

# Litigating the Line Drawers: Why Courts Should Apply *Anderson-Burdick* to Redistricting Commissions

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*In the wake of the Supreme Court’s recent decision in Rucho v Common Cause, ruling partisan gerrymandering claims nonjusticiable, redistricting commissions have never been more important. These commissions remain one of the few methods to remove the redistricting process from the hands of self-interested state legislatures. To accomplish this goal, many commissions limit the number of Republicans and Democrats who can serve on the commission and bar certain political actors—such as legislators and party leaders—from serving as commissioners. Although likely necessary to ensure redistricting commissions’ independence, these provisions burden the First Amendment associational rights of the excluded individuals and their political parties. Recent litigation in Michigan has challenged the state’s commission under this theory, setting the stage for other suits to follow.*

*These challenges pose several questions. Chief among them is the proper constitutional standard of review to apply when evaluating associational-rights claims against redistricting commissions. Associational-rights doctrine provides two conflicting options: strict scrutiny under the Supreme Court’s patronage doctrine, or a sliding scale under the Anderson-Burdick balancing test, a standard of review often used by the courts to evaluate challenges to election laws. Plaintiffs challenging their exclusion from these commissions will likely argue for strict scrutiny, while defenders of redistricting commissions will argue for the more deferential sliding-scale scrutiny. This Comment sets out to resolve this dilemma. I evaluate the arguments for applying both strict scrutiny and Anderson-Burdick to First Amendment challenges to redistricting commissions, concluding that—both for doctrinal and normative reasons—Anderson-Burdick should apply.*

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## INTRODUCTION

In the battle against partisan gerrymandering, redistricting commissions are now on the front lines. In the 2019 case *Rucho v Common Cause*,<sup>1</sup> the Supreme Court held that claims of partisan gerrymandering are nonjusticiable under the political question doctrine, effectively removing any federal judicial oversight over

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<sup>1</sup> 139 S Ct 2484 (2019).

the mapmaking process.<sup>2</sup> By doing so, the *Rucho* decision has left the job to other nonpartisan checks.<sup>3</sup> In its opinion, the Court referenced alternatives to remove partisan influence in the redistricting process, including state court challenges,<sup>4</sup> new state governmental positions tasked with drawing maps,<sup>5</sup> and independent redistricting commissions.<sup>6</sup> Of these options, redistricting commissions have gained significant traction in recent years. A redistricting commission generally consists of a body removed from the state legislature that draws district lines for federal and state legislative seats. Many states have already established some form of these commissions in an attempt to decrease the influence of potentially self-interested legislators and to reduce partisan gerrymandering.<sup>7</sup>

Like every aspect of the redistricting process, these commissions have proved controversial.<sup>8</sup> Recently, several individuals and a political party have challenged certain provisions of Michigan's redistricting commission as a violation of their First Amendment associational rights.<sup>9</sup> The Supreme Court has long recognized that freedom of speech also protects a right of expressive association, as association with groups allows individuals to express and advance their ideas.<sup>10</sup> This right is particularly salient in the context of association with political parties. Provisions of redistricting commissions that bar certain classes of people from serving as commissioners, such as legislators and party employees, can potentially burden this right of political association.

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<sup>2</sup> See *id.* at 2506–07.

<sup>3</sup> State courts, for example, remain a forum for challenging partisan district maps. See, for example, *Common Cause v Lewis*, 2019 WL 4569584, \*108–24 (NC Super) (holding that North Carolina's 2017 district maps, the same as those at issue in *Rucho*, were unconstitutional under several provisions of the state's constitution).

<sup>4</sup> See *Rucho*, 139 S Ct at 2507 (“Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.”).

<sup>5</sup> See *id.* (“Voters [in Missouri] overwhelmingly approved the creation of a new position—state demographer—to draw state legislative district lines.”).

<sup>6</sup> See *id.* (“States are restricting partisan considerations in districting through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions.”).

<sup>7</sup> See *Number of States Using Redistricting Commissions Growing* (Associated Press, Mar 21, 2019), archived at <https://perma.cc/VKD3-H4CY>.

<sup>8</sup> See Andrew Prokop, *Are There Reforms That Can Prevent Gerrymandering?* (Vox, Nov 14, 2018), archived at <https://perma.cc/BV43-VUES>.

<sup>9</sup> See Complaint for Declaratory and Injunctive Relief, *Daunt v Benson*, No 19-cv-00614, \*3–4 (WD Mich filed July 30, 2019) (Daunt Complaint); Complaint for Declaratory and Injunctive Relief, *Michigan Republican Party v Benson*, No 19-cv-00669, \*3 (WD Mich filed Aug 22, 2019) (Rep Party Complaint).

<sup>10</sup> See *NAACP v Alabama*, 357 US 449, 460–61 (1958) (collecting cases).

The cases in Michigan—and the potential for others to follow—prompt several questions that the federal courts will need to consider. The central question that arises is the appropriate standard for evaluating constitutional challenges to redistricting commissions. In these cases, plaintiffs and defendants will likely argue for differing constitutional standards. Plaintiffs will likely demand strict scrutiny, as the challengers in Michigan have. Strict scrutiny requires the associational burdens of redistricting commissions to be justified by a compelling state interest and to be narrowly tailored to that end.<sup>11</sup> Defendants, however, will likely argue that the court should apply a different constitutional standard: *Anderson-Burdick* sliding-scale scrutiny.

First outlined by the Supreme Court in *Anderson v Celebrezze*<sup>12</sup> and *Burdick v Takushi*,<sup>13</sup> the *Anderson-Burdick* test applies to various subsets of election law. Under *Anderson-Burdick*, the level of scrutiny that an election law receives depends on the severity of the burden imposed, resulting in a more deferential standard for less burdensome laws.<sup>14</sup> Strict scrutiny would almost certainly lead courts to invalidate redistricting commissions—or at least their key provisions—while *Anderson-Burdick* would likely allow a court to find the provisions constitutional.<sup>15</sup> This question has already caused vexation in the Michigan litigation. In an opinion denying a motion for preliminary injunction, a majority of the Sixth Circuit panel held that *Anderson-Burdick* would likely apply, and thus the plaintiffs would likely fail on the merits,<sup>16</sup> while an opinion concurring in the judgment thoroughly criticized the majority's decision to apply sliding-scale scrutiny.<sup>17</sup>

With the next redistricting cycle quickly approaching after completion of the 2020 Census, resolving this question may determine whether redistricting commissions will be able to properly carry out their duties this decade. Additionally, delineating a constitutional standard will not only provide courts with a method for deciding the current constitutional challenges to redistricting commissions, but will also provide a framework to use going forward. Given the relative nascency of redistricting commissions, new variations on current commissions are likely to emerge to

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<sup>11</sup> See *Rutan v Republican Party*, 497 US 62, 74 (1990).

<sup>12</sup> 460 US 780 (1983).

<sup>13</sup> 504 US 428 (1992).

<sup>14</sup> See *id.* at 434.

<sup>15</sup> See Part V.

<sup>16</sup> See *Daunt v Benson*, 956 F3d 396, 406–08 (6th Cir 2020).

<sup>17</sup> See *id.* at 422–27 (Readler concurring in the judgment).

achieve the ultimate goal of creating nonpartisan electoral districts. Although this Comment evaluates associational claims against current provisions, the constitutional standard I propose here should be applicable in all future First Amendment associational challenges to redistricting commissions, regardless of what provisions are challenged.

This Comment evaluates both strict scrutiny and *Anderson-Burdick* as possible standards for judging challenges to independent redistricting commissions and concludes that the *Anderson-Burdick* test should be extended to these cases. Part I provides an overview of gerrymandering and redistricting commissions and details the provisions of redistricting commissions that can be challenged using a First Amendment associational-rights theory. Part II explains the two lines of cases that suggest either strict scrutiny or the *Anderson-Burdick* framework should apply to First Amendment challenges to redistricting commissions. Part III evaluates the doctrinal case for applying each standard to redistricting commissions and concludes that the balance tips toward applying *Anderson-Burdick*. Part IV supplements the doctrinal rationale for *Anderson-Burdick* with a normative justification for applying sliding-scale scrutiny to redistricting commissions. In contrast with strict scrutiny, the *Anderson-Burdick* test gives courts more flexibility to consider the severity of associational injuries against states' constitutional interest in regulating elections and gives redistricting commissions—one of the few remaining solutions to partisan gerrymandering—greater legal protection. Finally, Part V examines how a court might evaluate challenges to redistricting commissions under *Anderson-Burdick*, concluding that they should survive review under this standard.

## I. THE HISTORY OF REDISTRICTING COMMISSIONS AND THEIR CONSTITUTIONALLY CHALLENGEABLE PROVISIONS

### A. Partisan Gerrymandering and the Rise of Redistricting Commissions

The need for redistricting commissions has grown out of the increased use and sophistication of partisan gerrymandering by legislatures throughout the United States. As a general matter, partisan gerrymandering occurs when legislators draw electoral

district lines for political advantage.<sup>18</sup> Normally, this is done by the majority party in the state legislature, which “packs” large populations of opposition voters into certain districts and then “cracks” the rest into minorities in the remaining districts, effectively ensuring that the majority party earns a majority of seats disproportionate to their vote share in an election.<sup>19</sup> This can occur for federal congressional districts, state legislative districts, and even municipal districts.

Concerns over this sort of abuse from incumbent legislators date back to the early days of the United States. The term “gerrymander,” in fact, first appeared in an 1812 newspaper criticizing the Massachusetts redistricting process under Governor Elbridge Gerry, claiming one of the new districts resembled a salamander.<sup>20</sup> However, concerns over partisan gerrymanders have increased significantly in recent decades because of how easy they have become to create.<sup>21</sup> Advances in mapping technologies have made gerrymandering effortless and precise. Mapmakers can now generate maps optimizing outcomes for their preferred political party while adhering to traditional redistricting criteria,<sup>22</sup> such as compactness and contiguity.<sup>23</sup>

The results of these technological advances have been dramatic in many states. The maps considered in *Rucho* show a striking example: the challenged map in North Carolina gave Republicans ten of the thirteen congressional seats, while Maryland’s map gave Democrats control of seven of eight districts.<sup>24</sup> For context, then-candidate Donald Trump won 49.8 percent of the vote in North Carolina in the 2016 presidential election, while former Secretary of State Hillary Clinton won 60.3 percent of the vote in Maryland in the same election.<sup>25</sup> These distorted maps not only

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<sup>18</sup> See *Black’s Law Dictionary* (West 11th ed 2019) (defining “Gerrymandering” as “[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength”).

<sup>19</sup> Justin Levitt, *A Citizen’s Guide to Redistricting* 57–58 (Brennan Center for Justice 2010).

<sup>20</sup> See Allen Pusey, *A Move Toward ‘1 Person, 1 Vote’*, 104 ABA J 72, 72 (Feb 2018).

<sup>21</sup> See Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race* (The Atlantic, Oct 28, 2017), archived at <https://perma.cc/KRR8-V6C5> (detailing the history of technology use in redistricting and its advancement over the last few election cycles).

<sup>22</sup> See *id.*

<sup>23</sup> National Conference of State Legislatures, *Redistricting Criteria* (Apr 23, 2019), archived at <https://perma.cc/A4GU-C23P>.

<sup>24</sup> See *Rucho*, 139 S Ct at 2491–93.

<sup>25</sup> See *Presidential Election Results: Donald J. Trump Wins* (NY Times, Aug 9, 2017), archived at <https://perma.cc/C4RV-L5GK>.

waste votes of the minority party and damage proportionality between representation and support,<sup>26</sup> they also can impact the democratic process itself. Gerrymandered districts likely increase ideological polarization in legislatures, as packed districts become easy wins for the majority party in general elections. This leads to more competitive party primaries and more ideological candidates, as candidates must appeal to the more extreme party base instead of the ideological center in a general election.<sup>27</sup> This can in turn lead to increased gridlock in the legislative process because more extreme legislators are less likely to compromise.<sup>28</sup> Less competitive elections can also decrease voter turnout, as many citizens will see the election results as predetermined.<sup>29</sup>

The federal courts were long seen as a vehicle for combatting partisan gerrymandering and its ill effects. The Supreme Court, however, struggled over several decades to deliver a judicially manageable standard to resolve constitutional claims against the practice. In *Davis v Bandemer*,<sup>30</sup> the Court first attempted to set out a standard.<sup>31</sup> However, lower court difficulties in applying the standard caused the Court to reverse course eighteen years later in *Vieth v Jubelirer*,<sup>32</sup> in which a plurality declared partisan gerrymandering claims nonjusticiable.<sup>33</sup> Only Justice Anthony Kennedy's concurrence—which left open the possibility of discovering a workable standard—provided hope that federal courts would

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<sup>26</sup> All elections have wasted votes—that is, all votes cast for the losing candidate in an election and all votes cast for the winner above the electoral threshold. Partisan gerrymanders decrease the number of wasted votes for the party the gerrymander favors. One of the best methods of measuring the disproportionality of a wasted vote due to partisan gerrymandering is the “efficiency gap,” which is simply calculated by subtracting one party's wasted votes from the other and dividing by the total number of votes cast. The higher the number, the greater the efficiency gap. See Nicholas O. Stephanopoulos and Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U Chi L Rev 831, 849–55 (2015). Based on this metric, the gerrymanders of the 2010 redistricting cycle were the worst in modern history. See *id.* at 876.

<sup>27</sup> See Nathan S. Catanese, Note, *Gerrymandered Gridlock: Addressing the Hazardous Impact of Partisan Redistricting*, 28 Notre Dame J L Ethics & Pub Pol 323, 339 (2014) (explaining that more competitive primaries yield more ideologically extreme general election candidates).

<sup>28</sup> See *id.* at 331–33.

<sup>29</sup> See *id.* at 340–41.

<sup>30</sup> 478 US 109 (1986).

<sup>31</sup> See *id.* at 132 (White) (plurality) (deeming an electoral system unlawful if “arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole”).

<sup>32</sup> 541 US 267 (2004).

<sup>33</sup> See *id.* at 305 (Scalia) (plurality).

adjudicate these claims.<sup>34</sup> *Rucho* finally shut the door and removed the federal courts from the fight by declaring all partisan gerrymandering claims nonjusticiable.<sup>35</sup>

Consequently, redistricting commissions now remain one of the few options left to fight against partisan gerrymandering. Although now at the forefront, the proliferation of redistricting commissions occurred long before *Rucho*. Arkansas created the first commission in 1956 and a few states followed suit. But the majority of commissions have been established since 1990.<sup>36</sup> At the same time, scholars began to see redistricting commissions as a feasible method to eliminate partisan gerrymandering.<sup>37</sup> Michigan became the most recent state to join the club, establishing an independent commission via ballot initiative in 2018, while Colorado replaced its old partisan commission with an independent commission in the same year.<sup>38</sup>

This proliferation has not necessarily indicated stability; some of these commissions have recently seen constitutional challenges levied against them from different groups. Those established through citizen ballot initiatives came under scrutiny in the 2015 case *Arizona State Legislature v Arizona Independent Redistricting Commission*.<sup>39</sup> In a 5–4 decision, the Supreme Court upheld the constitutionality of this method of creating redistricting commissions.<sup>40</sup> In doing so, the Court interpreted the Elections Clause<sup>41</sup> of the US Constitution to include the people as part of the Arizona “Legislature,” giving the people the power to determine the

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<sup>34</sup> See *id.* at 313–14 (Kennedy concurring in the judgment).

<sup>35</sup> See *Rucho*, 139 S Ct at 2506–07.

<sup>36</sup> National Conference of State Legislatures, *Creation of Redistricting Commissions: Background* (Apr 6, 2018), archived at <https://perma.cc/J5ZS-BH6H>.

<sup>37</sup> See Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 *Tex L Rev* 837, 840–55 (1997) (providing an overview of scholarship on redistricting commissions and their effectiveness).

<sup>38</sup> See *Creation of Redistricting Commissions* (cited in note 36). Missouri added an alternative nonpartisan check on gerrymandering in a 2018 ballot initiative: an independent state demographer tasked with drawing legislative maps. Republicans legislators in Missouri have aimed to repeal this position through a new ballot initiative, however. See Jason Hancock, *Repeal of Voter-Approved Redistricting Plan Heads to Ballot After Missouri House Vote* (Kansas City Star, May 13, 2020), available online at <https://www.kansascity.com/news/politics-government/article242701011.html> (visited July 28, 2020) (Perma archive unavailable).

<sup>39</sup> 135 S Ct 2652 (2015).

<sup>40</sup> See *id.* at 2677.

<sup>41</sup> US Const Art I, § 4, cl 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.”).



methods of redistricting.<sup>42</sup> This cleared the way for Michigan and Colorado to establish their commissions through public referendum, allowing them to circumvent the state legislature.

This decision did not put redistricting commissions entirely in the clear, however. In the summer of 2019, litigants filed two constitutional challenges to Michigan's independent redistricting commission. Both challenge the commission's prohibition on certain political actors—including legislators, party insiders, and lobbyists—serving as commissioners. The first suit, filed by individual plaintiffs who fall into the prohibited categories, challenges the commission as a violation of their First Amendment associational rights to be free from political discrimination in government employment decisions.<sup>43</sup> The second, filed by the Michigan Republican Party, challenges the commission as a violation of its associational rights to choose its own members, since the commission requires applicants to self-identify as either Republican, Democratic, or unaffiliated.<sup>44</sup> The Western District of Michigan has now consolidated these two cases into the ongoing litigation of *Daunt v Benson*.<sup>45</sup> Although the Sixth Circuit recently affirmed a lower court's denial of a preliminary injunction in this case<sup>46</sup> and the Western District subsequently granted the defendant's motion to dismiss,<sup>47</sup> the suit may be far from over, with further appeals and litigation possible.

These suits likely represent the first of many against redistricting commissions on similar grounds. As discussed in the following Section, other commissions have similar provisions that bar certain interested parties from serving as commissioners. With the upcoming redistricting cycle in 2021, these challenges will serve as test cases for plaintiffs to consider future litigation against other redistricting commissions throughout the country. Many challengers will likely argue—as the *Daunt* plaintiffs do<sup>48</sup>—that these provisions are inseverable from the commissions as a

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<sup>42</sup> See *Arizona State Legislature*, 135 S Ct at 2671–77.

<sup>43</sup> See *Daunt* Complaint at \*3 (cited in note 9).

<sup>44</sup> See Rep Party Complaint at \*3, 12 (cited in note 9). The terminology varies regarding unaffiliated persons. For the sake of simplicity, I will use “unaffiliated” to refer to redistricting commission members that are not members of either the Republican or Democratic Party.

<sup>45</sup> See Order Granting Motion to Consolidate Cases, *Daunt v Benson*, No 1:19-cv-00614, \*2–3 (WD Mich filed Sept 11, 2019) (Consolidation Order).

<sup>46</sup> See *Daunt*, 956 F3d at 422.

<sup>47</sup> *Daunt v Benson*, No 19-cv-00614, slip op at 34 (WD Mich July 6, 2020).

<sup>48</sup> See *Daunt* Complaint at \*22–26 (cited in note 9).

whole. If successful, the commissions could cease to exist at the one time in this decade when their services are needed. To comply with constitutional standards, every state with more than one congressional seat usually redistricts after each national census is completed.<sup>49</sup> Most states only redistrict every ten years in compliance with this constitutional minimum, making redistricting commissions obsolete if they do not function during the redistricting cycle.<sup>50</sup> Even if severable, removing these provisions from redistricting commissions could impair the commissions' ability to create unbiased, nonpartisan district maps. The following Section will introduce these provisions and explain how they function to remove partisan influence from the mapmaking process.

#### B. Structure of Redistricting Commissions and Challengeable Provisions

Redistricting commissions exist in various forms throughout the country. All commissions consist of a certain number of commissioners tasked with the creation of district maps, often with the aid of experts, technology, and other outside resources.<sup>51</sup> Commissions fall mainly into four distinct categories: advisory, backup, politician, and independent.<sup>52</sup> Advisory commissions assist in drawing legislative districts but leave the final decision to the state legislature.<sup>53</sup> Backup commissions only step in to draw district lines if the state legislature fails to do so in the required time.<sup>54</sup> Politician commissions actually remove redistricting power from state legislatures, but are comprised of individual legislators as well as various other state political actors.<sup>55</sup> In Ohio, for example, the governor, auditor of state, secretary of state, and

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<sup>49</sup> See *Reynolds v Sims*, 377 US 533, 583–84 (1964) (“While we do not intend to indicate that decennial reapportionment is a constitutional requisite . . . if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect.”).

<sup>50</sup> However, nothing prohibits states from redistricting more frequently. Some states do so, often for partisan advantage. See generally, for example, *League of United Latin American Citizens v Perry*, 548 US 399 (2006) (evaluating a Republican-led redistricting in Texas three years after the state redistricted under the 2000 Census).

<sup>51</sup> See, for example, Mich Const Art IV, § 6(5) (requiring the Michigan Legislature to apportion funds to their independent redistricting commission to “carry out its functions, operations and activities, which activities include retaining independent, nonpartisan subject-matter experts and legal counsel”).

<sup>52</sup> See Levitt, *Guide to Redistricting* at 20–22 (cited in note 19).

<sup>53</sup> See *id.* at 20. See also, for example, Iowa Code § 42.3.

<sup>54</sup> See Levitt, *Guide to Redistricting* at 21 (cited in note 19). See also, for example, Ill Const Art IV, § 3(b).

<sup>55</sup> See Levitt, *Guide to Redistricting* at 21 (cited in note 19).

four commissioners chosen by the majority and minority party leaders in the state legislative houses draw the state district maps.<sup>56</sup> Independent commissions—as their name suggests—attempt to entirely remove partisan influence from the redistricting process. These commissions attempt to eliminate political motivations by barring legislators and other partisan actors from serving on the commission.<sup>57</sup>

Despite the differences in commission structures across states, almost all share provisions that potentially burden First Amendment associational rights. Two provisions pose a particularly high risk of provoking lawsuits: (1) provisions that prohibit certain political actors—such as legislators, party insiders, and lobbyists—from serving on the commission; and (2) provisions that impose quotas or require persons with certain political affiliations to serve on the commission. Individuals can challenge both requirements as impermissible burdens on political association because of the political considerations needed to select commissioners. Political parties—if they have no say in the selection process—can argue that both provisions burden their First Amendment right to determine who associates with them.<sup>58</sup>

Independent commissions, unsurprisingly, are the most likely to include exclusionary provisions and therefore face constitutional challenges. Eight states currently have independent redistricting commissions: Alaska, Arizona, California, Colorado, Idaho, Michigan, Montana, and Washington.<sup>59</sup> Some of these commissions still allow the legislature to select commissioners,<sup>60</sup> but others consist of members selected from a pool of registered voters who apply to serve on the commission.<sup>61</sup> All of them, however, have restrictions on legislators and political actors serving on the

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<sup>56</sup> See Ohio Const Art XI, § 1(A).

<sup>57</sup> See Levitt, *Guide to Redistricting* at 22 (cited in note 19). See also, for example, Mich Const Art IV, § 6(1)(b)–(c).

<sup>58</sup> Both these lines of reasoning are present in the consolidated *Daunt* suit. See *Daunt* Complaint at \*3 (cited in note 9) (making individual associational claims against exclusionary provisions of Michigan's redistricting commission); Rep Party Complaint at \*3 (cited in note 9) (making party claims against the exclusionary provisions and the requirements of certain political affiliation on the Michigan commission).

<sup>59</sup> See Common Cause, *Independent and Advisory Citizen Redistricting Commissions*, archived at <https://perma.cc/ED6W-9KUC>. Utah currently has an independent advisory commission, but since the legislature must approve all maps, this committee is not included here.

<sup>60</sup> See, for example, Mont Const Art V, § 14(2) (“The majority and minority leaders of each house shall each designate one commissioner.”).

<sup>61</sup> See, for example, Mich Const Art IV, § 6(2) (detailing the application and selection process for serving on the Michigan commission).

commission.<sup>62</sup> For example, the Michigan commission—the target of the first constitutional challenge along these lines in *Daunt*—bars commissioners that fall into several specific categories, including: “a declared candidate for” or an “elected official to” partisan office; an officer of a political party; a consultant or employee of a political campaign or political action committee; a state-registered lobbyist; or a close relative or spouse of someone who falls into any of these categories.<sup>63</sup> Although these provisions are most common among independent redistricting commissions, other types of commissions sometimes also exclude political actors.<sup>64</sup>

Provisions that impose quotas or require persons with certain political association are slightly less common among redistricting commissions. These provisions normally require a certain number of Democrats, Republicans, and/or unaffiliated voters to serve on the commission. As an example, Michigan’s commission consists of thirteen members chosen semi-randomly from a pool of applicants of the state’s registered voters, subject to certain ratios.<sup>65</sup> Four commissioners must be voters who identify with the largest party in the legislature, four more must affiliate with the second largest party, and the final five must identify as unaffiliated with either major party.<sup>66</sup> Although not explicit in the text, this acts as a de facto requirement for four Democrats and four Republicans on the commission. Of particular concern for Michigan’s susceptibility to suit, party affiliation is not determined through voter registration or party records. Instead, applicants must only attest under oath that they associate with a certain

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<sup>62</sup> See Alaska Const Art VI, § 8(a) (barring “public employees or officials”); Ariz Const Art IV, Part 2, § 3 (barring candidates for or holders of public office, officers of a political party, paid lobbyists, or officers of a campaign committee for at least three years); Cal Govt Code § 8252(a)(2)(A) (barring elected public officials, candidates for public office, employees or consultants of political campaigns or parties, registered lobbyists, or significant campaign donors for ten years); Colo Const Art V, § 47(2)(c)(I), (III) (barring General Assembly members and candidates for five years and other elected public officials for three years); Idaho Const Art III, § 2(2) (barring current elected or appointed public officials); Mich Const Art IV, § 6(1)(b)–(c) (barring candidates and holders of public office, lobbyists, officers of political parties, employees of campaigns and political action committees, and close relatives of someone belonging to any of these categories); Mont Const Art V, § 14(2) (barring all public officials); Wash Const Art II, § 43(3) (barring elected officials for two years).

<sup>63</sup> See Mich Const Art IV, § 6(1)(b)–(c).

<sup>64</sup> See, for example, Iowa Code § 42.5(2) (requiring that no member of Iowa’s advisory commission be someone who “[h]olds partisan public office or political party office” or a close relative or employee of someone belonging to these categories).

<sup>65</sup> See Mich Const Art IV, § 6(1)–(2).

<sup>66</sup> See Mich Const Art IV, § 6(2)(a)(iii), (f).

party or consider themselves unaffiliated.<sup>67</sup> Without more certainty from prior documentation of political association, political parties have a stronger claim that selected commissioners do not represent their interests and deprive them of their right to choose their members.

Other independent commissions, including those in California and Colorado, have similar provisions in which commissioners with certain political affiliations are chosen randomly or by an independent body.<sup>68</sup> California's commission would have a stronger defense against a party associational claim because its commissioners must be registered with their designated political party.<sup>69</sup> Colorado remains more vulnerable, as it only requires a nonpartisan staff to review applications attesting to political affiliation.<sup>70</sup> Many other states with both independent and nonindependent commissions also have requirements for commissioners from each party.<sup>71</sup> However, these states allow representatives in the state legislature to choose commissioners, likely undercutting an associational claim from political parties.<sup>72</sup> Of course, because these quotas still require the selecting body to consider political affiliation, they could still be subject to an individual associational claim.

Although not all redistricting commissions contain these exclusionary provisions, many see such provisions as essential to creating truly independent redistricting commissions and eliminating partisan gerrymandering. Voters Not Politicians (VNP), the group behind the ballot initiative establishing Michigan's independent redistricting commission, argues that the provisions are necessary to exclude commissioners who are "most likely to have a conflict of interest" in the redistricting process.<sup>73</sup> Regarding the quotas for certain numbers of partisans, VNP explains that these provisions help create consensus and ensure that the

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<sup>67</sup> See Mich Const Art IV, § 6(2)(a)(iii) (describing what plaintiffs must attest to under oath).

<sup>68</sup> See Cal Const Art XXI, § 2(c)(2); Colo Const Art 5, § 44.1(10).

<sup>69</sup> See Cal Const Art XXI, § 2(c)(2).

<sup>70</sup> See Colo Const Art 5, § 44.1(6).

<sup>71</sup> See, for example, Ariz Const Art IV, Part 2, § 1(3) ("No more than two members of the independent redistricting commission shall be members of the same political party.").

<sup>72</sup> See, for example, Ariz Const Art IV, Part 2, § 1(6) (requiring that the majority and minority leaders of both state houses alternate picking candidates from a pool of applicants).

<sup>73</sup> See Voters Not Politicians, *We Ended Gerrymandering in Michigan*, archived at <https://perma.cc/BFN6-88W7>.

commission acts in a nonpartisan manner.<sup>74</sup> Empirical evidence backs up these claims. A 2018 survey by the Brennan Center for Justice evaluated different redistricting commission variations to discover what provisions most effectively reduce abuses in the redistricting process.<sup>75</sup> Among other recommendations, the survey found that commissions that “not only screen[ ] applicants for disqualifications or conflicts of interest but also make[ ] qualitative assessments about the fitness of applicants to do the job” and commissions that “require[ ] that a map obtain at least some support from each major political block” maximized effectiveness and voter satisfaction.<sup>76</sup>

Consequently, removing exclusionary or quota provisions—whether through the courts or the legislative process—could put the efficacy of these commissions at risk. Without these provisions, independent commissions could not guarantee that self-interested political parties and incumbent legislators would not influence the redistricting process. Even worse, a court could find the provisions inseverable from the rest of the commission, eliminating the commission entirely from the electoral process. In short, these suits threaten some of the foundational commission provisions that ensure both an unbiased redistricting process and nonpartisan electoral maps.

## II. POTENTIAL STANDARDS FOR EVALUATING REDISTRICTING COMMISSIONS’ CONSTITUTIONALITY

Considering the proliferation of redistricting commissions with these provisions, courts will likely see an influx of lawsuits challenging their constitutionality under First Amendment associational rights from partisan stakeholders wishing to continue gerrymandering practices. Although not explicit in the text of the First Amendment, courts have long recognized that the Constitution protects the right of expressive association and that laws burdening this right receive strict scrutiny—the highest level of constitutional review. In *NAACP v Alabama*,<sup>77</sup> the Supreme Court first recognized that freedom of speech includes a right to

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<sup>74</sup> See Voters Not Politicians, *Frequently Asked Questions*, archived at <https://perma.cc/MYE8-KJ6J>.

<sup>75</sup> See *Redistricting Commissions: What Works* (Brennan Center for Justice, July 24, 2018), archived at <https://perma.cc/7BG9-AR6M>.

<sup>76</sup> *Id.*

<sup>77</sup> 357 US 449 (1958).

associate with groups for expressive purposes.<sup>78</sup> In reaching this conclusion, the Court recognized that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.”<sup>79</sup> According to the Court, “it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”<sup>80</sup>

Although associational rights encompass all forms of association, a large portion of such cases—and those pertinent to redistricting commissions—deal with political association. Since *Williams v Rhodes*,<sup>81</sup> the Court has declared unconstitutional many government actions that limit individuals’ abilities to join political groups or express their association with such groups. In *Williams*, this meant eliminating an Ohio law that impaired a new political party’s ability to get on the ballot to choose electors.<sup>82</sup> In other cases, the Court has struck down laws that restricted individuals’ ability to vote in a party primary<sup>83</sup> and restrictions on donations to groups formed to advocate for or against a ballot initiative,<sup>84</sup> to name a couple. This right of political association not only extends to individuals, but also to political parties themselves, specifically protecting their ability to choose who associates with and represents them.<sup>85</sup>

In the redistricting commission context, plaintiffs will likely push courts to evaluate the challenged provisions under a subset of the Supreme Court’s political association doctrine: the “Patronage Cases.” Employing these cases would compel a court to apply strict scrutiny to redistricting commissions, which would require the state to provide a compelling state interest for these provisions and require that the law be narrowly tailored to achieve that interest. The plaintiffs challenging Michigan’s commission in

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<sup>78</sup> See *id.* at 460 (“It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”).

<sup>79</sup> See *id.*

<sup>80</sup> *Id.* at 460–61.

<sup>81</sup> 393 US 23 (1968).

<sup>82</sup> See *id.* at 30–34.

<sup>83</sup> See *Kusper v Pontikes*, 414 US 51, 56–61 (1973).

<sup>84</sup> See *Citizens Against Rent Control/Coalition for Fair Housing v City of Berkeley*, 454 US 290, 295–99 (1981).

<sup>85</sup> See *Cousins v Wigoda*, 419 US 477, 487–88 (1975) (holding that a party’s associational rights allow it to choose the delegates to its national convention).

*Daunt* seek precisely this.<sup>86</sup> However, another constitutional standard, often used by the courts when evaluating constitutional challenges to election laws, arguably controls in these suits against redistricting commissions: *Anderson-Burdick* sliding-scale scrutiny. Defendants will likely argue that this is the proper standard for evaluating constitutional challenges to redistricting commissions because of the more lenient review it yields.<sup>87</sup>

This Part explores the contours of strict scrutiny under the Patronage Cases and of sliding-scale scrutiny under the *Anderson-Burdick* doctrine. It also discusses when courts choose to apply each. This will lay the groundwork for deciding which should apply when reviewing redistricting commissions.

#### A. The Patronage Cases and First Amendment Strict Scrutiny

The plaintiffs in *Daunt* rely on the First Amendment's Patronage Cases to argue for strict scrutiny,<sup>88</sup> likely framing the argument for future challenges to similar redistricting commission provisions. The Patronage Cases are a colloquial term for three Supreme Court cases—*Elrod v Burns*,<sup>89</sup> *Branti v Finkel*,<sup>90</sup> and *Rutan v Republican Party of Illinois*<sup>91</sup>—that created a new subset of constitutional protections for political associational rights. They follow the general mandate that courts must apply strict scrutiny to situations in which the government burdens political association. Specifically, these cases determined that the consideration of political affiliation in employment decisions—potentially analogous to the restrictive provisions on redistricting commissions discussed above—constitute an associational burden, and that these burdens in turn fail strict scrutiny.

This doctrine originates with the Supreme Court's decision in *Elrod*, in which the Court first held that the government cannot consider politics in employment termination decisions. When the Republican sheriff of Cook County in Illinois was replaced by Democrat Richard Elrod in 1970, Elrod fired the plaintiffs—a group of non-civil-service employees in the office—for not affiliating with the Democratic party.<sup>92</sup> Writing for a plurality of the

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<sup>86</sup> *Daunt* Complaint at \*4 (cited in note 9).

<sup>87</sup> See Part V.

<sup>88</sup> *Daunt* Complaint at \*16–21 (cited in note 9).

<sup>89</sup> 427 US 347 (1976).

<sup>90</sup> 445 US 507 (1980).

<sup>91</sup> 497 US 62 (1990).

<sup>92</sup> See *Elrod*, 427 US at 351 (Brennan) (plurality).



Court, Justice William Brennan recognized that this discharge burdened the plaintiffs' political beliefs and association, which Justice Brennan referred to as "the core of those activities protected by the First Amendment."<sup>93</sup> The decision to terminate these employees therefore had to survive "exacting scrutiny."<sup>94</sup> That is to say, the government had to advance some "paramount" interest that overcame the burden on protected rights and that was narrowly tailored to the desired end.<sup>95</sup> Justice Brennan made certain to note that in the instant case of political discrimination, "care must be taken not to confuse the interest of partisan organizations with governmental interests."<sup>96</sup> In other words, advancing the interests of a single political party could never amount to a legitimate government interest.

Applying strict scrutiny to Sheriff Elrod's termination decisions, Justice Brennan considered and rejected several state interests as insufficiently compelling, including: employee efficiency, public accountability, political loyalty, and preservation of the democratic process.<sup>97</sup> Specifically regarding the interest in preserving the democratic process—a particularly salient interest in the context of redistricting commissions—Justice Brennan dismissed the idea that reliance on patronage is necessary to a well-functioning democratic government. While noting that "[p]reservation of the democratic process is certainly an interest . . . which may in some instances justify limitations on First Amendment freedoms," he found no justification for thinking that eliminating patronage would "bring about the demise of party politics."<sup>98</sup>

Justice Brennan concluded that firing the plaintiffs severely burdened their political beliefs and associational rights, and that no government interest advanced by the defendants was sufficiently compelling to legitimize them.<sup>99</sup> Accordingly, these patronage dismissals were unconstitutional under the First and Fourteenth Amendments.<sup>100</sup> He made sure to note, however, that this

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<sup>93</sup> *Id.* at 356.

<sup>94</sup> *Id.* at 362.

<sup>95</sup> *Id.*

<sup>96</sup> *Elrod*, 427 US at 362 (Brennan) (plurality).

<sup>97</sup> See *id.* at 364–69.

<sup>98</sup> *Id.* at 368–69.

<sup>99</sup> See *id.* at 372–73.

<sup>100</sup> See *Elrod*, 427 US at 373 (Brennan) (plurality). Most patronage practices violate both the First and Fourteenth Amendments, but this is because the Fourteenth Amendment incorporates the First Amendment and applies it against the states. Justice Brennan

holding did not apply to policymaking positions, where patronage might be necessary to ensure that the will of the public is effectively implemented.<sup>101</sup>

The Court did not consider another patronage case until four years later in *Branti*. Accepting the holding of *Elrod*, the Court focused on drawing the line between policymaking and nonpolicymaking positions to further refine the doctrine. The proper inquiry for resolving this question, according to the Court, was “whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.”<sup>102</sup> Applying this formulation, the Court determined that assistant public defender jobs were not “policymaking” positions, and thus that the plaintiffs’ terminations violated the First and Fourteenth Amendments.<sup>103</sup> Unlike the Court’s previous decision in *Elrod*, the opinion in this case commanded a majority of the Court, solidifying the patronage doctrine as good law.<sup>104</sup> Its clarification of the policymaking exception also further refined the doctrine, a distinction that has particular importance in fights over redistricting commissioners.<sup>105</sup>

A decade later, the last in the trilogy of Patronage Cases, *Rutan*, greatly expanded the doctrine to other employment practices beyond terminations, thereby setting the stage for the current set of lawsuits against redistricting commissions. The case concerned a group of plaintiffs from Illinois, who challenged the governor’s use of political considerations in various employment decisions, including hiring, promotions, transfers, and layoff recalls.<sup>106</sup> The defendants attempted to distinguish these employment practices from the terminations in *Elrod* and *Branti*, but the Court quickly rejected this idea.<sup>107</sup> Although these were not firings, employees still faced negative consequences. Namely, each had to compromise their political beliefs and associational rights to receive an

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acknowledged this in *Elrod*, explaining that “while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.” *Id.* at 356 n 10, quoting *Board of Education v Barnette*, 319 US 624, 639 (1943). For simplicity, this Comment will refer to the Patronage Cases as applying First Amendment—rather than Fourteenth Amendment—doctrine.

<sup>101</sup> See *Elrod*, 427 US at 372 (Brennan) (plurality).

<sup>102</sup> *Branti*, 445 US at 518.

<sup>103</sup> See *id.* at 519–20.

<sup>104</sup> See generally *id.*

<sup>105</sup> See Part III.A.2.

<sup>106</sup> See *Rutan*, 497 US at 65–67.

<sup>107</sup> See *id.* at 71–72.

employment benefit (like a promotion) from the government, a condition prohibited under the First Amendment.<sup>108</sup> Consequently, the decision in *Rutan* expanded the First Amendment prohibition on considerations of party affiliation and support to acts of promotion, transfer, recall, and hiring.<sup>109</sup> A few years later, the Court determined that the First Amendment protections established in the Patronage Cases also extended to government contractors.<sup>110</sup> By prohibiting political considerations in hiring decisions, *Rutan* paved the way for potential challenges to redistricting commissions. If certain provisions mandate that political affiliations are considered when selecting commissioners, these provisions could potentially violate the holdings of the Patronage Cases.

#### B. The *Anderson-Burdick* Balancing Test for Election Laws

In contrast to the strict scrutiny demanded by the Patronage Cases, supporters of redistricting commissions will likely argue that courts should instead apply the *Anderson-Burdick* balancing test to claims brought against redistricting commissions. Instead of always demanding a narrowly tailored law furthering a compelling governmental interest, this standard adjusts the level of scrutiny based on the severity of the burden. Low burdens on constitutional rights receive relatively little scrutiny, while greater burdens require more compelling government interests to survive. Unlike strict scrutiny and rational basis review,<sup>111</sup> which are found throughout constitutional law, *Anderson-Burdick* applies only to certain subsets of election laws that burden voting and associational rights.

This standard originated with the Supreme Court's decision in *Anderson*. Plaintiff John Anderson—an independent candidate for president of the United States in the 1980 election—failed to appear on the Ohio ballot despite getting the requisite number of

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<sup>108</sup> See id at 74.

<sup>109</sup> See id at 79.

<sup>110</sup> See *O'Hare Truck Service, Inc v City of Northlake*, 518 US 712, 721–22 (1996).

<sup>111</sup> Rational basis review is the most deferential form of constitutional scrutiny courts can apply. Under this standard, a law “is not to be pronounced unconstitutional unless” it cannot be shown that “it rests upon some rational basis within the knowledge and experience of the legislators.” *United States v Carolene Products Co*, 304 US 144, 152 (1938). Rational basis review applies to most laws challenged under the Constitution, unless they facially implicate “a specific prohibition of the Constitution,” harm specific “political processes” like “interferences with political organizations,” or “prejudice [ ] discrete and insular minorities.” Id at 152 n 4.

signatures, as he failed to meet Ohio's early filing deadline for independents.<sup>112</sup> In response, Anderson and three voters challenged the early filing deadline as a violation of their First Amendment associational rights.<sup>113</sup>

In evaluating this claim, the Court emphasized that these kinds of ballot access restrictions not only affect candidates, but also burden voters' constitutional rights.<sup>114</sup> Restricting the candidates who appear on the ballot implicates a voter's right to cast their vote effectively and their right to associate with a political campaign, which can serve as "an effective platform for the expression of views" or a "rallying point for like-minded citizens."<sup>115</sup> Nonetheless, the Court noted that comprehensive regulation of elections by the states is necessary to keep them "fair and honest."<sup>116</sup> When scrutinized, essentially every election law "inevitably affects—at least to some degree—the individual's right to vote and his right to associate."<sup>117</sup>

To solve this inherent dilemma, the Court eschewed the strict scrutiny/rational basis review dichotomy that normally characterizes First Amendment evaluations. Instead, when evaluating state election laws, a court must "first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" and then "identify and evaluate the precise interests put forward by the State as justifications for the burden."<sup>118</sup> Only after weighing and comparing these factors can a court rule on the constitutionality of the regulation.<sup>119</sup> When applying this newly formulated balancing test to the Ohio early filing deadline, the Court quickly acknowledged that the burden it placed on independent voters was "substantial."<sup>120</sup> The Court then concluded that none of the interests put forward by the government balanced out the infringement on voting and associational rights.<sup>121</sup>

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<sup>112</sup> See *Anderson*, 460 US at 782.

<sup>113</sup> See *id.* at 783. The plaintiffs also challenged the filing deadline on Fourteenth Amendment equal protection grounds. See *id.* That aspect of the case is beyond the scope of this Comment.

<sup>114</sup> See *id.* at 786.

<sup>115</sup> *Id.* at 787–88.

<sup>116</sup> *Anderson*, 460 US at 788.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 789.

<sup>119</sup> See *id.*

<sup>120</sup> *Anderson*, 460 US at 790.

<sup>121</sup> See *id.* at 806.

The other half of the *Anderson-Burdick* moniker came several years later, when the Court considered the case of *Burdick* and solidified the balancing test for certain challenges to election laws. The petitioners in *Burdick* claimed that Hawaii's prohibition on write-in voting violated their First Amendment associational rights.<sup>122</sup> The Court reaffirmed the special interest that states have in regulating their elections, stating that this interest derives not only from necessity and common sense, but also from the Elections Clause of the Constitution.<sup>123</sup> Accordingly, strict scrutiny is inappropriate for cases challenging election laws under the First Amendment and the "more flexible standard" laid out in *Anderson* controls instead.<sup>124</sup> The Court also clarified the test, stating that "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights."<sup>125</sup> The Court then applied the standard to Hawaii's write-in voting ban. Unlike in *Anderson*, it concluded that the burden placed on petitioner's rights—although present—was not particularly severe.<sup>126</sup> Because of the limited nature of the burden, it was outweighed by Hawaii's purported interest in the ballot restriction.<sup>127</sup>

Although originally limited to ballot access and voting restrictions like those in its founding cases, the *Anderson-Burdick* test has been expanded to several other areas of election law. Most notably, the standard now applies in cases where parties, as opposed to individuals, are asserting their First Amendment associational rights. The first Supreme Court case to evaluate these claims under *Anderson-Burdick* came in 1997 in *Timmons v Twin Cities Area New Party*.<sup>128</sup> The Court considered the New Party's challenge to a Minnesota law prohibiting fusion candidacies—when a candidate appears on the ballot as the nominee of more than one party.<sup>129</sup> The New Party contended that the rule

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<sup>122</sup> See *Burdick*, 504 US at 430.

<sup>123</sup> See *id.* at 433 ("The Constitution provides that States may prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives.'"), quoting US Const Art I, § 4, cl 1 (alteration in original).

<sup>124</sup> *Burdick*, 504 US at 433–34.

<sup>125</sup> *Id.* at 434.

<sup>126</sup> See *id.* (acknowledging that Hawaii's laws clearly "have an impact on the right to vote" but stating that "it can hardly be said that the laws . . . unconstitutionally limit access to the ballot").

<sup>127</sup> See *id.* at 439–40.

<sup>128</sup> 520 US 351 (1997).

<sup>129</sup> See *id.* at 354.

infringed on its associational rights by preventing it from choosing its preferred nominee.<sup>130</sup> Applying the *Anderson-Burdick* framework, the Court upheld the law as a legitimate exercise of the state's election-regulation authority.<sup>131</sup>

Further cases have applied and expanded the range of the balancing test. In *Clingman v Beaver*,<sup>132</sup> the Supreme Court used *Anderson-Burdick* to uphold an Oklahoma law that only allowed parties to hold closed or semiclosed primaries.<sup>133</sup> Recently, the Court has also used the *Anderson-Burdick* framework to uphold laws instituting top-two blanket primaries<sup>134</sup> and voter ID laws.<sup>135</sup> Lower courts have even used the framework to evaluate the unique voting rights claim that *Bush v Gore*<sup>136</sup> created.<sup>137</sup>

Overall, the *Anderson-Burdick* balancing test has gained more traction and widespread use in recent decades in various election law contexts. However, there remain several areas of election law in which the Court has not applied the *Anderson-Burdick* framework, instead applying strict scrutiny or some other constitutional standard of review. These include campaign finance,<sup>138</sup> racial vote dilution,<sup>139</sup> racial gerrymandering,<sup>140</sup> and,

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<sup>130</sup> See id at 355.

<sup>131</sup> See id at 369–70.

<sup>132</sup> 544 US 581 (2005).

<sup>133</sup> See id at 586–97.

<sup>134</sup> See *Washington State Grange v Washington State Republican Party*, 552 US 442, 452–58 (2008). A top-two blanket primary consists of a primary election open to candidates from all parties as well as independents, in which voters can vote for any candidate. The top two vote-getters in the primary move on to face each other in the general election. See id at 447–48.

<sup>135</sup> See *Crawford v Marion County Election Board*, 553 US 181, 200–03 (2008) (Stevens) (plurality). Voter ID laws—as the name suggests—generally require voters to produce government-issued identification at a polling place before voting. See id at 185–86.

<sup>136</sup> 531 US 98 (2000) (per curiam).

<sup>137</sup> See *Wexler v Anderson*, 452 F3d 1226, 1231–33 (11th Cir 2006). *Bush* was the first case to consider an equal protection challenge to the treatment of ballots themselves, instead of simply the right to cast a ballot. See *Bush*, 531 US at 104–10 (finding that the disparate treatment of ballots during the 2000 Florida recount denied voters equal protection).

<sup>138</sup> See *Buckley v Valeo*, 424 US 1, 25, 44–45 (1976) (per curiam) (applying both strict scrutiny and a more intermediate scrutiny to expenditure and contribution limits, respectively).

<sup>139</sup> See *City of Mobile v Bolden*, 446 US 55, 65–68 (1980) (requiring a showing of discriminatory intent to invalidate a law under a constitutional vote dilution challenge). This standard is never used, however, because of the statutory standard for evaluating vote dilution claims under the amended § 2 of the Voting Rights Act. See *Thornburg v Gingles*, 479 US 30, 47–51 (1986) (outlining the statutory standard).

<sup>140</sup> See *Miller v Johnson*, 515 US 900, 920 (1995) (applying strict scrutiny to a redistricting plan where race was the “predominant” explanation for the map).

before *Rucho*, partisan gerrymandering.<sup>141</sup> *McIntyre v Ohio Elections Commission*<sup>142</sup> offers the best explanation the Court has given for this divergence. In that case, the Court declined to apply the *Anderson-Burdick* test to an Ohio regulation that prohibited the distribution of campaign leaflets without the responsible party's name and address, instead deciding to apply "exacting scrutiny."<sup>143</sup> The Court reasoned that the statute was "a regulation of pure speech" and not one that controls "the mechanics of the electoral process" like in *Anderson* or *Burdick*.<sup>144</sup> Looking retroactively, this distinction can partially explain why the *Anderson-Burdick* framework has been applied in many cases, like ballot regulations, but not in others, like campaign finance. Whereas ballot regulations relate to electoral mechanics, campaign finance regulations directly restrict the expression of individuals.<sup>145</sup> This distinction can help guide an analysis of whether redistricting commissions might fall into the current scope of *Anderson-Burdick*, as discussed in the following Part.

### III. DOCTRINAL ASSESSMENT OF THE APPROPRIATE CONSTITUTIONAL STANDARD FOR REDISTRICTING COMMISSIONS

When faced with future challenges to exclusionary provisions of redistricting commissions, courts will have to grapple with these competing constitutional standards for evaluating associational burdens. Facially, the situation has factual similarities to the Patronage Cases, which follow general associational-rights doctrine and apply strict scrutiny. Classifying redistricting commissions as election laws, however, puts *Anderson-Burdick* in play. This dilemma places these provisions of redistricting commissions in a limbo of constitutional review.

This Part assesses the merits of both standards in the redistricting commission context, illustrating how the decision facing the courts is a close call. Overall, the *Anderson-Burdick* balancing test has a slight doctrinal edge over strict scrutiny as the appropriate methodology for courts to use when handling these claims. Several factual and doctrinal distinctions call into question the analogy between certain provisions of redistricting commissions

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<sup>141</sup> See *Davis*, 478 US at 132 (outlining the now-defunct standard for evaluating whether an unconstitutional partisan gerrymander has occurred).

<sup>142</sup> 514 US 334 (1995).

<sup>143</sup> See *id.* at 344–47.

<sup>144</sup> *Id.* at 345.

<sup>145</sup> See *Buckley*, 424 US at 19.

and the Patronage Cases. Applying the Patronage Cases to redistricting commissions would thus require a doctrinal expansion. *Anderson-Burdick*, on the other hand, has a less restrictive scope than the patronage doctrine. Redistricting commissions can easily fall into the broad bucket of “election laws” that the Supreme Court implicitly acknowledged in *Arizona State Legislature*, and are more similar to election laws for which *Anderson-Burdick* applies than those for which it does not. Part IV supplements this doctrinal assessment with a normative argument about why courts should apply *Anderson-Burdick* to redistricting commissions.

A. Should First Amendment Strict Scrutiny Apply to Redistricting Commissions?

Given the rigor of strict constitutional review, challengers of redistricting commissions would likely prefer that courts apply strict scrutiny. Taken at a high level of generality, the patronage doctrine seems to apply. As articulated in *Rutan*, “conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so.”<sup>146</sup> Almost all redistricting commissions with exclusionary provisions prohibit party employees and leadership from becoming commissioners, seemingly discriminating against them based on their political associations. Provisions that create quotas for a certain number of partisans also implicate the Patronage Cases, as they require the government to consider political affiliation when making hiring decisions.

Both provisions ostensibly harm the associational rights of political parties as well. The exclusionary provisions bar certain party members from gaining government positions, and the affiliation requirements could infringe on a political party’s right to choose its members and nominees for public positions. Consider a situation—possible under Michigan’s redistricting commission—in which a citizen swears under oath their affiliation with the Republican Party and is selected to the commission. That citizen, however, is not a Republican, and redistricts according to other interests. An associational harm has likely taken place.

Although these redistricting commission provisions seem analogous to the Patronage Cases, when examined more closely, there are several distinguishing factors. To apply strict scrutiny under the patronage doctrine, courts would need to first answer

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<sup>146</sup> *Rutan*, 497 US at 78.



certain questions, including whether commissioners are employees of the state; whether commissioners are policymakers; and whether the political discrimination here resembles the situations in the Patronage Cases. This Section attempts to parse out the answers to these questions. Overall, applying strict scrutiny to the exclusionary provisions of redistricting commissions would require an expansion of the existing patronage doctrine. This Section then evaluates how the Patronage Cases apply to quota provisions, whose constitutionality will depend more heavily on the statutory text.

1. Whether commissioners are employees of the state.

As the doctrine currently stands, the holdings of the Patronage Cases generally apply only to employment decisions.<sup>147</sup> The Supreme Court broadened the scope slightly in *O'Hare Truck Service, Inc v City of Northlake*,<sup>148</sup> holding that the government cannot consider political affiliation when making agreements with independent contractors absent narrow tailoring toward a compelling state interest.<sup>149</sup> If redistricting commissioners are not employees or independent contractors, courts would have to extend the current doctrine to encompass the associational burdens that the exclusionary provisions impose.

None of the commissions that have exclusionary provisions expressly classify the commissioners as employees.<sup>150</sup> This is not terribly surprising; service on a redistricting commission is limited to the yearlong redistricting cycle, occurring once every ten years.<sup>151</sup> However, one could classify commissioners as temporary employees of the state. After the ruling in *O'Hare*, some courts have indicated that the patronage doctrine also extends to temporary employees.<sup>152</sup>

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<sup>147</sup> See *id.* at 79 (noting that the patronage doctrine extends to “promotion, transfer, recall, and hiring decisions based on party affiliation” that involve the government “pressuring *employees* to discontinue the free exercise of their First Amendment rights”) (emphasis added).

<sup>148</sup> 518 US 712 (1996).

<sup>149</sup> See *id.* at 721.

<sup>150</sup> See, for example, Mich Const Art IV, § 6 (referring to commissioners only as “commissioners” or “members”).

<sup>151</sup> See note 49 and accompanying text.

<sup>152</sup> See, for example, *Tarpley v Jeffers*, 96 F3d 921, 927 (7th Cir 1996) (“[A]t least until the Supreme Court’s recent decision in *O’Hare Truck Service*, the applicability of *Rutan* to temporary positions was not clearly established.”).

The fact that some commissioners receive compensation for their service also obfuscates an attempt to distinguish them from actual employees. The members of the Michigan redistricting commission each receive compensation equal to at least 25 percent of the governor's salary<sup>153</sup>—not an insignificant amount of money.<sup>154</sup> Other commissions have similar compensation provisions<sup>155</sup> or allow members to be reimbursed for expenses.<sup>156</sup> Commissions that do not have compensation provisions, however, could make a plausible claim that they do not provide a benefit akin to employment. Challengers could respond by arguing that serving on the commission itself constitutes a government benefit, even without employment status or compensation. For example, it would be difficult to say that an unpaid government intern working on Capitol Hill does not receive a “benefit,” even though they receive no income.

Additionally, some commissions prevent current employers from terminating employees for missing work for commission duties.<sup>157</sup> This may cut both ways, as it puts the commission on an even playing field with employment but also allows commissioners to keep their current jobs. Overall, even if commission members are not considered “employees” under the traditional applications of the patronage doctrine, it is likely that a court could apply the doctrine to commissioners based on their relationship with the government. However, this would require an expansion of how the courts currently think of government employees.

## 2. Whether commissioners are policymakers.

Even if commissioners are employees, the patronage doctrine would not apply if they served a policymaking function. The Patronage Cases make clear that their holdings—and the strict constitutional review they entail—do not extend to policymaking positions. The rationale behind this exception is that political hiring is often essential to implementing the policy of a new

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<sup>153</sup> See Mich Const Art IV, § 6(5).

<sup>154</sup> As of 2019, the governor of Michigan earned an annual salary of \$159,300, guaranteeing each commission member compensation of at least \$39,825. See Marissa Perino and Dominic-Madori Davis, *Here's the Salary of Every Governor in All 50 US States* (Business Insider, Oct 30, 2019), archived at <https://perma.cc/29WR-QGN4>.

<sup>155</sup> See, for example, Cal Govt Code § 8253.5 (compensating members of the commission \$300 per day, an amount adjusted once each decade according to changes in the California Price Index).

<sup>156</sup> See, for example, Ariz Const Art IV, Part 2, § 1(21).

<sup>157</sup> See Mich Const Art IV, § 6(21).

administration.<sup>158</sup> In drawing the line between standard government employees and policymakers, the Supreme Court has held that the ultimate inquiry is “whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.”<sup>159</sup>

Lower courts have struggled with applying this distinction, yielding “conflicting and confusing” results.<sup>160</sup> In an attempt to create more distinct classifications, the Seventh Circuit considers a policymaker someone whose employment “involves the making of policy and thus the exercise of political judgment or the provision of political advice to the elected superior, or [whose] job (such as speechwriting) [ ] gives the holder access to his political superiors’ confidential, politically sensitive thoughts.”<sup>161</sup> The Sixth Circuit defines four categories of employees who fall within the policymaking exception, one of which is “positions that are part of a group of positions filled by balancing out political party representation.”<sup>162</sup> A potential example of this arrangement is the Federal Election Commission, which requires 6 members with “[n]o more than 3 members . . . affiliated with the same political party.”<sup>163</sup>

Although no courts have yet considered whether redistricting commissioners are policymakers, some have analyzed the policymaking status of election officials. Applying the formulation from the Supreme Court, the Sixth Circuit concluded that a county election administrator was a policymaker under the patronage doctrine.<sup>164</sup> In doing so, the court noted the administrator’s significant discretion in “plans for redistricting, precinct boundaries, polling stations, and early voting locations.”<sup>165</sup> The court also rejected the plaintiff’s argument that the election administration position should be apolitical, properly noting that the test is

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<sup>158</sup> See *Elrod*, 427 US at 367 (Brennan) (plurality) (noting that advancing the interest of preventing “tactics obstructing the implementation of policies of [a] new administration” could be done by “[l]imiting patronage dismissals to policymaking positions”).

<sup>159</sup> *Branti*, 445 US at 518.

<sup>160</sup> *Jenkins v Medford*, 119 F3d 1156, 1160 (4th Cir 1997), quoting *Upton v Thompson*, 930 F2d 1209, 1212 (7th Cir 1991).

<sup>161</sup> *Riley v Blagojevich*, 425 F3d 357, 359 (7th Cir 2005).

<sup>162</sup> *Peterson v Dean*, 777 F3d 334, 352 (6th Cir 2015), citing *McCloud v Testa*, 97 F3d 1536, 1557 (6th Cir 1996).

<sup>163</sup> See 52 USC § 30106(a)(1).

<sup>164</sup> See *Peterson*, 777 F3d at 350.

<sup>165</sup> *Id* at 347.

whether political considerations in employment decisions are appropriate, not essential.<sup>166</sup>

Following these circuit precedents does not provide conclusive guidance for analyzing the policymaking status of redistricting commissioners. In the Sixth Circuit, analogizing redistricting commissioners to election administrators could place them within the realm of policymakers. They certainly share several of election administrators' discretionary policymaking judgments, most notably the authority over "plans for redistricting."<sup>167</sup> Additionally, the Sixth Circuit includes in the policymaking exception entities that require a balance of political affiliations among their members, which many commissions require.<sup>168</sup> However, considering commissioners under the Seventh Circuit's "political judgment" requirement<sup>169</sup> could tip the scales the other way. In one sense, commissioners create important policy for the state that has significant political ramifications: deciding the district lines for future elections. Nonetheless, the entire point of the commissions is to be nonpolitical—or to at least minimize political influence. To argue that choosing members for redistricting commissioners necessitates political considerations conflicts with the idea that the commissions are truly independent. If this is the case, it is difficult to argue that redistricting commissioners are making political judgments, putting them outside the bounds of the policymaking exception in the Seventh Circuit. Overall, no Supreme Court or circuit precedent bears directly on the policymaking status of redistricting commissioners, and an answer to this question may depend on the jurisdiction in which the case is brought. Most likely, resolving this issue in favor of analyzing such cases under the patronage doctrine would require a narrower view of the policymaking exception.

3. Whether redistricting commissions' exclusionary provisions constitute political discrimination under the patronage doctrine.

At the heart of challenges to the redistricting commissions' exclusionary provisions is a more fundamental problem with the analogy to the patronage doctrine. The prohibitions on legislators,

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<sup>166</sup> See *id.* at 347–48.

<sup>167</sup> *Id.* at 347.

<sup>168</sup> See Part I.

<sup>169</sup> *Riley*, 425 F3d at 359.

party insiders, and lobbyists discriminate against these actors differently than the prototypical political patronage practices discriminated against such plaintiffs. In all of the Patronage Cases, the plaintiffs suffered adverse employment decisions because of their affiliation or nonaffiliation with a particular political party. That is to say, Democratic sheriff Elrod fired his employees because they were not Democrats.<sup>170</sup> In the redistricting commission context, members are not excluded because they are Republicans or Democrats. Instead, the provisions exclude certain groups that are most likely to have a conflict of interest in the redistricting process, which happens to include actual party employees and legislators that have a stake in their party's electoral success. For example, the state legislative leaders of both the Republican and Democratic Parties cannot serve on Michigan's commission.<sup>171</sup> This is not because they are a Republican or a Democrat, but rather because they likely have a self-interested desire to draw district lines to maximize their party's—or their own—electoral outcomes.

Because the current scope of the patronage doctrine only extends to discrimination based on association with a specific political group, a decision that applied the Patronage Cases to these types of provisions would require an expansion of the doctrine. A court would have to say that the patronage doctrine not only applies to discrimination against a particular political affiliation, but also to discrimination against a general political status that applies to all affiliations, such as a party employee, chairperson, or legislator. The analogy is not impossible to imagine, however. Although not targeted toward a single political party, the commission still denies applicants based on their political association. Indeed, their association may be even more intense, as they have chosen to become an employee of a political party or represent a party in a governmental position. Their association with the Republican or Democratic Party may be stronger than that of the average worker fired for their political beliefs. Nonetheless, it seems like the government decisions targeting a specific political party did most of the work in the Patronage Cases. In its decision denying a preliminary injunction to the challengers of Michigan's redistricting commission, the Sixth Circuit relied heavily on this distinction, finding that the exclusionary provisions barred the plaintiffs based on "their associations with professional politics,

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<sup>170</sup> See note 92 and accompanying text.

<sup>171</sup> See Mich Const Art IV, § 6(1)(b).

regardless of which party they . . . supported.”<sup>172</sup> This does not mean that another circuit or the Supreme Court will agree. Still, although not unfathomable, courts may be hesitant to apply strict scrutiny to this type of political discrimination and expand the current scope of the patronage doctrine.

4. Whether associational claims against quota provisions of redistricting commissions could be subject to strict scrutiny.

Based on the distinctions above, applying strict scrutiny to the exclusionary provisions of redistricting commissions would require an expansion of current patronage doctrine. Other provisions of commissions, however, might be susceptible to this standard of review under the current doctrine. More specifically, commissions that have quotas on the number of Democratic and Republican members could face constitutional challenge from individuals and political parties.<sup>173</sup> For example, the California redistricting commission, consisting of fourteen members, must have five members who are registered Republicans, five who are registered Democrats, and four who are unaffiliated.<sup>174</sup>

Like the exclusionary provisions discussed above, individuals could challenge quotas under the patronage doctrine. Recently, the Third Circuit struck down a similar provision of the Delaware Constitution used for selecting state court judges.<sup>175</sup> The provisions of the state constitution required three of the five justices of the Delaware Supreme Court to “be of one major political party” and the other two to “be of the other major political party,” with similar provisions for lower state courts.<sup>176</sup> Applying the Patronage Cases, the court struck down these provisions as a violation of the plaintiff’s associational rights as an Independent Party

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<sup>172</sup> *Daunt*, 956 F3d at 413.

<sup>173</sup> Political parties could claim that these provisions violate their associational rights to choose who represents them in governmental positions. This claim would likely rely on *Timmons*, which recognized the right of political parties to nominate their own candidates, see *Timmons*, 520 US at 359, or party-primary cases like *Tashjian v Republican Party of Connecticut*, 479 US 208 (1986), which recognized the rights of parties to choose who votes in their primary elections, see *id.* at 214. However, as discussed in Part II.B, the courts have reliably applied *Anderson-Burdick* in these cases. Unlike claims that invoke the Patronage Cases, choosing a standard of review for such challenges is not a close call.

<sup>174</sup> See Cal Const Art XXI, § 2(c)(2).

<sup>175</sup> See *Adams v Governor of Delaware*, 922 F3d 166, 176–85 (3d Cir 2019), cert granted, *Carney v Adams*, 140 S Ct 602 (2019).

<sup>176</sup> See *id.* at 170, quoting Del Const Art IV, § 3.

member, as the provisions barred her from serving on the Delaware courts.<sup>177</sup>

Redistricting commissions like those in California and Michigan are likely insulated from this type of constitutional challenge. Although their quotas require certain numbers of Republicans and Democrats, they also call for a quota of unaffiliated voters to serve as commissioners.<sup>178</sup> This undermines any claim of denial of associational rights by an unaffiliated voter like in the Delaware case, as they clearly can serve on the commission. Commissions would only be vulnerable to such a challenge if their provisions specifically required equal numbers of Democrats and Republicans and left no positions for unaffiliated members.<sup>179</sup> As of today, no commission has such a provision—although many have commissions appointed by the minority and majority leaders in the state legislature, essentially ensuring that they will be composed of partisan nominees.<sup>180</sup> Any claim under this theory would likely turn on the previous distinctions between the Patronage Cases and redistricting commissions, including whether the commissioners fall into the policymaking exception.<sup>181</sup> Thus, as stated earlier, applying the Patronage Cases and strict scrutiny to these provisions would thus likely require an expansion of the current doctrine.

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<sup>177</sup> See *Adams*, 922 F3d at 176–85. The plaintiff in this case was apparently influenced by a law review essay by Joel Edan Friedlander, in which he first suggested that Delaware’s judge selection system violates the First Amendment patronage doctrine. See id at 172; Joel Edan Friedlander, *Is Delaware’s “Other Major Political Party” Really Entitled to Half of Delaware’s Judiciary?*, 58 *Ariz L Rev* 1139, 1153–61 (2016).

<sup>178</sup> See Cal Const Art XXI, § 2(c)(2) (“The commission shall consist of 14 members . . . [including] four who are not registered with either of the two largest political parties in California.”); Mich Const Art IV, § 6(2)(f) (“[T]he secretary of state shall randomly draw the names of . . . five commissioners from the pool of remaining non-affiliating applicants.”).

<sup>179</sup> It could be argued that even including quotas for unaffiliated voters could still discriminate against them if the quotas are not proportionate to the major parties. For example, a commission with seven Democrats, seven Republicans, and one unaffiliated voter could potentially still violate unaffiliated voters’ associational rights. No court has addressed this question.

<sup>180</sup> See, for example, Hawaii Const Art IV, § 2 (requiring the minority and majority leader in each state legislative house to select two members of the commission each, and the eight selected to then select a ninth).

<sup>181</sup> The Third Circuit held that judges do not fall into the policymaking exception, which is why it struck down the Delaware law. See *Adams*, 922 F3d at 178–81.

B. Should the *Anderson-Burdick* Balancing Test Apply to Redistricting Commissions?

As an alternative to strict scrutiny under the Patronage Cases, courts could apply the *Anderson-Burdick* balancing test to associational-rights claims against provisions of redistricting commissions. Like the application of the patronage doctrine, applying this standard would require an expansion of the current scope of *Anderson-Burdick*. Unlike the patronage doctrine, however, the *Anderson-Burdick* test is more open-ended and has fewer qualifying distinctions that courts would need to resolve to apply the standard. The current line of cases provides parallels that could justify the application of this standard to redistricting commissions. Like other elections laws, redistricting commissions pit two constitutional rights against one another: plaintiffs' First Amendment associational rights and states' rights to determine the manner of their elections under the Elections Clause. This Section examines these rights and the constitutional justification for applying the *Anderson-Burdick* standard to redistricting commissions, and then attempts to place redistricting commissions within the current jurisprudence on judicial review of election laws.

1. Whether redistricting commissions fall within the constitutional scope of *Anderson-Burdick*.

Initially, the Supreme Court indicated only that the *Anderson-Burdick* balancing test applied to the somewhat ambiguous category of state “[e]lection laws.”<sup>182</sup> Broadly speaking, the definition of a state election law stems from the Elections Clause of the Constitution, which provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.”<sup>183</sup> Indeed, most of the cases within the Supreme Court’s *Anderson-Burdick* doctrine cite this provision as the source of the states’ significant power to regulate their elections, despite potential burdens on voting and associational rights.<sup>184</sup>

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<sup>182</sup> See *Burdick*, 504 US at 433.

<sup>183</sup> US Const Art I, § 4, cl 1.

<sup>184</sup> See, for example, *Burdick*, 504 US at 433. Since *Burdick*, other cases have followed suit. See *Washington State Grange v Washington State Republican Party*, 552 US 442, 451 (2008); *Clingman*, 544 US at 586; *Timmons*, 520 US at 358.



Common sense indicates that redistricting commissions make up part of the larger scheme that regulates the “Places and Manner” of elections. By drawing the district lines for state and national elections, each commission has an impact on how elections transpire in their respective states. The Supreme Court implicitly acknowledged this fact in *Arizona State Legislature*—the case that saved redistricting commissions created via ballot initiative.<sup>185</sup> The dispute in that case turned on the proper interpretation of the Elections Clause.<sup>186</sup> The Court concluded that the word “Legislature” included the people when a state has authorized lawmaking through ballot initiatives, giving a citizen-created election commission authority to regulate elections and circumvent the state legislature.<sup>187</sup> This necessarily implied that independent redistricting commissions fall within the “Times, Places and Manner of holding Elections.”<sup>188</sup> Although the current *Anderson-Burdick* cases tend to deal with the actual administration of an election—that is, how ballots and voting operate on Election Day—the ex ante nature of redistricting commissions does not remove them from the constitutional bounds of election law. Clearly, the commission’s task of reapportioning legislative districts plays an essential part in the administration of elections. Without some sort of line drawing mechanism, states would have no districts for candidates to run in. Given the breadth of the Elections Clause, redistricting commissions clearly fall within its scope, and thus, I argue, within the scope of *Anderson-Burdick*.

2. Whether redistricting commissions fall into the category of election laws that can receive *Anderson-Burdick* scrutiny.

Although the Elections Clause likely includes redistricting commissions, several other areas of election law arguably fall into this broad constitutional scope, and the courts have so far refrained from applying *Anderson-Burdick* to them. Most notably, the Supreme Court has never considered applying sliding-scale scrutiny in campaign finance cases.<sup>189</sup> In the foundational case

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<sup>185</sup> See *Arizona State Legislature*, 135 S Ct at 2677.

<sup>186</sup> See *id* at 2666.

<sup>187</sup> See *id* at 2673.

<sup>188</sup> US Const Art I, § 4, cl 1.

<sup>189</sup> Scholars, on the other hand, have argued that *Anderson-Burdick* should apply to campaign finance laws. See Noah B. Lindell, Comment, *Williams-Yulee and the Anomaly of*

*Buckley v Valeo*,<sup>190</sup> the Court acknowledged that campaign finance restrictions can burden political association by limiting a person's ability to donate to the candidate of their choice.<sup>191</sup> Instead of relying on a standard like *Anderson-Burdick*, the Court applied two higher levels of scrutiny for these sorts of regulations: strict scrutiny for expenditure limits<sup>192</sup> and a more intermediate scrutiny for contribution limits.<sup>193</sup> These campaign finance laws—like redistricting commissions—clearly fall within the broad constitutional scope of the time, places, and manner of elections, as they directly regulate electoral campaigns. Of course, the Court decided *Buckley* seven years before the advent of sliding-scale scrutiny in *Anderson*. But even after introducing a different standard for election laws, the Court has never considered applying the more lenient *Anderson-Burdick* standard, always citing the two standards outlined in *Buckley*.<sup>194</sup>

Despite this dilemma in its election law jurisprudence, the Court has only made one explicit distinction between cases that receive *Anderson-Burdick* scrutiny and those that do not. In *McIntyre*, the Court refused to apply sliding-scale scrutiny to an Ohio law regulating anonymous campaign advertising, specifically because the law regulated “pure speech” and not “the mechanics of the electoral process.”<sup>195</sup> Instead, the Court applied “exacting scrutiny.”<sup>196</sup> This could explain part of the dichotomy

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*Campaign Finance Law*, 126 Yale L J 1577, 1590–94 (2017) (arguing that applying sliding-scale scrutiny to campaign finance law would unify existing election law doctrine).

<sup>190</sup> 424 US 1 (1976).

<sup>191</sup> See *id.* at 22 (“The Act’s contribution and expenditure limitations also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate.”).

<sup>192</sup> See *id.* at 44–45 (“[T]he constitutionality of [expenditure limits] turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights.”). Expenditure limits restrict expenditures made to support a candidate that do not go directly to the campaign, but are instead made independently by the donor.

<sup>193</sup> See *id.* at 25 (“Even a ‘significant interference with protected rights of political association’ may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.”), quoting *Cousins v Wigoda*, 419 US 477, 488 (1975). Contribution limits restrict money directly contributed to a candidate’s campaign.

<sup>194</sup> See, for example, *Nixon v Shrink Missouri Government PAC*, 528 US 377, 386 (2000); *McCutcheon v Federal Election Commission*, 134 S Ct 1434, 1444 (2014). Justice Stephen Breyer, however, did cite *Anderson*—among other cases—to argue for applying a balancing test to campaign finance laws in his concurrence in *Shrink Missouri*. See *Shrink Missouri*, 528 US at 402–03 (Breyer concurring).

<sup>195</sup> *McIntyre*, 514 US at 345.

<sup>196</sup> *Id.* at 347.

between campaign finance laws and those election laws that receive the *Anderson-Burdick* test, since *Buckley* acknowledged that campaign expenditures constituted “substantial” restrictions on “political speech,” rather than simply conduct.<sup>197</sup> The *Anderson-Burdick* cases, on the other hand, typically deal with regulations of elections themselves.<sup>198</sup> However, the Court has not revisited this distinction between pure speech and electoral mechanics in later election law cases.

Defendants in redistricting commission cases arguing for *Anderson-Burdick* scrutiny would have to justify why their cases differ from election law situations that do not apply sliding-scale scrutiny. This requires showing why redistricting commissions are more akin to the bucket of election laws subject to *Anderson-Burdick* than to those like campaign finance laws subject to strict scrutiny. Path dependency could explain some of the difference, given that the Court decided *Buckley* a few years prior to *Anderson*. In some respects, the campaign finance regime created in *Buckley* was a precursor to *Anderson-Burdick*, as it varied the level of scrutiny given to contribution and expenditure limits based on the perceived associational burden each imposed.<sup>199</sup> The *Anderson-Burdick* standard has gained more traction over the years as the preeminent constitutional test for election laws, while the *Buckley* framework remains confined to campaign finance.

However, defendants will likely also have to convince the courts that redistricting commission provisions regulate electoral mechanics and not pure speech like in *McIntyre*, which refused to apply *Anderson-Burdick* to campaign advertising.<sup>200</sup> Facially, the exclusionary and quota provisions of redistricting commissions do not appear to be pure speech in the *McIntyre* sense. That case appeared mostly concerned with direct restrictions on “[d]iscussion of public issues and debate on the qualification of

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<sup>197</sup> See *Buckley*, 424 US at 19.

<sup>198</sup> See, for example, *Burdick*, 504 US at 430 (dealing with a ban on write-in voting).

<sup>199</sup> See *Buckley*, 424 US at 14–23. One could potentially argue that a court could use a more intermediate scrutiny for redistricting commissions, as the Court did for contribution limits in *Buckley*. However, this doesn’t have any basis in the doctrine, as the Court has not expanded the *Buckley* framework outside of campaign finance. Moreover, it is likely that intermediate scrutiny would function the same as the *Anderson-Burdick* test in this context. See Part V.

<sup>200</sup> See *McIntyre*, 514 US at 345.

candidates,”<sup>201</sup> seeing this as “core political speech.”<sup>202</sup> The Supreme Court applied exacting scrutiny to restrictions on the ability to post anonymous campaign flyers,<sup>203</sup> a fairly direct political speech restriction. Although the Court has not revisited this distinction, circuit courts have consistently applied *McIntyre* only to direct restrictions on campaign and election speech.<sup>204</sup> When a regulation triggers more associational-rights aspects of the First Amendment, circuit courts have applied *Anderson-Burdick*.<sup>205</sup> Moreover, redistricting commissions seem to fall nicely into the category of those laws that regulate the “mechanics of the electoral process.”<sup>206</sup> Redistricting commissions decide the districts in which people will vote, perhaps the most fundamental aspect of an election outside of voting itself. Disclosure requirements and campaign finance laws, on the other hand, regulate political speech in the campaigns leading up to elections. At this general level, redistricting commissions and their provisions thus fall closer to regulations of electoral mechanics than direct restrictions on speech.

Overall, the Supreme Court’s varying treatment of different election laws may give courts pause when evaluating redistricting commissions, but these cases do not bar the application of *Anderson-Burdick*. The trend in the last few decades in the Supreme Court’s jurisprudence points toward wider acceptance and use of *Anderson-Burdick*.<sup>207</sup> Redistricting commissions fall into the broader scope of election laws under the Constitution, and do not obviously fall into categories of election laws that receive strict scrutiny. In comparison to the strict scrutiny of the Patronage Cases, expanding the *Anderson-Burdick* doctrine to redistricting commissions requires courts to make fewer legal jumps, making it a better fit for these new constitutional challenges.

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<sup>201</sup> Id at 346, quoting *Buckley*, 424 US at 14.

<sup>202</sup> *McIntyre*, 514 US at 347.

<sup>203</sup> See id.

<sup>204</sup> See, for example, *281 Care Committee v Arneson*, 766 F3d 774, 784–85 (8th Cir 2014) (holding that a statute criminalizing false statements about proposed ballot initiatives warrants strict scrutiny); *Federal Election Commission v Public Citizen*, 268 F3d 1283, 1287 (11th Cir 2001) (applying exacting scrutiny under *McIntyre* to certain Federal Election Campaign Act disclosure requirements).

<sup>205</sup> See, for example, *Chula Vista Citizens for Jobs and Fair Competition v Norris*, 782 F3d 520, 529–34 (9th Cir 2015) (applying *Anderson-Burdick* to a law that prohibited corporations from being an official proponent of a ballot measure and declining to apply strict scrutiny under *McIntyre*).

<sup>206</sup> *McIntyre*, 514 US at 345.

<sup>207</sup> See notes 128–44 and accompanying text.

#### IV. NORMATIVE JUSTIFICATIONS FOR APPLYING *ANDERSON-BURDICK* SCRUTINY TO REDISTRICTING COMMISSIONS

With both strict scrutiny and the *Anderson-Burdick* test potentially justified under existing constitutional doctrine, courts may wish to consider normative arguments when deciding which standard to apply. Several considerations point to applying *Anderson-Burdick* to associational-rights claims. Some of these considerations mirror the underlying rationale for the original creation and expansion of the standard, and some are unique to redistricting commissions. This Part will first present these arguments and then respond to critiques regarding the efficacy of *Anderson-Burdick* in achieving these goals.

##### A. Parallels to Other Election Laws and the Importance of Redistricting Commissions

The same normative reasons that motivated the creation of the flexible *Anderson-Burdick* standard in the first place justify its application to redistricting commissions. The Court acknowledged in *Anderson* that “there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.”<sup>208</sup> Importantly, states must impose restrictions that “protect the integrity and reliability of the electoral process.”<sup>209</sup> Pigeonholing every election law that imposes some sort of burden on associational rights would “tie the hands of States seeking to assure that elections are operated equitably and efficiently.”<sup>210</sup> In these original cases, it is clear the Court feared that acknowledging the incidental burdens that election restrictions place on the right to vote and associate could undermine electoral stability and make elections unwieldy and unreliable. As Professor Christopher Elmendorf eloquently puts it, the goal has to be to create “a doctrinal framework that empowers lower courts to police abusive electoral reforms, while giving legislators plenty of room for constructive tinkering and experimentation.”<sup>211</sup> The *Anderson-Burdick* framework remedies this problem by giving courts broad discretion to

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<sup>208</sup> *Anderson*, 460 US at 788, quoting *Storer v Brown*, 415 US 724, 730 (1974).

<sup>209</sup> *Anderson*, 460 US at 788 n 9.

<sup>210</sup> *Burdick*, 504 US at 433.

<sup>211</sup> Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U Pa L Rev 313, 328–29 (2007).

weigh First Amendment burdens against the state's practical and constitutional interests.

The main goal of redistricting commissions echoes the reasons outlined in *Anderson* for granting states discretion in creating election laws: “protect[ing] the integrity and reliability of the electoral process.”<sup>212</sup> States implement redistricting commissions to combat partisan gerrymandering, a practice that can damage the political process by entrenching the current party in charge and allowing legislators to choose their electorate. Like other election laws, provisions that create and organize redistricting commissions invariably impose some sort of associational burden. But subjecting all of these provisions to strict scrutiny could undermine their power to protect the “integrity and reliability”<sup>213</sup> of elections and ensure that “elections are operated equitably and efficiently.”<sup>214</sup> Thus, a more flexible standard like the *Anderson-Burdick* test guarantees that courts will give them the proper deference that other election laws receive. As Elmendorf suggests, sliding-scale scrutiny will still allow courts to police those provisions of redistricting commissions that they consider abusive.<sup>215</sup> But the standard will also allow broad experimentation among redistricting commissions—something greatly needed to find the optimal way to remove partisan influence from redistricting—without having to worry about minor associational burdens.

Importantly, redistricting commissions may be the last best hope for addressing partisan gerrymandering. The *Rucho* decision has hamstrung efforts by the federal courts to deal with the problem. Some state courts have attempted to take up the mantle, but state court intervention requires specific language in state constitutions, such as Florida's “Fair Districts Amendment.”<sup>216</sup> The federal government could attempt to alter congressional maps *ex post* based on its power under the Elections Clause,<sup>217</sup> but any direct command by Congress to states to refrain from

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<sup>212</sup> *Anderson*, 460 US at 788 n 9. The Sixth Circuit relied heavily on these normative considerations from *Anderson* in deciding to apply *Anderson-Burdick* to deny the *Daunt* plaintiffs' motion for a preliminary injunction. See *Daunt*, 956 F3d at 407.

<sup>213</sup> *Anderson*, 460 US at 788 n 9.

<sup>214</sup> *Burdick*, 504 US at 433.

<sup>215</sup> See Elmendorf, 156 U Pa L Rev at 328–29 (cited in note 211).

<sup>216</sup> See *League of Women Voters of Florida v Detzner*, 172 So3d 363, 392–93 (Fla 2015) (throwing out Florida's congressional district map as unconstitutional under Fla Const Art III, § 20(a), the Fair Districts Amendment).

<sup>217</sup> See US Const Art I, § 4, cl 1 (allowing Congress to “make or alter such Regulations” from the states regarding elections).

partisan gerrymandering could raise commandeering issues.<sup>218</sup> In any event, the legislators in Congress directly benefit from gerrymandering and would likely be loath to pass such a law. Even some redistricting commissions themselves face other existential threats. Justice Kennedy—the swing vote in *Arizona State Legislature*—retired in 2018, leaving open the possibility of revisiting whether citizens can constitutionally create redistricting commissions through ballot initiatives.<sup>219</sup>

If there were ever a new election law situation in which to apply *Anderson-Burdick*, this would be it. Without redistricting commissions, the integrity of democracy in America could falter. Applying an unforgiving standard like strict scrutiny would likely lead to courts striking down redistricting commissions. On the other hand, courts would probably uphold redistricting commissions under *Anderson-Burdick*—as discussed in Part V below. Given the close call between the competing doctrines, if courts recognize the importance of redistricting commissions to electoral integrity, they should apply *Anderson-Burdick* over strict scrutiny when evaluating associational-rights claims.

#### B. Critiques and Support of *Anderson-Burdick*

Of course, *Anderson-Burdick* is not a perfect standard, and it has critics that question its efficacy in protecting voting and associational rights. In particular, Demian A. Ordway has criticized the test as confusing and has noted the inconsistent results it produces across jurisdictions.<sup>220</sup> Although he focused on *Anderson-Burdick*'s application to voting rights claims and voter ID laws, Ordway highlights that the standard has led to inconsistent conclusions when evaluating the severity of burdens.<sup>221</sup> He also points out that “weighing the burden on the voters against the importance of the state interest involves *normative* judgments”

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<sup>218</sup> At a basic level, the anti-commandeering doctrine prevents the federal government from forcing states to enact or enforce federal law. See generally *New York v United States*, 505 US 144 (1992).

<sup>219</sup> A reversal of *Arizona State Legislature* would eliminate a handful of commissions that possess constitutionally challengeable provisions. However, many commissions that possess exclusionary provisions were not created via ballot initiative and would not be affected by a reversal, thus leaving them open to challenge and necessitating the determination of a constitutional standard of review.

<sup>220</sup> See Demian A. Ordway, *Disenfranchisement and the Constitution: Finding a Standard that Works*, 82 NYU L Rev 1174, 1191–1208 (2007) (providing examples of inconsistent applications of the *Anderson-Burdick* test and proposing an alternative standard).

<sup>221</sup> See *id.* at 1192–93 (explaining that Georgia courts found the burden on the right to vote of voter ID laws severe, while Indiana courts did not).

that will lead to different courts reaching different results without refined consensus.<sup>222</sup> Instead of *Anderson-Burdick*, Ordway suggests that courts should apply a modified version of strict scrutiny to voting rights claims.<sup>223</sup>

Despite being set in the context of voting rights, Ordway's critiques still have bite when evaluating *Anderson-Burdick* in associational-rights cases. Courts and judges have different inherent biases and worldviews, and giving them a more flexible standard can lead to inconsistent evaluations of the associational burdens imposed by certain election laws. In his concurrence in the judgment denying a preliminary injunction against the Michigan redistricting commission, Sixth Circuit Judge Chad A. Readler echoed many of these critiques. He criticized the majority's application of *Anderson-Burdick*, commenting that the standard "affords far too much discretion to judges" deciding "sensitive policy-oriented cases."<sup>224</sup> However, any constitutional standard requires a certain amount of normative judgment. Even if applying strict scrutiny to an associational burden, judges must still consider whether the government interests put forward are compelling and narrowly tailored. Adding an additional standard—evaluating the burden imposed—may make the process more normative. But the greater deference given to the states' prerogative to ensure free and fair elections outweighs whatever inconsistencies this may produce.

Outside of this main critique, *Anderson-Burdick* generally finds support within election law literature. This is not the first piece to suggest an expansion of the *Anderson-Burdick* framework. Other scholars have advocated its application in other contexts, including all burdens on political parties' associational rights,<sup>225</sup> partisan gerrymandering claims,<sup>226</sup> campaign finance,<sup>227</sup> and vote dilution claims.<sup>228</sup> In particular, Professor Daniel Tokaji—writing before *Rucho*—argued that the balancing test provides the "best available standard" for solving partisan gerrymandering

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<sup>222</sup> See *id.* at 1197 (emphasis in original).

<sup>223</sup> See *id.* at 1202–08.

<sup>224</sup> See *Daunt*, 956 F3d at 424 (Readler concurring in the judgment).

<sup>225</sup> See Tabatha Abu El-Haj, *Networking the Party: First Amendment Rights and the Pursuit of Responsive Party Government*, 118 Colum L Rev 1225, 1286–1300 (2018).

<sup>226</sup> See Daniel P. Tokaji, *Gerrymandering and Association*, 59 Wm & Mary L Rev 2159, 2190–2209 (2018).

<sup>227</sup> See Lindell, Comment, 126 Yale L J at 1590–94 (cited in note 189).

<sup>228</sup> Bruce E. Cain and Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 Ohio St L J 867, 901 (2016).



claims,<sup>229</sup> an area in which the Supreme Court struggled for decades to find a workable standard. The growing scholarship on the wide applicability of *Anderson-Burdick*, and its steady growth in Supreme Court doctrine over the years, demonstrate its power as a useful standard for evaluating various forms of election laws. In the aggregate, the scholarship has collectively argued that sliding-scale scrutiny should apply in essentially all election law cases, regardless of what specific constitutional right these laws impact. Expanding the doctrine to redistricting commissions would constitute another incremental gain in an already expanding body of law.

#### V. APPLYING THE *ANDERSON-BURDICK* STANDARD TO DIFFERENT REDISTRICTING COMMISSION PROVISIONS

After deciding on *Anderson-Burdick* as the appropriate standard for evaluating First Amendment associational-rights claims against redistricting commissions, courts will have to apply the balancing test and weigh the alleged burdens against the state's interest in having these provisions. To review, the rigor of the court's inquiry turns on "the extent to which a challenged regulation burdens First and Fourteenth Amendment rights."<sup>230</sup> A court must weigh "the character and magnitude of the asserted injury" against the "precise interests put forward by the State as justifications for the burden imposed."<sup>231</sup> Severe burdens must be narrowly tailored to advance a compelling state interest, but lesser burdens receive more deferential review.<sup>232</sup>

Two entities have potential associational claims: political parties and individuals. Both groups can challenge the exclusionary provisions of redistricting commissions as well as partisan-affiliation quotas for commissioners. However, the associational-burden theories differ between the entities, and thus should be resolved separately. A political party's first claim would attack provisions that have specific quotas for Republicans and Democrats serving on the commission, such as Michigan's provision requiring four from each party.<sup>233</sup> As the theory goes, if this provision allows commissioners to self-identify as either Republican or Democrat, it burdens the party's ability to select its

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<sup>229</sup> See Tokaji, 59 Wm & Mary L Rev at 2209 (cited in note 226).

<sup>230</sup> *Burdick*, 504 US at 434.

<sup>231</sup> *Id.*, quoting *Anderson*, 460 US at 789.

<sup>232</sup> See *Burdick*, 504 US at 434.

<sup>233</sup> See Mich Const Art IV, § 6(2)(f).

members.<sup>234</sup> Individuals could also challenge these provisions, arguing that the quotas exclude certain people based on their political affiliation.<sup>235</sup> Political parties' second potential claim relates to provisions that exclude certain persons from serving on the commission—specifically those barring party insiders and employees.<sup>236</sup> Individuals could claim that these provisions burden their rights of political association with those parties.<sup>237</sup> Further, parties could claim that these provisions exclude their members from serving in government, weakening their association.

#### A. Evaluating Burdens on Political Parties Under *Anderson-Burdick*

The party associational claim parallels the Supreme Court's application of *Anderson-Burdick* to other election regulations that affect political parties, specifically the regulations on ballots and party primaries. These cases can provide guidance for determining the severity of the burden on political parties' associational rights that redistricting commissions impose. Parties have an established right to designate their "standard bearer[s]," which include their nominees for political positions and their delegates to party conventions.<sup>238</sup> Their associational rights also protect them from regulations that specifically address the party's internal affairs.<sup>239</sup> However, the Court has found that bans on fusion candidacies,<sup>240</sup> bans on open primaries,<sup>241</sup> and mandated top-two blanket primaries<sup>242</sup>

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<sup>234</sup> See, for example, Rep Party Complaint at \*3 (cited in note 9).

<sup>235</sup> These claims likely would receive strict scrutiny under the Patronage Cases, but no current redistricting commission is likely vulnerable to this type of suit. See Part III.A.4.

<sup>236</sup> See, for example, Mich Const Art IV, § 6 (barring "officer[s] or member[s] of the governing body of a national, state, or local political party").

<sup>237</sup> See, for example, Daunt Complaint at \*3 (cited in note 9).

<sup>238</sup> *Timmons*, 520 US at 359 ("The New Party's claim that it has a right to select its own candidate is uncontroversial."). See also *Cousins v Wigoda*, 419 US 477, 487, 491 (1975) (acknowledging that a party's associational rights gives it, rather than the state, the power to choose its delegates).

<sup>239</sup> See *Eu v San Francisco County Democratic Central Committee*, 489 US 214, 222–33 (1989) (striking down California laws that managed parties' internal affairs, such as those that set term limits for party chairs and prohibited parties from endorsing candidates in primaries).

<sup>240</sup> See *Timmons*, 520 US at 363 (concluding that the burdens imposed by Minnesota's fusion ban "though not trivial—are not severe").

<sup>241</sup> See *Clingman*, 544 US at 589 ("[E]ven if Oklahoma's semiclosed primary system burdens an associational right, the burden is less severe than others this court has upheld as constitutional.").

<sup>242</sup> See *Washington State Grange v Washington State Republican Party*, 552 US 442 458 (2008).

do not impose severe restrictions on parties' associational rights. Other cases—although decided before *Anderson-Burdick* expanded to the political-party context—demonstrate the kinds of regulations that impose serious burdens. Direct regulation of party affairs clearly meets this threshold,<sup>243</sup> as do mandated semiclosed primaries.<sup>244</sup>

In the primary-election context specifically, the Court has recognized that parties have a right “to determine for themselves with whom they will associate.”<sup>245</sup> For this reason, a mandated semiclosed primary that forces parties to allow independents to vote severely burdens this right.<sup>246</sup> The argument against quotas for self-identified Republicans and Democrats on redistricting commissions inverts this right. Instead of the party getting to choose who associates with it, the redistricting commissions allow citizens to associate with the party without its consent when they apply to become a commissioner. In a related sense, the restrictions also prevent the party from choosing its so-called standard bearers on the redistricting commission.

However, several distinctions show that the associational burden this regulation imposes is not nearly as severe as previously considered restrictions. Unlike in the primary context, allowing commissioner applications from self-identified Republicans and Democrats does not infringe on the party's ability to choose its representatives in an actual election, which the Court describes as “the crucial juncture at which the appeal to common principles may be translated into concerted action.”<sup>247</sup> And although the provisions curtail the party's ability to have its own standard bearer on the commission, this curtailment falls seriously short of a restriction on a party's ability to nominate its preferred candidate in an election. The Sixth Circuit relied heavily on this distinction in denying the Michigan Republican Party's motion for a preliminary injunction, noting that commissioners are not standard bearers fighting “for partisan ends.”<sup>248</sup> Moreover, the possibility

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<sup>243</sup> See *Eu*, 489 US at 229–31.

<sup>244</sup> See *Tashjian v Republican Party of Connecticut*, 479 US 208, 214–16 (1986).

<sup>245</sup> *Id.* at 214.

<sup>246</sup> See *id.* at 214–16.

<sup>247</sup> *Id.* at 216.

<sup>248</sup> See *Daunt*, 956 F3d at 415. The Sixth Circuit used this distinction to conclude that the commission provisions posed no associational burden on the Michigan Republican Party. Although this is one possible analysis, other courts could reasonably extrapolate a cognizable associational burden from current doctrine, which, I argue, should be evaluated under *Anderson-Burdick*.

of actual harm is likely slim. Few people would untruthfully swear an oath that they affiliated with a political party just to undercut the party's interest on a redistricting commission, especially given the punishment of perjury. Overall, there is a cognizable burden on a party's associational rights in this context, but it does not rise to the high level of severity seen in other restrictions.

B. Evaluating Burdens on Individuals Under *Anderson-Burdick*

The individual claims deal with another aspect of many redistricting commissions: the bans on legislators, party leaders and employees, and lobbyists from becoming commissioners. The Supreme Court has long recognized the right to associate with a political party of one's choice, both in the Patronage Cases and its *Anderson-Burdick* jurisprudence.<sup>249</sup> From the outset, this right potentially only implicates one category within the exclusionary provisions: the ban on party leaders and employees. Neither legislators nor public officials nor lobbyists are punished for their association with an established political group, such as a political party. Although most of those positions are inherently partisan, the provisions do not discriminate against these actors based on their association with a particular political entity. Claims challenging the prohibition on party leaders and employees, however, could plausibly state that such provisions discriminate against persons based on their affiliation with a political party, burdening their associational rights.

Again, turning to previous cases can be useful in articulating the severity of this alleged burden. As noted in *Anderson*, "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions."<sup>250</sup> Following this principle, the Court classified the state's early filing deadline as a severe burden because it specifically targeted independent candidates and voters.<sup>251</sup> On the other side of this principle, later regulations, such as photo-ID requirements, have been upheld because they do not explicitly target particular groups. Although the

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<sup>249</sup> See *Elrod*, 427 US at 356 (Brennan) (plurality) (recognizing that an "individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained" by patronage practices); *Anderson*, 460 US at 787 (recognizing that "the right of individuals to associate for the advancement of political beliefs . . . rank[s] among our most precious freedoms"), quoting *Williams*, 393 US at 30–31.

<sup>250</sup> *Anderson*, 460 US at 788.

<sup>251</sup> See id at 790–93.

photo-ID laws clearly impose some burden on associational and voting rights, they are facially nondiscriminatory.<sup>252</sup>

Like the photo-ID laws, banning political leaders, insiders, and employees from serving on redistricting commissions is facially nondiscriminatory. Unlike the early filing deadline in *Anderson*, which targeted independent candidates, the redistricting commission provisions apply evenhandedly to all political parties.<sup>253</sup> Many commissions even require certain numbers of Republicans, Democrats, and unaffiliated voters on the commission, undercutting a claim that these exclusionary provisions target persons based on their affiliation with a specific political party.<sup>254</sup> This distinguishes these restrictions from strict scrutiny under the patronage doctrine,<sup>255</sup> and for similar reasons makes any associational burden they impose less severe for *Anderson-Burdick* purposes.

### C. Potential State Interests to Justify Redistricting Commission Provisions

Because the redistricting commission provisions likely impose a nonnegligible, although not severe, burden on party and individual associational rights, the state will have to put forward important regulatory interests to justify them under the *Anderson-Burdick* framework. Two important interests come to mind: the preservation of the democratic process and the elimination of political conflicts of interest. Preservation of the democratic process has already been recognized as an important state interest in the Court's prior jurisprudence—ironically, in the Patronage Cases.<sup>256</sup> In *Elrod*, the Court was quick to note that patronage dismissals for nonpolicymaking positions did nothing to preserve

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<sup>252</sup> See *Crawford v Marion County Election Board*, 553 US 181, 204 (2008) (Stevens) (plurality) (“[I]f a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators.”).

<sup>253</sup> In the *Daunt* litigation, the Sixth Circuit came to a different conclusion, reasoning that the exclusionary provisions are not facially nondiscriminatory, because they “target[ ] specific classes of citizens.” *Daunt*, 956 F3d at 408. Nevertheless, the court still found the associational burden imposed to be “minimal.” See *id.*

<sup>254</sup> See, for example, Mich Const Art IV, § 6(2)(f). As discussed, these provisions may raise burdens on parties' associational rights, although likely not severe ones. See Part V.A.

<sup>255</sup> See Part II.A.3.

<sup>256</sup> See *Elrod*, 427 US at 368 (Brennan) (plurality) (“Preservation of the democratic process is certainly an interest protection of which may in some instances justify limitations on First Amendment freedoms.”).

the democratic process.<sup>257</sup> In the redistricting context, however, that interest is particularly compelling. Redistricting commissions protect democracy by preventing entrenchment of the party in power and allowing voters to cast meaningful ballots for their preferred candidates. Without fair district lines, the power of one's vote becomes weaker, undermining the voter's ability to participate in the democratic process. Eliminating interested actors and ensuring partisan balance on redistricting commissions helps ensure that districts will be drawn fairly to accomplish these goals.

The Court has not yet considered the elimination of conflicts of interest as an important state interest. It has, however, implicitly acknowledged the interest in one prior case. In *Nevada Commission on Ethics v Carrigan*,<sup>258</sup> a member of the City Council of Sparks, Nevada, sued the Nevada Commission on Ethics, which had censured him for failure to recuse himself from a vote for which he had a conflict of interest.<sup>259</sup> Nevada state statutes required legislators to recuse themselves from a vote whenever the "judgment of a reasonable person in [their] situation would be materially affected by . . . [a] commitment in a private capacity to the interests of others."<sup>260</sup> In holding that these laws do not implicate First Amendment rights of free speech, the Court looked favorably on a long history of recusal and conflict-of-interest laws.<sup>261</sup> Inherent in this historical analysis was a recognition that these laws serve an important state interest. Prohibiting legislators from voting on proposals in which they have a personal stake creates good governance and fosters public trust. In the same vein, eliminating interested parties from serving on redistricting commissions builds public trust in the reapportionment process and helps ensure equitable districting lines. Taken together, these potential state interests in eliminating conflicts of interest in redistricting and preserving the democratic process likely outweigh the burdens on associational rights that certain provisions of redistricting commissions impose. Consequently, they pass scrutiny under the *Anderson-Burdick* framework.

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<sup>257</sup> See *id.* at 369–70.

<sup>258</sup> 564 US 117 (2011).

<sup>259</sup> See *id.* at 120, quoting Nev Rev Stat § 281A.420(2) (2007).

<sup>260</sup> *Carrigan*, 564 US at 119.

<sup>261</sup> See *id.* at 122–25.

## CONCLUSION

Redistricting commissions and the body of law surrounding them are still developing. The number of commissions continues to grow, and their various forms in different states show broad experimentation. Within the last five years, the Supreme Court has saved one redistricting commission (in *Arizona State Legislature*) and pointed to such commissions as one of the last bastions against partisan gerrymandering (in *Rucho*). With federal courts out of the picture for settling gerrymandering claims, many states will likely turn to redistricting commissions to remedy this growing problem.

The constitutional claims against the Michigan independent redistricting commission in *Daunt* are unlikely to be the last. As indicated, several other commissions across the country share similar provisions to those challenged in Michigan. As the 2020 redistricting cycle approaches, many more of these lawsuits will likely arise against other redistricting commissions. Plaintiffs will likely attempt to enjoin commissions from carrying out their line-drawing functions, placing the redistricting process back in the hands of interested state legislatures and ensuring that districts remain gerrymandered for another ten years. Furthermore, new commissions experimenting with different provisions could arise, and these new provisions could also impose associational burdens on certain entities, opening them up to constitutional challenges as well.

This Comment is intended to help courts address these claims when they arise. The *Anderson-Burdick* balancing test provides the proper standard for evaluating claims against redistricting commission provisions that burden First Amendment associational rights. Not only do redistricting commissions fit within *Anderson-Burdick's* doctrinal applicability to election laws, but the standard also gives courts the flexibility to allow proper deference to these commissions and the important interests they serve. Undoubtedly, other issues will arise as challenges to redistricting commissions make their way through the judiciary. Such is the case in any novel area of law. As new issues are brought and different provisions are challenged, hopefully this Comment will provide a starting point for evaluating redistricting commissions now and into the future.