “law as integrity” approach to constitutional interpretation, rather than a more utopian account of equal protection. From the perspective of ideal political theory, it is easy to argue that a sound constitution for America would protect each of the two major political parties from redistricting maps

it makes sense to require a state government to defend a redistricting map against a charge of unconstitutional gerrymandering only when the plaintiff meets an initial burden of demonstrating inappropriate manipulation of the map in deviation from existing geographical conditions. The symmetry standard offered in *LULAC*, however, had no way to differentiate between manipulated and “unmanipulated” (that is, undistorted) maps, and it was for this reason that Kennedy saw the symmetry standard as an insufficient basis on which a plaintiff could predicate a claim of unconstitutionality.

Since *LULAC*, political scientists have endeavored to develop an alternative to the symmetry standard that might prove more acceptable to Kennedy and other members of the Court (at least enough to form a five-member majority). One such effort, which is being employed in pending litigation to challenge Wisconsin’s legislative map, is called the “efficiency gap.”⁴⁷ It is designed to measure the extent to which each party’s votes are inefficient or “wasted” in the party’s attempt to turn votes into legislative seats. A vote is inefficient if it *either* was superfluous insofar as it was cast in a district that the party already won without need of this particular vote *or* was cast in a district that the party did not win and thus did not contribute to a victorious seat.⁴⁸ The “efficiency

that give one party a competitive advantage, regardless of whether this competitive advantage was an element of the mapmaker’s intended design. But from the perspective of *interpreting* the Constitution as it exists, with the obligation that a sound interpretation *fit* the Constitution’s history as it has developed thus far, it is too much to say that America’s constitutional tradition, including the current corpus of equal protection precedents, is properly interpreted as entailing an obligation on the part of legislative mapmakers to refrain from adopting any map that would have the effect of putting one of the two major political parties at a competitive disadvantage. Mapmakers might have a constitutional obligation to refrain from engaging in mapmaking *mischief*, but there is insufficient material in America’s constitutional tradition from which to construct an existing obligation of mapmakers to insulate political parties from the competitive effects that innocently conventional districting might have. (I am grateful to several readers of an earlier draft for helping me clarify this crucial point.)

⁴⁷ See Nicholas O. Stephanopoulos and Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U Chi L Rev 831, 849–67 (2015). In the Wisconsin litigation, as of this writing, the plaintiffs’ use of the efficiency gap as a constitutionally appropriate measure of partisan gerrymandering prevailed, after trial, before a three-judge district court. See generally *Whitford v Nichol*, 2016 WL 6837229 (WD Wis). The case is now pending on appeal in the Supreme Court. See *No. 16-1161* (Supreme Court of the United States), archived at <http://perma.cc/33HU-AZPQ>. A complete record of the case can be found at *Litigation: Whitford v. Nichol* (Election Law @ Moritz, May 9, 2017), archived at <http://perma.cc/TZ6T-6FW7>.

⁴⁸ Stephanopoulos and McGhee, 82 U Chi L Rev at 834, 850–51 (cited in note 47).

gap” is the difference between how many inefficient votes each of the two parties has.⁴⁹

The idea of this efficiency gap is a simple and elegant way to capture the evil of gerrymandering, because a gerrymander is designed precisely to cause an opposing party to waste more of its votes. A gerrymander does this *either* by packing an excessive number of the opposing party’s voters into fewer districts, so that the opposing party wins those districts with lots of superfluous votes, *or* by dispersing the opposing party’s voters across a large number of districts so that these voters are always in the minority and never have a chance to contribute to a victory. Given the way that the efficiency gap directly calculates and compares each party’s total number of wasted votes, one understandably might think it would provide a perfect way to measure a partisan gerrymander.

The difficulty, however, is that an efficiency gap can occur without the existence of partisan gerrymandering. As with asymmetry, an efficiency gap can exist solely because of the geographical presence of Democrats concentrated in cities and Republicans dispersed throughout exurban areas.⁵⁰ A legislative map that tracks these residential patterns, without any partisan machinations, will cause Democrats to waste a large number of superfluous urban votes as well as all the votes of the relatively few exurban Democrats who are routinely outnumbered by exurban Republicans. By contrast, with the same legislative map, Republicans will be relatively efficient in their votes, with fewer superfluous votes in their exurban districts and fewer outnumbered votes in the cities. Thus, just as with asymmetry, there is a conceptual challenge in identifying when an efficiency gap is the product of partisan overreaching, rather than the ordinary operation of districting given the self-sorting of Democrats and Republicans into urban and nonurban areas.⁵¹ The essence of the problem, again, is that an efficiency gap can exist without any improper manipulation of a redistricting map, and yet the only basis for subjecting a state government to the task of defending a redistricting map against the charge of

⁴⁹ Id.

⁵⁰ Id at 894.

⁵¹ One recent paper by five political scientists characterized the “problem” this way: “the efficiency gap is also prone to detect gerrymanders when we have no other reason to suspect them.” Jonathan Krasno, et al, *Can Gerrymanders Be Measured? An Examination of Wisconsin’s State Assembly* *15 (unpublished manuscript), archived at <http://perma.cc/SRZ9-YTPQ>. “As a result,” these authors concluded, “we do not believe that the efficiency gap is a reliable tool with which to detect gerrymanders.” Id at *16.

unconstitutionality would be the plaintiff providing evidence that the map was the product of improper manipulation.⁵²

Thus, while mathematically much simpler than the symmetry standard, and correspondingly much more intuitive, the efficiency gap ultimately suffers from the same inherent flaw. In the history and structure of American elections, there is no expectation that long-standing geographical subdivisions within the polity will be consistent with both political parties' equal ability to translate raw popular votes into effective electoral power. The 2016 presidential election is a reminder of this fundamental truth. Secretary Hillary Clinton won the national popular vote, yet lost the constitutionally authoritative Electoral College.⁵³ President Donald Trump, in other words, was much more efficient in converting his popular votes into winning seats in the all-important Electoral College. Clinton beat Trump in California by more than four million votes, but all those extra votes were wasted; they added nothing in reaching the constitutionally necessary 270 Electoral College votes.⁵⁴ Likewise, Clinton received almost four million votes in Texas, but these too were entirely wasted because they were useless in reaching 270, as Trump won Texas with almost five million votes.⁵⁵ The Electoral College, in other words, is consistent with an extremely large efficiency gap. One could call the Electoral College a "natural gerrymander," but to do so would only underscore the key point that—given the history and structure of America's electoral system—the Electoral College is not an impermissible manipulation of electoral districts to generate an improper partisan advantage. Consequently, if a state's legislative districts tracked long-standing municipal and

⁵² In other words, a map is not inherently suspicious just because it has an efficiency gap. One way the *Whitford* plaintiffs tackled this point was to suggest that a state should not be required to defend a map unless the measure of its efficiency gap exceeds 7 percent. See Plaintiffs' Post-trial Brief, *Whitford v Nichol*, Case No 15-CV-421, *11 (WD Wis filed June 10, 2016) (available on Westlaw at 2016 WL 3457694). But quite apart from the superficial arbitrariness of this 7 percent burden-shifting threshold, evidence at the *Whitford* trial showed that court-mandated redistricting maps (among others lacking any indicia of improper manipulation) can have an efficiency gap exceeding 7 percent. See Defendants' Post-trial Brief, *Whitford v Nichol*, Docket No 15-CV-421, *13, 19–20 (WD Wis filed June 10, 2016), archived at <http://perma.cc/S4UY-HVSP>.

⁵³ See John Woolley and Gerhard Peters, *Election of 2016* (American Presidency Project), archived at <http://perma.cc/RM3H-C6GP>.

⁵⁴ See *id.*

⁵⁵ See *id.*

other geographical boundaries, the fact that an efficiency gap resulted would not be inherently improper given the traditions and expectations of American elections.

In his own separate dissent in *Vieth*, Breyer attempted to cabin the search for unconstitutional gerrymanders by focusing solely on the situation in which a districting map unjustifiably causes a minority of voters to capture a majority of seats.⁵⁶ Limiting this inquiry in this way seems laudable, as minority control of a legislature seems particularly antithetical to democracy, with its dedication to majority rule. But once again, linking this democratic deficiency to partisan gerrymandering proves frustratingly elusive. The same residential patterns that yield asymmetry and an efficiency gap without any partisan abuse can also cause the circumstance in which a minority of voters statewide are able to win a majority of legislative seats.⁵⁷ The Electoral College example itself shows that, even without manipulation of existing geographical boundaries, a majority of overall votes does not necessarily translate into a majority of seats.

Thus, if the Constitution is to constrain gerrymandering, there needs to be a standard that identifies partisan distortion in a legislative map. It is not enough that one party or its voters are disadvantaged by the map. Such disadvantage may result from innocuous, or at least nonmalevolent, geographical conditions.⁵⁸

⁵⁶ *Vieth*, 541 US at 360 (Breyer dissenting).

⁵⁷ In *Vieth*, Kennedy categorically rejected the plaintiffs' contention that "a majority of voters in the Commonwealth should be able to elect a majority of the Commonwealth's congressional delegation." Id at 308 (Kennedy concurring in the judgment). Kennedy did so because he recognized that legitimate districting criteria—"(*e.g.*, contiguity and compactness)"—might sometimes produce maps that permit a minority of voters to win a majority of seats. Id (Kennedy concurring in the judgment). For a striking visualization of this point, see the Pennsylvania congressional map that could have been drawn after the 2010 census using the shortest possible district lines. *Gerrymandering: Tough to Avoid* (StatSheet, Apr 24, 2014), archived at <http://perma.cc/49HF-5UW7>. With this nongerrymandered map, Democrats would have won only seven of the state's eighteen districts, even if Democrats won a majority of congressional votes statewide. Id. The reason is the demographic fact of Democrats clustering in Pennsylvania's big cities.

⁵⁸ This crucial point is also ultimately what undermines Professor Samuel S.-H. Wang's recent effort to develop a statistical method for measuring partisan gerrymanders. See Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 *Stan L Rev* 1263, 1306–09 (2016). Wang's sophisticated statistics, while endeavoring to account for what he acknowledges as "population clustering," id at 1298, do not adequately differentiate between when district lines legitimately are drawn to reflect existing geography and when these lines deviate inappropriately from geographical considerations. Although Wang thinks it advantageous that his statistical approach "do[es] not use geography," id at 1308, but instead endeavors to detect nonrandom variations from nationally typical districts, see id at 1289, his method cannot tell whether a nonrandom map is caused by faithful respect for preexisting local political boundaries or manipulative partisan deviation

Instead, it is the partisan manipulation of district lines beyond what geography alone would entail that is the distinctive perniciousness of gerrymandering and that is in need of being captured by the appropriate constitutional test.⁵⁹

B. Changes in Voting Rules

The same Warren Court that produced the “reapportionment revolution” also construed the Equal Protection Clause of the Fourteenth Amendment to invalidate state laws that “invidiously

from those boundaries. Ultimately, Wang falls back on the assertion that legislative maps should be invalid if statistics show them exhibiting the characteristic of nonrandom partisan asymmetry even if there is no demonstration that these maps were the product of malevolent partisan manipulations rather than fidelity to traditional geographical considerations (like preexisting political boundaries):

I suggest that districting can impose a burden on a group’s representational rights whether or not the offense was intentional. Even where intentions are nonpartisan, bipartisan, or unknown, the effect of a districting plan with partisan asymmetry is to produce legislative blocs whose size is unrepresentative of the popular will.

Id at 1318. But that approach, of course, is entirely inconsistent with decades of constitutional law, which requires invidious intent as part of any equal protection claim, see *Washington v Davis*, 426 US 229, 246–48 (1976)—a requirement that the Supreme Court clearly has carried over into its three partisan gerrymandering cases (*Bandemer*, *Vieth*, and *LULAC*), even if invidiousness in this context is *partisan* rather than race-based discrimination (a point that Wang himself begrudgingly acknowledges, see Wang, 68 Stan L Rev at 1272–73 (cited in note 58)). Thus, despite its own self-professed goals, Wang’s approach is a nonstarter in terms of developing a judicially manageable standard for the adjudication of partisan gerrymandering claims under equal protection, because it is flatly inconsistent with a core component of equal protection doctrine.

⁵⁹ In his fence-sitting *Vieth* concurrence, Kennedy expressed the hope that the First Amendment, unlike the Equal Protection Clause, would be able to provide a judicially manageable standard for identifying unconstitutional gerrymanders. *Vieth*, 541 US at 314 (Kennedy concurring in the judgment). That hope, however, has not materialized. The reason—as I indicated in discussing Professor Levy’s attempt at developing a “nonpartisanship principle”—is that the First Amendment provides no basis for distinguishing between legitimate and illegitimate considerations of partisanship on the part of a legislature. See note 17. See also Briffault, 14 Cornell J L & Pub Pol at 408–09 (cited in note 12):

[U]ltimately, the First Amendment argument fails. . . . Indeed, so long as districting is undertaken by legislatures elected on partisan lines, legislative awareness of, and attention to, the partisan consequences of districting seems impossible to avoid.

On the other hand, if the First Amendment is not an absolute prohibition on attention to partisan concerns, then it is unclear what work the First Amendment theory does.

(citation omitted). The due process principle of fair play that this Article develops, by contrast, provides a basis for distinguishing between legitimate and excessive partisanship.

discriminate” among citizens with respect to voting.⁶⁰ The canonical case on this point is *Harper v Virginia Board of Elections*,⁶¹ which struck down Virginia’s law requiring citizens to pay a \$1.50 poll tax as a prerequisite to casting a ballot.⁶² “Wealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process,” the Court explained.⁶³ Then, the Court repeated the point for emphasis and clarity: “To introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor.”⁶⁴

Since *Harper* in 1966, the Supreme Court has applied this equal-protection-for-voting jurisprudence to a wide variety of state electoral laws, rejecting some while upholding others. For example, in *Dunn v Blumstein*,⁶⁵ the Court invalidated a Tennessee law that required US citizens to have lived within the state for a full year in order to be eligible to vote in the state’s elections.⁶⁶ The Court castigated the year-long residency requirement for its “crudeness as a device for achieving the articulated state goal of assuring the knowledgeable exercise of the franchise.”⁶⁷ A much shorter residency requirement clearly sufficed, in the Court’s view, to establish that the voter was indeed a bona fide resident of the state. By contrast, the Court sustained state laws that required voters to register fifty days in advance of Election Day in order to participate in that particular election.⁶⁸ “[T]he 50-day voter registration cutoff,” the Court observed, “is necessary to permit preparation of accurate voter lists.”⁶⁹

Over the years, this equal-protection-for-voting jurisprudence has evolved into what is known as the “*Anderson-Burdick* balancing test,”⁷⁰ so named after two leading cases in this long

⁶⁰ *Crawford v Marion County Election Board*, 553 US 181, 189 (2008) (Stevens) (plurality), quoting *Harper v Virginia Board of Elections*, 383 US 663, 666 (1966).

⁶¹ 383 US 663 (1966).

⁶² See *id.* at 664, 670.

⁶³ *Id.* at 668.

⁶⁴ *Id.*

⁶⁵ 405 US 330 (1972).

⁶⁶ See *id.* at 331, 360.

⁶⁷ *Id.* at 357–58.

⁶⁸ *Marston v Lewis*, 410 US 679, 679–80 (1973) (per curiam). See also *Burns v Fortson*, 410 US 686, 687 (1973) (per curiam).

⁶⁹ *Marston*, 410 US at 681.

⁷⁰ For prior analysis of *Anderson-Burdick* balancing, see Foley, 81 Geo Wash L Rev at 1847–51 (cited in note 2); Christopher S. Elmendorf and Edward B. Foley, *Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 Wm & Mary Bill Rts J 507, 523–25 (2008).

line of precedents: *Anderson v Celebrezze*⁷¹ and *Burdick v Takushi*.⁷² Along the way, the Court encountered election laws concerning not only the opportunity of voters to cast ballots, but also the opportunity of candidates to appear on the ballots that voters cast; and in considering these different types of election laws, the Court has invoked not only the basic equal protection constraint against invidious discrimination, but also the First Amendment interests of candidates and voters to express their political beliefs through their participation in the electoral process. *Anderson* itself involved an Ohio law that imposed a March 20 deadline in order for a presidential candidate to appear on the state's general election ballot in November.⁷³ There, the Court voided the deadline as excessively early and in doing so noted: "[W]e base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis."⁷⁴ *Burdick* involved Hawaii's prohibition against voting for write-in candidates, and the Court again invoked the "First and Fourteenth Amendments" as the predicates for its constitutional analysis.⁷⁵ This time, however, the Court upheld the state law as among the permissible class of "reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls."⁷⁶

Taken together, and along with other cases in the same line of precedents, *Anderson* and *Burdick* create a kind of sliding-scale balancing test, whereby the strength of the state's justification required to defend its law depends on the severity of the burden that the law imposes on the would-be voter's opportunity to cast a ballot (or the candidate's opportunity to be on the ballot that the voter casts). If the burden on casting a ballot is a heavy one, then the court's scrutiny of the state's justification for the burden will be strict, meaning that the imposition must be necessary to serve a compelling interest that the state has. Conversely, if the burden is modest, then the judicial scrutiny is more relaxed, and the imposition needs to be only "reasonable" in light of "legitimate interests" that the state can articulate.⁷⁷

⁷¹ 460 US 780 (1983).

⁷² 504 US 428 (1992).

⁷³ *Anderson*, 460 US at 782–83.

⁷⁴ *Id.* at 786 n. 7.

⁷⁵ *Burdick*, 504 US at 430, 434.

⁷⁶ *Id.* at 438.

⁷⁷ *Id.* at 434, 440.

In *Crawford v Marion County Election Board*,⁷⁸ the Supreme Court applied its *Anderson-Burdick* balancing test to Indiana's voter identification law.⁷⁹ The Court split three ways in *Crawford*, with three justices in each camp. Souter, Ginsburg, and Breyer would have invalidated the ID law in its entirety under *Anderson-Burdick*, finding the law's purported benefits insufficient in relation to its potential burdens on exercising the right to vote. The travel necessary to get an ID, or to get one's provisional ballot counted if one lacked the ID, was for these justices "a high hurdle" disproportionate to the claimed benefits of (i) combating voter fraud (no evidence of a problem on that front), (ii) redressing the state's bloated voter rolls (a problem of the state's own making), and (iii) increasing public confidence in the integrity of the electoral process (speculative).⁸⁰

Scalia, Thomas, and Alito would have upheld the law in its entirety, reaching the exact opposite conclusion about the application of *Anderson-Burdick*. They viewed the burden of the ID requirement as minor and thus would not have demanded that the government prove more than a modest benefit from the law, which they found that the state easily did: "The burden of acquiring, possessing, and showing a free photo identification is simply not severe. . . . And the State's interests are sufficient to sustain that minimal burden."⁸¹

The controlling opinion in the case was written by Stevens and joined by Roberts and Kennedy. These justices in the middle refused to invalidate the law entirely, on the ground that for most voters the burden was trivial (because most voters already possessed the required ID) and thus readily justified by the government's asserted reasons for the law. "Petitioners urge us to ask whether the State's interests justify the burden imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk's office after voting."⁸² But there was insufficient "evidence in the record" regarding "this narrow class of voters," Stevens observed, and in its absence the

⁷⁸ 553 US 181 (2008).

⁷⁹ Id at 185, 190–91 (Stevens) (plurality).

⁸⁰ Id at 217, 233–37 (Souter dissenting); id at 241 (Breyer dissenting). Although Breyer wrote a separate dissent from Souter's, which Ginsburg joined, Breyer shared with the other two dissenters the same view of *Anderson-Burdick* balancing as being highly flexible. Breyer wrote separately primarily to explain his understanding of the role that the so-called Carter-Baker Commission's report should have in the analysis.

⁸¹ Id at 209 (Scalia concurring in the judgment) (citation omitted).

⁸² *Crawford*, 553 US at 200 (Stevens) (plurality).

challenge to the law could not begin to warrant a judicial decree “that would invalidate the statute in all its applications.”⁸³ Under long-standing doctrine, “[a] facial challenge must fail where the statute has a plainly legitimate sweep,” as the ID law did because Indiana’s interest in electoral integrity sufficed to impose the requirement on the “vast majority of Indiana voters” for whom it amounted to no trouble at all.⁸⁴

At the same time, however, this centrist trio left open the possibility that the ID requirement might be unconstitutional as applied to the specific subset of voters who lack the necessary ID and for whom it would be difficult to get one. If in a different case the necessary evidence as to these voters was forthcoming, then the statute potentially could be rendered unenforceable just as to them.⁸⁵ Thus, under this trio’s view of *Anderson-Burdick*, the balancing of the law’s benefits and burdens might tip the scales in the opposite direction as compared to the law’s application to most voters.

Anderson-Burdick balancing operated very differently in the hands of these centrist justices than it did as employed by the conservative trio of Scalia, Thomas, and Alito. Those three explicitly stated that they would not let *Anderson-Burdick* be used in an as-applied challenge that would evaluate an election law’s burden on individual voters, but instead would evaluate only a law’s entire scope: “[O]ur precedents refute the view that individual impacts are relevant to determining the severity of the burden [the challenged law] imposes,” and “requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence.”⁸⁶ Quite apart from considerations of stare decisis, Scalia’s opinion added, a “voter-by-voter examination of the burdens of voting regulations would prove especially disruptive,” inviting “constant litigation,” and accordingly should be rejected.⁸⁷

Scalia also objected to the way Stevens characterized the sliding scale nature of *Anderson-Burdick* balancing. Scalia preferred to see *Anderson-Burdick* as establishing two distinct categories of

⁸³ Id (Stevens) (plurality).

⁸⁴ Id at 202–04 (Stevens) (plurality) (quotation marks omitted).

⁸⁵ See id at 203–04 (Stevens) (plurality). See also Richard L. Hasen, *Election Law’s Path in the Roberts Court’s First Decade: A Sharp Right Turn but with Speed Bumps and Surprising Twists*, 68 *Stan L Rev* 1597, 1609–10 (2016) (explaining that the Crawford plurality “left the door open for as-applied challenges as to those voters facing serious impediments in securing a form of voter identification the state accepted as adequate”).

⁸⁶ *Crawford*, 553 US at 205–07 (Scalia concurring in the judgment).

⁸⁷ Id at 208 (Scalia concurring in the judgment).

judicial review: strict scrutiny for heavy burdens and “deferential” scrutiny for lesser burdens.⁸⁸ By creating this “two-track approach,” as Scalia put it, “*Burdick* forged *Anderson*’s amorphous ‘flexible standard’ into something resembling an administrable rule.”⁸⁹ Stevens, however, would have none of this, insisting that *Anderson* had not lost its flexibility. Neither in *Burdick* nor in any other case in this line of precedent, according to Stevens, did the Court “identify any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters.”⁹⁰

The division among the justices in *Crawford* demonstrates the difficulty in applying the *Anderson-Burdick* balancing test. This difficulty has been replicated in the lower courts since *Crawford*. Like the justices themselves, federal district court judges have disagreed vociferously over how to apply *Anderson-Burdick* to voter ID laws in other states, including Wisconsin and Texas.⁹¹ Federal judges have also struggled with applying *Anderson-Burdick* to various state rules governing the casting and counting of provisional ballots.⁹²

⁸⁸ Id at 204–05 (Scalia concurring in the judgment).

⁸⁹ Id (Scalia concurring in the judgment).

⁹⁰ *Crawford*, 553 US at 191 (Stevens) (plurality).

⁹¹ See, for example, *Frank v Walker*, 17 F Supp 3d 837, 845–46 (ED Wis 2014), revd and remd, 768 F3d 744 (7th Cir 2014), rehearing en banc denied, 773 F3d 783 (7th Cir 2014), permanent injunction denied, 141 F Supp 3d 932 (ED Wis 2015), vacd in part and remd, 819 F3d 384 (7th Cir 2016), preliminary injunction granted, 196 F Supp 3d 893 (ED Wis 2016), stayed pending appeal, 2016 WL 4224616 (7th Cir); *Veasey v Perry*, 71 F Supp 3d 627, 685–93 (SD Tex 2014), affd in part on other grounds, *Veasey v Abbott*, 830 F3d 216 (5th Cir 2016) (en banc); *Lee v Virginia State Board of Elections*, 188 F Supp 3d 577, 607–09 (ED Va 2016), affd, 843 F3d 592 (4th Cir 2016); *North Carolina State Conference of the NAACP v McCrory*, 182 F Supp 3d 320, 509–24 (MD NC 2016), revd and remd, 831 F3d 204 (4th Cir 2016).

⁹² See, for example, *Service Employees International Union, Local 1 v Husted*, 887 F Supp 2d 761, 777–79, 788–92 (SD Ohio 2012), affd in part and revd in part, *Northeast Ohio Coalition for Homeless v Husted*, 696 F3d 580, 604 (6th Cir 2012) (per curiam) (“NEOCH”) (reversing the preliminary injunction requiring the counting of provisional ballots despite poll-worker errors). *NEOCH* was still in litigation in 2016, when the federal district court ruled it unconstitutional to invalidate a provisional ballot *solely* because the voter accidentally wrote the current date instead of the voter’s birthdate (when the innocent error did not prevent the election officials from verifying the provisional voter’s eligibility and registration). *Northeast Ohio Coalition for the Homeless v Husted*, 2016 WL 3166251, *5, 55 (SD Ohio). The Sixth Circuit, in a 2–1 decision, reversed the district court on this point but affirmed it on a comparable issue concerning absentee ballots. See generally *Northeast Ohio Coalition for the Homeless v Husted*, 837 F3d 612 (6th Cir 2016). Similar disagreement among federal judges occurred over North Carolina’s new statute for disqualifying provisional ballots for being cast at the wrong polling location. See *North Carolina State Conference of NAACP v McCrory*, 997 F Supp 2d 322, 365–70 (MD NC 2014) (denying a preliminary injunction), revd in relevant part, *League of Women Voters of North Carolina*

Yet these difficulties are relatively minor compared to the conceptual conundrums associated with applying *Anderson-Burdick* to state laws that cut back on the availability of early voting and eliminate the opportunity to register and cast a ballot simultaneously. Both Ohio and North Carolina have enacted versions of this kind of cutback law. In Ohio, a 2005 state law authorized county boards of election to provide up to thirty-five days of early voting, the first six of which would occur before the state's voter registration deadline, set at thirty days before Election Day. The result was a six-day window in which the opportunity to cast a ballot during early voting overlapped with the opportunity to register to vote before the thirty-day deadline.⁹³ This window came to be called "Golden Week" for the convenience it provided to previously unregistered voters, who now could simultaneously register and vote in one trip to their local early voting site.⁹⁴ In 2014, however, the Ohio legislature enacted a new law that set the beginning of early voting at the twenty-ninth day before Election Day, thereby eliminating Golden Week.⁹⁵

Similarly, before 2014, North Carolina law authorized local election boards to provide up to seventeen days of early voting,⁹⁶ during which previously unregistered voters were permitted to simultaneously register and cast their ballots at an early voting site.⁹⁷ What Ohio more colorfully called "Golden Week" North Carolina simply labeled "same-day registration."⁹⁸ But, as in Ohio, the North Carolina legislature passed a new law in 2015 to

v North Carolina, 769 F3d 224, 248–49 (4th Cir 2014) (granting an emergency injunction pending appeal), appellate mandate stayed, 135 S Ct 6 (2014). After trial, the federal district court ruled that this North Carolina statute did not violate *Anderson-Burdick* balancing. *North Carolina State Conference of the NAACP*, 182 F Supp 3d at 509–11, 517–18. Without reaching the *Anderson-Burdick* issue, the Fourth Circuit reversed on the ground that the statute was intentional race discrimination. *North Carolina State Conference of NAACP v McCrory*, 831 F3d 204, 219 (4th Cir 2016).

⁹³ Because it was possible to both register and vote on the thirtieth day before Election Day, this day plus the five immediately preceding ones were the six days during which voting and registration overlapped.

⁹⁴ *Ohio State Conference of National Association for the Advancement of Colored People v Husted*, 43 F Supp 3d 808, 812 (SD Ohio 2014).

⁹⁵ *Id.*

⁹⁶ *North Carolina State Conference of the NAACP*, 182 F Supp 3d at 334.

⁹⁷ *Id.* at 336.

⁹⁸ *Id.* at 331.

eliminate same-day registration.⁹⁹ This new law also curtailed the period of early voting to ten days.¹⁰⁰

These legislative cutbacks in early voting, together with the removal of the convenience of simultaneous registering and voting, understandably aroused suspicions. In both Ohio and North Carolina, the legislatures that adopted these rollbacks were under Republican control, and Democrats viewed the rollbacks as a partisan ploy to lower turnout among Democratic voters, thereby increasing the chances of electoral victories for Republican candidates.¹⁰¹ Although Republicans in both states offered ostensibly nonpartisan reasons for these legislative rollbacks, including the simple notion of cutting costs and improving the administration of the voting process,¹⁰² Democrats saw these rationales as mere pretext for the partisan motive underlying the legislative curtailment of voting opportunities.

These legislative moves indeed may be partisan mischief. But do they violate equal protection under *Anderson-Burdick* balancing? They undoubtedly cause a loss of convenience compared to what existed in each state before. But is this loss of convenience a *burden* on exercising the right to vote for the purpose of *Anderson-Burdick* balancing, requiring the state to justify the burden in order for the judiciary to conduct a weighing of the asserted benefits against the burden imposed?

In Ohio's lengthy litigation over the legislative curtailment of Golden Week, the US Supreme Court (in a 5–4 order shortly before the 2014 general election) stayed a preliminary injunction issued by the federal district court and upheld by the Sixth Circuit on the ground that the curtailment likely violated *Anderson-Burdick* balancing.¹⁰³ After a settlement of that particular lawsuit, which resulted in an adjustment of the specific days and hours of early

⁹⁹ Id at 346–47. All North Carolina voters, including those who want to use early voting, must comply with the state's preexisting registration deadline, set at twenty-five days before Election Day. Id.

¹⁰⁰ See *North Carolina State Conference of the NAACP*, 182 F Supp 3d at 346.

¹⁰¹ See id at 337, 339–44; *North Carolina State Conference of NAACP*, 831 F3d at 225–29; *NEOCH*, 2016 WL 3166251 at *12–14.

¹⁰² See, for example, *Ohio State Conference of the National Association v Husted*, 768 F3d 524, 548–49 (6th Cir 2014) (“Ohio State Conference of the NAACP”).

¹⁰³ For the Supreme Court stay order, see *Husted v Ohio State Conference of the National Association for the Advancement of Colored People*, 135 S Ct 42, 42 (2014). For the district court decision to grant the preliminary injunction, see *Ohio State Conference of the NAACP*, 43 F Supp 3d at 853. For the Sixth Circuit decision affirming the preliminary injunction on *Anderson-Burdick* grounds, see *Ohio State Conference of the NAACP*, 768 F3d at 540–49.

voting in Ohio (but no restoration of Golden Week),¹⁰⁴ a separate lawsuit sought reinstatement of Golden Week on similar *Anderson-Burdick* grounds.¹⁰⁵ A different federal district judge, after a full trial on the merits, agreed with the plaintiffs that the elimination of Golden Week was a violation of *Anderson-Burdick*.¹⁰⁶ A 2–1 decision by a new Sixth Circuit panel, however, disagreed.¹⁰⁷

In North Carolina’s litigation over the elimination of same-day registration, the federal district court rejected an *Anderson-Burdick* claim similar to the one in Ohio.¹⁰⁸ On appeal, the Fourth Circuit sidestepped the *Anderson-Burdick* issue in the case, finding instead that the entire statute of which the elimination of same-day registration was one part was racially motivated by an unconstitutional intent to make voting more difficult for African Americans.¹⁰⁹ Thus, as matters stand, there remains conflict and confusion among federal judges over how *Anderson-Burdick* is supposed to apply to legislative cutbacks in voting opportunities.¹¹⁰ Perhaps it is the inherent analytical ambiguities in *Anderson-Burdick* analysis that account for these judicial difficulties.¹¹¹

¹⁰⁴ *Ohio Organizing Collaborative v Husted*, 189 F Supp 3d 708, 724 (SD Ohio 2016).

¹⁰⁵ See generally *id.*

¹⁰⁶ *Id.* at 739.

¹⁰⁷ *Ohio Democratic Party v Husted*, 834 F3d 620, 630, 640 (6th Cir 2016) (“[E]ven without Golden Week, Ohio’s registration and voting processes afford abundant opportunity for all Ohio voters, of whatever racial or ethnic background, to register and exercise their right to vote.”).

¹⁰⁸ *North Carolina State Conference of the NAACP*, 182 F Supp 3d at 509–21.

¹⁰⁹ See *North Carolina State Conference of NAACP*, 831 F3d at 233, 239.

¹¹⁰ Like Ohio and North Carolina, Wisconsin has enacted a cutback in the days and hours of its in-person early voting, although the Wisconsin law does not involve an elimination of simultaneous registering and voting as do the laws in the other two states. *One Wisconsin Institute, Inc v Thomsen*, 198 F Supp 3d 896, 905–07 (WD Wis 2016). A federal district judge has held the Wisconsin cutback unconstitutional under *Anderson-Burdick* (a “moderate” burden unjustified by the state’s cost-saving and other administrative rationales) and also intentionally discriminatory on the basis of race. *Id.* at 923–25, 931–35. The case is on appeal. For a record of the pending case, see *Litigation: One Wisconsin Institute v. Thomsen* (Election Law @ Moritz, Jan 20, 2017), archived at <http://perma.cc/F36E-N7UH>. If the Seventh Circuit affirms the district court’s *Anderson-Burdick* analysis in the Wisconsin case, there will be a direct conflict with the Sixth Circuit’s *Anderson-Burdick* analysis in the Ohio case, as the two appellate rulings would be entirely irreconcilable. The kind of cutback in early voting that the federal court in Wisconsin considered unconstitutional, the Sixth Circuit considered inconsequential in light of the robust remaining voting options available (options, like voting by mail, also available in Wisconsin). See *Ohio Democratic Party*, 834 F3d at 630.

¹¹¹ Another example of the judicial inconsistency in applying *Anderson-Burdick* to equivalent cases is the disagreement between federal district courts over whether the elimination of “straight ticket voting” violates *Anderson-Burdick*. A district judge in Michigan said it likely did, while a week later a district judge in neighboring Wisconsin said it did not.

Consider a hypothetical state that offers two weeks of early voting before Election Day. Is that state imposing a burden on its voters because it does not offer three weeks of early voting, or more? It certainly is more generous than a state, like New York or Pennsylvania, that offers no early voting at all.¹¹²

But suppose the hypothetical state moved to two weeks of early voting after previously offering three weeks. Does that move now make the two weeks of early voting a burden, whereas it would not be in another state that expanded early voting from zero to two weeks? That analysis would seem odd. It would make a modest adjustment of an unusually lengthy five weeks of early voting down to a still-robust four weeks qualify as a *burden* on the opportunity to vote, whereas a state offering four weeks would still be twice as generous as a state that offered only two, which would not be a burden as long as these two weeks were an expansion from zero (or one).

The idea that a mere trimming of a very expansive government benefit automatically qualifies as a burden requiring the government's justification does not fit easily with conventional equal protection analysis. Suppose the government of a state gave every citizen of the state a check at the end of each year for \$1,000. (Perhaps the state was funding this annual payment from revenues received from the sale of the state's natural resources, like oil.) Suppose, then, that in the next year the state slightly cuts back the amount of the check that each citizen receives to \$990. (Perhaps the price the state received for its natural resources decreased somewhat.) It would be hard to think that, for equal protection analysis, this \$990 check that each citizen receives would be a *burden*, just because in the previous year each citizen received a \$1,000 check. Instead, equal protection is concerned with how the government is treating individuals currently. With every citizen in the state receiving the same \$990 check, the government would be treating each citizen equally with respect to this benefit. The government would not be put to the task of justifying

Compare *Michigan State A. Philip Randolph Institute v Johnson*, 2016 WL 3922355, *7–9 (ED Mich), with *One Wisconsin Institute*, 198 F Supp 3d at 945–46.

¹¹² See *Absentee and Early Voting* (National Conference of State Legislatures, Mar 20, 2017), archived at <http://perma.cc/SC4T-5LEJ>.

the reduction of the benefit from \$1,000 to \$990. Simply put, giving everyone a \$990 check instead of a \$1,000 check would not be an equal protection problem.¹¹³

The same basic conceptual point applies to the elimination of simultaneous registering and voting. Clearly, the opportunity to both register and vote during a single trip to an early voting site is especially convenient. But there would be no equal protection problem if the state did not provide this convenience in the first place—just like there is no equal protection problem if a state gives no year-end check to any of its citizens. Many states besides Ohio and North Carolina currently offer no option of registering and voting at the same time. Instead, all of these states require voters to register in advance (often thirty days in advance) before the thus-registered voter casts a ballot in the election, whether early or on Election Day itself. No one considers this conventional arrangement an equal protection problem. For a state to return to this conventional arrangement after experimenting with an alternative should not be understood to generate an *equal protection* problem, any more than would the abandonment of an experiment of giving each citizen an annual \$1,000 check. The loss of a \$1,000 check surely would be a disappointment. But as long as everyone returned to the previous circumstance of not receiving any check at all, it would not be a denial of equal protection—no more so than everyone not receiving a check in the first place. The same with the loss of Golden Week or same-day registration. An obvious disappointment. But because Ohio and North Carolina eliminated this convenience for all of each state's voters, the absence of this convenience in those two states is no more *unequal* treatment of the state's voters than is the absence of this convenience in all those many states that never experimented with this convenience in the first place.¹¹⁴

This observation leads to an even more fundamental conceptual point. For there to be an equal protection issue requiring some level of judicial scrutiny, a state must be engaging in some sort of differential treatment between two groups of persons. A tax law does not discriminate if everyone pays the same tax rate.

¹¹³ The reduction of the annual check from \$1,000 to \$990 would not even be subjected to rational basis review under the Equal Protection Clause, because there would be no unequal treatment requiring justification even under the deferential rational basis test.

¹¹⁴ For further elaboration of this analysis, with additional examples, see Edward B. Foley, *A Tale of Two Swing States* (Election Law @ Moritz, May 31, 2016), archived at <http://perma.cc/B2CA-GQ6F>.

A benefit law does not discriminate if it provides everyone with the same benefit or uses a lottery to give everyone an equal chance of obtaining the benefit. A voting law similarly does not differentiate among voters if it provides all voters with exactly the same opportunity to cast a ballot.

In all of its cases that apply *Anderson-Burdick* balancing to assess whether a state has violated equal protection in its voting laws, the Supreme Court appears to have adhered to this fundamental analytic precept. *Harper* was a case that treated would-be voters differently depending on whether or not they paid the \$1.50 poll tax: those who did were entitled to cast a ballot, while those who did not were precluded from doing so, thereby being outright disenfranchised.¹¹⁵ The same was true in *Crawford*: those with the required ID were entitled to vote a conventional ballot, while those without the required ID were put to the extra burden of casting a provisional ballot with the obligation of returning to the local election board with adequate proof of eligibility in order to have that provisional ballot counted.¹¹⁶ In *Dunn*, the case invalidating Tennessee's year-long residency requirement as a prerequisite for voting, the Court made explicit its search for the way in which the law discriminated between two groups of voters as the first step of its analytic inquiry under equal protection:

Durational residence laws . . . divide residents into two classes, old residents and new residents, and discriminate against the latter to the extent of totally denying them the opportunity to vote. The constitutional question presented is whether the Equal Protection Clause of the Fourteenth Amendment permits a State to discriminate in this way among its citizens.¹¹⁷

No Supreme Court case employing *Anderson-Burdick* repudiates this fundamental analytic point.¹¹⁸

¹¹⁵ *Harper*, 383 US at 664 n 1.

¹¹⁶ *Crawford*, 553 US at 186 (Stevens) (plurality).

¹¹⁷ *Dunn*, 405 US at 334–35 (citation omitted).

¹¹⁸ Some have suggested that *Anderson-Burdick* is not really a species of equal protection law, but more akin to substantive due process. See, for example, Kevin Cofsky, Comment, *Pruning the Political Thicket: The Case for Strict Scrutiny of State Ballot Access Restriction*, 145 U Pa L Rev 353, 402–03 (1996); *NEOCH*, 696 F3d at 592 (noting that the *Anderson-Burdick* test has been applied to facially neutral laws treating voters equally). The abortion cases, as part of substantive due process law, employ an “undue burden” test that is analytically similar to *Anderson-Burdick* balancing. See *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 873–74 (1992) (O'Connor, Kennedy, and Souter) (plurality). But the Supreme Court has never explained *Anderson-Burdick* this

A state that provides all of its voters with two weeks of early voting would appear not to differentiate among its voters in a way that would trigger equal protection analysis. All of the state's voters would be receiving exactly the same benefit of two weeks of early voting in addition to the traditional Election Day. This equal treatment of all voters would be the same, moreover, whether the state previously provided three weeks of early voting or instead none at all. Either way, two weeks of early voting would provide the same amount of opportunity to cast an early ballot to all of the state's voters. *Anderson-Burdick* balancing would not even seem to be implicated in this situation, because there would be no differential treatment of voters to judicially scrutinize.¹¹⁹

way, instead seeing it as emanating from its equal protection jurisprudence. In *Crawford*, for example, the controlling opinion starts its analysis of Indiana's voter identification law with a citation to *Harper* and an invocation of equal protection; the opinion then moves on to a discussion of *Anderson* and *Burdick* as part of the same constitutional jurisprudence. See *Crawford*, 553 US at 189 (Stevens) (plurality). In any event, insofar as *Anderson-Burdick* is better reformulated as an element of due process law, rather than equal protection law, this Article, with its historical analysis of the relationship between due process and the fair play constraint against partisan overreaching, provides the much-needed jurisprudential underpinning for such a reformulation.

¹¹⁹ The argument might be made that a law offering two weeks of early voting differentiates between those voters who are able to take advantage of this offering and those who are not. Furthermore, this argument might go, this differentiation between two groups of voters is analytically identical to the poll tax in *Harper* or the voter ID law in *Crawford*, insofar as those laws differentiated between (a) voters able to pay the tax or obtain the required ID and (b) those unable to do so. But this argument misses the fundamental distinction between disparate impact and facial discrimination—a distinction applicable not just in voting cases but to all areas of equal protection law. See *Washington*, 426 US at 242. A law requiring a voter to pay a \$1.50 poll tax is a law that *on its face* discriminates between the voter who pays the tax and a would-be voter who does not. Likewise, a law requiring a voter to show a photo ID as a prerequisite to casting a regular ballot is a law that *on its face* discriminates between a voter with the ID and one lacking the ID. By contrast, a law permitting all voters to cast a ballot during two weeks of early voting contains no such facial discrimination but has a disparate impact only on any voter unable to show up during the two-week period.

In this respect, the law that makes early voting available for a two-week period is analytically equivalent for equal protection purposes to a law that makes a municipal swimming pool available to any member of the public for a two-month period during the summer. It is possible to imagine a member of the public who is unable to go to the pool during the two-month period during which the pool is open, but who would have been able to go to the pool if it had opened one month earlier. As to this would-be swimmer, the two-month period of the pool's availability (rather than three) has a disparate impact, but there is no facial discrimination among any members of the public as to the pool's availability. If the law required a member of the public to pay a \$1.50 entrance fee to use the pool, then the law would contain a facial discrimination against those unable to pay. If the law required a member of the public to show a photo ID to use the pool, then the law would contain a facial discrimination against anyone without the requisite ID. But a law providing that "the pool is open during July and August, and anyone may use it then" does not facially discriminate against someone who cannot use it then but who would have used it

Insofar as *Anderson-Burdick* balancing encompasses First Amendment as well as equal protection considerations, perhaps the existence of differential treatment is unnecessary to trigger *Anderson-Burdick* review. But it is difficult to see how the availability of two weeks of early voting, rather than a previous three weeks, would be an infringement on a voter's expressive interests in casting a ballot. After all, the unavailability of any early voting at all in a state that never had it would not be any kind of impairment of First Amendment expressive interests that would trigger *Anderson-Burdick* balancing. Giving voters the opportunity to cast their ballots for two weeks prior to the traditional Election Day might be less of a facilitation of free speech than providing voters with three such weeks, but it is still a facilitation of free speech, not an infringement or abridgement of free speech.

Thus, there is no avoiding the conclusion that *Anderson-Burdick* balancing is a poor doctrinal vehicle for considering the constitutionality of laws that cut back on the availability of voting opportunities. The question is whether there might be a better doctrinal alternative.

II. DUE PROCESS AND FAIR PLAY

Elections, like sports, are about winning and losing. Especially in the kind of two-party system that America has, the competition between parties to win elections resembles the competition between teams to win an athletic game or, perhaps more aptly, a championship after a series of games. Each team desperately wants to win, yet each player on the team knows that there is conduct that would be ethically inappropriate in the effort to win, no matter how intense the desire for victory.¹²⁰

in June. The failure to appreciate this distinction between disparate impact and facial discrimination misperceives a basic element of equal protection jurisprudence, and one applicable just as much to voting cases as to any other cases (or at least the Supreme Court has never explicitly announced to the contrary).

¹²⁰ See Arthur Isak Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* 113–35 (Princeton 1999) (developing a philosophical model of competition as it applies across various social domains). For the ethical practice of political competition specifically, see generally Candice J. Nelson, David A. Dulio, and Stephen K. Medvic, eds, *Shades of Gray: Perspectives on Campaign Ethics* (Brookings 2002); Ronald A. Faucheux and Paul S. Herrnson, eds, *Campaign Battle Lines: The Practical Consequences of Crossing the Line between What's Right and What's Not in Political Campaigning* (Campaigns & Elections 2002); Bruce L. Felknor, *Political Mischief: Smear, Sabotage, and Reform in U.S. Elections* (Praeger 1992).

Sports, in other words, are subject to a morality of fair play.¹²¹ The obligation to compete fairly is consistent with the quest to beat one's opponent.¹²² One certainly need not be indifferent between which side wins; one obviously wants one's own team to vanquish the other side. Even so, one knows that certain tactics would be out of bounds. Corking the bat in baseball, for example. Even if one does it, one knows it is not merely against the rules, but a form of cheating that it is antithetical to the essence of the game. In the old days, using a gendered term, one would have called it unsportsmanlike conduct.¹²³

As with sports, so too with electoral competition.¹²⁴ The morality of fair play is just as applicable to the effort to win an election. No matter how hard one competes to win the race, one knows that there is certain conduct that would be morally out of bounds as part of the effort to prevail. Stuffing the ballot box with fake votes, for example. Like corking the bat, it would be not merely against the rules, but antithetical to the very idea of an election as being an enterprise to determine which candidate received more actual votes. A candidate or political party might be tempted to do it, might even actually do it. But if one succumbed to this temptation and did stuff the ballot box, one would know that one had crossed the line and breached the ethics of fair play.¹²⁵

¹²¹ See generally Peter McIntosh, *Fair Play: Ethics in Sport and Education* (Heinemann 1979); M.J. McNamee and S.J. Parry, eds, *Ethics and Sport* (E & FN Spon 1998).

¹²² See Robert Butcher and Angela Schneider, *Fair Play as Respect for the Game*, 25 *J Phil Sport* 1, 15 (1998):

Without question, any athlete who respects his or her sport will try his or her best to win whenever he or she plays. However, respect for the game requires that the athlete view winning only as a good if it comes as a result of a particular process: the well-played, well-matched game.

¹²³ See Sheila Wigmore and Cei Tuxill, *A Consideration of the Concept of Fair Play*, 1 *Eur Physical Educ Rev* 67, 71 (1995) (“‘Fair Play’ does not only mean adherence to written rules; rather it describes the right attitudes of sportsmen and sportswomen and the right spirit in which they conduct themselves.”).

¹²⁴ Sport is a useful analogy to politics precisely because athletic competition provides “the paradigmatic examples of fair and foul play.” Sigmund Loland and Mike McNamee, *Fair Play and the Ethos of Sports: An Eclectic Philosophical Framework*, 27 *J Phil Sport* 63, 71 (2000).

¹²⁵ Perhaps the most poignant example of this point is the self-destruction of Edward Pritchard, who was a Justice Felix Frankfurter protégé, a rising star during the New Deal, and destined, many thought, to be president. But he got caught stuffing the ballot box in a 1948 US Senate election, and that ended his promising political career. He knew his misconduct was morally wrong, but he was overcome by the temptation to prove to his partisan teammates that he was a team player in their effort to win. See Foley, *Ballot Battles* at 338 (cited in note 3); Tracy Campbell, *Short of the Glory: The Fall and Redemption of Edward F. Pritchard Jr.* 137–48 (Kentucky 1998).

Thus, fair play is a societal norm that constrains partisan competition. Conduct of partisans that breaches the norm of fair play would be, intrinsically, an instance of excessive partisanship, or what we could call partisan overreaching. Policing partisan competition to rule out acts that contravene the norm of fair play would be an appropriate regulation of the competitive endeavor, consistent with holding the competition in the first place. Far from interfering with the competition, a referee who stops a competitor from taking advantage of an opponent by means of conduct contrary to fair play is upholding the spirit as well as the rules of the competition, enabling it to occur in a way that is true to its basic purpose. Thus, requiring electoral competition to occur within the bounds of fair play—by enjoining partisan conduct that contravenes fair play—would be a kind of umpiring entirely consistent with both the reason for having an election to pick a winning candidate and the actual operation of the election in order to fulfill that social purpose.¹²⁶

If judges were to enforce the norm of fair play in the context of elections, there would be nothing inappropriate from the perspective of democratic theory—the philosophy that underlies the function that elections serve. Even so, can the judicial enforcement of fair play in electoral competition be linked to the Constitution? Judicial review under *Marbury v Madison*¹²⁷ consists of interpreting and enforcing the text of the Constitution, at least according to some understanding of what it means to interpret and enforce the Constitution as authoritative law (whether that understanding is “originalist” or otherwise).¹²⁸ Consequently, before judges leap into the enterprise of policing the partisan competition to win elections so as to enjoin partisan overreaching that breaches the norm of fair play, there must be some cogent basis for linking the norm of fair play to the judicial exercise of the *Marbury* power to interpret and enforce the Constitution.

¹²⁶ See Simon Eassom, *Games, Rules, and Contracts*, in McNamee and Parry, eds, *Ethics and Sport* 57, 65 (cited in note 121) (exploring a similar analogy between umpires and judges).

¹²⁷ 5 US (1 Cranch) 137 (1803).

¹²⁸ For an introduction to American constitutional theory and the role of the judiciary in constitutional interpretation, see generally Richard H. Fallon Jr, *The Dynamic Constitution: An Introduction to American Constitutional Law and Practice* (Cambridge 2d ed 2013). See also Michael J. Gerhardt, et al, *Constitutional Theory: Arguments and Perspectives* 59–293, 365–426 (LexisNexis 4th ed 2013); Michael C. Dorf and Trevor W. Morrison, *The Oxford Introductions to U.S. Law: Constitutional Law* 11–68 (Oxford 2010).

To put the point of the previous paragraph in Dworkinian terms: although there is no obstacle to judicial invocation of the norm of fair play as a constraint on partisan overreaching along what Professor Dworkin called the dimension of “justification”¹²⁹—given the soundness of this norm from the perspective of democratic theory—judicial invocation of the norm still must be defended adequately with respect to the crucial dimension of *fit*. No matter how attractive the norm of fair play might be *as a norm*, it still is not an appropriate basis for judicial decrees as mandated by interpretation of the Constitution if this norm flunks the dimension of fit.¹³⁰ Thus, the task at hand is to see if the norm of fair play can achieve an adequate grade (so to speak) along the dimension of fit, so as to provide a warrant for judicial reliance upon it in the domain of litigation over election laws. To conduct this inquiry, as Dworkin himself would have had Justice Hercules do, it is necessary to examine the available legal materials, beginning with relevant judicial precedents concerning the interpretation of the Fourteenth Amendment and then expanding the inquiry to the historical circumstances surrounding the adoption of the Fourteenth Amendment.¹³¹

A. The Judicial Invocation of Fair Play

It turns out that the Supreme Court regularly invokes the idea of fair play as a core component of its due process jurisprudence and has done so for a century. In the context of civil procedure, the *International Shoe Co v Washington*¹³² line of precedent makes the test for in personam jurisdiction turn on whether the lawsuit in question comports with “traditional notions of fair play and substantial justice.”¹³³ In criminal cases, vagueness in a statute making conduct a crime “violates the first essential of due process” because it contravenes “ordinary notions of fair play and the settled rules of law.”¹³⁴

The Supreme Court first invoked fair play as an essential element of due process in a 1914 opinion authored by Justice Oliver

¹²⁹ Dworkin, *Law’s Empire* at 239 (cited in note 18).

¹³⁰ See *id.* at 378–79 (“Many arrangements other than those now embedded in American legal practice are possible, and some may well be better from the point of view of ideal theory.”).

¹³¹ See *id.* at 379–99 (elaborating on this judicial methodology by his idealized Justice Hercules).

¹³² 326 US 310 (1945).

¹³³ *Id.* at 316.

¹³⁴ *Johnson v United States*, 135 S Ct 2551, 2556–57 (2015).

Wendell Holmes.¹³⁵ The case involved a South Dakota statute imposing strict liability and punitive damages on a railroad company for loss of the plaintiff's property from a fire caused by a locomotive engine.¹³⁶ The Court unanimously invalidated the statute because it provided inadequate notice to the railroad of what amount of damages a jury might award.¹³⁷ In so holding, Holmes wrote: "No doubt the States have a large latitude in the policy that they will pursue and enforce, but the rudiments of fair play required by the Fourteenth Amendment are wanting when a defendant is required to guess rightly what a jury will find."¹³⁸

Three years later, Holmes, writing again for a unanimous Court, invoked fair play as a constraint on a state's exercise of in personam jurisdiction.¹³⁹ There, Texas had attempted to assert jurisdiction over an out-of-state resident simply by publishing a newspaper notice.¹⁴⁰ Holmes allowed that some circumstances might permit jurisdiction over a defendant not located in the state, but not in this particular situation. "[I]n States bound together by a Constitution and subject to the Fourteenth Amendment," Holmes explained, "great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact," given the principle that "[t]he foundation of jurisdiction is physical power."¹⁴¹ *International Shoe* cited this 1917 opinion by Holmes, as well as an intermediate precedent that echoed the "fair play" phrase from this Holmes opinion.¹⁴² Thus, the entire *International Shoe* lineage stems from this initial invocation of fair play by Holmes as grounds for denying a state power over a defendant in a civil case.

Since *International Shoe* itself, the Supreme Court has quoted the now-talismanic "fair play and substantial justice" formulation in over thirty cases. Among the most recent of these are unanimous opinions in 2011 by Justice Ginsburg¹⁴³ and 2014 by Justice Thomas.¹⁴⁴ That these two justices, at the opposite ends of the Court's ideological spectrum, would so similarly rely on the

¹³⁵ See *Chicago, Milwaukee & St. Paul Railway Co v Polt*, 232 US 165, 168 (1914).

¹³⁶ *Id.* at 167.

¹³⁷ *Id.* at 168.

¹³⁸ *Id.*

¹³⁹ *McDonald v Mabee*, 243 US 90, 91 (1917).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See *International Shoe*, 326 US at 316, citing *McDonald*, 243 US at 91, and *Milliken v Meyer*, 311 US 457, 463 (1940) (Douglas).

¹⁴³ *Goodyear Dunlop Tires Operations, SA v Brown*, 564 US 915, 919 (2011).

¹⁴⁴ *Walden v Fiore*, 134 S Ct 1115, 1121 (2014).

same fair play standard on behalf of all their colleagues on the Court indicates just how deeply embedded and universal this fair play standard is. Indeed, even when the justices disagree on the application of the standard to particular facts, there is no dispute that fair play is the operative principle that governs the Court's adjudication of the case.¹⁴⁵

In the realm of criminal procedure, the principle of fair play arises in various different ways. As the Supreme Court has repeatedly observed for over half a century, "our sense of fair play" lies at the heart of the constitutional prohibition against self-incrimination,¹⁴⁶ including the *Miranda* doctrine¹⁴⁷ that protects this constitutional immunity.¹⁴⁸ This same "sense of fair play and decency" is what prohibits the government from pumping a person's stomach in the search for evidence of a crime, as the Court famously held in *Rochin v California*.¹⁴⁹ And, as already observed, "ordinary notions of fair play" underlie the constitutional prohibition against vague criminal statutes—a doctrine recently reaffirmed in an opinion for the Court by Justice Scalia.¹⁵⁰

¹⁴⁵ In her dissent in *J. McIntyre Machinery, Ltd v Nicastro*, 564 US 873 (2011), Ginsburg's very last line was devoted to the claim that she, and not the justices reaching the opposite conclusion, was being faithful to the *International Shoe* standard of "fair play and substantial justice." Id at 910 (Ginsburg dissenting). These other justices thought they were being true to the same canonical standard. Id at 880 (Kennedy) (plurality).

¹⁴⁶ *United States v Balsys*, 524 US 666, 690 (1998); *Withrow v Williams*, 507 US 680, 691–92 (1993); *Pennsylvania v Muniz*, 496 US 582, 595 n 8 (1990); *Doe v United States*, 487 US 201, 212–13 (1988); *Andresen v Maryland*, 427 US 463, 476 n 8 (1976); *Couch v United States*, 409 US 322, 328 (1973). All these cases quote *Murphy v Waterfront Commission of New York Harbor*, 378 US 52, 55 (1964). Although the specific holding of *Murphy* has been overruled, its invocation of the fair play principle endures. See *Balsys*, 524 US at 688–90 & n 11.

¹⁴⁷ See generally *Miranda v Arizona*, 384 US 436 (1966).

¹⁴⁸ See *Slagle v Ohio*, 366 US 259, 265–66 (1961):

Surely traditional notions of fair play contemplate that a person summoned to testify before any adjudicatory or investigatory body, including a legislative investigatory committee, may object to any question put to him upon any available ground. . . .

. . . To hold that these witnesses, in these circumstances, willfully and contumaciously refused to answer those questions would deeply offend traditional notions of fair play and deprive them of due process.

In *Withrow*, which held that *Miranda* violations are remediable in federal habeas proceedings, the Court invoked the basic "sense of fair play" to justify why *Miranda* rights require this extra level of procedural protection, whereas the Fourth Amendment and its exclusionary rule do not. *Withrow*, 507 US at 691–92.

¹⁴⁹ 342 US 165, 173 (1952).

¹⁵⁰ *Johnson*, 135 S Ct at 2557.

None of these many cases, either civil or criminal, in which the Supreme Court has linked due process with fair play specifically concerns the regulation of the electoral process. That fact, however, is no barrier to such linkage in the future. Indeed, as the Court itself observed in a case touching on voting rights, although not regulating them directly, “[A]s a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings.”¹⁵¹ That case concerned the federal Civil Rights Commission’s investigation of voting rights violations.¹⁵² The specific question before the Court was whether the Commission’s procedures for taking testimony from witnesses violated due process.¹⁵³ In an opinion by Chief Justice Earl Warren, the Court held that they did not.¹⁵⁴ In so holding, the Court recognized the variability of the fair play that due process requires depending on the particular context at hand.¹⁵⁵ Thus, due process can require a different form of fair play in administrative proceedings than in criminal prosecutions, and by the same reason can also require a different form of fair play when it comes to redistricting or other ways in which the law regulates the electoral process.

Indeed, there already have been hints of this use of fair play in cases concerning the procedures that the government uses to count votes. In a monumental dissent to a decision invoking the political-question doctrine in such cases, Justice John Marshall Harlan proclaimed that for government officials to manipulate the counting of ballots would be tantamount to stuffing the ballot box and thus a subversion of free government that would necessarily contravene due process.¹⁵⁶ This Harlan dissent was ahead of its time (as was his dissent in *Plessy v Ferguson*¹⁵⁷). Thus, after

¹⁵¹ *Hannah v Larche*, 363 US 420, 442 (1960).

¹⁵² *Id.* at 421–22.

¹⁵³ *Id.* at 423.

¹⁵⁴ *Id.* at 451–53.

¹⁵⁵ See *Hannah*, 363 US at 442 (“The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.”).

¹⁵⁶ *Taylor v Beckham*, 178 US 548, 608 (1900) (Harlan dissenting) (“[T]he overturning of the public will, as expressed at the ballot box, without evidence or against evidence, *in order to accomplish partisan ends*, is a crime against free government, and deserves the execration of all lovers of liberty.”) (emphasis added). I have discussed the significance of this Harlan dissent, including its relationship to *Bush v Gore*, 531 US 98 (2000) (per curiam), elsewhere. Foley, *Ballot Battles* at 170–77 (cited in note 3).

¹⁵⁷ 163 US 537, 552–64 (1896) (Harlan dissenting).

the repudiation of the old conception of the political-question doctrine in *Baker v Carr*,¹⁵⁸ lower federal courts began to apply the same due process principle to constrain a state's manipulation of its vote-counting rules.¹⁵⁹ Moreover, some observers see the Supreme Court's ruling in *Bush v Gore*¹⁶⁰—that Florida improperly varied its rules and procedures for the counting of “hanging chads”¹⁶¹—as resting more soundly on due process rather than equal protection.¹⁶²

In sum, the fertile soil of the Supreme Court's due process precedents provides ample grounds for generating a subsidiary jurisprudence that requires a state's laws governing elections to conform to the principle of fair play as appropriately tailored to the electoral context.

B. Fair Play and the Fourteenth Amendment's Ratification

1. An overview of the argument, including its jurisprudential perspective.

There is an additional, larger reason why it is appropriate to construe the Due Process Clause of the Fourteenth Amendment to embody the principle of fair play as a constraint on partisan overreaching. This reason emanates from the circumstances surrounding the ratification of the Fourteenth Amendment itself. As Professor Bruce Ackerman has highlighted in his monumental project on how constitutional history should inform constitutional interpretation, determining whether or when the Fourteenth Amendment had become duly ratified by the requisite three-fourths of the states was highly problematic.¹⁶³ Ratification occurred in the midst of Reconstruction, when the status of the Southern states was ambiguous.¹⁶⁴ Was it necessary, or proper, to

¹⁵⁸ 369 US 186, 228–29 (1962).

¹⁵⁹ See, for example, *Roe v Alabama*, 43 F3d 574, 580–81 (11th Cir 1995) (per curiam); *Griffin v Burns*, 570 F2d 1065, 1077–78 (1st Cir 1978).

¹⁶⁰ 531 US 98 (2000) (per curiam).

¹⁶¹ See *id.* at 105–06, 111.

¹⁶² See, for example, Richard L. Hasen, *Bush v. Gore and the Lawlessness Principle: A Comment on Professor Amar*, 61 Fla L Rev 979, 985–86 (2009); Edward B. Foley, *The Future of Bush v. Gore?*, 68 Ohio St L J 925, 960–61 (2007). See also generally, for example, Roy A. Schotland, *In Bush v. Gore: Whatever Happened to the Due Process Ground?*, 34 Loyola U Chi L J 211 (2002).

¹⁶³ Bruce Ackerman, 2 *We the People: Transformations* 110–13 (Belknap 1998).

¹⁶⁴ For the leading history of Reconstruction, see generally Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (Harper & Row 1988). For a new and highly readable account, which focuses on the difficulties of restitching the Republic after the

include these Southern states in calculating whether the requisite three-fourths had been reached?¹⁶⁵ (And who would speak for these states, given their status as conquered territory after General Robert E. Lee's surrender at Appomattox?)

Moreover, there was a great partisan divide over the Fourteenth Amendment's ratification. Republicans, especially the radicals in control of Congress and its Reconstruction policies, pushed hard for the Amendment's ratification.¹⁶⁶ Democrats, even those in the North who had supported the Union during the Civil War, opposed the Fourteenth Amendment as an excessive interference with state sovereignty and, from their perspective, an overly aggressive embrace of racial equality.¹⁶⁷ After Congress sent the Fourteenth Amendment to the states for ratification, Democrats won key elections for seats in the state legislatures of Ohio and New Jersey, and they used these victories as an opportunity to rescind the ratifications of the Amendment that occurred in those two states.¹⁶⁸ Because these rescission measures were adopted before it had become settled whether three-fourths of the states had completed the ratification process, the question arose whether these rescission measures were effective in undoing the previous ratifications that had occurred in Ohio and New Jersey.¹⁶⁹ Thus, could those two states count as having ratified the Fourteenth Amendment for the purpose of ascertaining whether the ratification process had reached the decisive three-quarters mark?

In the midst of this uncertainty, it was also unclear who in the federal government had the authority to make the definitive pronouncement on whether the Fourteenth Amendment had duly become part of the Constitution. Historically, the secretary of state had been the federal officer who made this pronouncement,

Civil War, see generally Mark Wahlgren Summers, *The Ordeal of the Reunion: A New History of Reconstruction* (North Carolina 2014).

¹⁶⁵ See Joseph B. James, *The Ratification of the Fourteenth Amendment* 287 (Mercer 1984) ("How many ratifying states were necessary to declare the Fourteenth Amendment a part of the Constitution? That question had bothered Congress from the beginning and was still unsettled in 1868.")

¹⁶⁶ See *id.* at 219–30.

¹⁶⁷ For more on the role of the Democrats as the opposition party during Reconstruction, see generally Joel H. Silbey, *A Respectable Minority: The Democratic Party in the Civil War Era, 1860–1868* (W.W. Norton 1977).

¹⁶⁸ See James, *The Ratification* at 282–87 (cited in note 165).

¹⁶⁹ See Ackerman, 2 *We the People* at 112 (cited in note 163); James, *The Ratification* at 287–88 (cited in note 165).

but that authority was not specified in the Constitution itself.¹⁷⁰ When the issue of the Fourteenth Amendment's status was put to Secretary of State William Seward in the summer of 1868, he hedged.¹⁷¹ In this context, Republicans in Congress felt it necessary that Congress issue an official resolution proclaiming that the Fourteenth Amendment had been duly ratified.¹⁷²

The Democrats, given their fierce opposition to the Fourteenth Amendment, could have attempted to obstruct this congressional proclamation. Even though a minority in Congress, Democrats could have employed the filibuster and other procedural devices in an effort to block this congressional pronouncement that the Fourteenth Amendment was now part of the supreme law of the land.¹⁷³ But they did not.¹⁷⁴ Instead, as a thorough history of the Fourteenth Amendment's ratification succinctly observed: "The concurrent Senate resolution was adopted without debate or recorded vote."¹⁷⁵

¹⁷⁰ Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv L Rev 386, 401 (1983) (noting that "[s]ince 1818, Congress has provided a statutory mechanism for keeping a record of state ratifications [of constitutional amendments]" and further noting that historically the secretary of state would "cause the amendment to be published").

¹⁷¹ See Ackerman, 2 *We the People* at 112 (cited in note 163); James, *The Ratification* at 294–96 (cited in note 165). Seward's proclamation, issued on July 20, 1868, was explicitly conditional, qualifying the status of the Fourteenth Amendment's ratification as dependent on treating the rescinding efforts in Ohio and New Jersey as ineffectual:

[I]f the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the legislatures of those States, which purport to withdraw the consent of said States from such ratification, then the aforesaid amendment has been ratified.

Proclamation of William Seward, July 20, 1868, Appx 11, 15 Stat 706, 707 (emphasis added).

¹⁷² Joseph James described the response of Republicans in Congress to Seward's conditional July 20 proclamation: "In Congress, the reaction to the proclamation was strong. Dominant Republicans judged it to be completely unsatisfactory and took swift and angry action." James, *The Ratification* at 296 (cited in note 165). Ackerman echoed this point: "Congressional reaction was swift and unequivocal." Ackerman, 2 *We the People* at 112 (cited in note 163). Indeed, the congressional resolution "to set the record straight," James, *The Ratification* at 297 (cited in note 165), was adopted the very next day after Seward's equivocation: "On July 21, both Houses passed a concurrent resolution . . . declaring [the Fourteenth Amendment] 'to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State.'" Ackerman, 2 *We the People* at 112 (cited in note 163), quoting 39 Cong Globe, 40th Cong, 2d Sess 4266 (July 21, 1868).

¹⁷³ For a history of the filibuster in the nineteenth century, see Gregory Koger, *Filibustering: A Political History of Obstruction in the House and Senate* 37–95 (Chicago 2010).

¹⁷⁴ See 39 Cong Globe, 40th Cong, 2d Sess 4266 (July 21, 1868).

¹⁷⁵ James, *The Ratification* at 296–97 (cited in note 165).

Why did the Democrats not resist this resolution, when they had fought so fiercely to resist ratification, including by means of the rescission measures in Ohio and New Jersey? To understand this acquiescence of the Democrats in its historical context, and thus to understand the potential implications of this acquiescence for modern interpretation of the Fourteenth Amendment and its role in the Constitution that organizes our collective self-government today, it is necessary to review the high drama that had occurred in Congress just a few weeks earlier. In May 1868, the Senate had acquitted President Andrew Johnson of the impeachment charges brought by the House of Representatives.¹⁷⁶ This acquittal, which meant that Johnson would remain president, occurred because the Senate's roll call on the charges against Johnson fell just one vote shy of the two-thirds necessary for his removal. With Republicans dominating the Senate, the reason why the effort to remove Johnson failed was that seven Republican senators crossed party lines and refused to convict Johnson for charges they saw as inappropriately partisan.¹⁷⁷ Johnson's misdeeds concerned policy disagreements with Republicans over how to pursue Reconstruction, not the kind of "high crimes or misdemeanors" that would warrant impeachment and removal of a president from office.¹⁷⁸

Thus, these seven senators put country and the Constitution before party, refusing to engage in the partisan overreaching that the removal of Johnson would have been.¹⁷⁹ Two months later,

¹⁷⁶ For the history of the impeachment and acquittal of Johnson, see generally David O. Stewart, *Impeached: The Trial of President Andrew Johnson and the Fight for Lincoln's Legacy* (Simon & Schuster 2009); Michael Les Benedict, *The Impeachment and Trial of Andrew Johnson* (Norton 1999).

¹⁷⁷ Summers, *The Ordeal of the Reunion* at 139–40 (cited in note 164).

¹⁷⁸ US Const Art II, § 4. See also Foner, *Reconstruction* at 334–35 (cited in note 164) ("Of the eleven articles of impeachment, nine hinged on either the removal of Stanton or an alleged attempt to induce Gen. Lorenzo Thomas to accept orders not channeled through Grant. Two others . . . charged the President with denying the authority of Congress and attempting to bring it 'into disgrace.'"). As Professor Eric Foner further explained, as flimsy as even these charges were, they were camouflage for "the real reasons Republicans wished to dispose of Johnson," namely, "his political outlook, the way he had administered the Reconstruction Acts, and his sheer incompetence." Foner, *Reconstruction* at 335 (cited in note 164).

¹⁷⁹ One of the seven—Senator Edmund Ross, whose vote to acquit was most doubtful—was featured in John F. Kennedy, *Profiles in Courage* (Harper & Row memorial ed 1964). President John F. Kennedy started his chapter on Ross:

In a lonely grave, forgotten and unknown, lies "the man who saved a President," and who as a result may well have preserved for ourselves and our posterity constitutional government in the United States—the man who performed in 1868 what one historian has called "the most heroic act in American history."

Id at 111.

without partisan obstruction or even any debate from Democrats—rather, by a voice vote of acclamation—the Senate passed the congressional resolution proclaiming the Fourteenth Amendment as duly ratified.¹⁸⁰ Now, these two closely contemporaneous events in the vernal season of 1868 need not be seen as an explicit *quid pro quo* between the two parties. Instead, they are better understood as two essential steps in the momentous achievement of a constitutional equilibrium, after the nation teetered on the edge of a partisan-induced unraveling during the Johnson impeachment trial.

Moreover, it is not necessary that the congressional participants in this high constitutional drama themselves recognized the equilibrium they achieved, or understood it in those terms. Rather, for our own present-day purposes of interpreting the Constitution that we have been bequeathed, is it reasonable for us to review the historical record of what occurred in the summer of 1868 and see it as the achievement of a constitutional equilibrium? Moreover, we can ask this interpretative question with a Dworkinian frame of mind: Does the historical record sufficiently *fit* this account—that is, that an important constitutional equilibrium was in fact achieved, whether or not the participants at the time self-consciously appreciated their role in achieving this equilibrium—such that we are *justified* in adopting this account? The alternative to this interpretation is that the Fourteenth Amendment, like the Constitution as a whole, offers nothing in the way of a solution to the serious problem of partisan overreaching. As between these two alternatives, Scalia undoubtedly would have chosen this latter, minimalist interpretation, simply because the bare text of the document is silent on the topic of excessive partisanship. But is this latter, minimalist interpretation really the better one? Is it better suited to the role the Constitution plays for us today in our project of democratic governance? To put this question in explicitly Dworkinian terms, which of the two possible alternative interpretations puts the Constitution “in its best light”?¹⁸¹ In other words, which interpretation is the more attractive one given the democratic function we want, and need, the Constitution to serve for us today? Regarding the dimension of normative attractiveness alone, there is no doubt that seeing the Constitution as including a constraint against partisan overreaching is superior.

¹⁸⁰ Ackerman, 2 *We the People* at 112 (cited in note 163).

¹⁸¹ Dworkin, *Law's Empire* at 398 (cited in note 18).

Even Scalia acknowledged this point in *Vieth*.¹⁸² If there were an explicit clause of the Constitution that provided, “No state legislature shall adopt legislation that, in contravention of the norm of fair play as applied to political competition, amounts to partisan overreaching,” Scalia undoubtedly would have judicially enforced that explicit constitutional command as best he could, given his overriding commitment to constitutional text. But seeing no such text, Scalia found no warrant for enforcing a constitutional constraint against partisan overreaching.

From a Dworkinian perspective, no matter how attractive a constitutional constraint against partisan overreaching might be as a norm of democratic theory, it cannot be an attractive *interpretation* of the Constitution itself unless it has an adequate *fit* with the historical record. On this point, Dworkin himself sided with Scalia against any constitutional utopians willing to impose whatever theoretical norm they find most attractive regardless of fit. But Dworkin, unlike Scalia, was willing to look beyond bare text to the larger historical record for the purpose of determining whether there is at least an *adequate* fit, which need not be the most perfect fit, for the purpose of choosing between the two available interpretations: either a Constitution that constrains excessive partisanship or a Constitution with no such constraint. Thus, given the normative desirability of having a Constitution that contains a constraint against partisan overreaching, does an honest examination of the historical record demonstrate a sufficient fit with the proposition that the ratification of the Fourteenth Amendment was the consequence of a constitutional equilibrium that rendered partisan overreaching out-of-bounds in our system of government? Readers will have to judge for themselves whether the historical record supports a finding of adequate fit from a Dworkinian perspective, recognizing that the essence of judging according to Dworkin is to achieve “law as *integrity*.”¹⁸³ But what follows is an account of the available historical record that, at least in the judgment of this Article’s author, meets the Dworkinian test of adequate fit.¹⁸⁴

Excessive partisanship on the part of Radical Republicans had pushed the nation to the brink with the House’s prosecution

¹⁸² See *Vieth*, 541 US at 286 (Scalia) (plurality).

¹⁸³ Dworkin, *Law’s Empire* at 225 (cited in note 18) (emphasis added).

¹⁸⁴ I am grateful to several readers, especially Professors Michael Les Benedict and Lisa Marshall Manheim, for pressing me to explain more fully the jurisprudential, and specifically Dworkinian, framework with which I approach the historical record.

of its purely political impeachment charges. Seven Republican senators, however, refused to go along with this excessive partisanship and pulled the nation back from the brink. Partisan fervor on the part of Democrats also had contributed to the disarray over the Fourteenth Amendment's ratification, with the partisan rescission measures in Ohio and New Jersey especially adding to the uncertainty. Simply put, the nation had been engulfed in a partisan frenzy. But by July 1868, this overzealousness had settled down, with Senate Democrats accepting the Fourteenth Amendment's ratification as part of that summer's overall constitutional accommodation.

Enough Republicans pulled back from partisan overreaching to prevent the constitutional calamity that would have been Johnson's removal from the presidency. Enough Democrats pulled back from their scorched-earth opposition to the Fourteenth Amendment's adoption to avoid a crisis over the status of its ratification. In this way, the Fourteenth Amendment owes its very presence as an unquestioned component of the Constitution to an operational acceptance in the summer of 1868 on both sides of the partisan divide that partisanship can go too far. From a Dworkinian perspective, this history provides enough grounds to interpret the Due Process Clause of the Fourteenth Amendment, insofar as it already embodies the norm of fair play, as entailing a constitutional constraint against excessive partisanship.

2. Details of the historical record.

The seven Republicans who voted to acquit Johnson saw their votes in exactly this light, as a stance against partisan overreaching. The Radical Republicans in the House, led by Representative Thaddeus Stevens, had impeached Johnson because he had removed Secretary of War Edwin Stanton in violation of a statute the Radicals had passed to prevent such removal.¹⁸⁵ The statute, an unconstitutional interference with the president's authority over the executive branch, reflected the strong disagreement between Johnson and the Radicals over how best to pursue Reconstruction.¹⁸⁶ The Radicals may have had the better of this policy dispute, but

¹⁸⁵ Stewart, *Impeached* at 156–62 (cited in note 176).

¹⁸⁶ The Supreme Court confirmed that the Tenure of Office Act, 14 Stat 430 (1867), was an unconstitutional interference with the president's removal power. *Myers v United States*, 272 US 52, 176 (1926). See also *Free Enterprise Fund v Public Company Accounting Oversight Board*, 561 US 477, 494 n 3 (2010) (stating that the Tenure of Office Act "was widely regarded as unconstitutional and void (as it is universally regarded today)").

Johnson was guilty of nothing more than disobeying an unconstitutional statute concerning the power of the presidency to remove a cabinet secretary. (Even if the statute had not been unconstitutional, Johnson's malfeasance would have concerned purely a policy dispute and was nothing like the abuse of office that occurred during Watergate, when President Richard Nixon participated in an attempted cover-up of his campaign's criminal break-in of the opposing party's headquarters.¹⁸⁷)

Thus, no matter how strongly they had opposed Johnson on policy grounds, these seven Republicans understood that it would be a partisan abuse of their senatorial power to remove him from the presidency for this reason. Johnson, a Democrat picked by President Abraham Lincoln to be his vice president as an exercise of wartime unity to bridge the two parties in the North, was president solely because of Lincoln's assassination.¹⁸⁸ But that did not make him any less entitled to the office, and it did not make the dispute between him and the Radicals over Reconstruction any less partisan. The Democrats simply had different views on how to bring the South back into the Union than the Republicans did, and Johnson had simply used the presidential powers that constitutionally belonged to him to promote the Democratic conception of Reconstruction rather than the Republican approach. After his impeachment by the House, the question before the Senate was whether to boot Johnson out of the presidency, thereby replacing him with one of their own—Senator Benjamin Wade—a staunch Radical who happened to be next in the line of succession.¹⁸⁹ Tempted as they were, these seven senators knew that move would have been an egregious act of partisan overreaching.

Senator Lyman Trumbull of Illinois, one of the seven, expressed this point explicitly in the opinion he submitted to the record to explain his vote of acquittal. Chairman of the Senate Judiciary Committee, known for his integrity,¹⁹⁰ and regarded as a "great constitutional lawyer,"¹⁹¹ Trumbull was "[o]ne of the most influential men in Congress."¹⁹² Trumbull opened his characteristically judicious opinion with the observation that "the duty" and

¹⁸⁷ For a discussion of the Watergate scandal, see generally Carl Bernstein and Bob Woodward, *All the President's Men* (Simon & Schuster 40th anniversary ed 2014).

¹⁸⁸ Stewart, *Impeached* at 5–13 (cited in note 176).

¹⁸⁹ *Id.* at 38.

¹⁹⁰ *Id.* at 228.

¹⁹¹ Edmund G. Ross, *Historic Moments: The Impeachment Trial*, 11 *Scribner's Magazine* 519, 524 (1892).

¹⁹² Foner, *Reconstruction* at 243 (cited in note 164).

“oath” each senator took was “[t]o do impartial justice in all things appertaining to the present trial,” adding that “he who falters in the discharge of that duty, either from personal or *party* considerations, is unworthy [of] his position, and merits the scorn and contempt of all just men.”¹⁹³ Trumbull defended his acquittal verdict as consistent with this duty of nonpartisanship: “I have endeavored to be governed by the case,” he explained, “without giving the least heed to the clamor of intemperate zealots who demand the conviction of Andrew Johnson as *a test of party faith*.”¹⁹⁴ Finding it “[p]ainful . . . to disagree with so many political associates and friends,” Trumbull avowed that he opposed Johnson’s policies as much as any other Republican senator, but that this was “insufficient cause” to “convict and depose the Chief Magistrate”:

His speeches and the general course of his administration have been as distasteful to me as to any one, and I should consider it the great calamity of the age if the disloyal element, so often encouraged by his measures, should gain political ascendancy. If the question was, Is Andrew Johnson a fit person for President? I should answer, *no*; but [this impeachment trial] is not a party question.¹⁹⁵

Trumbull then closed his opinion with a warning of the dire consequences “to the future of the country” if the Senate did not refrain from removing Johnson in a fit of overzealous partisanship:

[N]o future President will be safe who happens to differ with a majority of the House and two-thirds of the Senate on any measure deemed by them important, particularly if of a political character. *Blinded by partisan zeal*, with such an example before them, they will not scruple to remove out of the way any obstacle to the accomplishment of their purposes, and what then becomes of the checks and balances of the Constitution, so carefully devised and so vital to its perpetuity?¹⁹⁶

There can be no doubt that Trumbull’s opinion, from start to finish, is animated by the goal of keeping congressional partisanship

¹⁹³ 3 *Trial of Andrew Johnson, President of the United States, before the Senate of the United States, on Impeachment by the House of Representatives for High Crimes and Misdemeanors* 319 (GPO 1868).

¹⁹⁴ *Id.* at 327–28 (emphasis added).

¹⁹⁵ *Id.* at 328.

¹⁹⁶ *Id.* (emphasis added).

within appropriate and manageable bounds, particularly at this moment of acute crisis, for the sake of the Republic's posterity.

Senator James Grimes of Iowa, another of the seven, who also was an influential leader in the Senate with a reputation for integrity,¹⁹⁷ and who had served on the Joint Committee on Reconstruction,¹⁹⁸ echoed Trumbull's position. "I cannot agree to destroy the harmonious working of the Constitution for the sake of getting rid of an unacceptable President," Grimes declared.¹⁹⁹ He continued:

However widely, therefore, I may and do differ with the President respecting his political views and measures, and however deeply I have regretted, and do regret, the differences between himself and the Congress of the United States, I am not able to record my vote that he is guilty of high crimes and misdemeanors by reason of those differences.²⁰⁰

Senator Joseph Fowler of Tennessee, in his justification of his acquittal vote, offered a disquisition on the evil of excessive partisanship. "The framers of the Constitution," he observed, "were not content to leave the term treason to any construction that party spirit or unbridled ambition might educe" from the annals of legal history.²⁰¹ Nor could the Constitution be construed to give the Senate power over removal of cabinet officers. Otherwise, the exercise of this power would "become mere partisan c[o]nflicts and end in the overthrow of all sense of justice and right in the Senate."²⁰²

"There is no party impenetrable to the seductions of power," Fowler generally pronounced.²⁰³ "However much of integrity they may possess in their origin, they will in time run upon the common rock on which all political parties in a republic must sooner or later be wrecked."²⁰⁴ In a confession of candor relating to the specific charges at hand, Fowler saw the statute that Johnson was accused of breaching as motivated by a "violent party feeling," lamenting that it was "unwise legislation to attempt a construction

¹⁹⁷ See Foner, *Reconstruction* at 247 (cited in note 164); Stewart, *Impeached* at 228 (cited in note 176).

¹⁹⁸ Stewart, *Impeached* at 44–45 (cited in note 176).

¹⁹⁹ 3 *Trial of Andrew Johnson* at 340 (cited in note 193).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 193–94.

²⁰² *Id.* at 199–200.

²⁰³ 3 *Trial of Andrew Johnson* at 200 (cited in note 193).

²⁰⁴ *Id.*

of our Constitution under the influence of party animosity.”²⁰⁵ Consequently, he viewed “[t]he present trial” with disdain—and predicted that “the historian will so denominate it, *the trial of the integrity of the republic.*”²⁰⁶

Given the enormity of what was at stake, Fowler perceived his role as resisting the “high party feeling” that was engulfing “the greatest number” of his fellow Republicans at the moment, causing them to “yield to the pressure of the political demand” rather than following “any compunctions of conscience.”²⁰⁷ But, as for himself, Fowler would “trust with confidence” the “just judgment of posterity.”²⁰⁸ He could “endure” if “necessary” the “slanders of the partisan, the desertion of friends.”²⁰⁹ In this way, along with the six others, he would serve as a bulwark against the egregious abuse of power his own party was prepared to commit.

Senator William Fessenden of Maine was the most distinguished and respected of the seven so-called martyrs who crossed party lines to acquit Johnson.²¹⁰ He had been Lincoln’s Treasury secretary, fixing the nation’s finances after mismanagement by his predecessor (Secretary Salmon Chase), and had chaired the Joint Committee on Reconstruction, which had drafted the Fourteenth Amendment.²¹¹ His opinion on acquittal mostly confined itself to careful analysis of the relevant constitutional considerations. It closed, however, with a peroration on the necessity of curbing partisanship in the exercise of the impeachment power: “[I]t must be conceded that the power thus conferred might be liable to very great abuse, especially in times of *high party excitement*, when the passions of the people are inflamed against a perverse and obnoxious public officer.”²¹² He continued: “The office of President is one of the great co-ordinate branches of the government,” and “to make it the mere sport of temporary majorities, tends to the great injury of our government, and inflicts a wound upon constitutional liberty.”²¹³ Accordingly, “the offence for which a Chief Magistrate

²⁰⁵ *Id.* at 195.

²⁰⁶ *Id.* at 198.

²⁰⁷ 3 *Trial of Andrew Johnson* at 200 (cited in note 193).

²⁰⁸ *Id.* at 207.

²⁰⁹ *Id.*

²¹⁰ See Benedict, *The Impeachment* at 9 (cited in note 176) (noting that Fessenden was “the Senate’s most respected member”); Stewart, *Impeached* at 39 (cited in note 176) (noting that “[s]ome regarded” Fessenden as “the Senate’s finest legislator”).

²¹¹ See Stewart, *Impeached* at 39–40, 56, 177 (cited in note 176).

²¹² 3 *Trial of Andrew Johnson* at 29–30 (cited in note 193) (emphasis added).

²¹³ *Id.* at 30.

is removed from office, and the power intrusted to him by the people transferred to other hands, and *especially where the hands which receive it are to be the same which take it from him,*” should be “beyond all question, an adequate cause.”²¹⁴ Here Fessenden was averting to the fact that Wade, a Radical, would assume the presidency upon Johnson’s removal, and that this replacement would appear especially partisan.²¹⁵ To avoid any doubt about his meaning, Fessenden added that any removal of the president in such circumstances “should be free from the taint of party” and “leave no reasonable ground of suspicion upon the motives of those who inflict the penalty.”²¹⁶ For good measure, he added: “Anything less than this . . . would be to shake the faith of the friends of constitutional liberty in the permanency of our free institutions, and the capacity of man for self-government.”²¹⁷

On the day that the Senate acquitted Johnson, Fessenden was the first of the seven Republicans to cast an acquittal vote, as the roll call proceeded in alphabetical order. But his was not the most consequential of the seven. That belonged to Senator Edmund Ross of Kansas, because his was the one most in doubt on that fateful day. The tension in the chamber was most severe as his name was called. Ross himself later described the moment as one in which he “almost literally looked down into [his] open grave.”²¹⁸ He could see his fellow “Senators in their seats leaned over their desks, many with hand to ear, that not a syllable or intonation in the utterance of the verdict should be lost.”²¹⁹

Insofar as Ross’s vote was the most decisive one, determining that the count would fall one short of the necessary two-thirds for removal, it is particularly significant that he, too, justified his vote on the same grounds of the necessity to curb partisan overreaching in the exercise of the impeachment power. Shortly after his crucial vote, he took to the floor of the Senate to explain: “I sought to divest my mind of all party prejudice.”²²⁰ Like Trumbull and Grimes, he emphasized:

I had been, and still am, an earnest opponent of the reconstruction policy of his Administration. I thought, as I still

²¹⁴ *Id.* (emphasis added).

²¹⁵ Stewart, *Impeached* at 176–77 (cited in note 176).

²¹⁶ 3 *Trial of Andrew Johnson* at 30 (cited in note 193).

²¹⁷ *Id.*

²¹⁸ Ross, 11 *Scribner’s Magazine* at 524 (cited in note 191).

²¹⁹ *Id.*

²²⁰ 39 *Cong Globe*, 40th Cong, 2d Sess 2599 (May 27, 1868) (statement of Sen Ross).

think, that policy in many most important particulars, unwise and injurious to the best interests of the country. I longed, and still long, for such changes in the administration of the Government as would conform it to the views of the dominant party of the country, and to the reconstruction policy of Congress.²²¹

But these “differences as to governmental policy” could not be the basis of a vote to “declare the President guilty of high crimes and misdemeanors.”²²² On the contrary, Ross reiterated for emphasis: “[W]hen I voted on the several articles of impeachment I cast out of the scale, as far as I was able, all mere party considerations.”²²³

Years later, in an article for *Scribner’s Magazine*, Ross elaborated on the reasons for his acquittal vote. If “the President must step down” because of “partisan considerations,” the consequence would “have revolutionized our splendid political fabric into a partisan Congressional autocracy.”²²⁴ Conversely, a vote “for acquittal,” being “non-partisan” because “no other could acquit him as the Senate was then constituted,” would

effectually impress upon the world a conviction of the strength and grandeur of republican institutions in the hands of a free and enlightened people—institutions rendered vastly more substantial and enduring by reason of having passed successfully and safely through the fiery ordeal of partisan prejudice and turmoil into which they had been cast.²²⁵

As Fessenden also had argued, for Ross nothing short of the whole capacity for constitutional self-government was at stake. It was thus essential for Ross to vote the way he did so that “America would pass the danger-point of partisan rule.”²²⁶

Taking together all these explanations offered by the Republicans who saved Johnson from removal, one cannot avoid the conclusion that preservation of the Republic from partisan overreaching was the evident motive. At a moment of great national peril, when the country was literally reconstructing itself, those holding the balance of power in the Senate set aside party loyalty for the sake of maintaining the proper constitutional order between

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ Ross, 11 *Scribner’s Magazine* at 520 (cited in note 191).

²²⁵ *Id.* at 520, 522.

²²⁶ *Id.* at 522.

president and Congress. To be sure, a majority of Republicans in both the House and the Senate were willing to remove Johnson from the presidency, thereby demonstrating the degree to which overzealous partisanship did influence governance at the time. Why then credit the role of the relatively few Republicans who resisted this overzealousness? The reason is that it was these resisters—the so-called Seven Martyrs—who engaged in the constitutionally decisive conduct, given the two-thirds requirement for removal of a president from office upon impeachment. Consequently, from the perspective of constitutional construction, the unwillingness of the Seven Martyrs to go along with the overzealous partisanship of their fellow Republicans saved the day, so to speak, and in doing so established the constitutional principle that excessive partisanship was contrary to preservation of the constitutional order.²²⁷

A few weeks later, as part of the same overall enterprise of Reconstruction, Democrats in the Senate essentially reciprocated by refusing to engage in partisan overreaching to provoke a crisis over the status of the Fourteenth Amendment's ratification.²²⁸ In

²²⁷ In addition to the justifications for acquittal offered by the seven Republican senators, there is arguably an additional reason to understand the acquittal of Johnson as a repudiation of partisan overreaching. According to one historical account, Radical Republicans considered accelerating the admission of senators from the Reconstruction states, knowing that these additional senators would be extra votes to remove Johnson. But the Radicals declined to make this move, recognizing that it would be an especially egregious form of partisan abuse. "[N]ot even Stevens was willing to pack the impeachment jury this way." Stewart, *Impeached* at 273 (cited in note 176).

²²⁸ Because there was no debate in the Senate on the crucial resolution to recognize the Fourteenth Amendment's ratification, the Democrats in the Senate did not give speeches explaining themselves in the same way that the Republicans who refused to convict Johnson did. But it is the silence of the Democrats on this crucial resolution that speaks volumes. The key point is precisely that there was no debate, and no opposition, when there could have been. As a party, the Democrats had been doing their utmost to block the ratification of the Fourteenth Amendment, including by rescinding the previous ratification measures in New Jersey and Ohio as soon as they had the political power to do so in those states. It is not as if the Democrats, as a party, had reversed themselves on their views of the Fourteenth Amendment. Indeed, it would not be until four years later, in 1872, that the Democrats as a formal matter of their party platform explicitly recognized their acceptance of the Fourteenth Amendment as part of the Constitution. Thus, in the summer of 1868, the Democrats in the Senate kept themselves in check on the status of the Fourteenth Amendment's ratification, despite their vehement opposition to it and all that they had done as a party to block its ratification. The only explanation for their silent acquiescence, then, is a recognition (however reluctant) that attempting to block the ratification resolution in the Senate would be a partisan step too far. See Ackerman, 2 *We the People* at 110–13, 227–38 (cited in note 163).

It has been suggested that the Senate Democrats may have been fearful of the electoral consequences to their party in November 1868 if they had attempted to block the ratification resolution. Perhaps, but that electoral motive is entirely consistent with the

the summer of 1868, Congress managed to achieve a new constitutional settlement, one with the Fourteenth Amendment at its center. Congress reached this new constitutional equilibrium because of a balance of political forces, one that ruled out-of-bounds the excessive partisan zeal that was attempting to rid the nation of an unwanted president, and one that simultaneously rendered unacceptable a degree of partisan obstructionism that would have put in doubt the Fourteenth Amendment's place in the new constitutional order.

A century and a half later, one can read the bare words of the Constitution and think that it has nothing to say on the subject of partisanship. But to read the words alone, without understanding the historical circumstances of their adoption, would be to

point that they pulled back from the brink of going too far in their partisan zeal to block the Fourteenth Amendment. The crucial point is that the constitutional equilibrium against partisan overreaching had been achieved, even if part of the political dynamic that resulted in that equilibrium had been a fear of the electorate's reaction to partisan overreaching. See *id.*

What matters is that during the summer of 1868, as part of the process that resulted in the acceptance of the Fourteenth Amendment as part of the Constitution, political forces converged to the point that both political parties acted as if they recognized that there were outer limits to the extent to which they could pursue their respective partisan positions on how to reconstruct the Union. The Republicans pulled back from the outer limit when enough of them refused to remove Johnson from the presidency. The Democrats, in turn, pulled back from the outer limit when in the Senate they refused to block the resolution recognizing the Fourteenth Amendment's ratification. It was as if the two parties were doing an elaborate constitutional dance. First the Republicans made their move, and then the Democrats. The two parties may not exactly have been partners in this constitutional minuet, but what is important is where the political system as a whole ended up as a consequence of these maneuvers on both sides. The upshot was an equilibrium that depended on the rejection, on both sides, of partisan overreaching, and that equilibrium gave us the Fourteenth Amendment as an accepted part of the Constitution.

For the foregoing reasons, it is sufficient to see the events in 1868 as establishing this constitutional equilibrium. One could additionally rely on the Democratic Party's formal acceptance of the Fourteenth Amendment in 1872 as an essential component of fully achieving the constitutional equilibrium that resulted in the Fourteenth Amendment's indisputable status as part of the Constitution. This alternative account would see the achievement of the constitutional equilibrium as a four-year process, which included the election of 1868 and subsequent political developments during Reconstruction. Insofar as this alternative account ends up in the same place, it would be a basis for interpreting the Fourteenth Amendment as a constraint against excessive partisanship. My own view is that the focus on 1868 is more parsimonious and accurate in describing that the requisite equilibrium had been achieved at that time. From the moment that the Democrats in the Senate refused to block the ratification resolution, the Fourteenth Amendment was functionally part of the Constitution. The formal recognition of this fact in 1872 by the Democrats was, in my view, just a retrospective acknowledgement of the constitutional equilibration that had already occurred—and not itself an essential component of achieving that constitutional equilibrium. (I'm very grateful to Michael Les Benedict for discussions that have led to the clarification of this point.)

miss an essential component of their meaning. The words of the Fourteenth Amendment, including its capacious guarantee of “due process,” owe their existence as part of the Constitution to the new equilibrium achieved in the summer of 1868, an equilibrium premised on the rejection of partisan overreaching. Thus, far from saying nothing concerning the problem of excessive partisanship in a democracy, the Fourteenth Amendment itself rests on the foundation that partisan overreaching is antithetical to the success of constitutional self-government. For this reason, the principle of fair play that has been so widely and routinely recognized as a component of due process easily can—and should—be understood to encompass a constraint against excessive partisanship.²²⁹

It is important to reiterate what should be evident from the history just recounted: the Congress that ultimately refused to remove Johnson from office, and essentially at the same time ratified the Fourteenth Amendment, hardly condemned *all* partisanship. On the contrary, even the seven Republicans who crossed party lines to acquit Johnson were partisan politicians in most of their thinking and conduct, as they themselves acknowledged. It was only the extreme form of egregiously rabid partisanship that threatened to destabilize the entire democratic system of the Republic that they wished to rule out-of-bounds. It is this limited constitutional prohibition against *excessive* partisanship that historically underlies the ratification of the Fourteenth Amendment and deserves recognition as a component of due process. Accordingly, it is for this reason that due process—in contrast to equal protection (or the First Amendment)—provides a principled basis for condemning excessive partisanship, without condemning all forms of partisan conduct by legislatures or other branches of government.

²²⁹ This understanding of the Fourteenth Amendment shares affinities with Ackerman’s methodology of constitutional interpretation, in part because Ackerman himself has pointed to the special circumstances surrounding the Fourteenth Amendment’s ratification. See text accompanying note 163. But Ackerman’s own work does not draw the same connection between the Fourteenth Amendment’s ratification and the Senate’s ultimate refusal to remove Johnson from office, and Ackerman has not offered a reading of the Fourteenth Amendment that would render excessive partisanship a due process violation. Ackerman views the events of 1868 more in terms of Republicans achieving a new constitutional hegemony than as a constitutional settlement that recognized the inevitability of two-party competition in a well-functioning republic. See Ackerman, 2 *We the People* at 227–38 (cited in note 163). Moreover, although reading the Fourteenth Amendment in this way can be characterized as “Ackermanian” in nature, one can embrace this reading without adopting all elements of Ackerman’s approach to constitutional interpretation, including his view that the New Deal represents an unwritten constitutional amendment.

III. FAIR PLAY AND GERRYMANDERING

Part II established that due process embodies the idea of fair play and that, in light of the special historical circumstances associated with the Fourteenth Amendment's ratification, it makes sense to understand the fair play principle embedded in due process as encompassing a constraint against excessive partisanship.²³⁰ In this Part, it is necessary to consider how this due process constraint against excessive partisanship applies to the problem of gerrymandering. To do this requires three tasks. First, this Part considers the historical understanding of gerrymanders as an especially egregious form of partisan overreaching. Second, it shows how this historical understanding can be employed as the foundation for a workable judicial test to identify unconstitutional gerrymanders. Third, it compares this historically grounded test, rooted in the due process requirement of fair play, to the existing equal protection alternatives, which emanate from political science but which so far have been unable to generate a successful judicial method for differentiating between unfair and appropriate districting.

²³⁰ The historical analysis developed in Part II also explains why it is appropriate to locate the fair play constraint against partisan overreaching in the Fourteenth Amendment's Due Process Clause, rather than in the original Constitution's "Republican Form of Government" or "Guarantee" Clause. US Const Art IV, § 4. Like the original Constitution of which it is a part, the Guarantee Clause is premised on the Framers' expectation that the separation of powers (as a form of constitutional architecture) would prevent the consolidation of multifarious factions into stable and ongoing two-party competition, and thus the Guarantee Clause does not contain within it the norm of constraining one well-established party from overreaching in its ongoing competition against the opposing party that is its consistent and perpetual adversary. Thus, it would be anachronistic to interpret the original Constitution's Guarantee Clause as protecting the Republic from the risk of one party dominating the other in the way that the Reconstruction Republicans threatened to dominate the Democrats during the impeachment and trial of President Johnson. But the crucial point is that it is not anachronistic to so interpret the Fourteenth Amendment, given the historical role that the impeachment and trial of Johnson had just played at precisely the point when Congress was considering the status of the Fourteenth Amendment's ratification. By this point, not only had the nature of two-party competition developed—and come to be accepted as the normal equilibrium in a democratic Republic—but the impeachment and trial of Johnson had demonstrated the potentially devastating threat to that equilibrium from excessive partisan overreaching. Thus, as a matter of history and America's constitutional development, it is appropriate to interpret the Fourteenth Amendment's Due Process Clause as containing the necessary constitutional constraint against undue partisanship that threatens the functioning of the democratic Republic, whereas it is not similarly appropriate to interpret the original Constitution's Guarantee Clause in this way. (I am indebted to Professor Evan Zoldan for recognizing the importance of this comparative point about the Guarantee Clause.)

A. Gerrymanders and the Fourteenth Amendment

It is all well and good that, as Part II showed, the history of the Fourteenth Amendment reveals that it should be understood to constitutionalize a constraint against excessive partisanship. But if it turned out that the framers of the Fourteenth Amendment specifically did not believe that gerrymandering was a form of excessive partisanship, it would be difficult to employ this constitutional constraint against excessive partisanship as a means of rendering gerrymandering unconstitutional.²³¹ As it happens, however, the history surrounding the adoption of the Fourteenth Amendment shows that its authors, far from accepting gerrymandering as appropriate political behavior, condemned it as the very essence of the excessive partisanship that they considered inappropriate.

While it would be too much to say that the framers of the Fourteenth Amendment had a specific intent to outlaw gerrymandering as a component of their constitutional handiwork, it is not too much to say that those responsible for the Fourteenth Amendment being part of the Constitution exhibited adherence to *both* the general goal of eradicating the kind of extreme partisanship that threatened the nation during the Johnson impeachment proceedings *and* the specific understanding that gerrymanders

²³¹ In Dworkinian terms, there would be an obstacle to this interpretation in terms of its fit with the historical record. This obstacle would occur at the level of applying a general principle that otherwise did fit (the constraint against excessive partisanship) to a specific practice, gerrymandering. Consider an analogy from Establishment Clause jurisprudence. Suppose at the level of general principle that the Establishment Clause is properly interpreted as containing a constraint against the government engaging in an official endorsement of sectarian faith, as Justice O'Connor famously articulated with her "no endorsement" test. See *Lynch v Donnelly*, 465 US 668, 687–88 (1984) (O'Connor concurring). Suppose further, however, that at the level of specific application, it was impossible to conclude that the long-standing practice of legislative prayer led by legislatively appointed (and legislatively funded) chaplains was a violation of the Establishment Clause. See *Marsh v Chambers*, 463 US 783, 795 (1983). The historical record of this particular practice being consistent with the Establishment Clause was just too strong for the practice to be invalidated. *Id.* at 790. Any interpretation that invalidated the practice would flunk the dimension of fit. In this situation, even if the general principle of no endorsement otherwise adequately fit the historical record, and thus properly could be applied to invalidate other government practices inconsistent with the principle, the Dworkinian approach would have to uphold the validity of legislative prayers based on legislative practice as a necessary interpretative exception to the general principle. Thus, to comply with the mandate of "law as integrity," the Dworkinian approach requires an examination of the historical record to see whether gerrymandering must be accepted as an entrenched exception to the otherwise-valid principle that constrains partisan overreaching in the same way that legislative prayer must be accepted as an entrenched exception to the otherwise-valid "no endorsement" principle.

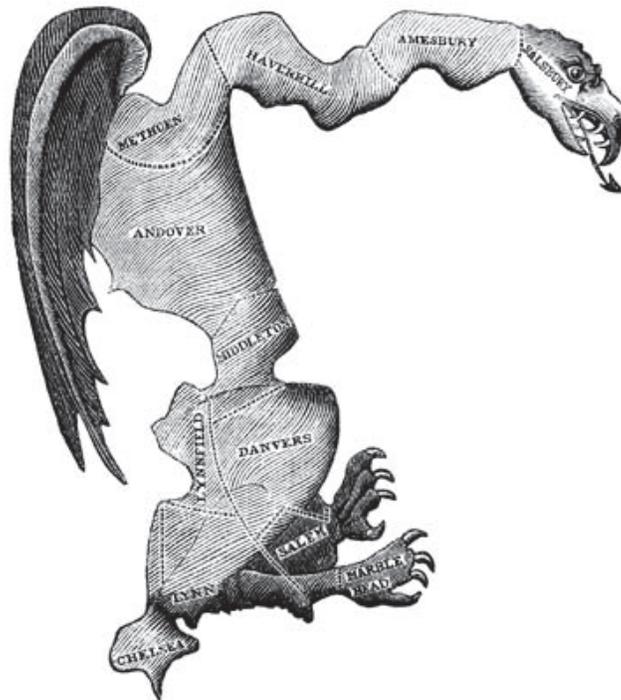
were the archetypal evil resulting from overzealous partisanship. Although the framers of the Fourteenth Amendment themselves may not have combined these two propositions into the constitutional conclusion that follows from their combination—that gerrymandering contravenes the constraint against partisan overreaching embodied in the Fourteenth Amendment—judges today can take both of these historically rooted propositions and combine them to reach this constitutional conclusion. Both propositions are comfortably sound along the dimension of *fit*, and for Professor Dworkin’s Justice Hercules to combine them to reach the conclusion that gerrymandering violates due process is to interpret the historical circumstances of the Due Process Clause in their best light. To be sure, it is not the most minimalist interpretation of the Due Process Clause. “Law as integrity,” however, does not seek the most minimalist interpretation, but rather the one that is the most appropriate understanding of the historical record for the purposes that the Constitution serves today—most especially, as the framework for organizing democratic governance. In this way, a contemporary determination that gerrymandering violates the principle of fair play embedded in due process follows from historically appropriate propositions concerning the Fourteenth Amendment generally and gerrymandering specifically.

The original gerrymander was a misshapen district adopted by the Massachusetts legislature in 1812 as part of the new map for seats in the state senate.²³² Named after Governor Elbridge Gerry, who signed the map into law, and shaped like a monstrous salamander according to a cartoon that quickly came to represent the archetype of inappropriate districting,²³³ this original gerrymander was designed to preserve the political power of the so-called Democratic Republican, or Jeffersonian Republican, Party, which recently had overtaken its rival, the Federalist Party.²³⁴

²³² Elmer C. Griffith, *The Rise and Development of the Gerrymander* 16–18 (Scott, Foresman 1907).

²³³ See Figure 1.

²³⁴ See Kenneth C. Martis, *The Original Gerrymander*, 27 *Polit Geo* 833, 834–35 (2008).

FIGURE 1. THE ORIGINAL GERRYMANDER²³⁵

Despite their recent ascendancy, the Democratic Republicans were fearful of the Federalists mounting a comeback. The two parties had been locked in ferocious combat, especially in New England, at least since President Thomas Jefferson had won the presidency in 1800.²³⁶ The salamander-shaped senatorial district was immediately denounced as an especially egregious weapon in this partisan war.²³⁷ It is impossible to overstate the importance of the district's grotesque shape as an essential element of its impropriety to those that condemned it in the nineteenth century. Moreover, insofar as the term “gerrymander” is a portmanteau of

²³⁵ *The Gerry-Mander*, Boston Gazette 2 (Mar 26, 1812).

²³⁶ See Martis, 27 *Polit Geo* at 834–35 (cited in note 234).

²³⁷ As Professor Elmer Griffith described it, the map of the misshapen district was described as lacking only “wings to resemble a prehistoric monster,” and the artist Elkanah Tisdale “at once” took up the suggestion by drawing the famous cartoon that, once printed in a newspaper and widely circulated, gave the original gerrymander its quickly ubiquitous name. Griffith, *The Rise and Development* at 17–18 (cited in note 232). See also Martis, 27 *Polit Geo* at 834–35 (cited in note 234).

“Gerry” and “salamander,” the visual image of its ugliness is built into the very definition of the objectionable practice. Like all the other examples of gerrymandering that have followed in the footsteps of their original namesake, the 1812 partisan distortion of district lines that constituted the original gerrymander literally changed the field of electoral combat so that the field would favor one side over the other.

The Democratic Republicans were indeed successful in vanquishing their Federalist opponents, as America’s first party system gave way to the “Era of Good Feelings.”²³⁸ That interlude was unstable, and there soon arose the second party system, with the Whigs now the opponents to the Democrats, who became increasingly populist under President Andrew Jackson’s leadership. The Whigs in turn were replaced by the new Republican Party during the battles over slavery that led up to the Civil War.²³⁹ By 1860, when President Lincoln was elected and the South seceded, gerrymandering had become a prevalent practice in each version of the two-party combat that characterized American politics.²⁴⁰

Prevalent, but not popular. Viewed as a political sin, gerrymandering was the public analog to private immorality, like adultery or prostitution. “The gerrymander was considered a political, civil and moral injustice.”²⁴¹ It might have been a widespread practice, but that was because of susceptibility to temptation. Gerrymandering was no less evil or pernicious, or less recognized as such, because of its prevalence. Politicians simply could not resist engaging in the practice when they had the opportunity to do so, just as alcoholics cannot resist a drink when addiction overpowers their will.

The politicians addicted to gerrymandering themselves recognized the sinfulness of their behavior. For example, the future president James Garfield publicly acknowledged as a congressman that he was a beneficiary of gerrymandering to the detriment of his constituents. He pleaded for an institutional solution that

²³⁸ See Aldrich, *Why Parties* at 103–04 (cited in note 4).

²³⁹ For a useful overview of the development of America’s party systems in the nineteenth century by the leading political scientist on the topic, see John H. Aldrich, *Did Hamilton, Jefferson, and Madison “Cause” the U.S. Government Shutdown? The Institutional Path from an Eighteenth Century Republic to a Twenty-First Century Democracy*, 13 *Persp Polit* 7, 10–11 (2015).

²⁴⁰ Engstrom, *Partisan Gerrymandering* at 81 (cited in note 1) (“Throughout the 19th century, state political parties used gerrymandering to bias congressional election outcomes in their favor.”).

²⁴¹ Griffith, *The Rise and Development* at 124 (cited in note 232).

would rid the American political system of this evil, because he knew that he could not resist it as an individual politician.²⁴²

Thus, by the middle of the nineteenth century, this duality regarding the immorality of gerrymandering was commonplace: it was both widespread and widely condemned as a paramount political sin. As the first leading history on the topic summarized this essential point: “By 1840 the gerrymander was generally practiced by all the states that used election-districts. Moreover by that time it was fully recognized as an evil of the republic which demanded legislation to prevent it.”²⁴³

The question remained what was to be the institutional fix that would cure American democracy of this evil addiction, so that the public was not at the mercy of weak-willed politicians and their inevitably partisan motives. Congress legislated to address the manipulation of congressional districts in 1842, but this legislation was counterproductive because, by mandating single-member districts, Congress only exacerbated the problem.²⁴⁴ States amended their own constitutions in an effort to slay the gerrymander, but these measures had only limited success because their prescriptions tended only to redress particular means of accomplishing a gerrymandered map rather than outlawing gerrymanders in their entirety. For example, “[t]hese provisions included the requirements that the districts be composed of contiguous territory, that they be compact,” and “that no county be divided.”²⁴⁵ As the Civil War approached, a universal cure remained elusive.

In 1861, across the Atlantic, John Stuart Mill published *Considerations on Representative Government*.²⁴⁶ In it, he proposed a form of proportional representation as a means to redress Britain’s problem of “rotten boroughs,” whereby the interests of constituents were submerged by partisan manipulations aimed at favoring the members of Parliament and their party’s interests.²⁴⁷

²⁴² See Argersinger, *Representation and Inequality* at 19 (cited in note 1) (discussing Garfield’s confession of benefiting from gerrymandering at the same time as he denounced it as “the weak point in the theory of representative government, as now organized and administered”).

²⁴³ Griffith, *The Rise and Development* at 11 (cited in note 232).

²⁴⁴ See *id.* at 119, 123. See also Argersinger, *Representation and Inequality* at 13–14 (cited in note 1) (recognizing that the congressional motive may have been more partisan than fair-minded).

²⁴⁵ Griffith, *The Rise and Development* at 123 (cited in note 232).

²⁴⁶ See generally John Stuart Mill, *Considerations on Representative Government* (Parker, Son, and Bourn 1861).

²⁴⁷ See Dale E. Miller, *J.S. Mill: Moral, Social and Political Thought* 181 (Polity 2010).

While not identical to gerrymandering, Britain's rotten boroughs were an analogous cancer that subverted representative democracy. When Mill's book reached America's shores, it immediately aroused great interest, sparking a flurry of publications aimed at using his ideas to improve American democracy.²⁴⁸ Most especially, Mill's American readers saw his theory of proportional representation as an innovative way to eradicate the American evil of gerrymandering.

The leading text was *The Degradation of Our Representative System, and Its Reform* by J. Francis Fisher, a prominent Philadelphian.²⁴⁹ Written in the midst of the Civil War, it was a call for the rejuvenation of the Union's democratic-republican institutions, which the author believed were perishing due "to the rapid decay of public virtue in [elected] representatives."²⁵⁰ After discussing Mill's *Representative Government* generally and the dangers of overreaching by a political party in majority control of a legislature, Fisher singled out gerrymandering as particularly pernicious:

[O]f all the evil consequences of this unstable possession of power, the most obnoxious is a party measure peculiar to our country, invented, it is said, by one of the early Democratic Governors of Massachusetts, from whom it has its appellation,—Gerrymandering. *A more unprincipled scheme, and one more opposed to the true principles of Democracy, never was imagined or put in practice; . . . it is one of the monstrous evils arising out of our mode of electing by local majorities, which cries out for reform.*²⁵¹

Two years after Fisher's work appeared, Simon Sterne, a Philadelphia native who had moved to New York after studying law at the University of Pennsylvania, took a trip to England and

²⁴⁸ See Kathleen L. Barber, *A Right to Representation: Proportional Election Systems for the Twenty-First Century* 19 (Ohio State 2000) (explaining that Mill's "writings were widely read in the United States").

²⁴⁹ See generally J. Francis Fisher, *The Degradation of Our Representative System, and Its Reform* (C. Sherman, Son 1863). Fisher was active in creating the Historical Society of Pennsylvania, which continues to house his family's papers. See *Collection 1858: Joshua Francis Fisher (1807-1873) Papers* *1 (Historical Society of Pennsylvania 2004), archived at <http://perma.cc/FZ3W-UZHJ>.

²⁵⁰ Fisher, *The Degradation of Our Representative System* at 3 (cited in note 249).

²⁵¹ *Id.* at 9–10 (emphasis added).

met with Mill.²⁵² Upon his return, Sterne worked with other leading lawyers of his era, including David Dudley Field, to promote the adoption of proportional representation in America.²⁵³ One of Sterne's lectures on the topic, at the Cooper Union in 1869, drew a crowd estimated at about fifteen hundred listeners.²⁵⁴ Sterne also wrote his own book, *On Representative Government and Personal Representation*.²⁵⁵ Like Fisher, Sterne explained why a Millian system of proportional representation would eliminate the evil of gerrymanders:

That political knavery known as gerrymandering, which is possible only by means of, and is created by the district system, would, under [proportional] representation, be utterly destroyed and laid to rest. . . .

This evil, so necessarily incident to the district system, would cease by means of [proportional] representation.²⁵⁶

About the same time as Sterne published his book, Salem Dutcher, another New Yorker, wrote one of his own, *Minority or Proportional Representation*, which made equivalent claims: "Instances of the operations of 'gerrymandering' in the United States might be given *ad infinitum*. No party seems ever to have had virtue enough to refrain from yielding to the temptation afforded by it to sustain itself in power."²⁵⁷ Dutcher even cited "one miracle of 'gerrymandering,' by which the majority on the popular vote failed to obtain a single Representative in the legislative body!"²⁵⁸ Proportional representation, Dutcher maintained, was the antidote to this disease.

The discussion was not confined to books, but instead extended to the pages of the *American Law Review*. In an 1872

²⁵² Clarence Gilbert Hoag and George Hervey Hallett Jr., *Proportional Representation* 183 (Macmillan 1926); John Foord, *The Life & Public Services of Simon Sterne* 1 (Macmillan 1903).

²⁵³ Hoag and Hallett, *Proportional Representation* at 184–85 (cited in note 252).

²⁵⁴ *Id.* at 185.

²⁵⁵ See generally Simon Sterne, *On Representative Government and Personal Representation* (J.B. Lippincott 1871). Sterne, born in 1839, was thirty-two years younger than Fisher, who was born in 1807. Foord, *The Life & Public Services of Simon Sterne* at 1 (cited in note 252); *Joshua Francis Fisher Papers* at *1 (cited in note 249). Thus, Sterne was in his thirties when he wrote his book, while Fisher was in his fifties at the time of writing his.

²⁵⁶ Sterne, *On Representative Government* at 96–97 (cited in note 255).

²⁵⁷ Salem Dutcher, *Minority or Proportional Representation: Its Nature, Aims, History, Processes, and Practical Operation* 23 (United States Publishing 1872).

²⁵⁸ *Id.*

article entitled *The Machinery of Politics and Proportional Representation*, the Boston polymath Professor William R. Ware collected all the relevant sources then available. Ware added his voice to the rising chorus of intellectuals who were advocating proportional representation as an alternative to America's noxious system of legislative districting: "The most notorious evil connected with the system [] is that known as 'Gerrymandering.'"²⁵⁹ The article included a reproduction of the original cartoon of the monstrously shaped district that visually defined what a gerrymander was.²⁶⁰ Leading newspapers, "including the *New York World and Tribune*, the *Chicago Republican, Times*, and *Tribune*, the Cincinnati *Enquirer*, and the *St. Louis Republican*," were making the same point in their editorials.²⁶¹

It was not just intellectuals who were attacking America's problem of gerrymandering. After Mill's *Representative Government* garnered attention in the United States, the campaign to

²⁵⁹ William R. Ware, *The Machinery of Politics and Proportional Representation*, 6 *Am L Rev* 255, 283 (1872).

²⁶⁰ See *id.* at 284. The article attributed the original cartoon to the famous artist Gilbert Stuart, a common misattribution at the time. *Id.* at 283 n 1. See also Martis, 27 *Polit Geo* at 836 (cited in note 234). This misattribution hardly undercuts the point that in the middle of the nineteenth century, whenever anyone condemned the evil of gerrymandering, they visually had in mind the image of the original cartoon of the 1812 misshapen district. On the contrary, attributing the cartoon to the same artist who painted the most prominent portraits of Presidents George Washington, John Adams, Thomas Jefferson, and virtually all the other leading figures of the Founding pantheon only elevated the status of the cartoon as representing exactly what was widely understood—and condemned—as an unconscionable gerrymander. Carrie Reborá Barratt and Ellen G. Miles, *Gilbert Stuart* 134–90, 217–22, 277–85 (Yale 2004). Indeed, Professor Kenneth Martis has observed that some credited Stuart with the very term "gerrymander" as well as the quintessential cartoon depicting it. Martis, 27 *Polit Geo* at 836 (cited in note 234).

²⁶¹ Hoag and Hallett, *Proportional Representation* at 185 (cited in note 252). See also Dutcher, *Minority or Proportional Representation* at 42 (cited in note 257).

adopt proportional representation as a remedy for gerrymandering gained traction in Congress as well.²⁶² Its leading advocate there was Senator Charles Buckalew of Pennsylvania.²⁶³

Buckalew favored a version of proportional representation known as cumulative voting, whereby each voter receives the same number of votes as seats and can cast up to all of those votes for a single candidate. (Cumulative voting works as a form of proportional representation insofar as adherents of a minority political party can win a portion of the seats by concentrating more votes on fewer candidates.)²⁶⁴ Buckalew introduced a bill to adopt cumulative voting for congressional elections in 1867. In a speech to the Senate on July 11 of that year, Buckalew directly invoked the elimination of gerrymandering as a reason to support cumulative voting: “[O]ne great advantage of this system is that it abolishes gerrymandering in the States, cuts it up by the roots, ends it forever. That is one of the most crying evils of the time.”²⁶⁵ Buckalew repeated the point for emphasis: “The system of cumulative voting, however, avoiding the creation of single districts in a State, avoids altogether this capital evil and mischief of gerrymandering and brings it to an end so far as the selection of members of Congress is concerned.”²⁶⁶

Buckalew delivered his speech at the same time that the Fourteenth Amendment was under active consideration. It had been sent to the states by Congress in June 1866.²⁶⁷ A year later, when Buckalew brought cumulative voting and the evil of gerrymandering to the Senate’s attention, it had been ratified by

²⁶² There were also efforts to adopt proportional representation in the states. For example, New York’s constitutional convention in 1867 considered one such proposal. One proponent observed:

I am not one of those, Mr. Chairman, who consider the existence of parties as an unmixed evil. I think we must and should have parties in a free government and the plan proposed will not break up or destroy parties. It will tend to do away with party tyranny. It will liberate the voter from the dominion of party. . . . And this I consider not an end to be feared, but “a consummation devoutly to be wished.”

Dutcher, *Minority or Proportional Representation* at 51 (cited in note 257). Illinois was one state that had a system of proportional representation for over a century. See generally Robin Tholin, “*One Person, Three Votes*,” *Illinois’ 110-Year Experiment with Cumulative Voting* (unpublished thesis, Wesleyan University, Apr 2012), archived at <http://perma.cc/WV94-VPSQ>.

²⁶³ Hoag and Hallett, *Proportional Representation* at 183–84 (cited in note 252).

²⁶⁴ See Tholin, “*One Person, Three Votes*” at *14–29 (cited in note 262).

²⁶⁵ 39 Cong Globe, 40th Cong, 1st Sess 577 (July 11, 1867) (statement of Sen Buckalew).

²⁶⁶ *Id.*

²⁶⁷ See James, *The Ratification* at 2–6 (cited in note 165).

twenty-two states (including Ohio and New Jersey, which had not yet voted to rescind their ratifications), but not the twenty-eight states presumed necessary on the assumption that the former Confederate states still counted for the purpose of reaching the three-quarters necessary under Article V of the Constitution.²⁶⁸ Thus, when Buckalew proposed cumulative voting as a remedy for gerrymandering, Congress was still deliberating about the fate of the Fourteenth Amendment, which would not be resolved until the following summer.

Congress did not adopt Buckalew's plan for cumulative voting. But that was not because Congress accepted gerrymandering as salutary. Rather, cumulative voting was too radical a cure for the disease. Members of Congress still condemned gerrymandering, even as they were searching for a more appropriate remedy. As Representative, later president, Garfield put it: "In my judgment it is the weak point in the theory of representative government, as now organized and administered, that a large portion of the voting people are permanently disenfranchised."²⁶⁹

After acknowledging that he could "find no stronger illustration of the evil than in [his] own State," where "the adjustment and distribution of political power" through gerrymandering caused an essentially fifty-fifty split in votes to yield a fourteen-to-five partisan split in the state's congressional delegation, Garfield proclaimed: "Now no man, whatever his politics, can justly defend a system that may in theory, and frequently does in practice, produce such results as these."²⁷⁰

Although a congressional statute eradicating gerrymanders would have been desirable, Congress provided an alternative foundation for a remedy through the Fourteenth Amendment. Members of Congress may not have been aware of its potential implications at the time, but the Amendment's Due Process Clause and its principle of fair play had the capacity to become an antidote to gerrymandering. There is no reason not to let the Due Process Clause do this work simply because the Congress that simultaneously condemned gerrymandering and secured the Fourteenth Amendment's place in the Constitution did not put two and two together for themselves. Judges today still can recognize the truth that $2 + 2 = 4$. Indeed, from a Dworkinian perspective, it is precisely the task of contemporary judges to engage

²⁶⁸ See *id.* at 280–81.

²⁶⁹ 41 Cong Globe, 41st Cong, 2d Sess 4737 (June 23, 1870) (statement of Rep Garfield).

²⁷⁰ *Id.*

in such an enterprise. When the historical record presents to the contemporary judge both the major and minor premises of a syllogism, putting both premises together to yield the syllogism's conclusion is an example of interpreting the historical record in its best light, and this is true even if at the time the historical protagonists did not recognize the syllogistic connection themselves.²⁷¹ The Fortieth Congress, which sat in 1867 and 1868, bequeathed both components of the syllogism that renders gerrymandering unconstitutional. It gave us the major premise that the ratification of the Fourteenth Amendment constitutionalizes a constraint against partisan overreaching, as well as the minor premise that gerrymandering is a pernicious form of partisan overreaching that must be redressed. Just like $2 + 2$ necessarily equals 4, it is now incumbent on Dworkin's Justice Hercules to put together the major and minor premises of the syllogism, both of which are rooted in the historical record, to yield the necessarily entailed conclusion: gerrymandering is a form of partisan overreaching that violates the Due Process Clause's norm of fair play.

B. Due Process and Gerrymanders: A Judicially Workable Test

Even if we accept that the principle of fair play embedded in due process imposes a constitutional constraint on partisan gerrymandering, there still needs to be a way for judges to operationalize this constraint. As Part I demonstrated, efforts to use the Fourteenth Amendment's Equal Protection Clause to generate a judicially enforceable constraint against partisan gerrymanders have foundered in part because of a perception that such efforts can yield no judicially manageable standard to distinguish an unconstitutional gerrymander from permissible legislative districting. What makes the Due Process Clause and its principle of fair play different in this regard?

The answer lies in the use of the original gerrymander as an appropriate historical benchmark for measuring partisan manipulation of legislative districting that contravenes fair play. The evil of gerrymandering, as was immediately understood upon looking at the monstrous, salamander-shaped district on the map, was that the district lines were an inappropriate distortion of what the legislative districts should be. It was evident that this

²⁷¹ Dworkin, *Law's Empire* at 227–32 (cited in note 18).

distortion was committed for partisan purposes.²⁷² Moreover, it is possible to measure the amount of distortion in this original gerrymander and use that measure as a standard by which to judge any other legislative map.²⁷³

As explained more fully in the next Section, it is appropriate to use the visual image of the original gerrymander in this way precisely because it is what nineteenth-century writers and politicians had in mind when they condemned gerrymandering as pernicious. From a historical perspective, grounding the constitutional constraint against gerrymandering in the visual shape of the original gerrymander is not unprincipled. On the contrary, it is the constitutional interpretation that simultaneously best fits the historical record and is capable of construing the Constitution in its best light for the purpose of employing the Constitution as the framework for contemporary democracy. Other ways to invalidate partisan redistricting might be more normatively attractive from the perspective of pure political theory, but they do not adequately fit the historical record, whereas a constitutional standard grounded in the original gerrymander itself meets the essential test of interpretive fit.

Thus, a plaintiff challenging a map as a violation of the Due Process Clause would have to show that the challenged map contained a measure of distortion equal to or greater than the distortion of the original gerrymander. The plaintiff would also have to show that this distortion was a breach of fair play because it produced a partisan advantage for the mapmaker's party that would

²⁷² See Griffith, *The Rise and Development* at 70 (cited in note 232) (“That the intended results of this law were generally known is further evident from the number of resolutions passed throughout the state and the numerous protests sent to the legislature.”). Federalists asserted that the original gerrymander, which passed on purely partisan votes in the legislature, was “a travesty upon the Bill of Rights when it allowed the minority to govern.” Id at 71. The original gerrymander was successful in achieving its purpose, as the Democratic Republican Party retained control of the state senate, with twenty-nine seats compared to eleven for the Federalists, even though statewide Federalist candidates for state senate seats had received 51,766 votes, whereas their Democratic Republican opponents had received only 50,164. Id at 72–73. “Thus the twenty-nine Democratic senators were elected by a smaller vote than the eleven Federalist senators received.” Id at 73. The original gerrymander appropriately serves as the archetypal example of the evil gerrymandering accomplishes not only because of its distorted shape but because this distortion enabled a party *rejected* by a majority of voters nonetheless to cling to majority control of a legislative chamber. That kind of partisan overreaching is inherently subversive of majority rule in a democracy.

²⁷³ See generally Stephen Ansolabehere and Maxwell Palmer, *A Two Hundred-Year Statistical History of the Gerrymander*, 77 Ohio St L J 741 (2016) (measuring the compactness of congressional districts against the original gerrymander).

not have been achieved with an undistorted map. The plaintiff would meet this burden of proof by offering an example of an undistorted map that would have yielded an electoral result lacking this partisan advantage. In other words, if the distorted map caused Party A to win x legislative seats, whereas using the undistorted map would have caused Party A to win y seats, where $y < x$, then the plaintiff would have met the burden of showing that the distorted map produced a partisan advantage.²⁷⁴

The plaintiff would not automatically win the case upon meeting this burden of proof. Rather, at that point, the burden would shift to the mapmaker to justify the use of the distorted map despite the partisan advantage it conferred. Perhaps the mapmaker could demonstrate a good reason for the distorted map. But this justification would need to be nonpartisan. The mapmaker could not defend the constitutionality of the map on the ground that the goal was to achieve the partisan advantage that the distortion produced. That would be the very essence of unfair play in violation of the Due Process Clause. Instead, the mapmaker would be required to show that what superficially appeared to be distortion reflected legitimate geographical circumstances, such as the nature of demographic residential patterns in the particular localities involved. If the mapmaker could make this showing, then the map would not be a breach of fair play and thus would withstand due process scrutiny. But if not, then the plaintiff would prevail by demonstrating that the distorted map

²⁷⁴ Using precinct-level electoral returns, the plaintiff would satisfy this burden by showing that, with the undistorted alternative map, the vote totals for each party in each district would cause Party A to win more votes in only y number of districts, whereas with the same precinct-level data and the distorted actual map the vote totals for each district would cause Party A to win x number of districts. This calculation could be applied to an election that already occurred using the actual distorted map. If so, the calculation for the alternative undistorted map would be made as if the same candidates were running in all the same legislative races, even though the district lines would be different. Obviously, that assumption is counterfactual insofar as different district lines might cause different candidates to run within each party, and different candidates to win party primaries. Nonetheless, the plaintiff's demonstration that changing from a distorted to an undistorted map would eliminate a partisan advantage even assuming the same candidates is enough to put the burden on the mapmaker to justify the choice of the distorted map.

Similarly, even before an election is run using the distorted map, a plaintiff could challenge the map with precinct-level data from the most recent election held in the state. With that data, one can see how many seats the mapmaker's party would have won in that election if the distorted map had been in use. One can also show how many seats that same party would have won if the plaintiff's alternative undistorted map had been used. If the mapmaker's party would win more seats under its new, distorted map than it would under the plaintiff's alternative, undistorted map, that showing should suffice to require the mapmaker to justify the distorted map on the basis of a legitimate, nonpartisan reason.

was an exercise of partisan overreaching that could not be justified on legitimate nonpartisan grounds, and thus was a violation of the Due Process Clause's fair play principle.

What is distinctive about this approach is its use of the original gerrymander as the benchmark. In an important new paper, the political scientists Professors Stephen Ansolabehere and Maxwell Palmer demonstrated how the original gerrymander can be used in this way to create a standard by which all other districts can be measured.²⁷⁵ There are actually multiple ways to measure the extent to which a district is misshapen, and any one of these can be used for the purpose of setting the original gerrymander as the standard. For example, the so-called Reock method identifies the smallest circle in which a district will fit and compares the area of the district to the area of that circle.²⁷⁶ The Polsby-Popper method, by contrast, measures a district's perimeter and then compares the district's area with the area of a circle having the same perimeter as the district.²⁷⁷ As Ansolabehere and Palmer showed, these two methods often, but not always, agree on which districts are misshapen.²⁷⁸ And for each method, the original gerrymander can be set as 1, so that it serves as the standard, with every other district having a measure greater or less than 1.²⁷⁹ All districts measuring greater than 1 are more misshapen than the original gerrymander according to that particular method.²⁸⁰

For purposes of litigation under the Due Process Clause's principle of fair play, a plaintiff should be permitted to identify a district as presumptively problematic according to any of these particular methods of measurement. In other words, if a district exceeds a score of 1 under either Reock or Polsby-Popper, and if the plaintiff also demonstrates a partisan advantage resulting from a district that is more misshapen than the original gerrymander according to this score—meaning that the plaintiff can offer a map with all districts scoring less than 1 and not causing this partisan advantage—then it is appropriate to shift the burden to the mapmaker to justify the misshapen district.²⁸¹ Because

²⁷⁵ See generally Ansolabehere and Palmer, 77 *Ohio St L J* 741 (cited in note 273).

²⁷⁶ *Id.* at 743, 746.

²⁷⁷ *Id.* at 746–47.

²⁷⁸ See *id.* at 757.

²⁷⁹ See Ansolabehere and Palmer, 77 *Ohio St L J* at 752 (cited in note 273).

²⁸⁰ This test can be used for either congressional or state legislative districts.

²⁸¹ The reason why it is appropriate to let a plaintiff rely on either Reock or Polsby-Popper, rather than require the plaintiff to demonstrate that a challenged district is worse

the plaintiff has shown that it was possible to draw a map without any district having a worse score than the original gerrymander, why did the mapmaker draw a district having this poor score? If the mapmaker offers a good reason for having done so (meaning, again, a nonpartisan reason), then the map is valid. But if the mapmaker is incapable of offering a legitimate, nonpartisan reason to have a map with a worse score than the original gerrymander, and if the plaintiff has demonstrated that the map's distorted shape has yielded an unjustified partisan advantage, then the map should be declared invalid under the Due Process Clause's fair play principle.

Thus, using the original gerrymander in this way yields a straightforward, workable test for judges to employ in identifying modern gerrymanders that are unconstitutional because they violate the Fourteenth Amendment's constraint against partisan overreaching.²⁸²

C. The Appropriateness and Comparative Advantage of This Workable Test

For the reasons just given, one might agree that this use of the original gerrymander as a benchmark might yield a judicially workable test, and yet still ask whether this test is appropriate, or why it is superior to the various tests that have been proposed pursuant to the Fourteenth Amendment's Equal Protection Clause. Is it arbitrary to make the constitutionality of contemporary legislative districts turn on their resemblance to a single malformed district adopted in one state in 1812? And even if it is not arbitrary, is it really any different—or better—than the burden-shifting tests that Justices Stevens and Souter proposed in *Vieth* under the Equal Protection Clause?

than the original gerrymander according to *both* mathematical measures, is that the purpose of the math is to have a precise way to identify what looks suspicious upon visual inspection. Any district that scores worse than the original gerrymander is presumptively suspicious, because the original gerrymander was so objectionable itself. To be sure, the mapmaker must have an opportunity to rebut that suspicion, but it is still constitutionally appropriate to put that burden on the mapmaker for any map that is suspicious just because of its comparability to the quintessential evil of the original gerrymander.

²⁸² Ansolabehere and Palmer offered visual examples of fifteen of the most gerrymandered districts in history, most of which are recent. Ansolabehere and Palmer, 77 *Ohio St L J* at 759 (cited in note 273). While all of these are highly suspicious simply as a result of their appearance, in each case the mapmaker would be entitled to attempt a defense on nonpartisan grounds before the district could definitively be ruled unconstitutional under this due process analysis.

The answer to the first question is no, the use of the original gerrymander is not arbitrary, and the reason is the special historical link between the original gerrymander and the problem of partisan overreaching that the Fourteenth Amendment, embodying the principle of fair play, exists to curtail. The original gerrymander is not just any legislative map. It is *the* map that everyone in the middle of the nineteenth century invoked to define what they meant by inappropriate partisan overreaching. Not only did this map generate the very term “gerrymandering,” but when Buckalew and others in the 1860s used this term they had the particular map from Massachusetts in 1812 very much in mind.²⁸³ For them, this map was the illustration of what inappropriate partisanship looked like, and they themselves used this map as the benchmark for the evil they wished to avoid—*evil* being the exact word routinely used to describe this pernicious partisanship.²⁸⁴

At the same time as Congress was castigating the original gerrymander as the quintessential illustration of improperly excessive partisanship, the Fourteenth Amendment was coming into existence because of the recognition that the Constitution must be understood to contain a constraint against partisan overreaching. Once it is recognized that it is appropriate to interpret the Fourteenth Amendment as embodying a constitutional constraint against partisan overreaching, because of the historical circumstances surrounding the congressional affirmation of the Fourteenth Amendment’s ratification, it becomes equally appropriate to identify the original gerrymander as the archetypal illustration of what this constitutional constraint against partisan overreaching renders unconstitutional. Far from being arbitrary, the original gerrymander is the very essence of what the idea of fair play, in its application to partisan competition and as understood by the Congress that affirmed the Fourteenth Amendment’s ratification, condemns.

This condemnation of the original gerrymander as the antithesis of political fair play is not rooted in any particular theory concerning the ideal way to engage in legislative districting. Likewise, it is not premised on any particular conception of voting rights or the nature of political equality among citizens. Instead,

²⁸³ Again, such mid-nineteenth-century authors as Fisher and Ware made explicit reference to the original 1812 gerrymander, including reproducing a visual depiction of it, as part of their condemnation of the practice named after that archetypal instance of it. See text accompanying notes 249–60.

²⁸⁴ See text accompanying notes 251, 256, 259, 265–66, and 270.

it is based on a specific historical understanding of what constitutes inappropriate, or undue, partisanship. For purposes of constitutional adjudication, however, this historical rootedness is a feature, not a bug. The Due Process Clause, it has long been understood, is concerned with history and tradition, not abstract political theory.²⁸⁵ This point applies as much to the fair play principle embedded in due process as it does to any other aspect of due process jurisprudence. Thus, to determine what amounts to a violation of fair play, as constitutionalized through the Due Process Clause, it is necessary to conduct a historical inquiry concerning what America's political tradition reveals as a breach of fair play. This historical inquiry leads immediately to the inescapable conclusion that the original gerrymander constitutes the quintessential breach of fair play as this principle applies to the domain of partisan competition.

By eschewing abstract political theory, this historically rooted understanding of how due process and fair play apply in the context of legislative districting avoids the problems that arise with the use of the symmetry standard, or the efficiency gap, or other ways to equalize electoral opportunities. As was shown, those approaches founder because of residential patterns unconnected with partisan overreaching.²⁸⁶ When Democrats clump together in urban areas at the same time that Republicans are dispersed in rural and other exurban areas, there is no single theory of electoral representation that can be tied to the Equal Protection Clause to distinguish appropriate from inappropriate districting. But using the original gerrymander as a benchmark entirely escapes that problem.

It is important to be clear how this distinction between using the original gerrymander as a benchmark and developing a non-historical standard of partisan fairness (like the efficiency gap) relates to the enterprise of constitutional *interpretation*. From the perspective of ideal political theory, the original gerrymander is indeed arbitrary, just one possible deviation from fair districting among many. From the perspective of ideal political theory, it deserves no privileging.

²⁸⁵ See, for example, Katharine T. Bartlett, *Tradition as Past and Present in Substantive Due Process Analysis*, 62 *Duke L J* 535, 540–45 (2012); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 *Utah L Rev* 665, 669–71. See also generally, for example, Cass R. Sunstein, *Due Process Traditionalism*, 106 *Mich L Rev* 1543 (2008).

²⁸⁶ See notes 40–59 and accompanying text.

But ideal political theory cannot be adequately linked to the history of the Constitution itself to warrant its use in an exercise of constitutional interpretation. There is no basis in the historical record for saying that the Constitution embodies a standard of partisan symmetry or the condemnation of districting maps that produce an efficiency gap between parties. There is no reason whatsoever to believe that nineteenth-century writers and politicians would have condemned maps with partisan asymmetry, or maps with large efficiency gaps, if those maps were merely the consequences of districting decisions that tracked existing political boundaries or other conventional districting criteria. In the nineteenth century, a map would not have been even presumptively problematic, requiring government justification, simply because the map had a bad efficiency gap score.

By contrast, what nineteenth-century writers and politicians vociferously condemned was the conscious *manipulation*, or *distortion*, of a legislative district's lines, which was visually recognizable by the misconfigured shape of the district on the map itself. Making the constitutional standard turn on a visually distorted map is faithful to the historical record underlying the ratification of the Fourteenth Amendment, regardless of its soundness as a matter of pure political theory. It is appropriate as an exercise of constitutional interpretation to put any mapmaker to the burden of justifying a district that is more misshapen than the original gerrymander itself. It is appropriate as constitutional interpretation, not because of a theory of political equality that can be linked to equal protection, but instead because an egregiously misshapen map that cannot be defended on nonpartisan grounds breaches the norm of fair play, which properly can be linked to the Due Process Clause.

With the original gerrymander as the standard for identifying presumptively unconstitutional districts, the focus is entirely on whether or not a legislative district is as misshapen as the original gerrymander, not on whether a legislative map is deficient under the symmetry standard, efficiency gap, or some other contestable norm for determining how districts should be drawn. A district that is not as distorted as the original gerrymander does not contravene the Due Process Clause's historically rooted principle of fair play, regardless of whether that district is part of a map that flunks the symmetry standard, has an excessive efficiency gap, or is arguably deficient according to some other contestable

measure of electoral equality.²⁸⁷ Conversely, however, any district as or more distorted than the original gerrymander must be justified by the mapmaker based on legitimate, nonpartisan grounds—and that is exactly how Justice Hercules should conduct the constitutional analysis according to “law as integrity,” which requires adequacy of historical fit. The original gerrymander is the template of unconstitutionality based on the fair play principle embedded in due process, and thus any contemporary district that is equally egregious according to that template of unconstitutionality requires nonpartisan justification.

In *Vieth*, both Stevens and Souter proposed burden-shifting tests that share some affinities with the workable burden-shifting test proposed here. But neither Stevens nor Souter used the original gerrymander as the benchmark for determining when the burden shifts to the mapmaker to defend the map, and both Stevens and Souter attempted to derive their burden-shifting tests from equal protection, rather than due process, analysis. Both approaches, while promising, ultimately faltered because they could not identify a constitutionally principled benchmark for identifying when the burden shifted to the mapmaker. Relatedly, they could not explain how equal protection analysis would identify a standard for determining when the burden shifts.

Stevens said only that “a district’s bizarre shape” should require the mapmaker to justify the district on nonpartisan grounds.²⁸⁸ But he did not elaborate on how to determine when a district’s shape qualified as “bizarre,” and he did not explain how equal protection would provide a basis for making this “bizarreness” determination. Souter similarly would have made “deviations from traditional districting principles” part of a test for determining when the burden of justification shifts to the mapmaker.²⁸⁹ But Souter explicitly declined to identify how much deviation from traditional districting principles would trigger this burden-shifting. Nor did Souter explain how or why “deviations

²⁸⁷ To be sure, making the original gerrymander the benchmark in this way means that legislative maps just slightly less misshapen—those with scores of 0.9, for example—would escape constitutional invalidation. But this truth is just a consequence of the fact that the existing Constitution is imperfect and cannot be fairly interpreted to make it perfect. Nonetheless, it is still better to interpret the existing Constitution to condemn current gerrymanders just as bad as the original one—which is a fair interpretation of the document given its history—than to interpret it as not condemning any gerrymanders at all, which is how the *Vieth* plurality would have it.

²⁸⁸ *Vieth*, 541 US at 339 (Stevens dissenting).

²⁸⁹ *Id.* at 349–51 (Souter dissenting).

from traditional districting principles” were a violation of equal protection.

The use of the original gerrymander as the benchmark, together with the link between the original gerrymander and the due process principle of fair play, solves the problems inherent in the approaches offered by Stevens and Souter. There is nothing indeterminate about the original gerrymander as a benchmark. It supplies the exact measure of “bizarreness,” to use Stevens’s term, or “deviations from traditional districting principles,” in Souter’s language. There is no guessing to be done: under this due process approach, mapmakers know exactly when the burden shifts to them to provide a nonpartisan justification for their maps.²⁹⁰ Moreover, they know *why* they are being put to this burden under the due process approach: the original gerrymander is the constitutional evil to be avoided according to the due process principle of fair play. If you draw a district as misshapen as the original gerrymander, and if your misshapen map gives your party an advantage, then you are acting in a presumptively unconstitutional manner according to this fair play principle, and you need to defend yourself in terms consistent with the principle of fair play in political competition. It is as straightforward and simple as that, and this workable test is appropriately rooted in the constitutional history underlying the adoption of the Fourteenth Amendment and its Due Process Clause. There is no reason to be mired in the indeterminacies that afflicted the equal protection approaches attempted by Stevens and Souter in *Vieth*.²⁹¹

IV. FAIR PLAY AND CHANGES IN VOTING RULES

The fair play principle embedded in the Fourteenth Amendment’s Due Process Clause does not constrain partisan

²⁹⁰ Unlike obscenity, for which Justice Potter Stewart’s famous claim (“I know it when I see it”) was debatable, *Jacobellis v Ohio*, 378 US 184, 197 (1964) (Stewart concurring), Ansolabehere and Palmer’s observation that “we know a gerrymander when we see it” is, by definition, mathematically demonstrable. Ansolabehere and Palmer, 77 Ohio St L J at 761 (cited in note 273).

²⁹¹ Justice Kennedy in *Vieth* understood that “[t]he ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government, and in the citizenry itself.” *Vieth*, 541 US at 316 (Kennedy concurring in the judgment). He just could not identify the appropriate constitutional basis for this principle of restraint or how to operationalize it. This Article has shown that due process is the appropriate grounds for this fair play principle and how history provides a sound basis for the judicial enforcement of it.

overreaching only in the form of gerrymanders. It also constrains excessive partisanship in the form of changes to voting rules.²⁹² The improper unsettling of legitimately settled expectations has long been recognized as a core component of what due process protects against. This same analysis applies to the unsettling of expectations concerning voting procedures. If voters have reasonably come to rely on the availability of a particular type of voting procedure, and if the government removes its availability without a legitimately nonpartisan reason for doing so, then this removal is a form of inappropriate partisanship in violation of fair play and due process. Moreover, because this protection of reasonable expectations of voting procedures against purely partisan changes derives from the fair play principle embedded in the Due Process Clause, there is no need to demonstrate that the purely partisan change is a form of discrimination in violation of equal protection; instead, regardless of the inapplicability of *Anderson-Burdick* and its focus on discriminatory burdens, the Due Process Clause protects all voters, even if they are equally affected, from excessively partisan changes in voting procedures.²⁹³

²⁹² These two different specifications of the fair play norm do not necessarily need to be linked directly to each other. Instead, they properly can be seen as separate applications of the same fair play norm to different particular situations, just as both are separate from the way fair play operates in the realm of in personam jurisdiction or criminal procedure. Each of these specifications is best understood as an example of the kind of intermediary constitutional principle that Professor Richard H. Fallon Jr has so helpfully analyzed. See Richard H. Fallon Jr, *Implementing the Constitution* 76–101 (Harvard 2001). Constitutional adjudication consists of both general norms and subsidiary implementing principles. Fair play is one such general norm, and it needs different subsidiary implementing principles to address different particular problems, like gerrymandering and the rollback of voting rules. To invoke (again) the analogy of Establishment Clause jurisprudence, the overarching norm of government impartiality in the realm of religion leads to two different subsidiary principles for separate implementation contexts: the “no endorsement” principle, to cover government expressions of religious adherence; and fiscal neutrality, to cover government subsidies to religious and nonreligious schools. See *Lynch v Donnelly*, 465 US 668, 687–88 (1984) (O’Connor concurring) (describing the no endorsement principle); *Mitchell v Helms*, 530 US 793, 810 (2000) (Thomas) (plurality) (describing the neutrality principle).

²⁹³ The due process analysis applied to voting rules, as articulated here, overlaps to some extent with my colleague Professor Daniel P. Tokaji’s recent reliance on the First Amendment as a basis for challenging legislation affecting voting opportunities. See generally Daniel P. Tokaji, *Voting Is Association*, 43 Fla St U L Rev 763 (2016). His approach, like mine, focuses on the concern that partisanship causes improper interference with voting opportunities. *Id.* at 786. His reliance on the First Amendment, while a valuable addition to the literature, has two shortcomings. First, by triggering constitutional scrutiny for any law with a “disparate impact on voters affiliated with the non-dominant party,” Tokaji’s approach is unduly intrusive. *Id.* at 787. States should not be required to defend laws just because they have a minimally differential impact on a political party other than the one with majority status in the legislature. Instead, the focus should be on breaches of the

A. The Due Process Clause's Protection of Legitimately Settled Expectations

The Due Process Clauses of the Fifth and Fourteenth Amendments have long been understood to protect persons against laws that improperly unsettle “vested rights” or other reasonable reliance interests that persons may have in existing legal arrangements.²⁹⁴ This due process protection against inappropriate legal change usually has been associated with *either* protection of property, contracts, or other economic interests *or* protection against the retroactive application of newly enacted criminal or other punitive measures.²⁹⁵ Nonetheless, this due process principle is broad enough that it is capable of encompassing changes in voting rules that inappropriately unsettle reasonable expectations concerning the operation of the voting process.²⁹⁶

norm of fair play, which is a more exacting standard. The idea of fair play gives more leeway for the normal political competition between political parties, and this leeway is more appropriate for judicial policing of the constitutional boundaries of legitimate political competition in a democracy. Second, and relatedly, reliance on the norm of fair play as a component of due process has a better fit with the historical record than does the claim that the First Amendment protects political parties from disparate impacts. The First Amendment, as originally drafted, was not intended to protect political parties. Moreover, even insofar as the First Amendment has properly been construed to encompass a right of political association, that right is not confined to political parties, but extends to all forms of political associations, as Tokaji acknowledges. *Id.* at 788–89. Although I share Tokaji’s view that political parties play a distinctive role in a democracy, and that the nondominant party needs constitutional protection from overreaching legislation imposed by the dominant party, I think the better way to understand that protection from a Dworkinian perspective, given the judicial obligation to assure an adequate fit with the historical record, is to locate that protection in the due process norm of fair play, rather than a First Amendment constraint against discriminatory impacts upon political associations.

²⁹⁴ Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *Yale L J* 408, 423–24 (2010).

²⁹⁵ *Id.* at 423–25.

²⁹⁶ As already noted in Part II.A, at the end of the nineteenth century, Justice Harlan recognized that the Fourteenth Amendment’s Due Process Clause protected against improper interference with the rights of voters and candidates to participate in a fair electoral process. Harlan’s lengthy and eloquent opinion in *Taylor v Beckham*, 178 US 548 (1900), is an exegesis on this point from the historically appropriate perspective of nineteenth-century jurisprudence. See *id.* at 592 (Harlan dissenting) (identifying the question before the Court as being whether manipulating the counting of ballots, after they were cast, was a violation of the Fourteenth Amendment’s Due Process Clause and affirming that “[t]here ought not, at this day, to be any doubt as to the objects which were intended to be attained by the requirement of due process of law”). In finding a due process violation, Harlan did not mince words: “Looking into the record before us, I find such action taken by the body claiming to be organized as the lawful Legislature of Kentucky as was discreditable in the last degree and unworthy of the free people whom it professed to represent.” *Id.* at 605 (Harlan dissenting). One more passage from Harlan’s opinion suffices to settle the point:

Before adoption of the Fourteenth Amendment, the US Supreme Court had construed the Fifth Amendment's Due Process Clause to protect vested rights from unwarranted abrogation, and state supreme courts had done the same with respect to analogous due process provisions in state constitutions.²⁹⁷ Leading constitutional commentators of the era, including most famously Chief Justice Thomas Cooley of the Michigan Supreme Court, had also announced the settled understanding that the principle of due process protects vested rights from improper infringement.²⁹⁸ Indeed, the great constitutional scholar Professor Edward Corwin later reflected that "the Doctrine of Vested Rights" was the most "fundamental doctrine" of American constitutional law before the Civil War.²⁹⁹

After the Fourteenth Amendment's ratification, the Supreme Court confirmed this understanding of due process. In *Campbell v Holt*,³⁰⁰ for example, all the justices agreed that the deprivation of a "vested right" would violate the Due Process Clause; they disagreed only whether the retroactive suspension of a statute of limitations constituted deprivation of a vested right.³⁰¹ The majority

[T]he declaration by that body of men that Goebel was legally elected ought not to be respected in any court as a determination of the question in issue, but should be regarded only as action taken outside of law, in utter contempt of the constitutional rights of freemen to select their rulers.

Id at 606 (Harlan dissenting).

²⁹⁷ See *Bloomer v McQuewan*, 55 US (14 How) 539, 553–54 (1852). See also Williams, 120 Yale L J at 437–45, 466 (cited in note 294).

²⁹⁸ Cooley, the great Michigan jurist and scholar, published the first edition of his especially influential *Constitutional Limitations* treatise in 1868, the year of the Fourteenth Amendment's ratification. In it, he explained that "general rules may sometimes be as obnoxious as special, when in their results they deprive parties of vested rights." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 355 (Little, Brown 1868). Thus, Cooley continued, legislation will not qualify as "[d]ue process of law" if it constitutes "arbitrary interference" with "existing vested rights." Id at 355–57.

Also writing that same year was George W. Paschal, an Arkansas judge who subsequently lived in Texas and who had remained faithful to the Union during the Civil War. In his own treatise, he put the same point succinctly: "[W]here rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away." George W. Paschal, *The Constitution of the United States Defined and Carefully Annotated* 260 (W.H. & O.H. Morrison 1868). See also Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law* 537–42 (John S. Voorhies 1857) (discussing cases holding that deprivation of vested rights violated due process).

²⁹⁹ Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 Mich L Rev 247, 247 (1914).

³⁰⁰ 115 US 620 (1885).

³⁰¹ Id at 628.

asserted: “We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right,”³⁰² whereas the dissent exclaimed: “The immunity from suit which arises by operation of the statute of limitations is as valuable a right as the right to bring the suit itself . . . and, when vested, is as much to be protected as any other right that a man has.”³⁰³

Some applications of this vested rights doctrine provoked no division among the justices of the Court. This was true even in the midst of the so-called *Lochner* era, when the justices were otherwise bitterly divided over the use of the Due Process Clause to protect economic interests. For example, Justice Holmes—whose dissent in *Lochner v New York*³⁰⁴ famously proclaimed that the Fourteenth Amendment “is not intended to embody a particular economic theory”³⁰⁵—wrote in 1922 for a unanimous Court to invalidate a Florida statute that retroactively required a shipper to pay a toll for passage through a canal, when the law at the time the boat actually went through the canal did not require any such payment.³⁰⁶ In his pithy opinion, which compared the Florida statute to one retroactively requiring “a man [to] pay a baker for a gratuitous deposit of rolls,”³⁰⁷ Holmes wrote for the Court:

To say that the legislature simply was establishing the situation as both parties knew from the beginning it ought to be would be putting something of a gloss upon the facts. We must assume that the plaintiff went through the canal relying upon its legal rights and it is not to be deprived of them because the Legislature forgot.³⁰⁸

Likewise, in 1936, even as the justices were furiously debating the constitutionality of New Deal legislation, and just a year before the Court (thanks to Justice Owen Roberts’s change of heart) would repudiate *Lochner* in “the switch in time that saved nine,”³⁰⁹ the Court was unanimous in its condemnation of a Louisiana law that purported to change the terms upon which a stockholder of a building and loan association could withdraw

³⁰² *Id.*

³⁰³ *Id.* at 631 (Bradley dissenting).

³⁰⁴ 198 US 45 (1905).

³⁰⁵ *Id.* at 75 (Holmes dissenting).

³⁰⁶ *Forbes Pioneer Boat Line v Board of Commissioners of Everglades Drainage District*, 258 US 338, 339 (1922).

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 340.

³⁰⁹ For the relevant history of this tumultuous era, see generally Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (Oxford 1998).

funds invested in the association.³¹⁰ Despite the state's claim that the statute was necessitated by "the existing economic emergency" caused by the Great Depression, the unanimous Court (in an opinion by Roberts) observed that the statute's provisions were not a suitable response to the emergency, as they were "neither temporary nor conditional" and instead "arbitrarily deprive[d the stockholder] of vested property rights without due process of law."³¹¹

The protection of vested rights, or other legitimately settled expectations, against arbitrary subsequent legislation is a core component of due process that has survived the demise of the *Lochner* era. For example, in *Landgraf v USI Film Products*,³¹² the Court refused to give an amendment to the Civil Rights Act retroactive application in order to avoid a due process violation.³¹³ In so holding, the Court observed: "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."³¹⁴ The Court also quoted Justice Joseph Story's expansive definition of "retrospective" laws that trigger this due process principle: "[T]he ban on retrospective legislation embraced 'all statutes, which, though operating only from their passage, affect vested rights and past transactions.'"³¹⁵

In *Eastern Enterprises v Apfel*,³¹⁶ Justice Kennedy's crucial concurrence rested on the ground that the statute in question, the Coal Industry Retiree Health Benefit Act,³¹⁷ violated due process because it operated retroactively.³¹⁸ The Act imposed liabilities on

³¹⁰ See *Treigle v Acme Homestead Association*, 297 US 189, 193–94 (1936).

³¹¹ *Id.* at 195, 198.

³¹² 511 US 244 (1994).

³¹³ *Id.* at 266, 285–86.

³¹⁴ *Id.* at 265. See also Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law after the Class Action Fairness Act*, 106 Colum L Rev 1839, 1843 n 18 (2006) ("Settled expectations as one animating principle of due process stretches as far back as Hobbes.").

³¹⁵ *Landgraf*, 511 US at 268–69, quoting *Society for the Propagation of the Gospel v Wheeler*, 22 F Cases 756, 767 (CC NH 1814) (Story). As the *Landgraf* Court noted, Story continued: "[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." *Landgraf*, 511 US at 269, quoting *Society for the Propagation of the Gospel*, 22 F Cases at 767.

³¹⁶ 524 US 498 (1998).

³¹⁷ Pub L No 102-486, 106 Stat 3036 (1992), codified as amended at 26 USC § 9701 et seq.

³¹⁸ *Eastern Enterprises*, 524 US at 547 (Kennedy concurring in the judgment and dissenting in part).

a coal mining company that the company could not have reasonably foreseen when it engaged in the conduct that triggered the subsequently imposed liabilities.³¹⁹ The plurality opinion, by Justice O'Connor, would have held the Act unconstitutional under the Takings Clause of the Fifth Amendment,³²⁰ but Kennedy insisted that the Takings Clause was inapplicable because the Act did not take property from the coal mining company: "The Coal Act imposes a staggering financial burden on the petitioner, Eastern Enterprises, but it regulates the former mine owner without regard to property."³²¹ Instead, Kennedy asserted, the relevant constitutional question was whether the Act was "arbitrary" in its excessive imposition of retroactive liability.³²² Kennedy found that the statute flunked this basic arbitrariness test because it reached back to conduct that had occurred thirty-five years previously as the basis for imposing liability and was "most egregious" in relationship to reasonable expectations.³²³

Justice Breyer agreed in his dissenting opinion (for Justices Stevens, Souter, and Ginsburg, as well as himself) that due process was the relevant issue, but concluded that the Act was not so egregious as to be unconstitutional.³²⁴ The protection of justifiably settled expectations against arbitrary legislative undoing, Breyer acknowledged, was not a return to *Lochner*-style "substantive due process," but instead a separate, long-standing, and deeply rooted due process principle.³²⁵ Also invoking Story, among other historical authorities, Breyer asserted:

To find that the Due Process Clause protects against this kind of fundamental unfairness—that it protects against an unfair allocation of public burdens through this kind of specially arbitrary retroactive means—is to read the Clause in light of a basic purpose: the *fair application of law*, which purpose harkens back to the Magna Carta.³²⁶

³¹⁹ See *id.* at 549 (Kennedy concurring in the judgment and dissenting in part).

³²⁰ *Id.* at 538 (O'Connor) (plurality).

³²¹ *Id.* at 540 (Kennedy concurring in the judgment and dissenting in part).

³²² *Eastern Enterprises*, 524 US at 547 (Kennedy concurring in the judgment and dissenting in part).

³²³ *Id.* at 550 (Kennedy concurring in the judgment and dissenting in part).

³²⁴ *Id.* at 554–55, 567–68 (Breyer dissenting).

³²⁵ *Id.* at 557–58 (Breyer dissenting).

³²⁶ *Eastern Enterprises*, 524 US at 558 (Breyer dissenting).

Breyer simply did not see the imposition of retroactive liability on the coal mining company as arbitrary or fundamentally unfair in the way that Kennedy did.

Recent scholarship also has observed that the protection of justifiably settled expectations from improper legislative undoing is a transcendent principle of constitutional law, which the judiciary would find another basis for enforcing even if it did not so easily have a home in the Due Process Clause. In *The Non-retrogression Principle in Constitutional Law*, Professors John Jeffries and Daryl Levinson observed that this judicial solicitude for settled expectations arises in such divergent contexts as repeals of previously enacted civil rights legislation and the regulation of cable television.³²⁷ Recognizing that the nonretrogression principle has a statutory basis in § 5 of the Voting Rights Act of 1965,³²⁸ these scholars are more skeptical that a similar nonretrogression principle should be found embedded in constitutional law—even as they acknowledge the judiciary’s insistence in finding it there.³²⁹ In *Revoking Rights*, by contrast, Craig Konnoth was much more sympathetic to this judicial insistence on protecting settled expectations, seeing deep philosophical and psychological reasons why the loss of rights previously possessed is much more injurious than the absence of rights never possessed beforehand.³³⁰ (There is an analytic difference, to be sure, between *retroactive* laws, which purport to reach back in time to change the legal consequence of previous circumstances, and *retrogressive* laws, which make future conditions more burdensome than those of the past. Even so, both types of laws share the salient feature of unsettling previously settled expectations, and the relevant scholarship—including the Jeffries-Levinson and Konnoth contributions—shows that both forms of disrupting settled expectations raise constitutional concerns reflected in due process jurisprudence.)

Voting is certainly one domain in which the distinction between the loss of rights previously possessed and the absence of

³²⁷ See John C. Jeffries Jr and Daryl J. Levinson, *The Non-retrogression Principle in Constitutional Law*, 86 Cal L Rev 1211, 1226–34 (1998).

³²⁸ Pub L No 89-110, 79 Stat 437, 439, codified as amended at 52 USC § 10304.

³²⁹ Jeffries and Levinson, 86 Cal L Rev at 1234–40 (cited in note 327).

³³⁰ See Craig J. Konnoth, *Revoking Rights*, 66 Hastings L J 1365, 1375–85 (2015). See also Evan C. Zoldan, *The Civil Ex Post Facto Clause*, 2015 Wis L Rev 727, 779 (referring to the “historical aversion to retrospective laws”).

rights never held has proved especially powerful in existing jurisprudence.³³¹ As already indicated, the distinctive nature of § 5 of the Voting Rights Act is premised on the principle that it protects against the removal of voting opportunities previously available, whereas other elements of voting rights law condemn the absence of electoral opportunities never previously granted.³³² To be sure, § 5 of the Voting Rights Act never embodied a universal nonretrogression principle with respect to voting. Instead, as one component of a statute aimed at eradicating racial discrimination with respect to voting, § 5 addressed changes in voting laws that were racially discriminatory in nature. Even so, § 5's effectiveness has been negated by the failure of Congress to fix the formula for determining which states and localities are subject to § 5's nonretrogression principle, in the wake of the Supreme Court's invalidation of the existing coverage formula in *Shelby County, Alabama v Holder*.³³³

Nonetheless, the idea that electoral opportunities should be protected against backsliding remains judicially compelling. In *LULAC*, for example, Kennedy, writing for the Court, found that Texas's new map of congressional districts was unlawful because it took away from Latino voters electoral opportunities that these voters were just beginning to enjoy.³³⁴ Similarly, lower court judges have seen the removal of early voting opportunities as raising distinct constitutional concerns compared to the failure to provide those same early voting opportunities in the first place.³³⁵

³³¹ See, for example, *Bennett v Yoshina*, 140 F3d 1218, 1227 (9th Cir 1998). The concern about retroactive changes to voting rules was also a prominent feature of the due process holdings of *Roe v Alabama*, 43 F3d 574 (11th Cir 1995) (per curiam), and *Griffin v Burns*, 570 F2d 1065 (1st Cir 1978). See note 159 and accompanying text. The reason was the necessity of protecting the legitimate expectations of voters, as Harlan had recognized in *Taylor*. See notes 156, 296, and accompanying text. See also Richard L. Pildes, *Judging "New Law" in Election Disputes*, 29 Fla St U L Rev 691, 710–11 (2001) (discussing the "theory of detrimental reliance as the basis of constitutional injury").

³³² See Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 Denver U L Rev 225, 234–35 (2003); Foley, *A Tale of Two Swing States* (cited in note 114).

³³³ 133 S Ct 2612, 2622–28, 2631 (2013). See also Dylan Matthews, *Here's How Congress Could Fix the Voting Rights Act* (Wash Post, June 25, 2013), archived at <http://perma.cc/QZ9R-L9TD> (discussing Professor Spencer Overton's proposal for updating the Act's coverage formula).

³³⁴ *LULAC*, 548 US at 439–40.

³³⁵ See *Ohio State Conference of the National Association v Husted*, 768 F3d 524, 557–58 (6th Cir 2014) ("Ohio State Conference of the NAACP"), citing *LULAC*, 548 US at 439. See also *Ohio Organizing Collaborative v Husted*, 189 F Supp 3d 708, 756–58 (SD Ohio 2016), rev'd, *Ohio Democratic Party v Husted*, 834 F3d 620 (6th Cir 2016).

The question thus is whether the Due Process Clause, given its long-standing role in the protection of justifiably settled expectations, can be understood as an appropriate constitutional vehicle for invalidating improper legislative curtailments of preexisting voting opportunities. If so, this due process protection would not be a direct substitute for the now-suspended § 5 of the Voting Rights Act. Its focus would not be racially discriminatory rollbacks of voting opportunities, but instead rollbacks affecting all voters. Moreover, the strength of an antirollback provision derived from the Due Process Clause would likely be different from one embodied in an explicit congressional enactment. Courts would likely be much more deferential to legislative choices when using the Due Process Clause as the basis for judicial review, rather than § 5 of the Voting Rights Act. Nevertheless, judicial review of curtailments of voting opportunities under due process could potentially play a meaningful role in protecting voters from inappropriately partisan legislation, whether or not Congress is ever capable of resurrecting § 5 of the Voting Rights Act through enactment of an updated coverage formula.

B. Partisan Unsettling of Reasonable Expectations about Voting Procedures

It is appropriate for courts to construe the Due Process Clauses of the Fifth and Fourteenth Amendments as constraining legislative changes to voting rules.³³⁶ This constraint would hardly be absolute: of course, legislatures should be permitted to change voting rules for sound public policy justifications. Voting rules and procedures need to be updated in light of new technologies as well as new social circumstances, like increased suburbanization, which require relocation of polling places or even reconceptualization of the relationship between polling places and where voters live and work. Voting rules also deserve to be updated simply to make the voting process more accessible and convenient, as enhancing voter turnout and protecting the social value of voting are not static phenomena but instead are capable of improvements over time.

³³⁶ See Pildes, 29 Fla St U L Rev at 706 (cited in note 331) (“The *Griffin* and *Roe* cases are the strongest court of appeals decisions that support a constitutional role for federal courts in overseeing potential ‘new law’ that arises in the midst of elections and election disputes.”).

But not all changes to voting rules are, or should be, considered constitutionally equivalent. A change in a voting rule motivated purely by a partisan desire to defeat the opposing party's candidates is not a change deserving of judicial deference or respect. A purely partisan change of voting procedures, designed to "unlevel" the playing field between the opposing parties, is a breach of the norm of fair play as applied to the domain of electoral competition. Consequently, if the judiciary encounters a partisan change in voting procedures of this nature, the appropriate judicial response is to invalidate the change as a breach of the norm of fair play embedded within the Due Process Clause.

No legislature will admit that any change in voting rules is ever motivated by pure partisanship. Occasionally, a stray legislator will unguardedly make a statement conveying such a motive. But usually it is difficult to attribute the off-the-cuff remark to the legislature as a whole, especially when the legislature's lawyers are offering the court a nonpartisan justification for the legislative change.

Accordingly, it is necessary to fashion a judicial test that distinguishes between legitimate legislative changes to voting rules and illegitimate ones. Building on existing due process precedents concerning the protection of settled expectations, courts can weigh the extent to which voters have come to rely on existing voting procedures against the government's asserted reasons for wanting to change those procedures. If the voting procedures are long-standing and deeply rooted, such that the electorate's reliance interests are strong, and the change that the legislature wishes to make is significant (and not merely minimal in nature), then the government should be required to offer a strong nonpartisan justification for making the change.³³⁷ Moreover, the vote in the legislature for making a substantial change of this kind

³³⁷ The age of a voting practice subject to legislative change would not be the only factor. An ancient but inconsequential practice, like counting ballots by hand rather than using an electronic tabulator to count the ballots more efficiently, would not be a feature of the voting process giving rise to a vested interest and requiring a special justification to change. Conversely, a relatively new feature of the voting process—like the right to vote by mail without any particular excuse for doing so—might make voting so much more convenient to voters that eliminating this convenience once it has been made available would require an especially strong justification, even though the convenience had been in place only a short period of time. (Telling voters that they had lost their previous right to vote by mail might to some extent ameliorate the disruption associated with the loss of this previous right, but given the magnitude of the loss it might not be sufficient merely to provide this notice; it would depend on whether the state had an adequate nonpartisan reason for the rule change.)

should be sufficiently bipartisan. Otherwise, if the legislature is making a major change to voting rules with one party in favor and the other party not, and if the offered nonpartisan reasons for the change are weak in relation to the severity of upsetting the electorate's reasonable expectations concerning the operation of the voting process, then this particular change will seem suspiciously partisan in nature even without any "smoking gun" confession of the legislature's true partisan motive. In this circumstance, the judiciary should invalidate the legislative change as contrary to due process, given the insufficient nonpartisan defense of the change in relation to the degree to which the change disrupts reasonably settled expectations concerning how the voting process works.

Conversely, if the legislative change is only a modest adjustment to existing voting procedures, and if the existing procedures are themselves of recent vintage—such that the electorate has not formed settled expectations concerning their perpetuation—then the government should be permitted to make the adjustment without having to provide an especially strong justification for doing so. Some changes to voting rules are in the nature of an experiment, and the government should be permitted to end the experiment if it finds insufficient evidence of the experiment providing added benefits as intended, without the government bearing the burden of proving that the experiment caused a serious deterioration in the quality of the voting process. Experiments, in other words, should not be locked into the status quo and difficult to undo.³³⁸ Otherwise, the government will be discouraged from undertaking experiments in the first place, a consequence that would be detrimental to the improvement of the voting process in the long run. Only after electoral experiments have settled into the operation of the voting process to the point that previously innovative procedures have become routine, and voters have come to rely on them, should it be that the government is put to the burden of showing a strong justification for undoing these now-routine procedures. But if an experimental voting procedure has been in place for one election only, the government should be permitted to pull the plug on the experiment with little more justification than viewing the experiment

³³⁸ See *Ohio Democratic Party*, 834 F3d at 635 ("Plaintiffs prefer that we adopt a broad rule that any expansion of voting rights must remain on the books forever. Such a rule would have a chilling effect on the democratic process.").

as a bad idea after all, or a waste of the government's finite resources.

As just described, this due process inquiry is a kind of balancing test, weighing the degree to which the change in voting rules upsets reasonably settled expectations concerning the operation of the voting process against the strength of the government's nonpartisan reasons for making the change. Like any such constitutional balancing test, there inevitably will be good-faith debates about how the balance should be struck in any given instance.³³⁹ The best way to understand such a balancing test is to see it applied to particular cases and for a body of precedent concerning its application to develop over time.

Applying this due process balancing test to Ohio's changes in voting procedures, whereby Ohio cut the number of days of early voting from thirty-five to twenty-eight and in doing so eliminated the so-called Golden Week when voters could simultaneously both register and vote,³⁴⁰ yields the conclusion that the state has made only a modest change to an experiment of relatively recent vintage, with a nonpartisan goal of the change being to eliminate an unintended feature of the experiment. In 2005, Ohio altered its absentee voting rules, which had limited the availability of absentee ballots to voters with a specific excuse (travel, disability, etc.), to offer an absentee ballot on demand to any voter who would prefer one to voting on Election Day.³⁴¹ As a convenience to voters, local boards of election facilitated the casting of these absentee ballots in person, at the board's office or another centralized location, for voters who would prefer to cast these absentee ballots under the board's supervision rather than to deliver their absentee ballots by mail (or to drop off at the board's office a previously cast absentee ballot). By law in Ohio, all "in-person early voting" is actually just a form of absentee voting, a form made available as a result of local boards of election operating sites where voters can go to cast their absentee ballots.³⁴²

After expanding the availability of absentee voting in this way, Ohio soon discovered an unintended consequence. Prior to

³³⁹ See Foley, 81 *Geo Wash L Rev* at 1847–51 (cited in note 2). See also Fallon, *Implementing the Constitution* at 80–85 (cited in note 292).

³⁴⁰ See notes 93–95 and accompanying text.

³⁴¹ *Ohio State Conference of National Association for the Advancement of Colored People v Husted*, 43 F Supp 3d 808, 812 (SD Ohio 2014).

³⁴² *Ohio State Conference of the NAACP*, 768 F3d at 531–32 ("Early voting is done via an 'absentee ballot,' which may be cast either early in-person ('EIP') at the voter's Board of Elections' ('BOE') designated voting location or by mailing the ballot to the BOE.").

this expansion in 2005, absentee ballots in Ohio were available thirty-five days before Election Day, while the close of voter registration was thirty days before Election Day.³⁴³ Accordingly, prior to 2005, there was a six-day overlap between the period for absentee voting and the period for voter registration. But this overlap was inconsequential when absentee voting was limited to only those relatively few voters who had one of the specified excuses for voting absentee. Once absentee voting was opened up to all voters on demand, and in particular once the convenience of voting an absentee ballot in person was made available by local election boards, there arose an unanticipated consequence: a person could both register to vote and cast an in-person absentee ballot at the same time. Suddenly, the overlap between the thirty-five-day period of absentee voting and the thirty-day close of registration became consequential. The overlap, in effect, created a six-day period of same-day registration for those individuals wishing to both register and vote an in-person absentee ballot at the site provided by the local board of election.³⁴⁴ This overlap, apparently not foreseen or intended by the legislature that expanded absentee voting by eliminating the requirement of an excuse for casting an absentee ballot, became known as Golden Week because, like the proverbial pot of gold at the end of the rainbow, it was an unexpected and entirely fortuitous bonus.³⁴⁵

In 2014, based on a bipartisan recommendation of local election officials in Ohio, the state's legislature decided to shorten in-person absentee voting from thirty-five to twenty-nine days, thereby eliminating the fortuity of Golden Week.³⁴⁶ The reduction of the number of days, by itself, presents no due process problems. Ohio voters had not developed an expectation that the availability

³⁴³ *Id.* at 531.

³⁴⁴ *Id.*

³⁴⁵ *Ohio State Conference of the NAACP*, 43 F Supp 3d at 818.

³⁴⁶ *Id.* at 817–19; Darrel Rowland, *Panel Releases List of Voting Reforms* (Columbus Dispatch, Mar 14, 2013), archived at <http://perma.cc/GY8S-P6CV>:

The Ohio Association of Election Officials, made up equally of Democrats and Republicans, says Ohio voters should be able to cast early in-person ballots on three weekend days before a presidential election. . . .

The group also would eliminate “Golden Week.” . . .

“The two real goals were to demonstrate that bipartisan solutions were there to be had, and to add certainty to the voting process,” said association Executive Director Aaron Ockerman.

The Sixth Circuit opinion on Golden Week also invoked this same bipartisan recommendation. *Ohio Democratic Party*, 834 F3d at 623 (describing the recommendation as a “product of collaborative processes”).

of in-person absentee voting would extend for a five-week period. While some Ohio voters may have reasonably developed an expectation that in-person early voting would be available on either a Saturday or Sunday before Election Day, the legislative reduction as currently administered by Ohio's secretary of state leaves in place two Saturdays and two Sundays of in-person absentee voting, thereby maintaining consistency with that reasonable expectation.³⁴⁷

The elimination of Golden Week is more complicated under due process analysis. It is possible that some members of Ohio's electorate may have developed an expectation that there would be a short period of time at the beginning of the period for in-person absentee voting when it would be possible to both register and cast an in-person absentee ballot simultaneously. But the availability of Golden Week has not been very long-standing, having sprung into existence only unexpectedly after 2005. And few voters who used the special convenience of Golden Week once would need to do so again (because they would already be registered, and, if they needed to update their registration status, they could do so online, without making any appearance or mailing any form). Given the fact that Golden Week was an accidental experiment that did not enhance significantly the opportunity to register and vote in Ohio, it would seem under the due process analysis that the government should be permitted to end the experiment without the burden of providing an especially strong reason for doing so. The fact that a bipartisan group of local election officials in the state recommended its elimination as a way to rationalize Ohio's policy of requiring registration in advance of voting, rather than being a same-day-registration state, would seem a sufficiently legitimate, nonpartisan reason to justify eliminating an unintended feature of Ohio's expansion of absentee voting.

In North Carolina, by contrast, same-day registration was an intended feature of the state's voting procedures. In 2007, the state's legislature passed a law specifically to permit voters to both register and cast a ballot during the state's early voting period, which at the time was seventeen days.³⁴⁸ In 2013, among other changes to the state's voting rules, the legislature both cut

³⁴⁷ *Ohio Democratic Party*, 834 F3d at 630.

³⁴⁸ See *North Carolina State Conference of the NAACP v McCrory*, 182 F Supp 3d 320, 331, 336 (MD NC 2016).

the number of days of early voting to ten and completely eliminated same-day registration as an option.³⁴⁹

The reduction in the number of days of early voting was much more severe in North Carolina than in Ohio. In North Carolina, the reduction from seventeen to ten was a loss of 41 percent of the amount of early voting that had been available previously—a significant chunk—whereas in Ohio changing the start of in-person absentee voting from thirty-five days before Election Day to twenty-nine days before Election Day shrank the period of in-person absentee voting by only 17 percent. While North Carolina had not offered seventeen days of early voting for so many years that the state's voters had come to rely on that exact number of days, cutting the period of early voting almost in half was a significant intrusion on the electorate's reasonable expectations concerning the length of the early voting period.

The complete elimination of same-day registration was an even greater unsettling of the reasonable expectations that had developed in North Carolina concerning the availability of same-day registration. While same-day registration had not yet become a long-standing feature of North Carolina law, its availability was not an anomaly in the way it was in Ohio. Rather, since 2007, it had become an integrated element of the entire early voting process. In North Carolina, the nature of early voting for both the 2008 and 2012 presidential elections, as well as all other elections during that period, was that early voting was a procedure that permitted simultaneous registration and ballot casting. Whereas most of early voting in Ohio still required advance registration even when Golden Week was available for just the first six days of early voting, *all* early voting in North Carolina permitted simultaneous registration and ballot casting. Thus, the complete elimination of same-day registration in North Carolina was a significant disruption of reasonable expectations concerning the nature of early voting in the state. Indeed, because it was possible to use same-day registration as part of early voting in North Carolina even after the close of the registration period for Election Day voting (twenty-five days prior to Election Day³⁵⁰), the elimination of same-day registration in North Carolina easily could catch a voter by surprise in a way that the elimination of Golden Week would not. (Golden Week was always in advance of the thirty-day cutoff.

³⁴⁹ *Id.* at 346–48.

³⁵⁰ *Id.* at 333.

Therefore, no Ohio voter reasonably could show up to an early voting location within thirty days of Election Day and expect to be able to register, and this was true even before Golden Week was eliminated. By contrast, previously an unregistered voter in North Carolina could go to an early voting location to both register and vote, even after the twenty-five-day registration cutoff for Election Day voting. After the 2013 change in the law, however, if an unregistered voter waits until within twenty-five days of Election Day and then goes to an early voting location to both register and vote, this voter will be disenfranchised as a result of the elimination of same-day registration. In this way, the North Carolina change in voting procedures has a “gotcha” component, contrary to reasonable expectations, lacking in the Ohio change of voting rules.)

What is North Carolina’s asserted justification for eliminating same-day registration? In its brief to the Fourth Circuit, the state offers but a single justification: that it takes too long to verify a new registrant’s eligibility to vote in order to permit same-day registration during early voting (which occurs after the twenty-five-day registration cutoff for Election Day voting).³⁵¹ But this justification is entirely nonresponsive: if the state is concerned about verifying a newly registered voter’s eligibility, it can simply make the early-voted ballot provisional until such time as the verification occurs. There is no reason the state has to count the early-voted ballot immediately or abandon its verification process. Rather, it can permit the early unregistered voter to first register and then cast a provisional ballot, the eligibility of which will be verified in due course as would be any provisional ballot cast by a voter whose eligibility is in doubt for whatever reason.

Given, then, the weakness of North Carolina’s justification for entirely eliminating same-day registration, combined with the significant unsettling of reasonable expectations concerning the voting process that its elimination entails, North Carolina’s elimination of same-day registration flunks due process analysis in a way that Ohio’s elimination of Golden Week does not. North Carolina’s change of its voting rules, under this due process analysis, seems much more suspicious as a purely partisan power grab, in an effort to tilt the electoral playing field in favor of the party that controls the legislature, whereas Ohio’s change in its voting

³⁵¹ Brief of Appellees, *North Carolina State Conference of the NAACP v McCrory*, Nos 16-1468(L), 16-1469, 16-1474, 16-1529, *10–12 (MD NC filed June 9, 2016) (available on Westlaw at 2016 WL 3226367).

rules can be defended as a more reasonable and nonpartisan adjustment of its electoral regime, to eliminate an unintended consequence of a previously adopted expansion in absentee voting. Because North Carolina cannot survive this fair play balancing test, whereas Ohio can, North Carolina's change in voting rules should be declared a due process violation, whereas Ohio's change in voting rules should be declared consistent with the Due Process Clause.³⁵²

C. A Comparison of Due Process and *Anderson-Burdick*

One might reasonably wonder whether due process balancing, as just described, is preferable to *Anderson-Burdick* balancing, which long has been a feature of the Supreme Court's equal protection jurisprudence as applied to election laws. The answer has two parts. First, for those situations in which equal protection analysis is inapplicable, this due process balancing provides an alternative basis for assessing the constitutionality of the government's regulation of the electoral process. Second, even in those circumstances in which equal protection analysis is appropriate, the due process focus on *both* (i) partisan deviations from the norm of fair play, *and* (ii) the constitutionally appropriate protection of reasonable expectations from unjustifiable retrogressive unsettling of those expectations, serves as a valuable adjunct to *Anderson-Burdick* balancing, which otherwise can become frustratingly amorphous. Thus, rather than being a mode of analysis in competition with *Anderson-Burdick*, this due process balancing is complementary.

On the first point, Part I.B showed that equal protection analysis simply does not apply to certain types of election laws. The provision of ten days of early voting to all voters is, simply put, not a violation of equal protection. It affords equal opportunity to all. Thus, to apply *Anderson-Burdick* balancing to this voting law is either intellectually dishonest (if self-aware) or analytically confused (if not).

³⁵² This due process conclusion with respect to North Carolina would offer the US Supreme Court a basis for affirming the Fourth Circuit if the Supreme Court were to grant certiorari in the case and conclude that the Fourth Circuit's analysis on the issue of racially discriminatory intent was erroneous. See text accompanying notes 108–10. The legislative rollback of early voting still would be unconstitutional as an unjustified partisan violation of due process.

But if a state law that provides ten days of early voting is a reduction in the availability of early voting, which used to be seventeen days, then it is appropriate to ask whether that cutback is an unconstitutional infringement upon settled expectations in violation of due process. The answer might be no, but at least the due process question is the correct question to ask in this context. Here, there is no equality problem to consider. But there is a retrogression issue: the law is undeniably diminishing voting opportunities that were previously available. Is this diminishment unconstitutional or not? That question is a backward-looking one, comparing the way the law used to be to the way the law is now. That backward-looking inquiry fits comfortably within due process jurisprudence, not equal protection jurisprudence. As Professor Cass Sunstein once said in another context, equal protection is forward-looking while due process looks backward.³⁵³ When the constitutional concern is one about retrogression—the legislative rollback of previously existing rights—and does not involve the unequal treatment of individuals, as an adjustment in the available days for early voting does not, then the proper constitutional analysis lies in due process, and not equal protection.

There is no reason to fear this switch from *Anderson-Burdick* to due process balancing in those contexts in which retrogression, rather than unequal treatment, is the relevant constitutional concern. Due process balancing, as described above, asks the right questions in these contexts. To what extent is the new law retrogressive? How severely does the new law disrupt reasonable expectations concerning the voting process? What is the strength of the state's justifications for its disruption of these settled expectations? These are the appropriate issues to consider when all voters are suffering the same diminution in their electoral opportunities.

Second, there may be situations in which both *Anderson-Burdick* and due process analysis are appropriate. Consider, for example, a change in a voter identification law that imposes a more restrictive list of documents that qualify as valid identification—a student ID used to qualify but now does not. In this situation, *Anderson-Burdick* obviously applies, as *Crawford* applied *Anderson-Burdick* to the voter ID rule in that case.³⁵⁴ Moreover, this voter ID law, like the one in *Crawford*, differentiates among

³⁵³ Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship between Due Process and Equal Protection*, 55 U Chi L Rev 1161, 1163 (1988).

³⁵⁴ See text accompanying notes 78–79.

voters: those with the qualifying ID receive more favorable treatment than voters without the qualifying ID. Thus, equal protection analysis is entirely appropriate.

But so too is due process analysis, and its focus on the way in which this new ID law is retrogressive may help structure the otherwise-amorphous application of *Anderson-Burdick* analysis to this situation. To what extent did voters previously come to rely on student IDs as an acceptable form of voter identification? It is not just the discrimination between different groups of voters going forward that is relevant. Rather, it is also the way that the change in the voter ID rules unsettles previous understandings about how the voting process worked.

Moreover, adding due process analysis to the *Anderson-Burdick* inquiry in this situation appropriately focuses the judiciary's attention on the extent to which the change in the voter ID rules appears suspiciously to be a partisan endeavor to alter the playing field of electoral competition. The way in which the Supreme Court handled the claim of partisanship in *Crawford*, essentially ignoring it (except for a brief mention at the end of Stevens's plurality opinion),³⁵⁵ indicates that the Court is uncomfortable considering claims of partisanship in the context of equal protection analysis. By contrast, the problem of partisanship is front and center in the due process inquiry. The reason due process applies is because due process embodies a principle of fair play that constrains partisan overreaching in the regulation of electoral competition. One form of such partisan overreaching is when a legislature, in the control of one party, changes the electoral rules, thereby disrupting reasonable expectations concerning those electoral rules, without adequate nonpartisan justification.³⁵⁶

³⁵⁵ See *Crawford*, 553 US at 203–04 (Stevens) (plurality).

³⁵⁶ In a recent essay, Professor Samuel Issacharoff lamented the inability of current jurisprudence, exemplified by *Crawford*, to directly tackle the problem of partisanship:

Starting from the proposition that the new voting cases stem from a misuse of partisan authority over the administration of elections, the question becomes whether a contextual burden-shifting approach can overcome an inquiry that directs court focus away from the partisan motivations for the challenged ballot restrictions. In effect, courts are searching for the consequences of partisan excess without being able to ferret out the root cause.

Samuel Issacharoff, *Voter Welfare: An Emerging Rule of Reason in Voting Rights Law*, 92 Ind L J 299, 324 (2016). In a vivid summation of his concern, he explained: "At some point the oncologist needs to look for the cancerous tumor itself, not simply for the metastatic manifestations." *Id.* The due process principle of fair play provides the missing judicial inquiry that Issacharoff sought: the fair play principle causes courts to ask directly whether partisanship is the cause for the change in voting rules.

Thus, the relevant due process inquiry requires the judiciary to look for improper partisanship in the alteration of election rules, ferreting out those unjustified legislative changes from those with sufficient nonpartisan arguments in their defense. This appropriate judicial inquiry under due process analysis usefully can supplement *Anderson-Burdick* balancing. When it looks like the legislature is changing the electoral rules solely to benefit one party, the courts can nullify this partisan breach of fair play, and they can do so by pointing out that the Constitution protects not only the equal treatment of similarly situated voters, but also the integrity of the electoral process itself. If one party seeks to control the electoral process to give itself an unfair advantage, that power grab is a constitutional problem independent of whether it violates the equal treatment of similarly situated voters. The courts are capable of protecting both constitutional principles simultaneously, and doing so is especially important when both are potentially threatened by the legislature's adoption of a new voting rule. Conducting both *Anderson-Burdick* and due process balancing simultaneously may reveal the existence of an unconstitutional regulation of the voting process, when considering either mode of inquiry in isolation may fail to identify the constitutional infirmity.³⁵⁷

In sum, without abandoning *Anderson-Burdick* balancing, the courts should add due process balancing to their constitutional analysis in order to assure that they adequately protect the

³⁵⁷ In some particular contexts, it may be debatable whether a change in voting rules contravenes the reasonable settled expectations of voters, thereby requiring the state to justify the change under this due process analysis. Suppose, for example, that a state eliminates a preexisting practice that permitted candidates or political parties to send challengers to polling places for the purpose of challenging the eligibility of voters before they cast a ballot. One can imagine a legislature justifying the change on the ground that such challengers might risk causing long lines on Election Day. One can also imagine, however, that some voters might attack the legislative change as motivated by partisanship, trying to make it easier for ineligible voters to cast a ballot. Would this legislative change unsettle reasonably settled expectations, thereby triggering the obligation to provide a nonpartisan justification? One way to approach this question is to ask whether voters have any kind of vested expectation of the ability to challenge the eligibility of *other* voters at polling places. Would the removal of this right to challenge be a retrogression of voting rights for the purpose of § 5 of the Voting Rights Act? While the statutory retrogression analysis under § 5 would not be dispositive of the constitutional retrogression analysis under due process, it nonetheless would be a useful analogy. The likely conclusion would be that voters do not have a vested entitlement to challenge other voters. In any event, even if put to the obligation to provide a justification for the purpose of due process analysis, a legislature likely would be able to justify this change in the law because the fear of long lines at polling places would be a compelling concern.

voting process from partisan power grabs that breach the fundamental principle of fair play in electoral competition.

V. LIMITS ON JUDICIAL REVIEW OF PARTISAN OVERREACHING

The previous Parts of this Article show how construing the Due Process Clause to constrain partisan overreaching provides judicially enforceable standards for redressing the problems of gerrymanders and legislative cutbacks in voting opportunities. The same fair play principle embedded in due process constrains other forms of partisan overreaching, such as manipulation of ballot-counting rules after ballots have been cast.³⁵⁸ There are likely to be other issues of election law that emerge in the context of partisan competition to win elections to which the same fair play principles would appropriately apply to protect that electoral competition from excessive, or undue, partisanship.³⁵⁹

But what about issues beyond the regulation of the electoral process? What is the full scope of this due process constraint against partisan overreaching? Would it not apply to other forms of partisan abuses by legislative majorities; and if so, what is the limit to this due process principle?

It is true that there is nothing inherently electoral about this due process principle of fair play and its constraint against excessive partisanship. It is not an attempt to implement the idea of electoral equality. Indeed, that is its virtue. As Part I demonstrated, the idea of electoral equality ran into limitations when it endeavored to tackle the particular problems of gerrymandering and legislative cutbacks of voting opportunities. The separate principle of fair play, it turns out, does a better job of addressing these problems—and does so precisely because it is not concerned with the equal electoral rights of citizens but instead directly condemns the abuse by the majority party in the legislature of its dominant position. That kind of partisan abuse obviously can have electoral

³⁵⁸ See, for example, *Roe v Alabama*, 43 F3d 574, 580 (11th Cir 1995) (per curiam) (regarding the “retroactive validation of a potentially controlling number of votes”); *Griffin v Burns*, 570 F2d 1065, 1075–76 (1st Cir 1978) (regarding a retroactive ruling by a state election board that invalidated ballots); Pildes, 29 Fla St U L Rev at 710–11 (cited in note 331).

³⁵⁹ I share Professor Richard Levy’s recognition of the need to develop a doctrine to protect the electoral process from various forms of excessive partisanship, but as indicated earlier I differ from Levy in maintaining the necessity of letting legitimate partisanship operate in American politics and in invoking due process as the appropriate constitutional basis for distinguishing between legitimate and excessive partisanship. See note 17.

ramifications, as elections are an obvious area in which the dominant party might wish to secure an unfair advantage against its political opponents.

The dominant party, however, might seek an unfair advantage in other domains as well. Indeed, the canonical example of partisan overreaching that formed the context for the Fourteenth Amendment's ratification was the attempt by Radical Republicans to remove President Johnson from the presidency through the misuse of the impeachment process.³⁶⁰ This quintessential instance of excessive partisanship did not concern the regulation of the electoral process.

Thus, insofar as the Due Process Clause of the Fourteenth Amendment is properly interpreted as embodying a constraint against partisan overreaching—and is properly so interpreted because of the history concerning the impeachment of Johnson and the ultimate defeat of the excessively partisan effort to remove him from office—this due process principle cannot be intrinsically limited to the electoral context. Most obviously, for example, it would potentially apply to any future misuse of the impeachment power in an attempt to remove a president from office because of a partisan disagreement over policy.³⁶¹ It might potentially also apply to other ways in which the majority party in the legislature might abuse its power over legislative procedures, such as excluding members of the minority party from participating in legislative committee hearings.³⁶² Conceivably, it could also apply to breaches or manipulations of the legislature's own rules governing the processes for enacting legislation, as Congress was accused of doing when it used a highly unorthodox method for promulgating the so-called Obamacare legislation.³⁶³

To put this point more formally, this fair play constraint against partisan overreaching would seem to yield a new form of

³⁶⁰ See Part II.B.2.

³⁶¹ See generally Richard K. Neumann Jr, *The Revival of Impeachment as a Partisan Political Weapon*, 34 *Hastings Const L Q* 161 (2007).

³⁶² See generally Oliver A. Houck, *Things Fall Apart: A Constitutional Analysis of Legislative Exclusion*, 55 *Emory L J* 1 (2006).

³⁶³ See Tonja Jacobi and Jeff VanDam, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate*, 47 *UC Davis L Rev* 261, 312–15, 317 & n 290 (2013). See also Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress 188–232* (CQ 4th ed 2012). Congress contemplated using an even more controversial procedure to enact Obamacare, but ultimately decided against doing so in order to avoid a potential challenge. See Ronald J. Krotoszynski Jr, *Deconstructing Deem and Pass: A Constitutional Analysis of the Enactment of Bills by Implication*, 90 *Wash U L Rev* 1071, 1072–75, 1078–87 (2013).

judicial review, which could be called “due process of lawmaking” or “legislative due process.”³⁶⁴ This new form of judicial review would police legislative procedures, not just the substance of legislation, and not just adjudicatory procedures. If existing legislative rules prohibited enactment of a statute without three readings of the bill on the legislative floor, for example,³⁶⁵ then an attempt to pass a bill after only two readings might run afoul of this form of judicial review.

While some academic commentary has advocated that the Supreme Court embrace “due process of lawmaking” as a judicially enforceable principle,³⁶⁶ for the Court to do so would require a thorough repudiation of long-standing precedent. In 1892, the Court adopted the so-called enrolled-bill rule, meaning that, whenever Congress itself formally asserted that a bill had duly passed both chambers, the Court would accept that assertion at face value and refuse to look beneath that status for procedural defects.³⁶⁷ For over a century, the Court has never repudiated the doctrine. Rather, the Court has seen it as a species of the broader principle that the Court lacks power to police the internal procedures of the legislative branch.³⁶⁸ Indeed, pursuant to that broader principle, the Court will not adjudicate a claim that the Senate’s procedures for trying an impeachment violate the Bill of Rights, including the Due Process Clause of the Fifth Amendment.³⁶⁹ Thus, the very context that gives rise to the idea that due process constrains partisan overreaching—the abuse of the impeachment power—is off-limits to judicial enforcement under the so-called political-question doctrine.

³⁶⁴ See Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 BU L Rev 1915, 1921 n 24, 1966 (2011). See also generally id (providing a comprehensive analysis of the relevant literature including the canonical piece, Hans A. Linde, *Due Process of Lawmaking*, 55 Neb L Rev 197 (1976)).

³⁶⁵ See, for example, Va Const Art IV, § 11(c).

³⁶⁶ See, for example, Bar-Siman-Tov, 91 BU L Rev at 1970–74 (cited in note 364).

³⁶⁷ See *Field v Clark*, 143 US 649, 672–73 (1892).

³⁶⁸ In *Baker*, the Court’s major restatement of the political-question doctrine, the Court analyzed *Field* and its enrolled-bill rule as an example of a matter “committed to congressional resolution.” *Baker*, 369 US at 214.

³⁶⁹ See *Nixon v United States*, 506 US 224, 233–38 (1993). Although the Court’s opinion in *Nixon* explicitly concerns only the nonjusticiability of the Constitution’s Impeachment Trial Clause itself, the Court’s reasoning in the case is well understood to extend to any constitutional claims concerning the Senate’s trial of an impeachment, on the ground that such trials are committed exclusively to the authority of the Senate. See Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments after Nixon*, 44 Duke L J 231, 261–75 (1994) (addressing “the Constitution’s allocation of unique impeachment authority to Congress”).

Does the nonenforceability of due process in the context of impeachments, pursuant to the political-question doctrine, doom the idea that the Due Process Clause of the Fourteenth Amendment embodies a constraint against partisan overreaching? More broadly, does the Supreme Court's repeated and emphatic rejection of any role for a "due process of lawmaking" doctrine preclude adopting the idea that due process includes a principle of fair play that condemns excessive partisanship in some contexts, including gerrymandering and legislative cutbacks of voting opportunities?

The answer to these questions is, most definitively, no. It is true that this long-standing and deeply rooted precedent necessarily limits the scope of a judicially enforceable principle of fair play that constrains partisan overreaching. But this precedent does not preclude this judicially enforceable principle entirely. As long as the judiciary does not interfere with the legislature's rules for its own internal operations, the judiciary can insist that enacted legislation comply with the fair play principle that condemns excessive partisanship.

This cabining of due process, so that it does not contravene firmly entrenched precedents concerning the legislature's self-governing autonomy, is not a foreign concept in constitutional law. Occasionally, when two constitutional principles abut each other, one of them will need to be carefully circumscribed so as not to undermine the other. The absolute immunity of the president for conduct in office, for example, means that even if a president intentionally violates the Fourth Amendment by ordering a warrantless wiretap without probable cause, the president cannot be held liable for damages caused by this flagrant constitutional violation.³⁷⁰ Likewise, because it would be inappropriate to subject the president's decision to order a military strike to judicial supervision, the president's targeting of even a US citizen abroad must be immune from judicial issuance of injunctive relief even when there are allegations that the targeting violates due process.³⁷¹

³⁷⁰ See *Nixon v Fitzgerald*, 457 US 731, 755–57 (1982).

³⁷¹ See *Al-Aulaqi v Obama*, 727 F Supp 2d 1, 52 (DDC 2010) (holding that the court was not equipped to evaluate instances of "decision-making in the realm of military and foreign affairs"). But see *Al-Aulaqi v Panetta*, 35 F Supp 3d 56, 70 & n 21 (DDC 2014) (finding that, despite the political-question doctrine, the court had subject-matter jurisdiction over a claim involving the same targeted killing of a US citizen).

Thus, the due process principle of fair play must not be invoked to permit judicial scrutiny of whether the legislature adhered to its own internal procedures.³⁷² But this limitation has no applicability to gerrymandering, legislative cutbacks of voting opportunities, or other partisan manipulations of electoral procedures. The electoral process is not a part of the legislature's internal operations. Consequently, even though conceptually the principle of fair play and its constraint against partisan overreaching is not limited to regulation of the electoral process, as a practical matter this principle may have its greatest applicability to electoral procedures just because the same principle is judicially unenforceable with respect to the legislature's own internal procedures.³⁷³

This practical limitation, however, is no obstacle to judicial enforcement of the fair play principle in those domains other than the legislature's internal procedures. Thus, the courts should proceed robustly in enforcing the fair play principle to constrain partisan gerrymandering. Likewise, they should invoke the fair play principle when legislatures inappropriately upset settled expectations concerning voting procedures. These are areas in which the invocation of the fair play principle is not foreclosed by precedent. On the contrary, these are areas in which the judiciary has struggled with articulating a coherent theory of adjudication, attempting to use equal protection as a basis for jurisdiction, but

³⁷² Theoretically, the Supreme Court could distinguish the enrolled-bill rule as it applies to acts of Congress from an equivalent doctrine that would preclude *federal* court review of a *state* legislature's internal procedures. *Field*, in other words, could remain good law purely on separation-of-powers grounds, while leaving open the possibility of *federal* court review of *state* legislative procedures under the Due Process Clause of the Fourteenth Amendment. But while that distinction is theoretically available, it too would require overruling long-standing precedent, as shortly after *Field* itself the Supreme Court refused to examine the alleged deficiency of a state legislature's procedures if the state's own judiciary would not do so. See *Wilkes County v Coler*, 180 US 506, 524 (1901) (holding that federal courts should "follow the rulings of the highest court of a State on the question whether a particular enactment found in the printed statutes had been passed in such a manner as to become, under its constitution, a law of the State").

³⁷³ Invocation of due process, moreover, is potentially constrained by the textual necessity that the government must be depriving a voter of some sort of "liberty" or "property" interest in order to violate due process. "Liberty" or "property" can be interpreted capaciously for the purposes of enforcing the norm of fair play. As early as 1900, in *Taylor v Beckham*, 178 US 548 (1900), Justice Harlan was prepared to rule that voters have a liberty interest in protecting the counting of their ballots from partisan ballot-box stuffing. See *id.* at 592–93 (Harlan dissenting). Voters similarly have a liberty interest in protecting their right to vote from the drawing of legislative districts based on partisan distortions. But it remains important to note that the interpretation of due process cannot be entirely untethered from the protection of the liberty or property interests of individual voters.

failing to spell out a satisfactory understanding of how equal protection applies. In these contexts at least, even if not in all conceivable contexts, the judiciary should embrace a fair play principle rooted in due process as the basis for condemning constitutionally inappropriate partisanship.

CONCLUSION

America and the Supreme Court face a stark choice. It certainly is possible to construe the Constitution, as Justice Scalia did in his *Vieth* plurality, to provide no constraint against excessive partisanship. This reading of the Constitution would presume that it never outgrew the mistaken premise of its Framers that the separation of powers would suffice to prevent factions from coalescing into permanent two-party competition. On this reading, given this foundational mistake, the only way for the Constitution to redress the problem of excessive partisanship is through a constitutional amendment.

This “failed premise” understanding of the Constitution, however, is not the only available one. On the contrary, as this Article has shown, the circumstances surrounding the ratification of the Fourteenth Amendment reveal that this especially important amendment—the one responsible for reconstructing the Republic on a foundation of equality and fundamental rights—owes its existence to a congressional recognition that partisan overreaching would destroy the Republic. Once this history is properly understood, it becomes possible to interpret the Amendment’s Due Process Clause, and the idea of fair play that due process generally entails, as specifically encompassing a constraint against forms of partisan overreaching that would endanger democracy.

Which of these two interpretative options is the better choice? If one is a narrow “conventionalist,”³⁷⁴ because one cannot conceive that faithful interpretation of a written text can generate new meaning based on a better understanding of the text’s historical circumstances and its ongoing role in a nation’s political development, then one inevitably is confined to the “failed premise” understanding of the Constitution. But if one is open to the possibility of a more organic form of constitutional interpretation—one that recognizes that the Constitution, while a written text, plays a uniquely empowering role in the life of the nation (being the document that both created the polity and continuously

³⁷⁴ Dworkin, *Law’s Empire* at 94–95 (cited in note 18).

sustains it)³⁷⁵—then it becomes easy to embrace the reading of the Fourteenth Amendment, rooted in its own special history, that understands its Due Process Clause as embodying a constraint against partisan overreaching destructive of democracy.

Interpreting the Fourteenth Amendment's Due Process Clause as entailing this fair play constraint against excessive partisanship would provide a way out of the morass of attempting to derive an antipartisanship principle from equal protection. Partisan avarice is, regrettably, compatible with one person, one vote. But partisan avarice is not compatible with fair play. Thus, reliance on the fair play norm embedded in due process can redress directly the excessive partisanship that equal protection struggles to regulate.

Interpreting due process in this way provides an antidote to egregious partisan gerrymandering, which has previously proven elusive using only an equal protection approach. This interpretation of due process also provides a straightforward constitutional condemnation of state laws that remove previously available voting opportunities, like early voting, without nonpartisan justification—another issue that equal protection has struggled to handle. Thus, the interpretative choice that America and the Supreme Court face should yield a straightforward resolution. Interpreting due process to condemn partisan overreaching is a construction of the Constitution that accords with the best understanding of its history and its role in safeguarding the democracy that it both established and perpetuates.

³⁷⁵ See, for example, Jack M. Balkin, *Living Originalism* 277–319 (Belknap 2011).