erts may be inclined to give priority to another favorite conservative cause — private property rights.[71] The extent of this potential methodological split remains to be seen.

### *D. Equal Protection*

*Redistricting — Partisan Gerrymandering.* — Breakdowns in the democratic process initially appear to present especially appropriate opportunities for judicial intervention. Because groups that are excluded from elections cannot ordinarily remedy their disfranchisement through the political process, courts seem to offer a crucial check on malapportioned political power. However, despite having stepped into the "political thicket"[1] in 1962,[2] the Supreme Court has hesitated to appear as though it is imposing its own view of a properly functioning democracy unless it is particularly confident in its judgment. Last Term, in the latest manifestation of this self-doubt, *League of United Latin American Citizens (LULAC) v. Perry*,[3] the Court held that an electoral district in Texas impermissibly disadvantaged Latinos under section 2 of the Voting Rights Act of 1965[4] but rejected a broader claim that the underlying statewide redistricting scheme was an unconstitutional partisan gerrymander. The Court's decision creates new tensions in its application of the Voting Rights Act. However, *LULAC* is most noteworthy as an example of the Court's continued inability to address partisan gerrymandering claims coherently. This inability discourages both judicial and nonjudicial solutions to political gerrymandering and leads to a misplaced emphasis on the divisive issue of race in politics. The Court should make up its mind: it should either categorically foreclose claims of partisan gerrymandering or adopt a standard that will consistently address the issue.

In 2003, the Republican-dominated Texas legislature drew a new set of congressional districts entitled Plan 1374C to increase Texas Republicans' representation in Congress.[5] As part of the plan, a majority-Latino district in southwestern Texas, District 23, was redrawn to include more Republican Anglo voters and exclude Democratic Latino

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[71] *See, e.g.*, Kelo v. City of New London, 125 S. Ct. 2655, 2671 (2005) (O'Connor, J., dissenting) (joined by Rehnquist, C.J., and Scalia and Thomas, JJ.).

[1] The phrase "political thicket" has its origin in Justice Frankfurter's objection in *Colegrove v. Green*, 328 U.S. 549 (1946), that "[c]ourts ought not to enter th[e] political thicket" presented by equal protection challenges to electoral apportionment. *Id.* at 556 (plurality opinion).

[2] *See* Baker v. Carr, 369 U.S. 186, 208–10 (1962) (holding that an equal protection challenge to a state's electoral apportionment constituted a justiciable issue).

[3] 126 S. Ct. 2594 (2006).

[4] 42 U.S.C. § 1973 (2000).

[5] *See LULAC*, 126 S. Ct. at 2606–07 (plurality opinion). Plan 1374C replaced a set of districts that had been drawn by a district court in order to comport with the Constitution's one-person, one-vote requirement. *Id.* at 2606.

voters.[6] Although the plan reduced the number of Latinos in District 23, it placed additional Latino voters in the nearby District 25, which contained another community of Latino voters.[7] Several constituencies filed suit, claiming that the plan was impermissible for four reasons: it was implemented in the middle of a decade rather than immediately following a national census, it was motivated by discrimination against racial minorities, it was an unconstitutional partisan gerrymander, and it violated section 2 of the Voting Rights Act by diluting the voting power of minorities in multiple districts, including District 23.[8]

A three-judge panel of the district court rejected each of these claims. It held, first, that neither the Constitution's Elections Clause[9] nor the Voting Rights Act prevented mid-decade redistricting; second, that the plaintiffs had failed to prove that the redistricting plan was motivated by a specific intent to harm minorities; third, that the court lacked a sufficiently manageable standard to strike down the plan as a partisan gerrymander; and fourth, that any cognizable dilution of minority voting strength was cured by the creation of District 25 as an offsetting Latino opportunity district.[10] After five Justices opined in *Vieth v. Jubelirer*[11] that partisan gerrymandering claims are in theory justiciable even if not presently susceptible to a judicially manageable standard, the Court vacated the district court's decision and remanded for reconsideration in light of *Vieth*.[12] Treating the remand as limited to the allegations of partisan gerrymandering, the district court again rejected the plaintiffs' claims.[13]

In a set of fractured opinions, the Supreme Court affirmed the district court's rejection of the statewide partisan gerrymandering claims but reversed and remanded on the claim that District 23 violated the Voting Rights Act.[14] Writing for the Court, Justice Kennedy affirmed the principle announced in *Vieth* and *Davis v. Bandemer*[15] that "an equal protection challenge to a political gerrymander presents a justiciable case or controversy."[16] However, Justice Kennedy went on to

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[6] *See* Session v. Perry, 298 F. Supp. 2d 451, 488–89 (E.D. Tex. 2004) (per curiam).

[7] *Id.* at 489.

[8] *Id.* at 457. The plaintiffs included individual voters, members of Congress, the City of Austin, the State of Texas, the American GI Forum of Texas, and LULAC. *Id.*

[9] U.S. 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 . . . .").

[10] *Session*, 298 F. Supp. 2d at 457.

[11] 124 S. Ct. 1769 (2004).

[12] *See, e.g.*, Henderson v. Perry, 125 S. Ct. 351 (2004) (mem.); *see also LULAC*, 126 S. Ct. at 2607 (plurality opinion) (noting the decisions to vacate and remand).

[13] *See* Henderson v. Perry, 399 F. Supp. 2d 756, 759, 777–78 (E.D. Tex. 2005).

[14] *LULAC*, 126 S. Ct. at 2605.

[15] 478 U.S. 109 (1986).

[16] *LULAC*, 126 S. Ct. at 2607. Justices Stevens, Souter, Ginsburg, and Breyer joined Justice Kennedy in this conclusion.

deny the claim presented because the appellants had failed to "offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution."[17]

Writing alone, Justice Kennedy rejected the appellants' argument that a mid-decade districting plan must necessarily be animated *solely* by partisan motivations and thus serves no legitimate public purpose.[18] This assumption was unjustified, he concluded, because portions of the redistricting plan were motivated by "more mundane and local interests" rather than solely by political considerations.[19] Justice Kennedy also declined to rely on a "symmetry standard" proposed by amici, which would have "compar[ed] how both parties would fare hypothetically if they each (in turn) had received a given percentage of the vote."[20] This approach failed to satisfy Justice Kennedy because, in addition to requiring counterfactual speculation, it would still not determine "how much partisan dominance is too much."[21]

Although the Court rejected the appellants' challenge to the entirety of Plan 1374C as an unconstitutional partisan gerrymander, a majority agreed with the appellants that District 23 diluted Latino voting power in violation of section 2 of the Voting Rights Act.[22] Section 2 proscribes state political regulation that causes racial minorities to possess "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[23] Based on the district court's findings, the Court first concluded that the Latino community in District 23 met each of the threshold requirements to bring a section 2 claim established by *Thornburg v. Gingles*[24]: it was large and compact, politically cohesive,

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[17] *Id.*

[18] *Id.* at 2609 (opinion of Kennedy, J.).

[19] *Id.* Even assuming an exclusively partisan motivation for the plan, Justice Kennedy reasoned, the appellants had failed to "show a burden, as measured by a reliable standard, on [their] representational rights." *Id.* at 2610.

[20] *Id.* (quoting Brief of Amici Curiae Professor Gary King et al. in Support of Neither Party at 5, *LULAC* (Nos. 05-204, 05-254, 05-276, 05-439), 2006 WL 53994) (internal quotation marks omitted).

[21] *Id.* at 2611. The appellants also argued that, whereas post-census districts and court-drawn plans, which continue to reflect census numbers despite shifts in population, are deemed to comply with the one-person, one-vote requirement out of necessity, partisan gerrymanders should not benefit from such a dispensation because they further no legitimate purpose. *Id.* at 2611 (plurality opinion). Justice Kennedy, this time joined by Justices Souter and Ginsburg, rejected this argument because he again doubted that "a legislature's decision to override a valid, court-drawn plan mid-decade [was] sufficiently suspect." *Id.* at 2612.

[22] *See id.* at 2623 (majority opinion). Justice Kennedy was joined in this holding by Justices Stevens, Souter, Ginsburg, and Breyer.

[23] 42 U.S.C. § 1973(b) (2000).

[24] 478 U.S. 30 (1986).

and subject to majority bloc voting.[25] Thus, because Plan 1374C eliminated District 23 as a Latino opportunity district, the Plan would risk violating section 2 unless the newly created District 25 served as an offsetting opportunity district.[26]

Justice Kennedy concluded that District 25 did *not* compensate for the alteration of District 23, asserting that a state may "use one majority-minority district to compensate for the absence of another *only* when the racial group in each area had a § 2 right and both could not be accommodated."[27] Thus, the alteration of District 25 to create a Latino opportunity district would not offset the changes to District 23 unless the Latino voters in District 25 also satisfied the three *Gingles* requirements. Moreover, Justice Kennedy interpreted *Gingles*'s "compactness" requirement to refer not only to geographical proximity, but also to whether the two Latino communities within the district had similar "needs and interests."[28] Based on this understanding, he concluded that the district court had failed to make an adequate finding that the two Latino communities in District 25 — one near the Mexican border and the other near Austin — had sufficiently compact "characteristics, needs, and interests" to establish a section 2 right.[29]

After determining that District 25 did not offset the alteration of District 23, Justice Kennedy concluded that Plan 1347C violated section 2 based on a totality of the circumstances. In particular, Justice Kennedy focused on the fact that, without the offsetting benefit of District 25, only sixteen percent of the state's congressional districts were "reasonably compact" Latino districts, whereas twenty-two percent of voting-age Texas citizens were Latino.[30] This less-than-proportionate share of Latino opportunity districts led Justice Kennedy to conclude that the alteration of District 23 reduced Latinos' opportunity to elect representatives of their choice in violation of section 2.[31]

Justice Stevens authored an opinion concurring in part and dissenting in part. Although he agreed that District 23 violated section 2 of

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[25] *See LULAC*, 126 S. Ct. at 2615. Once these requirements are met, a court must assess whether racial minorities have less opportunity to participate in the political process or elect representatives of their choice based on a "totality of circumstances." *Gingles*, 478 U.S. at 46.

[26] *LULAC*, 126 S. Ct. at 2616.

[27] *Id.* (emphasis added).

[28] *Id.* at 2617.

[29] *See id.* at 2618–19.

[30] *Id.* at 2621.

[31] *See id.* at 2623. Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, concluded by rejecting the claim that Plan 1374C also violated section 2 by diluting the minority vote in District 24 — an African American–influence district. *Id.* at 2624 (plurality opinion). According to Justice Kennedy, the African Americans in District 24 simply did not fall within the coverage of section 2 because they did not constitute a sufficient proportion of the voters "to elect representatives of their choice." *See id.* at 2625–26 (quoting 42 U.S.C. § 1973(b) (2000)) (internal quotation marks omitted).

the Voting Rights Act, Justice Stevens would have invalidated Plan 1374C in its entirety as an unconstitutional partisan gerrymander.[32] Justice Stevens reasoned that the mid-decade alteration in Plan 1374C simply served no legitimate governmental purpose; rather, "Texas Republicans abandoned a neutral apportionment map for the sole purpose of manipulating district boundaries to maximize their electoral advantage and thus create their own impermissible stranglehold on political power."[33]

In contrast to Justice Stevens, Chief Justice Roberts concurred in the dismissal of the partisan gerrymandering claims but dissented from the invalidation of District 23.[34] The Chief Justice rejected Justice Kennedy's "surprising" conclusion that District 25 was not a Latino opportunity district because it contained two distinct, or "noncompact," Latino communities.[35] According to Chief Justice Roberts, the district court's finding that "the Hispanic-preferred candidate [would win] *every* primary and general election examined in District 25" was dispositive.[36] He contended that Justice Kennedy, by rejecting the district court's finding that minority voting power would not be diluted, had created the "antithesis of the totality test that [section 2] contemplates" and produced a right that exceeded the statutory text.[37]

While *LULAC* creates new tension in the Court's application of the Voting Rights Act, the decision is most troubling because it demonstrates how the Court's ambivalence toward partisan gerrymandering claims both fails to address the problem of electoral entrenchment and focuses misplaced attention on the divisive issue of race in politics. The Court should move away from this ambivalent middle ground and either adopt a standard for adjudicating partisan gerrymandering claims or abandon the endeavor entirely.

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[32] *Id.* at 2646–47 (Stevens, J., concurring in part and dissenting in part). Justice Breyer joined this portion of Justice Stevens's opinion. Justice Stevens would also have held that Plan 1374C's impact on District 24 violated section 2, and Justice Souter expressed a similar desire to invalidate District 24 in a separate opinion joined by Justice Ginsburg. *See id.* at 2650–51 (Souter, J., concurring in part and dissenting in part).

[33] *Id.* at 2628 (Stevens, J., concurring in part and dissenting in part). The Court was more than capable of making this determination under a judicially manageable standard, Justice Stevens reasoned. Unlike in *Vieth*, the appellants were challenging only the decision to redistrict, not particular decisions regarding district lines. *See id.* at 2631–32. Justice Stevens would also have invalidated Plan 1374C based on the amici's "symmetry" standard, which he asserted demonstrated a discriminatory impact on Texas's Democratic voters. *See id.* at 2637–38.

[34] *Id.* at 2652 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part). The Chief Justice was joined by Justice Alito.

[35] *Id.* at 2653.

[36] *Id.* (alteration in original) (quoting Session v. Perry, 298 F. Supp. 2d. 451, 503 (E.D. Tex. 2004) (per curiam)) (internal quotation marks omitted).

[37] *Id.* at 2660.

With regard to the Voting Rights Act, Justice Kennedy's controlling opinion produced two doctrinal twists that reflect a broader tension in the Court's election law jurisprudence. First, Justice Kennedy asserted that a state may offset the elimination of a minority opportunity district with the creation of another "only when the racial group in each area had a § 2 right and both could not be accommodated."[38] Second, interpreting the *Gingles* compactness requirement to include an analysis of a minority community's "characteristics, needs, and interests," Justice Kennedy concluded that a district including "two far-flung segments of a racial group with disparate interests" would not satisfy the requirement.[39]

Chief Justice Roberts criticized this approach as novel and erroneous, complaining that "[n]ever before has this or any other court struck down a State's redistricting plan under § 2, on the ground that . . . minority voters in one of those districts are not as 'compact' as the minority voters would be in another district were the lines drawn differently."[40] Yet the Court's equal protection jurisprudence has rejected the assumption that all minority voters "think alike, share the same political interests, and will prefer the same candidates at the polls."[41] This understanding, when coupled with the *Gingles* requirements of compactness and political cohesiveness,[42] helps explain the conclusion that minority voters should be protected as members of a discrete political community rather than merely as minorities per se.[43] Thus, although Chief Justice Roberts may well be correct in his assertion that protecting members of a discrete political community reaches beyond "the concern of the Voting Rights Act to ensure minority voters an equal opportunity,"[44] his criticism reflects the broader tension between the Court's statements in the equal protection context and the premises of the Voting Rights Act.[45]

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[38] *Id.* at 2616 (majority opinion).

[39] *Id.* Interestingly, this redefinition of the compactness requirement could arguably also be used to *defend* against the dismantling of a district that is home to minority communities of such "disparate interests," thus restricting the coverage of the Voting Rights Act.

[40] *Id.* at 2653 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

[41] *Id.* at 2618 (majority opinion) (quoting Miller v. Johnson, 515 U.S. 900, 920 (1995)) (internal quotation marks omitted).

[42] Although Justice Kennedy focused on the first *Gingles* requirement — compactness — his emphasis on a minority community's characteristics, needs, and interests is at least as well justified by the second *Gingles* requirement: political cohesion.

[43] *See* Posting of Heather Lloyd to SCOTUSblog, http://www.scotusblog.com (June 30, 2006, 11:35 EST) (attributing to Professor Daniel Ortiz the observation that Justice Kennedy's compactness inquiry is a logical extension of *Shaw v. Reno*, 509 U.S. 630 (1993)).

[44] *LULAC*, 126 S. Ct. at 2653 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

[45] For an in-depth discussion of the Court's struggle to define the injury from vote dilution and its resulting difficulty in reconciling equal protection and Voting Rights Act cases, see

Whereas the Court selected one of several potential solutions to the doctrinal tension that animates its application of the Voting Rights Act, it effectively chose no solution to the issue of partisan gerrymandering claims. As in *Vieth*, the Court maintained that although "an equal protection challenge to a political gerrymander presents a justiciable case or controversy," such a claim will be dismissed unless the complaining parties "offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution."[46] Placing the burden on litigants to produce an administrable standard is a somewhat unusual litigation requirement: as Justice Scalia complained in *Vieth*, "it is *our* job, not the plaintiffs', to explicate the standard that makes the facts alleged by the plaintiffs adequate or inadequate to state a claim."[47] However, the Court's failure to decide conclusively whether it will address partisan gerrymandering claims has more significant costs.

First, the Court's approach encourages analytical confusion. By declaring such claims justiciable but then dismissing them for lack of a manageable standard after considering the facts of each case, the Court muddies the distinction between the jurisdictional issues and the merits. This confusion is evident in Justice Kennedy's opinion, which relied on the fact that the appellants had not *demonstrated* a burden on their representational rights.[48]

Second, and more importantly, the Court's nominal willingness to review partisan gerrymandering claims places a judicial imprimatur on potentially unconstitutional districts that may diffuse any energy for change through the political process. Although the Court did not formally reach the merits of the claims in *Vieth* and *LULAC*, the nuances of justiciability are not necessarily clear to the general public or press. For example, one news outlet described the result in *LULAC* as an "endorsement of the plan,"[49] and many shared the perception that "the Supreme Court [had] upheld the statewide redistricting as [c]onstitu-

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Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001).

[46] *Id.* at 2607 (majority opinion).

[47] Vieth v. Jubelirer, 124 S. Ct. 1769, 1790 (2004) (plurality opinion).

[48] Justice Kennedy rejected the "sole intent" standard as unmanageable since an intent to create partisan advantage is, by itself, insufficient to establish unconstitutional gerrymandering absent proof of a burden on the complaining voters' representational rights. *See LULAC*, 126 S. Ct. at 2609–10 (opinion of Kennedy, J.). However, as Justice Stevens argued, this conclusion "goes to the merits, rather than the manageability, of a partisan gerrymandering claim." *Id.* at 2635 (Stevens, J., concurring in part and dissenting in part). Thus, it is analytically unclear whether the Court in fact reached the merits of the appellants' claim.

[49] Charles Lane & Dan Balz, *Justices Affirm GOP Map for Texas*, WASH. POST, June 29, 2006, at A1.

tional."[50] However, the suggestion that the Court stands ready to police democratic breakdowns is likely an empty promise. Given the Court's rejection of all proposed standards for resolving partisan gerrymandering claims, the resources devoted to litigating such cases may be better spent in pursuit of extrajudicial solutions such as independent commissions, proportional voting,[51] or simple political accountability for excessive gerrymandering.

Third and finally, *LULAC*'s assertion that partisan gerrymandering is theoretically within the domain of the Court, coupled with the Court's failure to address the issue in fact, focuses unnecessary attention on the divisive issue of race in politics. It is unlikely that the Texas legislature designed Districts 23 and 25 with a specific intent to harm Latino voters because of their ethnicity. Rather, the legislature almost certainly considered race as a proxy for political affiliation in drawing Plan 1374C. Thus, the Court's invalidation of the new District 23 based on the racial composition of District 25 recasts an essentially political issue in the inciting terms of racial animus and conflict. As Professor Samuel Issacharoff notes, "the perverse consequences of the absence of any real constitutional vigilance over partisan gerrymandering is that litigants must squeeze all claims of improper manipulation of redistricting into the suffocating category of race."[52] This emphasis on race as a proxy for politics ironically undermines the Court's professed goal of "foster[ing] our transformation to a society that is no longer fixated on race."[53]

The Court should either commit to regulating political gerrymandering or make way for nonjudicial solutions. The Court could choose

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[50] Wikipedia, *2003 Texas Redistricting*, http://en.wikipedia.org/wiki/2003_Texas_redistricting (last visited Oct. 15, 2006); *see also* Associated Press, *Justices Revise Part of Texas Redistricting*, MSNBC.COM, June 28, 2006, http://www.msnbc.msn.com/id/13592999 (describing the result as "largely blessing Tom DeLay's bitterly contested handiwork in Texas"); Bill Mears, *High Court Upholds Most of Texas Redistricting Map*, CNN.COM, June 28, 2006, http://www.cnn.com/2006/POLITICS/06/28/scotus.texasredistrict/index.html ("[T]he overall redistricting plan engineered by state Republicans was found to be proper."); Posting of Adam Bonin to Daily Kos, http://www.dailykos.com/story/2006/6/28/111835/521 (June 28, 2006, 8:18 PDT) ("A majority of the Court determined that nothing in the Constitution prevented Texas . . . from . . . redrawing the map . . . .").

[51] In contrast to "winner-take-all" voting, proportional voting, also known as cumulative voting, is a voting system in which a party's representation in a legislature corresponds to its proportion of votes statewide. On the virtues of proportional voting, see Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1483–84 (1991). For a comprehensive study of a U.S. jurisdiction that employs cumulative voting, see Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241.

[52] Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 630–31 (2002); *see also* Session v. Perry, 298 F. Supp. 2d 451, 474 (E.D. Tex. 2004) (per curiam) ("Inevitably, as the political party in power uses district lines to lock in its present advantage, the party out of power attempts to stretch the protective cover of the Voting Rights Act . . . .").

[53] Georgia v. Ashcroft, 539 U.S. 461, 490 (2003).

from several somewhat arbitrary but predictable approaches if it wished to regulate political gerrymandering actively. First, it could apply a symmetry standard that allows fluctuation within a fixed percentage range.[54] Although the Court would need to pull a permissible level of asymmetry out of thin air,[55] such a limit would be no more arbitrary than the percentages used in implementing the one-person, one-vote requirement[56] or the Court's rule that punitive damages awards exceeding nine times compensatory damages will rarely satisfy due process.[57]

Second, Justice Stevens's "sole intent" approach would also provide a workable, if perhaps less predictable, standard.[58] Critics of this standard, in both *LULAC* and *Vieth*, suggested that most districting decisions are accompanied by mixed motives and are rarely motivated solely by partisan aims.[59] But such review is not qualitatively different from the Court's other applications of rational basis review; the prevalence of mixed motives merely shows that the standard is difficult to satisfy, not unmanageable.[60]

Third, and most aggressively, the Court could simply create an overinclusive rule that any partisan motivation in drawing districts violates equal protection. This approach would require radical changes[61]: legislatures would effectively be required to delegate redistricting to an independent third party, institute proportional voting, or draw districts so beyond reproach that a claim of partisan motivation could not be maintained. However, such intervention would not be

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[54] For example, if the representation secured by one party based on a given percentage of the statewide vote differed by more than fifteen percentage points from the representation secured by the other party given the same percentage, the plan would be invalid.

[55] *Cf. LULAC*, 126 S. Ct. at 2611 (opinion of Kennedy, J.) (complaining that a symmetry standard fails to "provid[e] a standard for deciding how much partisan dominance is too much").

[56] *See, e.g.*, Brown v. Thomson, 462 U.S. 835, 842–43 (1983) (holding that the implementation of a redistricting plan for state legislative districts with population deviations over ten percentage points creates a prima facie case of discrimination under the Equal Protection Clause, thus shifting the burden to the State to defend the plan).

[57] *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

[58] *See LULAC*, 126 S. Ct. at 2640–41 (Stevens, J., concurring in part and dissenting in part) (suggesting that the Court should invalidate redistricting at least when it is clear that the scheme is motivated solely by partisan bias).

[59] *See, e.g.*, *id.* at 2609–10 (opinion of Kennedy, J.); Vieth v. Jubelirer, 124 S. Ct. 1769, 1780–81 (2004) (plurality opinion).

[60] Such a standard would be entirely toothless unless the Court were willing to apply a meaningful degree of scrutiny to a legislature's post hoc rationalizations of districting decisions. Even with the type of "heightened" rational basis review applied in cases such as *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); and *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), such a standard would likely reach little conduct.

[61] *See Vieth*, 124 S. Ct. at 1792–93 (Kennedy, J., concurring in the judgment) ("A decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process.").

unprecedented: although "one-person, one-vote" is now accepted as a virtual clause in the Constitution, the holding in *Reynolds v. Sims*[62] was not seen in the mid-1960s as obviously encompassed in the concept of equal protection[63] and could hardly have been more radical in its mandate.[64]

Nonetheless, the Court may simply be unwilling to engage in any such regulation of democracy. If this is the case, the Court should abandon the endeavor entirely to make way for alternative solutions. Without the promise of judicial intervention, voters may focus more energy on securing electoral change at the state level. Although it is true that gerrymandered districts increase the obstacles to such change, Texas itself underwent a shift from a Democratic to a Republican majority even though Democrats drew its districts.[65] Moreover, Congress can largely override the problem of legislative entrenchment by regulating elections to preclude political gerrymandering.[66] Although individual congresspersons may be averse to such a change, the pressure brought to bear by strong and closely matched political parties may provide a vehicle for pressuring Congress to pass such measures. Of course, these solutions require voters to focus on political gerrymandering as an electoral issue. While this possibility may appear unlikely today, the Court's empty promise that it will resolve the issue may contribute to this reality.

The choice between pervasive regulation and nonjusticiability is ultimately linked to a belief regarding the legitimate content of constitutional law. A jurist who believes that the content of the Constitution is specific in its mandate and stable over time would likely find these

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[62] 377 U.S. 533 (1964).

[63] *See* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 261 n.226 (1991).

[64] *See Reynolds*, 377 U.S. at 589 (Harlan, J., dissenting) ("In these cases the Court holds that seats in the legislatures of six States are apportioned in ways that violate the Federal Constitution. Under the Court's ruling it is bound to follow that the legislatures in all but a few of the other 44 States will meet the same fate." (footnote omitted)). Although it is true that the one-person, one-vote principle appears to be more determinate and "manageable" than a strict bar to partisan motivations, the distinction may be illusory. Because virtually no districting scheme can be perfectly balanced, the one-person, one-vote requirement requires courts to draw an arbitrary line describing just how much balance is required. Yet a computer could easily be programmed to draw district lines without regard to partisan voting patterns.

[65] *See* Henderson v. Perry, 399 F. Supp. 2d 756, 763–64 (E.D. Tex. 2005).

[66] *See Vieth*, 124 S. Ct. at 1775 (plurality opinion) ("[T]he Framers provided a remedy for such practices in the Constitution. Article I, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished."). Although this provision only allows for the regulation of federal elections, congressional participation in districting would place significant pressure on the design of state elections since many state districts are drawn to fit within congressional districts. If a state were to depart from this practice, it would both create additional administrative costs and make clear that the district was drawn for no reason other than partisan advantage.

proposed rules for regulating politics insufficiently grounded in a constitutional tradition. In contrast, one who believes that the Constitution's commands are more general and dynamic would see these rules as legitimate instruments for effectuating the Constitution's principles of equality and civic participation. In any event, both approaches are superior to *LULAC*'s ambivalence, which neither addresses the problem of political gerrymandering through the courts nor encourages solutions elsewhere.

### *E. Freedom of Association*

*Freedom of Expressive Association — Campus Access for Military Recruiters*. — Every fall, law schools open their doors to employers intent upon cherry-picking the best and brightest from the second-year classes. A courtship process ensues, facilitated by law schools, during which employers seek to convey their desirability to applicants through receptions, mailings, small gifts, off-campus interviews in hotels, and word-of-mouth.[1] It is a peculiar job-recruiting ceremony, unique to law schools and their vulnerable, inexperienced students. At the end of the process, though many students receive job offers, a large number find themselves with jobs of a less idealistic and public-spirited bent than what they had imagined upon entering law school;[2] somehow, the process strongly influences the result.[3] Last Term, in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*,[4] the Supreme Court upheld the Solomon Amendment against a First Amendment challenge, deciding en route that Congress would not violate the First Amendment if it were to force law schools to extend the same privileges to military recruiters as they extend to any other employer invited onto campus for recruiting purposes. If it is any indication of what is to come from the Roberts Court, this opinion establishes a worrisome precedent. Doctrinally, the opinion cuts back First Amendment protections on a number of fronts. More generally, it exhibits a marked indifference to the subtle forms that expression can

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[1] *See* Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 606 (1982) ("[E]ach firm puts on, with the tacit or enthusiastically overt participation of the schools, a conspicuous display of its relative status within the bar . . . . This process is most powerful for students who go through the elaborate procedures of firms in the top half of their profession.").

[2] *See id.* at 592 ("A surprisingly large number of law students go to law school with the notion that being a lawyer means something more, something more socially constructive than just doing a highly respectable job.").

[3] *See id.* at 591 ("Because students believe what they are told, explicitly and implicitly, about the world they are entering, they behave in ways that fulfill the prophecies the system makes about them and about that world.").

[4] 126 S. Ct. 1297 (2006).