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Making Politics De Minimis in the Political Process: The Unworkable Implications of *Cox v. Larios* in State Legislative Redistricting and Reapportionment

I. INTRODUCTION

Following the completion of the United States decennial census in the year 2000, state legislatures and federal courts returned to the frenzied and familiar world of congressional and state legislative redistricting and reapportionment.¹ In the course of redrawing electoral district boundaries and rebalancing district populations, the actions of state legislatures are often and inevitably called into question before the federal bench. But who should decide the size and shape of the fundamental divisions of our electoral system?²

States, and more particularly state legislatures, are constitutionally endowed with the power and prerogative to draw the physical boundaries of legislative and congressional districts.³ The courts, however, play a vital role in ensuring that redistricting and reapportionment plans do not violate constitutional guarantees of equal protection by preventing “invidious discrimination”⁴ and by upholding the “one person, one vote” principle.⁵ In the context of congressional districting, the Supreme Court has given states a strict requirement that distinct districts within a state be of nearly equal population.⁶ In other words, any deviation from an equal population distribution must be justified by a legitimate state interest.⁷ In

1. By statute, and often pursuant to state constitutional provisions, states undergo the process of redistricting and reapportionment for congressional and state legislative elections following each decennial federal census. *See, e.g.*, 2 U.S.C. § 2a (2004) (providing for the apportionment of U.S. Representatives after the census); *see also, e.g.*, GA. CONST. art. III, § 2, ¶ 2 (2004) (providing for apportionment of the General Assembly after the decennial U.S. census); GA. CODE ANN. §§ 28-2-1 to -2 (2004) (providing for the apportionment and specifying the qualifications of members of the General Assembly).

2. Thomas J. Kalitowski & Elizabeth M. Brama, *Should Judges Get Out of Redistricting?*, 61 BENCH & B. MINN. 19 (2004).

3. *See* Chapman v. Meier, 420 U.S. 1, 27 (1975).

4. Gaffney v. Cummings, 412 U.S. 735, 745 (1973).

5. *See* Reynolds v. Sims, 377 U.S. 533, 559 (1964).

6. *See, e.g.*, Wesberry v. Sanders, 376 U.S. 1, 8 (1964).

7. *See* Karcher v. Daggett, 462 U.S. 725, 740–41 (1983).

contrast, judicial review of state legislative districting plans represents a significant intrusion into an inherently local process and the courts have been appropriately deferential to state legislatures, so long as the resulting population deviations are de minimis.⁸ Consequently, courts have not traditionally required states to justify total population deviations that are below 10%, so long as there is no evidence of invidious discrimination.⁹ Deviations above 10%, however, are prima facie evidence of invidious discrimination and trigger, by implication, a type of strict scrutiny review that requires states to justify such deviations by showing that they are the result of some traditional state interest.¹⁰

The 10% threshold has proven to be a workable standard,¹¹ as evidenced by the great reliance of most states; the majority have drawn state legislative districts with deviations falling between 9 and 10% in at least one, and usually both, houses of their state legislatures.¹² Yet, in *Cox v. Larios*, the Supreme Court summarily affirmed the decision of a three-judge district court that upset precedent by invalidating a Georgia state legislative redistricting statute with a total population deviation within the 10% limit.¹³ The

8. See *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (“Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that ‘reapportionment is primarily the duty and responsibility of the State.’” (citations omitted)).

9. *Gaffney*, 412 U.S. at 745 (“[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.”).

10. See *Brown v. Thomson*, 462 U.S. 835 (1983) (upholding an 89% deviation because of state historical and constitutional interests).

11. The 10% rule has, by implication, long been recognized by the Supreme Court and has formed the basis of the majority of state redistricting schemes over the past decades. See Jurisdictional Statement for Appellants at *3 n.1, *Cox v. Larios*, 124 S. Ct. 2806 (2004) (No. 03-1413), available at 2004 WL 882937.

12. See NAT’L CONFERENCE OF STATE LEGISLATURES, REDISTRICTING 2000 POPULATION DEVIATION TABLE (2004), at <http://www.ncsl.org/programs/legman/redistrict/redistpopdev.htm> (last visited Sept. 4, 2004). Of forty-seven states surveyed after the 2000 U.S. Census, twenty-nine had district deviations in excess of 9%. *Id.*

13. 124 S. Ct. 2806 (2004) (Stevens, J., concurring), summarily *aff’g* *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (three-judge court). Most of Georgia’s state legislative districts deviated from the ideal district by less than plus or minus 5%, with an average deviation in the House and Senate plans of 3.47% and 3.78%, respectively. The total deviation (the difference between the largest positive and negative deviations from ideal) was 9.98%. See *Larios*, F. Supp. 2d at 1326, 1327. See also Richard L. Hasen, *Looking for Standards (In All the Wrong Places): Partisan Gerrymandering Claims After Vieth*, 3 ELECTION L.J. 626, 642 n.134 (2004) (referencing *Cox*, 124 S. Ct. at 2806, and stating, “Many people had read the Supreme

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Court, in the absence of any colorable claim of racial discrimination, vote dilution, or unconstitutional partisan gerrymandering, essentially applied strict scrutiny by requiring the Georgia General Assembly to justify its plan despite the absence of discrimination against a suspect classification.¹⁴ The Court justified the outcome because it found evidence that state legislators were partially motivated by political interests in enacting the redistricting proposal.¹⁵

Cox represents a significant departure from precedent and creates an unworkable standard for state legislatures to meet when drawing state legislative districts by effectively eliminating the traditional 10% safe harbor and by proscribing partisan influence. The *Cox* court ignores the reality and the political nature of state legislatures¹⁶ and removes the flexibility that state legislatures need to reach political compromises in what is arguably their most heated and politically contentious function.¹⁷ As a consequence, legislatures may become unable to enact politically viable districting plans, leaving this task to the courts.¹⁸ Even when compromise is achieved, and states adopt a redistricting plan, anytime they fail to achieve a zero population deviation there will be allegations of undue political influence and an inevitable onslaught of politically motivated lawsuits.¹⁹ The ensuing

Court's earlier cases as creating a 10% safe harbor for state and local districting . . . and the Supreme Court's summary affirmance in *Larios* seems to reverse that thinking.”)

14. *See id.* at 2807–08 (indicating that the state failed to justify the conceded deviations from the principle of “one person, one vote”); *see also Larios*, 300 F. Supp. 2d at 1322, 1339, 1341–42, 1349 (indicating that the state failed to justify deviations).

15. *Id.* at 2807.

16. *See id.* (Scalia, J., dissenting) (arguing that “politics as usual” may be a traditional criteria in redistricting).

17. *See* ROBERT MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 52 (1965) (“[T]o the affected legislators [reapportionment] involves no less an issue than political survival.”). *See generally* Christopher C. Confer, *To Be About the People's Business: An Examination of the Utility of Nonpolitical/Bipartisan Legislative Redistricting Commissions*, 13 KAN. J.L. & PUB. POL'Y 115 (2004) (describing the heated political nature of redistricting and arguing for bipartisan, extralegislative bodies to carry out redistricting).

18. In many instances in which the courts take over the redistricting process, it is not because the legislatures failed to pass redistricting legislation that meets constitutional requirements, but rather because legislatures failed to pass any redistricting legislation at all. *See Karcher v. Daggett*, 462 U.S. 725, 734 (1983) (citing *Carstens v. Lamm*, 543 F. Supp. 68 (D. Colo. 1982)).

19. *See Cox*, 124 S. Ct. at 2810 (Scalia, J., dissenting) (raising the fear of “encourag[ing] politically motivated litigation”). The rationale of the *Cox* concurrence has already been cited in a comparable case arising out of a Texas redistricting statute. *See Reply Brief for Appellants in Opposition to Motion To Affirm, Travis County v. Perry*, 125 S. Ct.

judicial dominion might not only infringe on state legislative discretion but would likely cost states millions of dollars in increased litigation expenses.²⁰

This Note argues that states are not required to justify total population deviations of less than 10% among state legislative districts so long as the state districting plan in question does not discriminate on the basis of race or some other constitutionally protected class. Part II of this Note provides an overview of redistricting and reapportionment jurisprudence, briefly discussing the history of traditional redistricting criteria and the relevant case law leading up to the holding in *Cox*. Part III then briefly outlines the factual and procedural background of the issues raised in *Cox*, as well as the Court's flawed holding that a state must justify a deviation of less than 10% and that political motivations in drawing legislative districts are improper. Part IV critically analyzes the reasoning employed by the concurring opinion and the three-judge district court panel, arguing that the Court attempted to vindicate the failed partisan gerrymandering claim by painting it as a "one person, one vote" claim, upsetting precedent and essentially eliminating the 10% safe harbor upon which states have come to rely in drawing legislative districts. In eliminating this safe harbor, the Court intrudes into traditional state legislative functions and invites an onslaught of politically motivated lawsuits that could make state legislatures impotent to carry out the redistricting process. Part V concludes that the case should have been summarily reversed or set for full briefing and argument so that the Court could have more adeptly addressed the implications of its holding.

II. BACKGROUND: REDISTRICTING AND REAPPORTIONMENT

First, redistricting and reapportionment are essentially different sides of the same coin. They are closely related, but they are not

352 (2004) (No. 03-1400), *available at* 2004 WL 1900503 (citing *Cox*, 124 S. Ct. at 2806). Likewise in New York, *Cox* has been cited as standing for the proposition that the 10% rule has been abandoned and states are now required to justify even the smallest population deviations in state legislative redistricting, as in congressional redistricting. *See* Brief for Kisha Thomas et al., as Amici Curiae in Support of Appellants, *Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004) (No. 04-218), *available at* 2004 WL 2356484 (citing *Cox*, 124 S. Ct. at 2806).

20. *See* Rhonda Cook, *Election 2004: Redistricting's Cost Will Hit \$2.3 Million*, ATLANTA J.-CONST., Aug. 3, 2004, at 3B.

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synonymous terms, and they are motivated by different interests. Second, actions alleging that a state redistricting or reapportionment statute violates constitutional or statutory protections are based on varied legal theories that invoke different standards and that require unique analysis. For example, a claim of racial discrimination is treated somewhat differently than claims alleging partisan gerrymandering²¹ or claims alleging vote dilution under the “one person, one vote” principle. Third, states must meet distinct constitutional requirements, depending on whether state legislative or congressional districting is at issue.

A. Redistricting Versus Reapportionment

One of the issues in the principal case is whether political factors and partisan influence are valid considerations in the redistricting process. To properly answer this question, it is critical to understand that while many cases, including *Cox*, use the terms “redistricting” and “reapportionment” interchangeably, there is a distinction.²² Pure reapportionment is simply “the allocation of seats in a legislative body where the district boundaries do not change but the number of members per district does,” as in the allocation of congressional seats among states.²³ Pure redistricting is merely “the drawing of new

21. “[G]errymandering” refers to “the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes.” *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (1969) (Fortas, J., concurring). It is also used to refer to the practice of dominant political parties drawing electoral districts in such a way as to give it “advantage at the polls.” *Davis v. Bandemer*, 478 U.S. 109, 164 (1986) (Powell, J., concurring in part and dissenting in part).

The term descends from Massachusetts Governor Elbridge Gerry, signer of the Declaration of Independence, delegate to the 1787 Constitutional Convention, and vice president to James Madison. He ran for gubernatorial reelection in 1812 after members of his political party, the Anti-Federalists, enacted a redistricting measure to ensure their domination at the next election. One of the resulting districts resembled a salamander, leading Federalist critics to coin the word “gerrymander” by combining the Governor’s name, *Gerry*, with the ending of *salamander*. Gerry was not reelected governor but was elected as James Madison’s vice president. See U.S. NAT’L ARCHIVES & RECORDS ADMIN., AMERICA’S FOUNDING FATHERS: DELEGATES TO THE CONSTITUTIONAL CONVENTION (2004), at http://www.archives.gov/national_archives_experience/charters/constitution_founding_fathers_manchachusetts.html#Gerry (last visited Nov. 17, 2004); see also *Gerrymandering*, BLACK’S LAW DICTIONARY 696 (7th ed. 1999).

22. See *Abate v. Mundt*, 300 N.Y.S.2d 447, 450 (N.Y. Sup. Ct. 1969) (stating that “redistricting” and “reapportionment” are not synonymous).

23. *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 5, 639 N.W.2d 537, 539 n.2; see also Robert Redwine, *Constitutional Law: Racial and Political Gerrymandering—Different Problems*

political boundaries.”²⁴ Both districting and apportionment are “primarily the duty and responsibility of the State,”²⁵ and, as a practical matter, most state procedures reveal that districting and apportionment are carried out concurrently and are, in fact, intertwined.²⁶ However, each is motivated by unique purposes and subject to unique limitations.²⁷

1. Redistricting, partisan motivation, and traditional districting criteria

When state legislatures draw the physical boundaries of legislative districts, the decision is both inherently local and inherently political.²⁸ As state legislators weigh the relevant factors in

Require Different Solutions, 51 OKLA. L. REV. 373, 374 (1998) (“[F]rom a technical standpoint, the words apportionment and reapportionment apply to the allocation of a finite number of representatives among a fixed number of pre-established areas, while districting and redistricting refer to the actual drawing of district lines.”).

24. *Jensen*, 639 N.W.2d at 539 n.2; *see also* *Seaman v. Fedourich*, 209 N.E.2d 778, 779 n.1 (N.Y. 1965) (“Apportionment is the process by which legislative seats are distributed among units entitled to representation; districting is the establishment of the precise geographical boundaries of each such unit or constituency.”). It is worthy to note that some publications and judicial decisions refer specifically to the reallocation of the U.S. House of Representatives following the decennial census as “reapportionment,” while reserving the term “redistricting” to describe the division of state and local political subdivisions into voting districts. *See* BRUCE M. CLARKE & ROBERT TIMOTHY REAGAN, FED. JUDICIAL CTR., REDISTRICTING LITIGATION: AN OVERVIEW OF LEGAL, STATISTICAL, AND CASE-MANAGEMENT ISSUES 1 n.1 (2002) (citing 2 U.S.C. § 2a (2004)).

25. *Chapman v. Meier*, 420 U.S. 1, 27 (1975).

26. As states review demographic data from the U.S. census, the population numbers serve as a basis for drawing new districts. *See, e.g., 2001–02 Guidelines for the House/Senate Committee on Congressional and Legislative Reapportionment and Redistricting*, at <http://georgiareapportionment.uga.edu/fguide.htm> (last visited Sept. 6, 2004).

27. *See infra* Parts II.A.1–2.

28. *See* *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (finding that districting represents “the most vital of local functions”); *cf.* *Coyle v. Smith*, 221 U.S. 559, 565 (1911) (holding that “[t]he power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers”). *But see* *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960) (holding that a state did not have unlimited powers to modify the boundaries of a municipality when the purpose was to disenfranchise minority residents). As one judge wrote:

Establishing the boundaries of a state’s congressional and legislative districts is an inherently political undertaking. The territory of a district may change drastically, stripping the incumbent of a constituent base he or she labored to build. Some incumbents find themselves pitted against one another in the same district. Other districts are left without an incumbent, opening the door to new candidates. While the redistricting process may focus on demographics, land use, and population changes, at its heart is the competition for partisan political advantage.

Kalitowski & Brama, *supra* note 2, at 19.

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determining the exact boundaries of such political subdivisions, they inevitably weigh many factors, including partisan interests inherent in the legislative process.²⁹ In the context of redistricting, states are generally only required to justify the rationale for particular boundaries where there is evidence of unconstitutional racial or partisan gerrymandering, or other invidious discrimination.³⁰ When such allegations are made and plaintiffs meet their evidentiary burdens, courts then look to what they call “traditional redistricting criteria” to determine whether the state has an independent basis—some traditional state interest—to justify the boundaries.³¹ Such criteria include making local districts compact and contiguous, respecting local municipal boundaries, preserving existing boundary lines (i.e., cores of prior districts), avoiding contests between incumbents, and promoting communities of interest.³² However, while these criteria may help a state rebut an allegation of unconstitutional racial or partisan gerrymandering, they are not constitutionally required.³³

2. Reapportionment and constitutional protection

Unlike redistricting, which often involves a balancing of numerous factors, apportionment promises a more ministerial-like act, driven by constitutional guarantees and protections.³⁴ The Equal

29. See discussion *infra* Part IV.D.

30. See *Shaw v. Reno*, 509 U.S. 630, 644 (1993) (finding, in a racial gerrymandering case, that plaintiffs must prove that race predominates in the drawing of district lines for redistricting legislation to be subject to strict scrutiny); *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (finding, in a partisan gerrymandering case, that plaintiffs must prove both intentional discrimination against a political group and an actual discriminatory effect resulting from the drawing of district lines to challenge redistricting legislation).

31. See *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1792 (2004) (noting traditional districting criteria such as geographic features or communities of interest); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (discussing compactness, municipal boundaries, preserving core districts, and avoiding contests between incumbents as state policies relevant to districting).

32. See *Karcher*, 462 U.S. at 740.

33. *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973).

34. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 579 (1964) (“[T]he overriding objective [in state legislative districting] must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.”); *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (holding that Article I, Section 2 of the U.S. Constitution “means that as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s”). State constitutions and statutes also provide for regular apportionment of state legislative districts. See, e.g., GA. CONST. art. III, § 2, ¶ 2 (2004); GA. CODE ANN. §§ 28-2-1 to -2 (2004).

Protection principle of “one person, one vote” generally demands that district populations be equal, or very nearly so, to ensure that every man’s vote counts as much as any other’s.³⁵ In this context, an “ideal district” is found by dividing the total state population by the total number of districts.³⁶ The goal of a neutral apportionment plan is to create districts that exactly match the “ideal,” resulting in a zero total deviation.³⁷ Thus, a pure apportionment decision could almost be automatic, based entirely on blind statistical analysis and mathematical algorithms applied to census maps.³⁸ However, despite the views of those who might like to see reapportionment become automated,³⁹ legislative reapportionment and redistricting are so interconnected and intimately tied to the political process that automation has proven unsatisfactory.⁴⁰

B. Legal Theories and Traditional Districting Criteria

While litigation involving both redistricting and reapportionment is similar and often overlapping, the legal theories which form the basis of the claims are distinct.⁴¹ A primary distinction rests on

35. *Wesberry*, 376 U.S. at 8.

36. *See generally* J. GERALD HEBERT ET AL., AM. BAR ASS’N, REALISTS’ GUIDE TO REDISTRICTING: AVOIDING THE LEGAL PITFALLS 6 (2000).

37. *See id.*

38. *See generally* Micah Altman, *The Computational Complexity of Automated Redistricting: Is Automation the Answer?*, 23 RUTGERS COMPUTER & TECH. L.J. 81 (1997).

39. On the subject of reapportionment, Ronald Reagan once said, “There is only one way to do reapportionment—feed into the computer all the factors except political registration.” *Id.* at 81 (citing Tom Goff, *Reinecke Denounces Court: Legislative Leaders Praise Action*, L.A. TIMES, Jan. 19, 1972, at A24 (quoting Ronald Reagan)).

40. Some states have endeavored to remove the redistricting and reapportionment functions from the heated context of state legislatures, delegating the power to bipartisan commissions. *See, e.g.*, IDAHO CODE § 72-1501 (Michie 2004) (creating the Idaho Commission for Reapportionment). However, these commissions have continued to encounter significant political and constitutional obstacles. *See, e.g.*, *Bingham County v. Idaho Comm’n for Reapportionment*, 55 P.3d 863 (Idaho 2002) (finding that a state legislative redistricting plan drawn by a bipartisan commission which resulted in population deviations above the 10% threshold set by the U.S. Supreme Court violated the “one person, one vote” principle); *see also* Ken Miller, *Redistricting Encounters More Hurdles; Commission, One Person Short, May Face Delay*, IDAHO STATESMAN, Dec. 5, 2001, Local Section, at 1 (reporting that after the Commission for Reapportionment met for three months, it was still unable to draw districts with population deviations below the 10% federal requirement).

41. Essentially, there are five different legal theories upon which potential claims can be brought: (1) claims of population inequality (either under Article I, Section 2 for congressional districts, or under the “one person, one vote” principle of the Equal Protection Clause of the Fourteenth Amendment for either state or congressional districts); (2) racial gerrymandering;

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whether the issue is one of population equality among districts (apportionment cases involving, for example, the “one person, one vote” principle) or whether the district boundaries themselves are problematic (districting cases involving gerrymandering claims). In this context, much also depends on the nature of the district in question: state legislative districts tolerate greater population deviations than congressional districts. A second distinction focuses on who is impacted by the districts and what is the discriminatory effect—that is, does the district, by design or in effect, result in discrimination based on race or some other protected class? In *Cox v. Larios*, while the plaintiff raised numerous complaints at trial, the only claim at issue on appeal was an alleged violation of the “one person, one vote” principle among state legislative districts.⁴²

1. “One person, one vote” claims

The essence of a “one person, one vote” claim is that the population of a suspect district is so vastly overpopulated, or that other districts are so vastly underpopulated, that the disparity among districts effectively dilutes the voting power of those in the overpopulated districts.⁴³ Equal Protection, “one person, one vote,” claims are similar to claims brought under Article I, Section 2 (proportional congressional apportionment) in that both are tied to population distributions and each requires an unconstitutional population deviation in order to state a claim.⁴⁴ But while “one person, one vote” can apply to both state and congressional districts, Article I claims only apply to the latter. Consequently, the threshold

(3) partisan gerrymandering; (4) violations of section 2 of the Voting Rights Act (VRA) (racial vote dilution); and (5) issues relating to section 5 of the VRA. *See generally* HEBERT ET AL., *supra* note 36.

42. *See Cox v. Larios*, 124 S. Ct. 2806, 2808 (2004); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1322 (N.D. Ga. 2004). Other potential claims include racial vote dilution (section 2 of the VRA), where either district boundaries or unequal population distributions may be illegal so far as they result in a “denial or abridgement of the right of any citizen of the United States to vote on account of race or color” or membership in a language minority group. 42 U.S.C. § 1973(a) (2000) (incorporating 42 U.S.C. § 1973b(f)(2)). Likewise, claims under section 5 of the Voting Rights Act alleging racial discrimination may also invalidate a redistricting plan. However, none of these are relevant to the scope of this Note.

43. *See Reynolds v. Sims*, 377 U.S. 533, 562–64 (1964).

44. *See, e.g., Mahan v. Howell*, 410 U.S. 315, 323–25 (1973) (discussing population deviations required to implicate a violation of equal protection in state legislative districting); *Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969) (requiring precise population equality for congressional districting).

population deviation required to establish a constitutional violation differs according to the type of district at issue. Specifically, states have traditionally been allowed a greater degree of population disparity when apportioning state legislative districts than when apportioning federal congressional districts.⁴⁵

a. The high standard of congressional districting. While the congressional districts at issue in *Cox v. Larios* were ultimately found not to violate Article I, the “one person, one vote” principle, or the Voting Rights Act,⁴⁶ a brief explanation of the high standard applied in the congressional districting context is critical because the Court, in effect, erroneously applied the *congressional* districting standard to invalidate *state* legislative districts.

When drawing and apportioning districts for representatives to the United States Congress, the Supreme Court has interpreted the Constitution to require states to achieve near absolute population equality.⁴⁷ Because of this high standard, any deviation invokes a type of strict scrutiny analysis, requiring states to demonstrate a legitimate state interest or policy that justifies even the slightest divergence.⁴⁸

On this premise, in *Karcher v. Daggett*,⁴⁹ the Court rejected a 0.7% deviation among congressional districts.⁵⁰ First, the Court stated that the parties challenging the apportionment statute carry the burden of proving that “population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population.”⁵¹ If that

45. See, e.g., *Mahan*, 410 U.S. at 323–25; see also *infra* Part IV.B.2.

46. See *Larios*, 300 F. Supp. 2d at 1353–54.

47. See *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (“[A]s nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.” (emphasis added)). Consequently, states must meet a strict standard in achieving near precise mathematical equality among the populations of congressional districts. See *Kirkpatrick*, 394 U.S. at 530–31. Thus, while it may not be possible to achieve perfect mathematical precision among congressional districts, there is no population variance small enough to be considered de minimis such that the “as nearly as practicable” standard could be satisfied without question. *Id.* This high standard has its origins in the text of the Constitution. See U.S. CONST. art. I, § 2.

48. See *Karcher v. Daggett*, 462 U.S. 725, 731 (1983) (“Article I, § 2 . . . ‘permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.’” (quoting *Kirkpatrick*, 394 U.S. at 531)).

49. *Id.*

50. *Id.*

51. *Id.* at 730.

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burden is not met, then the apportionment plan is upheld.⁵² Second, the Court determined that if the plaintiff “can establish that the population differences were not the result of a good-faith effort to achieve equality,” the State must justify “each significant variance” by showing a legitimate state interest.⁵³ In the congressional context for claims of a violation of the “one person, one vote” principle, the threshold question is whether there is, in fact, *any* deviation in district populations.⁵⁴

b. Deference to states in state legislative districting. Unlike the high standard imposed on congressional redistricting, which has a textual basis in Article I, Section 2 of the Constitution,⁵⁵ in the state legislative districting context, the Fourteenth Amendment has been interpreted only to prohibit substantial population deviations among districts.⁵⁶ That is, de minimis population deviations are permitted absent invidious discrimination, primarily because of the deference afforded state legislatures to carry out what is inherently a state legislative function.⁵⁷ Therefore, in contrast to congressional districting cases, prior to *Cox*, the threshold question in state

52. *Id.* at 730–31.

53. *Id.* at 731.

54. *Id.* at 732. The Court went on to explain the rationale for the heightened standard as applied to apportionment of congressional districts:

To accept the legitimacy of unjustified, though small population deviations in this case would mean to reject the basic premise of *Kirkpatrick* and *Wesberry*. We decline appellants’ invitation to go that far. The unusual rigor of their standard has been noted several times. Because of that rigor, we have required that absolute population equality be the paramount objective of apportionment only in the case of congressional districts, for which the command of Art. I, § 2, as regards the National Legislature outweighs the local interests that a State may deem relevant in apportioning districts for representatives to state and local legislatures, but we have not questioned the population equality standard for congressional districts.

Id. at 732–33; *see also* *White v. Weiser*, 412 U.S. 783, 793 (1973); *White v. Regester*, 412 U.S. 755, 763 (1973); *Mahan v. Howell*, 410 U.S. 315, 321–23 (1973).

55. *See* *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (holding that Article I, Section 2 of the U.S. Constitution “means that as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s”).

56. *See* *Reynolds v. Sims*, 377 U.S. 533, 579 (1964) (“[T]he overriding objective [in state legislative districting] must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.”).

57. *See* *White*, 412 U.S. at 764; *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973).

legislative districting has not been whether there is *any* deviation, but rather whether the deviation is greater than 10%.⁵⁸

The 10% rule has arisen by implication through a series of Supreme Court cases beginning with *Reynolds v. Sims*⁵⁹ and is applied in numerous district courts.⁶⁰ The rule ostensibly promotes sovereign discretion by giving states flexibility in crafting their legislative districts.⁶¹ While states are expected to make a good faith effort to achieve population equality among districts,⁶² minor population deviations are not considered to “substantially dilute the weight of individual votes . . . so as to deprive individuals . . . of fair and effective representation.”⁶³

58. See *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983); *Connor v. Finch*, 431 U.S. 407, 418 (1977). Compare *White*, 412 U.S. at 763–64 (finding that where total deviation was 9.9%, the state did not need to provide an explanation and the deviation was not unconstitutional), and *Gaffney*, 412 U.S. at 745 (upholding a deviation of 7.83% without justification by the state), with *Abate v. Mundt*, 403 U.S. 182, 184–87 (1971) (holding that an 11.9% total deviation required a county to provide an explanation). See generally Rosanna M. Taormina, Comment, *Defying One-Person, One-Vote: Prisoners and the “Usual Residence” Principle*, 152 U. PA. L. REV. 431, 440–41 (2003) (“Perhaps because ‘[t]he equal population requirements do not rest on the same stone in the constitutional foundation of the Republic,’ the Court has developed two different legal standards for evaluating federal congressional and state legislative redistricting plans—strict equality and the ten percent rule, respectively.”).

59. See *Voinovich v. Quilter*, 507 U.S. 146, 160 (1993); *Brown*, 462 U.S. at 842; *White*, 412 U.S. at 764; *Gaffney*, 412 U.S. at 745; *Reynolds*, 377 U.S. at 577; see also Taren Stinebrickner-Kauffman, *Counting Matters: Prison Inmates, Population Bases, and “one person, one vote,”* 11 VA. J. SOC. POL’Y & L. 229, 235 (2004) (“The generally accepted rule of thumb for state legislative districting is that if a plan has a maximum deviation of less than 10%, then it is prima facie constitutional; if the maximum deviation is greater than 10%, there is a prima facie violation.”).

60. See, e.g., *Frank v. Forest County*, 336 F.3d 570, 573 (7th Cir. 2003), cert. denied, 124 S. Ct. 1048 (2004) (observing that *Brown* makes it clear that the 10% rule creates a safe harbor); *Wright v. City of Albany*, 306 F. Supp. 2d 1228, 1231 n.5 (M.D. Ga. 2003) (“The Supreme Court has created a ‘safe harbor’ in regards to deviations. While the deviation is an important factor for the Court to consider, anything less than 10% is within the ‘safe harbor.’” (citing *Voinovich*, 507 U.S. at 161)); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 631 (D.S.C. 2002) (“Generally, a ‘safe harbor’ exists for legislatively implemented plans achieving less than a 10% deviation.”).

61. See *Easley v. Cromartie*, 532 U.S. 234, 242 (2001); *Miller v. Johnson*, 515 U.S. 900, 915 (1995); *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *Gaffney*, 412 U.S. at 749; *Mahan v. Howell*, 410 U.S. 315, 322 (1973) (“[B]roader latitude has been afforded the States . . . in state legislative redistricting.”); *Reynolds*, 377 U.S. at 578 (noting that state legislative districting is different in kind from congressional districting; thus, a more flexible standard for state district population deviations is constitutionally acceptable).

62. See *Brown*, 462 U.S. at 842 (quoting *Reynolds*, 377 U.S. at 577).

63. See *White*, 412 U.S. at 764. Nevertheless, at least one scholar warns that if a legislature intends to achieve a deviation of 10%, that may be sufficient evidence of invidious discrimination:

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State legislative districts with deviations above 10% constitute a *prima facie* equal protection violation,⁶⁴ effectively triggering a strict scrutiny review of the state plan. States must meet the “one person, one vote” requirement stemming from the Equal Protection Clause,⁶⁵ but courts have permitted states to adopt plans with significant deviations, so long as these deviations are “justifiable and legally sustainable.”⁶⁶ In other words, if states can provide a sufficient, nondiscriminatory justification based on some important state interest, even deviations above 10% can be sustained.⁶⁷

The exact function of the 10% rule is at the heart of the issue in *Cox*. Many courts have expressly recognized the rule as a safe harbor within which a state redistricting plan cannot be challenged absent invidious discrimination.⁶⁸ Other courts have treated the rule as an evidentiary rule that merely assigns the burden of proof: below 10%, the plaintiff must prove invidious discrimination; above 10%, the state must show a valid state justification.⁶⁹

First, the plaintiff must show deviation sufficient to make out a *prima facie* case. Deviations below ten percent ordinarily will be considered *de minimis*. However, legislators should not be tempted by the “*de minimis*” rule to aim for a ten percent deviation, because their obligation is to make “an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable.” Were a state to set “ten percent deviation” as a goal, this in and of itself may provide sufficient additional evidence of invidious discrimination to constitute a *prima facie* case of unconstitutionality.

Katharine Inglis Butler, *Redistricting in a Post-Shaw Era: A Small Treatise Accompanied by Districting Guidelines for Legislators, Litigants, and Courts*, 36 U. RICH. L. REV. 137, 154 (2002) (alteration in original) (citations omitted).

64. See *Gaffney*, 412 U.S. at 748–49.

65. See *Reynolds*, 377 U.S. at 577 (“[T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.”). *Reynolds* involved Alabama senatorial districts that were disproportionate by factors of as much as forty to one. *Id.* at 545. House districts varied by as much as sixteen to one. *Id.* The Alabama State Legislature had not reapportioned itself in over sixty years. *Id.* at 539–40.

66. See *Gaffney*, 412 U.S. at 745.

67. *Id.* at 749. The Court found such a legitimate interest in *Voinovich v. Quilter* where it upheld a state legislative districting plan with deviations above 10% because the state could have been reasonably advancing a state policy of preserving county boundaries. 507 U.S. 146, 161–62 (1993). Likewise, in *Brown v. Thomson*, the Court upheld a 60% deviation in Wyoming state legislative districts because of state constitutional and historical interests. 462 U.S. at 843.

68. See *supra* note 60.

69. See, e.g., *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996) (“In other words, for deviations below 10%, the state is entitled to a presumption that the apportionment plan was the result of an ‘honest and good faith effort to construct districts . . . as nearly of equal

2. *Gerrymandering claims*

Unlike “one person, one vote” claims, gerrymandering claims, whether racially or politically motivated, deal with the discriminatory effects of irregularly drawn district boundaries, generally without emphasis on population deviations.⁷⁰

Claims of racial gerrymandering must prove that race factors predominate in the drawing of district lines and that the redistricting legislation has negative effects on a particular racial class.⁷¹ Likewise, in partisan gerrymandering claims, plaintiffs must prove both intentional discrimination against a political group and an actual discriminatory effect resulting from the district lines.⁷² Racial gerrymandering was not at issue in *Cox v. Larios*, and while the partisan gerrymandering claim was dismissed by the district court, the rationale employed by the three-judge panel and by the concurrence on appeal to the Supreme Court implicates principles relating to partisan gerrymandering.

Prior to *Davis v. Bandemer*, partisan gerrymandering was thought to be a nonjusticiable political question.⁷³ And while the facts of *Davis* were insufficient to sustain a claim of partisan gerrymandering, the Court did recognize that legislatures could go too far.⁷⁴ However, in the recent case of *Vieth v. Jubelirer*, the Court revisited *Davis v. Bandemer* and, in a plurality opinion, found that partisan gerrymandering claims are not justiciable.⁷⁵

population as is practicable.’ However, this is a rebuttable presumption.” (citation omitted)); *Cecere v. County of Nassau*, 274 F. Supp. 2d 308, 311 (E.D.N.Y. 2003) (“Given that the deviation rate is under 10%, the plan is presumptively constitutional.”); *Hulme v. Madison County*, 188 F. Supp. 2d 1041, 1047 (S.D. Ill. 2001) (“[A] total population deviation of less than 10% enjoys a presumption of validity and will not, by itself, support a claim of invidious discrimination.”).

70. See *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (Fortas, J., concurring).

71. See *Shaw v. Reno*, 509 U.S. 630, 644 (1993).

72. See *Davis v. Bandemer*, 478 U.S. 109, 127 (1986).

73. See, e.g., *Jimenez v. Hidalgo County Water Improvement Dist. No. 2*, 424 U.S. 950 (1976) (affirming the decision of a three-judge District Court that determined that political gerrymandering equal protection challenges to a state legislative plan were nonjusticiable); *Ferrell v. Hall*, 406 U.S. 939 (1972); *Wells v. Rockefeller*, 398 U.S. 901 (1970); *WMCA, Inc. v. Lomenzo*, 382 U.S. 4 (1965). But see, e.g., *Davis*, 478 U.S. at 120 (dismissing for want of a substantial federal question but inferring justiciability of partisan gerrymandering claims); *Kelly v. Bumpers*, 413 U.S. 901 (1973); *Archer v. Smith*, 409 U.S. 808 (1972).

74. See *Davis*, 478 U.S. at 119.

75. *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1778 (2004) (plurality opinion) (“[Since *Davis v. Bandemer*,] no judicially discernible and manageable standards for adjudicating political

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III. COX V. LARIOS

While this Note focuses on the implications of *Cox v. Larios*⁷⁶ as a case where the Supreme Court wrongly affirmed the lower court, the totality of the Court's opinion amounts to only four words: "The judgment is affirmed."⁷⁷ The case was heard on direct appeal and summarily affirmed.⁷⁸ Yet, unlike a denial of certiorari review, summary dispositions bind lower courts with the reasoning of the three-judge district court.⁷⁹ Therefore, the implications of the summary affirmance in *Cox*, as espoused in Justice Stevens's concurrence and in the reasoning of the district court, upset precedent and create significant issues for state legislatures across the nation. Thus, this discussion spends considerable time analyzing the logic arising in both Justice Stevens's concurrence and in the judgment of the three-judge district court.

A. Factual Background

The case arrived at the district court after the Georgia General Assembly enacted both state legislative and congressional reapportionment⁸⁰ plans, beginning in 2001.⁸¹ The 2000 U.S. Census revealed that Georgia's total population increased enough to give them the right to two additional congressional seats pursuant to 2 U.S.C. § 2a.⁸² Additionally, the census showed that the urban and

gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.").

76. 124 S. Ct. 2806 (2004). Hereinafter, *Cox* refers to the affirming decision of the Supreme Court affirmation, which is the principal case of this Note. *Larios* will be used to denote the prior district court ruling, *Larios v. Cox*, 300 F. Supp. 2d 1320 (2004), in the same case.

77. *Cox*, 124 S. Ct. at 2806.

78. *Id.*

79. See *Lunding v. N.Y. Tax App. Trib.*, 522 U.S. 287, 307 (1998) (stating that while the Supreme Court may give less precedential value to its own summary dispositions, the lower courts are nevertheless bound); *U.S. v. Blaine County, Montana*, 363 F.3d 897, 904 (9th Cir. 2004) (stating that it is a "well-established rule that the Supreme Court's summary affirmances bind lower courts, unless subsequent developments suggest otherwise" (citing *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975))).

80. See *Larios*, 300 F. Supp. 2d at 1323. Because the Georgia General Assembly oversaw both redistricting and reapportionment efforts, the terms are used interchangeably to describe the factual history of the case.

81. *Id.* In Georgia, the General Assembly is required to engage in redistricting and reapportionment following each U.S. decennial census. See GEORGIA CONST. art. III, § 2, ¶ 2.

82. See *Larios*, 300 F. Supp. 2d at 1323.

suburban areas of north Georgia grew at a much faster rate than the population of rural, southern Georgia, leading to the redistricting of state legislative districts as well.⁸³

After a lengthy and politically charged process—encompassing a gubernatorial veto, two special legislative sessions, and a series of lawsuits—the Georgia General Assembly eventually adopted separate state House and Senate legislative redistricting plans.⁸⁴ In accord with the requirements of section 5 of the Voting Rights Act,⁸⁵ Georgia filed for declaratory judgment in the United States District Court for the District of Columbia, seeking a declaration that the plans enacted in the special sessions “did not have the purpose or would not have the effect of denying or abridging the right to vote on account of race or color.”⁸⁶ Ultimately, the plans in question were absolved of any allegations of racial discrimination and were precleared.⁸⁷

Meanwhile, members of the Republican Party who were adversely affected by the plans, including several incumbent legislators, filed suit in the federal District Court for the Northern District of Georgia, alleging that both the congressional and the

83. *Id.*

84. In two special sessions, the General Assembly enacted bills apportioning the state senate (“the 2001 Senate Plan”) and state house of representatives (the “House Plan”), and Governor Roy Barnes subsequently signed both bills. *Id.* at 1323–24.

Congressional redistricting in Georgia is a collaborative effort between the state House of Representatives and the state Senate. The House and Senate each passed a redistricting plan, both of which were referred to a conference committee composed of six members, three each from the House and Senate. There were no Republican representatives on the conference committee. On the final day of the special session, the conference committee sent a compromise redistricting plan back to the House and Senate. Each chamber passed the plan, and it was signed by the governor.

Id. at 1335.

85. Georgia is one of the specified jurisdictions required to receive preclearance from the federal government upon any change to its election laws. 42 U.S.C. § 1973c (2000).

86. *Larios*, 300 F. Supp. 2d at 1324.

87. A three-judge panel precleared the congressional and house plans but refused to preclear the 2001 Senate Plan. *Id.* Eventually, the section 5 issues with the 2001 Senate Plan were resolved in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), *vacating* 195 F. Supp. 2d 25 (D.D.C. 2002). Uncertain of the fate of the 2001 Senate Plan, however, the General Assembly adopted a revised senate plan (“the 2002 Senate Plan”) that, although not substantially different from the 2001 Senate Plan, was precleared by a federal district court. *Georgia v. Ashcroft*, 204 F. Supp. 2d 4, 15–16 (D.D.C. 2002).

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state legislative districting plans were unconstitutional.⁸⁸ While only the state legislative redistricting plan was at issue on appeal, a brief summary of the district court's rationale in upholding the congressional plan helps put this Note in context.

1. The congressional plan

In harmony with the strict standard applied to congressional reapportionment, the three-judge district court reviewed Georgia's 2001 Congressional Plan,⁸⁹ which had a total population deviation of only seventy-two people, or 0.01% of the "ideal congressional district."⁹⁰ After most of the plaintiff's claims were either dismissed or decided on summary judgment in favor of the state, the district court was left only to consider whether the population deviation violated the "one person, one vote" principle.⁹¹ To determine this, the court considered two questions: (1) whether deviations could be reduced by good faith effort, and (2) whether the deviations could be justified.⁹²

88. *Larios*, 300 F. Supp. 2d at 1321–22. Pursuant to 28 U.S.C. § 2284(a) (2000), a three-judge court was convened, including one circuit court judge and two district court judges. *Id.* at 1322.

89. While the congressional plan is not the focus of the controversy in the principal case, this Note briefly reviews the facts and reasoning of the district court for the purpose of framing inconsistencies in the state legislative districting decision. The court invalidated the state legislative plans because of a process enveloped in partisan influence. Yet the court found the congressional plan to meet the higher constitutional standards uniquely applicable to congressional apportionment, even though the plan was the result of the same process and involved similar, if not more significant political influence. Thus, the fact that the district court upheld the congressional plan but invalidated the state plan shows an element of inconsistency. See discussion *infra* Part III.A.1.

90. The court noted that the average district's absolute deviation was only seventeen people, or 0.003%. *Larios*, 300 F. Supp. 2d at 1335.

91. The Plaintiffs challenged the congressional plan on the basis that it violated Article I, Section 2 of the Constitution, the "one person, one vote" principle, and that it violated the Equal Protection Clause based on partisan and racial gerrymandering. *Id.* at 1322. The Plaintiffs also alleged that the state violated the First Amendment, 2 U.S.C. § 2c, and the Equal Protection Clause by using a combination of single- and multi-member districts in the State House of Representatives. All of these claims were either dismissed or decided in favor of the state on summary judgment. *Id.*; see also *Larios v. Perdue*, 306 F. Supp. 2d 1190 (N.D. Ga. 2003) (dismissing claims brought pursuant to 2 U.S.C.S. § 2c, which challenge the combination of single- and multi-member districts). The court also granted summary judgment in favor of the state on the claims of partisan gerrymandering. *Larios*, 300 F. Supp. 2d at 1322.

92. *Larios*, 300 F. Supp. 2d at 1354.

Because there was testimony that a plan could have been drawn with a deviation of plus or minus one person, which split fewer counties, was more compact, and divided fewer voting precincts,⁹³ the court determined that a “good faith” effort had not been made.⁹⁴ Additionally, the court found that the congressional districts were the obvious result of political influences, revealing “a process dominated by the personal interests of individual legislators and not by the traditionally recognized redistricting criteria.”⁹⁵ Highlighting this principle, the court found that of the thirteen congressional districts created under the plan, four of eight existing Republican representatives were paired against each other while no Democrat was paired against another.⁹⁶

However, in asking whether the deviations could be justified, the court discounted the partisan influence, stating that “[p]olitics and political considerations are . . . ‘inseparable from districting and apportionment’” and that “a redistricting process need not be free of politics in order to be constitutional.”⁹⁷ Thus, to find the state’s justification for the deviations, the court turned to the testimony of the principal reapportionment committee staff member who testified that given the reality of political constraints, a zero population deviation became impossible without “splitting more precincts or further splitting existing split precincts along something other than

93. *Id.*

94. *Id.* Despite spending considerable time describing how a better plan could have been crafted, the court concluded that “it is immaterial that a ‘better’ plan might have been possible.” *See id.* at 1334–37, 1353–56.

95. *Id.* at 1355 (referencing a specific legislator’s desire to create districts that would lead to successful congressional campaigns for his son). One state senator admitted that passing a districting plan is an “extraordinarily political process because so many legislators have aspirations of being elected to Congress and . . . have an interest in crafting a district they consider politically desirable.” *Id.* at 1336 (restating the testimony of Senator Eric Johnson, a Republican). One of the most oddly shaped Congressional districts, touching parts of eleven counties, resulted from various Senators attempting to create districts that would be “advantageous in the event they attempted to launch their own congressional careers.” *Id.* Another district was drawn across the middle of the state. This decision was influenced by one legislative leader who wanted to create a more challenging district for a sitting congressman. *Id.* (revealing the former speaker of the house’s intent to make Congressman Barr’s reelection “more challenging”). In fact, testimony was offered that political considerations played a significant role in the shape of one district simply because “each vote in the Senate would be of critical importance” in passing the compromise bill, thus “the drafters could not afford to alienate any one senator.” *Id.*

96. *Id.* at 1356.

97. *Id.* at 1354 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)).

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an easily recognizable boundary.”⁹⁸ Therefore, on the remaining “one person, one vote” claim, the district court upheld the congressional districting plan, reasoning that the population deviation was small,⁹⁹ the state had an interest in avoiding further precinct splits,¹⁰⁰ and the deviations did not result in any partisan advantage.¹⁰¹

2. State legislative plans

Yet while the district court ultimately discounted political influence in its determination that the congressional redistricting plan withstood constitutional scrutiny, the court found that the state legislative redistricting plans—which resulted from the very same process and were shaped by similar, if not exactly the same, partisan influences¹⁰²—went too far.¹⁰³ In essence, even though the district deviations were below 10%, the court reasoned that because the deviations were apparently the result of undue political influence, they amounted to a violation of the “one person, one vote” principle.

One of the many guidelines that the Georgia General Assembly adopted required that each House and Senate district be within 5% of the ideal district so that the total deviation did not exceed 10%.¹⁰⁴ Bipartisan committees were formed in both the House and Senate,¹⁰⁵ which ultimately adopted separate plans, each with a total deviation of 9.98%.¹⁰⁶ According to the legislative staff working with the committees, because the plans would ultimately need a coalition of

98. *Id.* “[H]aving precinct lines correspond with major natural or man-made boundaries made it easier for election officials who are responsible for maintaining an accurate list of voters” and made it easier for “voters to determine what district they are in.” *Id.* at 1336.

99. *Id.* at 1356 (the showing required to justify population deviations is proportional to the size of the deviations).

100. *Id.* at 1354–55.

101. *Id.* at 1356.

102. *See id.* at 1323.

103. *See id.* at 1322, 1338.

104. *Id.* at 1323.

105. The House committee consisted of twenty-nine House members, eighteen Democrats and eleven Republicans. *Id.* at 1325. The Senate committee consisted of twenty-four senators, twenty Democrats and four Republicans. *Id.* at 1327. Separate Democrat and Republican subcommittees were formed to draft competing plans. *Id.* at 1325–26.

106. *See id.* at 1326–27.

votes to pass, the political desires of many of the individual members were taken into account in setting district boundaries.¹⁰⁷

Consequently, because Democrats were in the majority and largely represented urban and rural districts,¹⁰⁸ the court concluded that many of the senior incumbents sought to preserve their own political influence and that of their constituent districts by drawing the most favorable districts possible.¹⁰⁹ The result was that a number of “Democrat-leaning” rural and urban districts were underpopulated while “Republican-leaning” suburban districts were often overpopulated.¹¹⁰ Also, the House Plan paired forty-two incumbents in the same districts for reelection, including thirty-seven Republicans and nine Democrats. In the Senate, ten incumbent Republicans were drawn into districts pairing them against other incumbents, compared with only two incumbent Democrats.¹¹¹ Despite the seeming advantages afforded to Democrats, the 2002 election, carried out under the plans, resulted in no measurable adverse impact on Republicans.¹¹²

3. District court findings and conclusions of law

As previously mentioned, among the plaintiff’s several claims,¹¹³ only the claim that the state plans violated the “one person, one vote” principle of the Fourteenth Amendment survived dismissal or

107. *Id.* at 1326 (“[I]ncumbents in all areas of the state sought to limit the expansion of their districts to what was considered legally necessary, i.e., a population deviation of \pm 5%.”).

108. *See id.*

109. *See id.*

110. *Id.* Overpopulated districts tend to indicate a lessening in the weight of votes cast within the district, while underpopulated districts indicate the opposite. Exactly one-half of all house districts had a deviation of plus or minus 4.0%, with some as high as plus or minus 4.9%. *Id.* The House Plan also split eighty counties into 266 parts. *Id.*

111. *Id.* at 1327.

112. For example, under the plan, the 2002 election resulted in Republicans gaining two senate seats, and ultimately control of the Senate. Before the enactment of the plan, Democrats had only thirty-two senate seats and Republicans held twenty-four. With the election, Republicans gained two additional seats, but following the election, four Democrats switched allegiance to the Republican party, giving Republicans majority control of the state Senate. *Id.* at 1327. While one could argue that Republicans might have gained greater influence had districts been drawn more favorably, such an outcome is pure speculation based on assumptions of voter preferences. The actual impact of the legislative plans had no actual negative impact on Republicans nor did they diminish the preexisting Republican influence in the state legislature.

113. The plaintiffs alleged violations of the First Amendment, as well as partisan and racial gerrymandering. *See supra* note 91.

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summary judgment.¹¹⁴ There were no viable claims of racial discrimination, and the claim of unconstitutional partisan gerrymandering was decided in favor of the State on summary judgment.¹¹⁵

Yet, in deciding the state legislative “one person, one vote” claim, the court essentially combined the facts underlying the failed partisan gerrymandering claim with the purportedly partisan-motivated population deviation, which was below 10%, to invalidate the plans.¹¹⁶ Citing *Karcher*, a congressional apportionment case, the court reasoned that “deviations from exact population equality may be allowed in some instances in order to further legitimate state interests”¹¹⁷ However, it indicated that “where population deviations are not supported by such legitimate interests but, rather, are tainted by arbitrariness or discrimination, they cannot withstand constitutional scrutiny.”¹¹⁸ In the court’s view, attempts by legislators to protect Democratic incumbents and minimize the degradation of rural and inner-city legislative influence were invidious.¹¹⁹

The state contended that previous Supreme Court decisions on state legislative districting had created a 10% safe harbor, within which states need not provide any justification absent invidious, racial discrimination.¹²⁰ The court rejected this argument, framing the “so-called ‘ten percent rule’” as a means for allocating the burden of proof.¹²¹ That is, if the plaintiff can show a deviation above 10%, the burden falls on the defendant-state to show adequate justification.¹²² But even if the plaintiff fails to show such a deviation,

114. *See Larios*, 300 F. Supp. 2d at 1322.

115. *Id.*

116. *Id.* at 1330 n.7. The court indicated that the facts offered to support partisan gerrymandering, while failing to support a claim, showed “intent to use population deviations to further advance the same goals.” *Id.*

117. *Id.* at 1337 (citing *Karcher v. Daggett*, 462 U.S.725, 740–41 (1983)).

118. *Id.* at 1338 (citing *Roman v. Sincock*, 377 U.S. 695 (1964) (dealing with a state legislative apportionment case with excessive population deviations, such that population-per-senator and population-per-representative disparities ranged from 1,643 to 64,820)).

119. *Id.*

120. *Id.* at 1340.

121. *Id.* at 1339 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973) (“[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.”)).

122. *Id.* at 1340 (citing *Brown v. Thomson*, 462 U.S. 835, 842 (1983)).

it can nevertheless provide other evidence to meet its burden of proof.¹²³ The court found evidence that the 9.98% deviation was intended to advance inappropriate regional and partisan motivations sufficient to establish a violation of the “one person, one vote” principle.¹²⁴ The court then sought state justification by reviewing whether any “traditional districting criteria” were the basis of the deviations.¹²⁵

a. Evidence of regional interests. The court found evidence that a substantial portion of the 9.98% population deviation was the result of “a deliberate and systematic policy of favoring rural and inner-city interest at the expense of suburban areas [around] Atlanta”¹²⁶ Relying on *Reynolds v. Sims*, the court noted that where significantly greater voting power is given to citizens in one region of the state, the “one person, one vote” principle is clearly violated.¹²⁷ The court did recite dicta from another case indicating, however, that “regional considerations in drawing of district lines were likely permissible so long as they did not result in substantial vote dilution.”¹²⁸ Despite the purported regional interests that were allegedly designed to give rural, southern Georgia greater voting power, southern Georgia

123. “[T]he 10% threshold ‘does not completely insulate a state’s districting plan from attack of any type’ but rather ‘serves as the determining point for allocating the burden of proof in a “one person, one vote” case.’” *Id.* (quoting *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996)).

124. *Id.* at 1327, 1341–42, 1348.

125. *Id.* at 1341–42.

126. *Id.* at 1327. Emphasizing statements about not wanting to “lose any more representation out of rural south Georgia than they had to,” the court determined that state legislators were primarily motivated by regional interests that resulted in the deviations. *Id.* at 1342. The court reasoned that the deviations were “an unambiguous attempt to hold onto as much of that political power as they could . . . aided by what they perceived to be a 10% safe harbor.” *Id.* at 1328.

127. *Id.* at 1342–43 (citing *Reynolds v. Sims*, 377 U.S. 533, 567–68 (1964)). The court cited a series of cases in which districting plans with a regional bias were invalidated *Id.* at 1344–45 (citing *Marshall v. Hare*, 378 U.S. 561, aff’g 227 F. Supp. 989 (D. Mich. 1964) (deviation of 2 to 1); *Davis v. Mann*, 377 U.S. 678 (1964) (deviation of 2.65 to 1); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964) (deviation of 1.5 to 1)).

128. *Id.* at 1345 (citing *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1035 (D. Md. 1994)).

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actually lost seven seats in the House and two seats in the Senate due to the redistricting plan.¹²⁹

b. Evidence of incumbent protection. The court found further evidence of invidious discrimination in Democratic efforts to protect incumbents because they created an unfair bias against Republicans.¹³⁰ Rather than focusing on the net result of the elections, in which Republicans actually gained seats in both houses, the court instead focused on the fact that more incumbent Republicans were paired with other incumbents than were Democrats; the court concluded that that the plans represented an intentional effort to allow incumbent Democrats to maintain or increase their delegation,¹³¹ while making reelection more difficult for certain, targeted Republican incumbents.¹³² Because this was purportedly achieved by “vastly” overpopulating the Republican districts by as much as 4.97%,¹³³ this imbalance formed another basis for invalidation.¹³⁴

129. *Id.* It is possible that rural areas might have lost more seats had districts been drawn more favorably for suburban areas, and this is ostensibly why the court found the regional motivations to violate the “one person, one vote” principle. *See id.* at 1347.

130. *Id.* at 1330. The court seems to discount evidence that Republicans actually gained seats in both the House and the Senate, inferring that the primary focus was not on the net result of partisan success, but rather on the effect on incumbents.

131. *Id.* Thirty-seven Republicans and nine Democrats were paired with incumbents in the House, with the result that only twenty-eight of the thirty-six paired incumbents (Republican and Democrat) could be reelected. *Id.* at 1328. Similarly, in the Senate, there were four pairings pitting Republican incumbents against each other and two that pitted incumbent Republicans against incumbent Democrats. *Id.* at 1329–30. The court noted, as further evidence of supposed impropriety, that one Republican senator was drawn into a district with a Democrat incumbent while an open district was drawn within two blocks of her residence. *Id.* at 1330. Additionally, two of the most senior Republican senators were drawn into the same district, and one Republican representative was drawn into the same district as a Democrat incumbent, presumably because the Republican was “generally disliked.” *Id.*

132. *Id.* (“Democratic incumbents attempted to draw districts that would enhance their own prospects at re-election and further their other political ends . . . but also that they targeted particular Republicans to prevent their re-election.”). The court went on to state that because the redistricting process was applied in a “blatantly partisan and discriminatory manner,” the plans “destroyed the re-election hopes of dozens of incumbents.” *Id.* at 1347. In fact, a total of eighteen Republican incumbents in the House and four in the Senate who were so paired actually lost their 2002 reelection bid while only three Democrats (all from the House) were ousted in the same way. *Id.* at 1329–30.

133. *Id.* at 1348. The author quotes the word “vastly” because he believes it to be a gross mischaracterization and overstatement of a less than 5% deviation.

134. *Id.*

c. Examining traditional districting criteria as a justification. Having determined that the plaintiff did provide sufficient evidence of invidious discrimination, the court next examined whether the population deviations in the state legislative redistricting plans might have been the result of the state's interest in employing "[t]raditional [r]edistricting [c]riteria."¹³⁵ The court reviewed the types of policies that "might permit some deviation from perfect population equality."¹³⁶ Among the criteria mentioned, the court identified "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives."¹³⁷

The court found that the State did not try to defend the 9.98% deviation on the basis of any traditional criteria.¹³⁸ But as with the congressional plan, the court conceded that the preservation of precinct lines may have been a marginal concern in the state legislative plans, but unlike the congressional plan, the court invalidated Georgia's House and Senate Plans, finding that the preservation of precinct lines was insufficient to explain the state legislative plan's deviation.¹³⁹

B. The Direct Appeal: Summarily Affirmed

Pursuant to 28 U.S.C. § 1253,¹⁴⁰ the State of Georgia appealed the invalidation of the state legislative redistricting plans directly to the Supreme Court.¹⁴¹ The Court issued a four-word opinion,¹⁴² summarily affirming the decision of the three-judge district court,¹⁴³

135. *Id.* at 1331.

136. *Id.*

137. *Id.* (quoting *Karcher v. Daggett*, 462 U.S. 725, 40 (1983)).

138. *Id.*

139. *Id.* at 1333 n.9.

140. 28 U.S.C. § 1253 (2004) reads:

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Id.

141. *See Cox v. Larios*, 124 S. Ct. 2806 (2004).

142. *Id.* ("The judgment is affirmed.")

143. *See* SUP. CT. R. 18.12 (providing for the summary disposal of cases brought on direct appeal; if not disposed of summarily, the appeal is set for full briefing and argument).

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with Justice Stevens filing a concurring opinion in which Justice Breyer joined.¹⁴⁴ Justice Scalia filed a dissent.¹⁴⁵

I. Stevens's concurrence

Justice Stevens characterized *Cox* as an affirmation that Georgia's legislative reapportionment plans violated the "one person, one vote" principle of the Equal Protection Clause.¹⁴⁶ He supported the district court's conclusion that Georgia's plan was invalid, both because improper regional interests influenced the district populations¹⁴⁷ and because the deviations showed evidence of an intentional effort to maintain or increase the power of incumbent Democrats.¹⁴⁸

After a brief review of selected findings of the district court on the partisan impact of the Georgia plans, Justice Stevens focused on the impact of the plans on incumbent legislators.¹⁴⁹ He reviewed the scenarios played in the district court, discussing the manner in which district lines were drawn to force Republican incumbents to run against each other or against Democrat incumbents.¹⁵⁰ He also agreed with the district court that the overpopulation of Republican-leaning districts led to "significant overall partisan advantage for Democrats"¹⁵¹

Justice Stevens also emphasized the absence of any state proffered justification for the deviations, mentioning a litany of "traditional districting criteria," specifically, compactness, contiguity, keeping counties whole, and preserving the cores of prior districts.¹⁵² He then reasserted the district court's conclusion that the deviations were intended to benefit Democrats by maintaining and/or

144. *Cox*, 124 S. Ct. at 2806 (Stevens, J., concurring).

145. *Id.* at 2809.

146. *Id.* at 2806.

147. *Id.* (citing *Larios v. Cox*, 300 F. Supp. 2d 1320, 1327 (N.D. Ga. 2004)).

148. *Id.* (citing *Larios*, 300 F. Supp. 2d at 1329).

149. *Id.* at 2807 ("[Democrat drafters] intended not only to aid Democratic incumbents in getting re-elected but also to oust many of their Republican incumbent counterparts.").

150. *Id.* Justice Stevens highlighted the plight of one Republican who was pitted against an incumbent Democrat simply because she was "generally disliked." *Id.*

151. *Id.* (quoting *Larios*, 300 F. Supp. 2d at 1331).

152. *Id.*

increasing their influence through “the impairment of the Republican incumbents’ reelection prospects.”¹⁵³

Justice Stevens further rejected the argument that a “safe harbor” existed for population deviations of less than 10% because such a rule would weaken the “one person, one vote standard.”¹⁵⁴ Citing *Vieth v. Jubelirer*,¹⁵⁵ which declared partisan gerrymandering claims to be nonjusticiable, he cautioned that “the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength.”¹⁵⁶ Despite the fact that the claim of partisan gerrymandering had been dismissed at trial, Justice Stevens seems to confuse the plaintiff’s “one person, one vote” claim as one of partisan gerrymandering: “Drawing district lines that have no neutral justification in order to place two incumbents of the opposite party in the same district is probative of [partisan gerrymandering].”¹⁵⁷

Expressing apparent dissatisfaction for the plurality opinion in *Vieth*, Justice Stevens concluded by stating that the “unavailability of judicially manageable standards cannot justify a refusal to condemn even the most blatant violation of a state legislature’s fundamental duty to govern impartially.”¹⁵⁸

153. *Id.* (quoting *Larios*, 300 F. Supp. 2d at 1334).

154. *Id.* at 2808 (“[A]ppellant invites us to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than ten percent, within which districting decisions could be made for any reason whatsoever. The Court properly rejects that invitation.”).

155. 124 S. Ct. 1769 (2004).

156. *Cox*, 124 S. Ct. at 2808.

157. *Id.* Justice Stevens seemed to further justify his support of the partisan gerrymandering claim by explaining that, in the 2002 election, state Republican senatorial candidates won a majority of votes statewide (991,108 votes to 814,641 for Democrats). *Id.* Yet, Justice Stevens clearly notes that the partisan gerrymandering claim was dismissed, was not appealed, and was not before the court. *Id.* Perplexingly, Justice Stevens stated, “[H]ad the Court in *Vieth* adopted a standard for adjudicating partisan gerrymandering claims, the standard likely would have been satisfied in this case.” *Id.*

158. *Id.* at 2809 (quoting *Vieth*, 124 S. Ct. at 1813 (internal quotations marks omitted)). Apparently referencing *Vieth*, Justice Stevens also stated, “I remain convinced that in time the present ‘failure of judicial will,’ will be replaced by stern condemnation of partisan gerrymandering that does not even pretend to be justified by neutral principles.” *Id.* (citations omitted).

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2. *Scalia's dissent*

In his dissent, Justice Scalia framed the issue in terms of giving deference to states in the redistricting of their own legislative boundaries.¹⁵⁹ While Justice Stevens rejected the notion that precedent provided a 10% “safe harbor,”¹⁶⁰ Justice Scalia recognized the established principle that “minor deviations” among state legislative districts—that is, de minimis deviations below 10%—do not require justification by the states because they are “insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment”¹⁶¹

Justice Scalia highlighted what is arguably the critical issue: “whether a districting plan that *satisfies* this 10% criterion may nevertheless be invalidated on the basis of circumstantial evidence of partisan political motivation.”¹⁶² He reminded the Court that this issue was brought on appeal and not on a petition for writ of certiorari; thus the case should “not [be] summarily affirm[ed] unless it is clear that the disposition . . . is correct.”¹⁶³ He concluded that the district court’s decision was not clearly correct because a strong case existed that Georgia’s plan complied with constitutional requirements.¹⁶⁴

First, he noted that the only claim on appeal was an alleged “impermissible *political* bias” that resulted from population deviations that were not easily justified by “traditional” redistricting criteria.¹⁶⁵ The plaintiff made no viable contention that the deviations, all smaller than 5% from the mean, were based on “race or some other suspect classification.”¹⁶⁶

Even if the de minimis population deviations in the Georgia plan required justification, the flaw in the analysis of the concurring opinion, according to Justice Scalia, was that it assumed that

159. *Id.* (Scalia, J., dissenting).

160. *See supra* note 154 and accompanying text .

161. *Cox*, 124 S. Ct. at 2809 (citations omitted); *Voinovich v Quilter*, 507 U.S. 146, 160–62 (1993); *see also* Hasen, *supra* note 13 (stating that many read prior Supreme Court cases as creating a 10% safe harbor and that the summary affirmance in *Cox* “seems to reverse that thinking”).

162. *Cox*, 124 S. Ct. at 2809 (Scalia, J., dissenting).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

“politics as usual” was not a traditional criterion of redistricting.¹⁶⁷ He cited *Vieth*, in which “all but one of the Justices agreed that [‘politics as usual’] is a traditional criterion, and a constitutional one, so long as it does not go too far.”¹⁶⁸ He added his belief that “[i]t is not obvious . . . that a legislature goes too far when it stays within the 10% disparity in population our cases allow.”¹⁶⁹ As a consequence, Justice Scalia foreshadowed that this destruction of the 10% safe harbor elaborated in previous decisions would invite a flurry of politically motivated lawsuits based on “allegations of political motivation whenever there is population disparity”¹⁷⁰ While not arguing to summarily reverse, Justice Scalia proposed setting the case for argument.¹⁷¹

IV. ANALYSIS: TAKING THE POLITICS OUT OF POLITICS

The Supreme Court’s summary affirmation of *Larios* represents a precarious departure from precedent that will open the door to judicial dominion of the state legislative process with regards to state legislative redistricting.

First, the Court erred in using evidence of partisan influence in the failed partisan gerrymandering claim to substantiate a purported violation of the “one person, one vote” principle—essentially creating a new cause of action. In doing this, the Court, at least by implication, rejects the 10% safe harbor rule for states crafting their own legislative districts and misapplies the congressional standard to state legislative districts. Even if the 10% rule were not a safe harbor but was instead a rule for allocating the burden of proof, evidence of unfair political bias is not *prima facie* evidence of invidious discrimination requiring state justification of some traditional state interest—that is, strict scrutiny does not apply because incumbent politicians are not a protected class. Another flaw in the reasoning of *Cox* is that political influence is improper in the redistricting process; politics is an inherent part of the legislative process. Finally, in

167. *Id.*

168. *Id.* (citing *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004)).

169. *Id.* at 2809–10.

170. *Id.* at 2810. He also stated, “Ferretting out political motives in minute population deviations seems to me more likely to encourage politically motivated litigation than to vindicate political rights.” *Id.*

171. *Id.* Pursuant to Court Rules, cases brought on direct appeal can be disposed of summarily, or can be set for full briefing and oral argument. SUP. CT. R. 18.12.

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rejecting the 10% safe harbor and proscribing political influence, the Court invites an increase in redistricting litigation that will cost states millions of dollars and infringe on states' ability to exercise their legislative discretion in redistricting.

A. The Court's Erroneous Equal Protection Arithmetic

The Court ultimately erred by attempting to dress up the failed partisan gerrymandering claim—dismissed at the district court—as a violation of the “one person, one vote” principal of equal protection.¹⁷² Simply put, a failed gerrymandering claim plus a failed “one person, one vote” claim should not equal a successful equal protection claim—that is nothing more than flawed legal math.¹⁷³

Partisan gerrymandering and “one person, one vote” claims are distinct creatures. A gerrymandering theory relates exclusively to the effect of drawing district boundaries in a discriminatory way.¹⁷⁴ In contrast, a “one person, one vote” theory is directly related to the weight of an individual vote resulting from the population or demographics of a district.¹⁷⁵ Confusing the two and framing the claim in this way gave new life to the Georgia Republicans' cause. The Court essentially endorsed a new cause of action where two failed claims can be combined to create a novel successful claim.¹⁷⁶

While Justice Stevens's desire to issue a “stern condemnation of partisan gerrymandering”¹⁷⁷ may be noble, in light of *Vieth's* holding that “political gerrymandering claims are nonjusticiable,”¹⁷⁸ Justice Stevens is likely wrong. In affirming the district court, the Supreme Court found a violation of the “one person, one vote” principle but

172. See *Larios v. Cox*, 300 F. Supp. 2d 1320, 1330 n.7 (N.D. Ga. 2004) (“While the plaintiffs' partisan gerrymandering claim has been dismissed, the evidence presented by the plaintiffs regarding an intent to gerrymander districts . . . indicates an intent to use population deviations to further advance the same goals.”).

173. See Jurisdictional Statement for Appellants at *7–8, *Cox* (No. 03-1413), available at 2004 WL 882937 (“Strangely, a plaintiff could successfully combine two otherwise insufficient claims—a de minimis deviation claim and a failed political discrimination claim—so that the sum of those insufficient claims somehow adds up to a winning claim. That should not be the law.”).

174. See *supra* Part II.B.2.

175. See *supra* Part II.B.1.

176. See Jurisdictional Statement for Appellants, *Cox* (No. 03-1413), available at 2004 WL 882937.

177. *Cox*, 124 S. Ct. at 2806 (2004) (Stevens, J., concurring).

178. *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1770, 1778 (2004) (plurality opinion).

based its decision on evidence of partisan gerrymandering. A strong argument can be made that a “one person, one vote” claim that is based on the same operative facts and elements as a nonjusticiable gerrymandering claim is, in fact, the same claim and would likewise be nonjusticiable.

B. In “One Person, One Vote” Claims, Population Deviations Below 10% in State Legislative Districts Are De Minimis and Should Not Require Justification by the States

Both the district court and the concurrence on appeal err in rejecting the 10% safe harbor rule for state districting. Clearly, on claims involving alleged violations of the “one person, one vote” principle, the Supreme Court has recognized a threshold under which minor deviations in state legislative districts require no justification.¹⁷⁹ Georgia’s redistricting plan, while close, falls within the 10% safe harbor, requiring no justification in an equal protection claim based on minor district population deviations. Yet, the district court circumvents this rule by framing it as an evidentiary rule, merely creating a rebuttable presumption of constitutionality. This result amounts to a misunderstanding of the asserted claims. It also ignores the importance of the deference that prior Courts have given to states sovereignty.

1. Federalism and “one person, one vote”: a basis for deference

First, states should be given greater latitude and afforded deference in drawing state legislative districts, especially when there is no evidence of discrimination against a protected class. Reapportionment and redistricting primarily fall within a state legislature’s “sphere of competence.”¹⁸⁰ And while equal protection principles govern a state’s drawing of legislative districts,¹⁸¹ “[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions.”¹⁸² Thus, states should

179. *See supra* note 58.

180. *Easley v. Cromartie*, 532 U.S. 234, 242 (2001).

181. *See Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

182. *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

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be given deference in questions of state districting,¹⁸³ and courts should play a more passive role, asserting themselves only when there is obvious invidious discrimination.¹⁸⁴

2. *De minimis deviations need no justification*

There is tension between the amount of deference states should be afforded and the specific requirements of the Equal Protection Clause. Yet, the rule that has emerged to balance these important interests—the 10% rule—is both fair and workable. It is well established that “minor deviations” among state legislative districts require no justification by the state.¹⁸⁵ This deference affords states “broader latitude” in drawing their own legislative districts than when drawing congressional districts¹⁸⁶ but still requires “‘*substantial* equality of population among the various districts, so that the vote of any citizen is *approximately* equal in weight to that of any other citizen in the State.’”¹⁸⁷

In *White v. Regester*,¹⁸⁸ the Supreme Court determined that the lower court erred when it ruled that a population differential of 9.9% from the ideal district, in the absence of special justification, constituted a prima facie equal protection violation under the Fourteenth Amendment.¹⁸⁹ Furthermore, the Court expressly refuted the notion that minor deviations must be justified to “avoid

183. See *Reynolds*, 377 U.S. at 578 (noting that state legislative districting is different in kind from congressional districting; a more flexible standard for state district population deviations is constitutionally acceptable).

184. See generally Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, “Fair Representation,” and an Exegesis Into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 532 (2003) (arguing that the Court should play a passive role and take a minimalist judicial approach to both racial and political gerrymandering questions).

185. See, e.g., *Voinovich v. Quilter*, 507 U.S. 146, 160 (1993); *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (quoting *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973)).

186. *Mahan v. Howell*, 410 U.S. 315, 322 (1973) (“[B]roader latitude has been afforded the States . . . in state legislative redistricting . . .”).

187. *Gaffney*, 412 U.S. at 744 (emphasis added) (quoting *Reynolds*, 377 U.S. at 579). The Court has also determined that “[a]n unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge [legitimate state] considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement.” *Id.* at 749.

188. *White v. Regester*, 412 U.S. 755, 764 (1973).

189. *Id.* at 763. The Court rejected the contention that the tolerances afforded state districting were diluted by cases subsequent to *Gaffney*. *Id.* (“*Kirkpatrick v. Preisler* did not dilute the tolerances contemplated by *Reynolds v. Sims* with respect to state districting . . .”).

invalidation under the Equal Protection Clause.”¹⁹⁰ The Court reasoned that “relatively minor population deviations among state legislative districts [do not] substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation.”¹⁹¹

Later, the Court expressly recognized the “under-10%” rule in *Connor v. Finch*.¹⁹² In addressing population deviations of 16.5% and 19.3% in the Mississippi State Senate and House, respectively, the Court stated that such deviations “substantially exceed the ‘under-10%’ deviations the Court has previously considered to be of prima facie constitutional validity only in the context of legislatively enacted apportionments.”¹⁹³ While there has not been absolute agreement,¹⁹⁴ a significant number of subsequent cases have affirmed the 10% rule as a safe harbor under which a state plan will be upheld.¹⁹⁵

190. *Id.* at 763–64 (“[W]e did not hold [that] any deviations from absolute equality, however small, must be justified to the satisfaction of the judiciary to avoid invalidation under the Equal Protection Clause.” (referring to *Mahan*, 410 U.S. at 327; *Swann v. Adams*, 385 U.S. 440 (1967); *Kilgarlin v. Hill*, 386 U.S. 120 (1967))).

191. *Id.* at 764. While upholding the 9.9% deviation, the Court warned, “[v]ery likely, larger differences between districts would not be tolerable without justification ‘based on legitimate considerations incident to the effectuation of a rational state policy.’” *Id.* (quoting *Reynolds*, 377 U.S. at 579).

192. *See Connor v. Finch*, 431 U.S. 407, 418 (1977) (affirming the de minimis approach in state legislative districting). *But see Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) (rejecting the de minimis approach in the context of congressional districting).

193. *Connor*, 431 U.S. at 418.

194. For cases that are read to not recognize the 10% rule as a safe harbor, see *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996) (interpreting the 10% rule as creating only a “rebuttable presumption” that an apportionment plan is the result of “an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable”); *Cecere v. County of Nassau*, 274 F. Supp. 2d 308, 311 (E.D.N.Y. 2003) (“Given that the deviation rate is under 10%, the plan is presumptively constitutional.”); *Hulme v. Madison County*, 188 F. Supp. 2d 1041, 1047 (S.D. Ill. 2001) (“[D]eviation of less than 10% enjoys a presumption of validity and will not, by itself, support a claim of invidious discrimination.”); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1032 (D. Md. 1994) (“[P]lan with maximum deviation below ten percent could still be successfully challenged, with appropriate proof”); *Story v. Anderson*, 611 P.2d 764, 767 (Wash. 1980) (allowing only minor deviations when necessary to achieve “legitimate, rational state objectives”).

195. *See, e.g., Chen v. City of Houston*, 206 F.3d 502, 522 (5th Cir. 2000) (“[B]elow a certain threshold the plaintiff has failed to establish a *prima facie* case and the districting body will not be required to justify minor variations. The court has indicated that this threshold is ten percent.” (citation omitted)); *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 827 (Fla. 2002) (finding that deviations for state House and Senate districts “fall well under the 10% deviation that the Supreme Court and this Court have recognized as constitutionally valid”); *Legislative Redistricting Cases*, 629 A.2d 646, 656 (Md. 1993) (“[T]he Supreme Court has unequivocally built a 10% degree of flexibility into the one person,

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3. *The 10% rule is both a safe harbor and a means of allocating the burden of proof*

Georgia's total deviation of 9.98% is mathematically below the 10% threshold. Yet, the district court and, by implication of the summary affirmance, the Supreme Court attempt to paint the 10% rule, not as a safe harbor, but as merely a threshold for a rebuttable presumption of constitutionality.¹⁹⁶ This section argues that the 10% rule is both a means of allocating the burden of proof *and* a safe harbor.

As previously noted, many cases stand for the proposition that states are shielded from scrutiny if state districting plans contain deviations smaller than 10%.¹⁹⁷ However, as other courts have found, falling within the safety of the 10% rule merely establishes a rebuttable presumption of constitutionality.¹⁹⁸ To support this latter proposition, the district court cited *Daly v. Hunt*.¹⁹⁹

In *Daly*, the Fourth Circuit reviewed whether the district court was required to consider total population or merely voting-age population in calculating district deviations.²⁰⁰ In its discussion, the court noted that "for deviations below 10%, the state is entitled to a presumption that the apportionment plan was the result of an 'honest and good faith effort to construct districts . . . as nearly of equal population as is practicable.' . . . However, this is a rebuttable presumption."²⁰¹

one vote requirement so that states can accommodate important concerns in reapportioning their legislatures."); *Black Political Task Force v. Connolly*, 679 F. Supp. 109, 123 (D. Mass. 1988) (holding that city and state electoral districts "fall within the de minimis ten percent deviation rule that insulates state redistricting plans from effective challenge as violative of the 'one person one vote' precept"); *Gorin v. Karpan*, 775 F. Supp. 1430, 1437 (D. Wyo. 1991) ("[T]he Court has provided only one definitive benchmark—the ten percent de minimis rule. Under this rule, a state need not justify 'minor' population inequalities . . .").

196. *Larios v. Cox*, 300 F. Supp. 2d at 1339–40 (2004).

197. *See supra* note 195.

198. *See supra* note 194.

199. 93 F.3d 1212 (4th Cir. 1996).

200. *Id.*

201. *Id.* at 1220 (quoting *Reynolds v. Sims*, 377 U.S. 533, 577 (1964)). It should be noted that at least one scholar has warned that if a state intends to enact deviations of 10%, it could be possible to prove that a good faith effort was not made to reach population equality. *See Butler, supra* note 63. In such a setting, it is argued that there may be sufficient evidence of bad faith and invidious discrimination to "constitute a prima facie case of unconstitutionality." *Id.* Yet, the guidelines adopted by the Georgia General Assembly did not purport to aim for a total 10% deviation, but rather established that the plans were to be within the plus or minus

If it were binding on this case, *Daly* might seem conclusive. Arguably, *Daly* represents good law; however, the district court misapplied the *Daly* principle in the present case. The confusion in *Cox* seems to arise from a failure to distinguish between the legal theories at issue. The *Daly* court went on to say, “Presumably, an apportionment plan that satisfies the 10% de minimis threshold could nevertheless be challenged under another theory, such as a violation of the Voting Rights Act or as an unconstitutional racial gerrymander.”²⁰² In other words, the 10% safe harbor only insulates states from claims of violations of the “one person, one vote” principle but does not insulate a state plan from attacks on other grounds.

Thus, whether the 10% rule provides a safe harbor or merely a rebuttable presumption of constitutionality depends on the nature of the claim. A deviation below 10% precludes a “one person, one vote” claim—that is, a claim of a violation of equal protection based on disparate district populations—because it cannot be said that anyone’s vote had been “substantially diluted.”²⁰³ However, with regards to some other legal theory such as racial gerrymandering or a violation of section 2 of the Voting Rights Act, a de minimis deviation represents only a rebuttable presumption of constitutionality.²⁰⁴

Vera v. Bush helps illustrate this distinction.²⁰⁵ While the case deals specifically with congressional districts, it presents a logical analysis that is applicable in an analogous state legislative districting

5% limits allowed under federal law. See *Larios*, 300 F. Supp. 2d at 1322, 1338; *supra* note 104 and accompanying text. While there was evidence that Democrat legislators hoped to achieve a partisan advantage, see *supra* note 95, there was no direct evidence presented that a 10% deviation was the goal of the Legislature; rather, the deviation was likely the result of the myriad factors, including, *inter alia*, political, regional, and personal motivations. As the district court also indicated, one of the possible factors, although not a substantial one, was a desire not to further divide precincts. See *supra* note 139 and accompanying text.

202. *Id.* at 1220–21.

203. See *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973) (“[I]t makes little sense to conclude from relatively minor ‘census population’ variations among legislative districts that any person’s vote is being substantially diluted.”).

204. See *Daly*, 93 F.3d at 1221.

205. 933 F. Supp. 1341, 1348 n.9 (S.D. Tex. 1996) (implementing a court ordered plan with a greater deviation than the original legislative proposal because of unconstitutional racial gerrymandering; the original plan adopted in 1991 had a zero population deviation while the court ordered plan resulted in a 0.82% deviation from the ideal district); see also *HEBERT ET AL.*, *supra* note 36, at 1.

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context. In 1991, the State of Texas prepared a congressional districting plan with a 0% population deviation among its districts, exactly meeting constitutional requirements of “one person, one vote.”²⁰⁶ Had there been some deviation, the higher congressional standard would require the state to show justification. However, with a 0% deviation, a claim challenging its constitutionality solely on the basis of “one person, one vote” would fail because *some* deviation is required to substantiate a claim. Nevertheless, while a “one person, one vote” challenge would not succeed, its constitutionality is rebuttable in the sense that it may still be vulnerable to other claims. In *Vera*, the federal district court invalidated the Texas plan, not because it violated the “one person, one vote” principle but because there was substantial evidence that the shape of the districts resulted in unconstitutional racial gerrymandering.²⁰⁷

In the state context, the same logic applies. When a state exceeds the allowable deviation of 10%, it must clearly justify the deviation.²⁰⁸ When it falls below the threshold, it should be within the safe harbor for “one person, one vote” claims and should not be required to show justification.²⁰⁹ However, while the population deviation may no longer be an issue, that fact provides only a presumption of constitutionality—rebuttable only if there are other constitutional claims or legal theories supported by *prima facie* evidence.

Georgia’s population deviations were mathematically smaller than 10%, and therefore its plan is presumptively constitutional in accord with the district court holding. However, this 10% threshold also provides a safe harbor on claims alleging a violation of the “one person, one vote” principle based on population disparity: only deviations above 10% provide *prima facie* evidence of violations of the “one person, one vote” principle. While its constitutionality could have been called into question on some other legal theory, the evidence was insufficient to support a claim of partisan gerrymandering, and no claims survived involving racial discrimination under section 2 or section 5 of the Voting Rights Act,²¹⁰ the Equal Protection Clause, or Article I, Section 2 of the

206. *Vera*, 933 F. Supp. at 1348.

207. *Id.*

208. *See, e.g.*, *Brown v. Thomson*, 462 U.S. 835, 845–46 (1983).

209. *See, e.g., id.* at 842.

210. 42 U.S.C. § 1973 (2000).

U.S. Constitution.²¹¹ Consequently, the plaintiff failed to overcome the constitutional presumption, and Georgia's districting plans should have been upheld without requiring any explanation.

Furthermore, by ignoring the 10% threshold, the Court also improperly obliterated the distinction between congressional and state legislative redistricting. As previously discussed, states must justify any deviation in populations only among congressional districts.²¹² Since state legislative districts were first required to satisfy "one person, one vote" guarantees in *Reynolds v. Sims*,²¹³ state legislatures have not been required to be mathematically perfect and have not been required to justify minor population deviations among state legislative districts.²¹⁴ In attempting to require states to justify such deviations in the present case, the district court improperly relied on the rationale of congressional districting cases in which the higher standard is applied.²¹⁵

It could be argued that a 9.98% deviation is not materially different from a deviation that is slightly greater than 10%—in this regard, the distinction is little more than arbitrary. This raises the question of the value of having a brightline rule. If states are to be sufficiently guided, so as to be able to successfully enact redistricting plans and avoid unnecessary litigation, a brightline rule is critical. Brightline rules allow legislatures to both understand and comply with the law, promoting uniformity and predictability.²¹⁶ Just as important, brightline rules help to "clearly allocat[e] responsibilities among competing decisionmakers," giving their decisions more legitimacy.²¹⁷ The 10% rule, as advanced in this Note, serves this purpose well. For better or worse, the rule has emerged, at least in perception, as being a firm 10%.²¹⁸ How this number was derived is

211. *Cox v. Larios*, 124 S. Ct. 2806, 2809 (2004) (Scalia, J., dissenting).

212. See discussion *supra* Part II.B.1.b.

213. 377 U.S. 533 (1964).

214. See *supra* note 60 (listing cases that did not require states to justify deviations below 10%).

215. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1330 (N.D. Ga. 1994) (citing *Karcher v. Daggett* 462 U.S. 725, 740–41 (1983)); see also discussion *supra* Part III.A.3.

216. See Spencer Overton, *Rules, Standards, and Bush v. Gore: Form and the Law of Democracy*, 37 HARV. C.R.-C.L. L. REV. 65, 74–75 (2002) (describing the benefits and disadvantages of brightline rules and flexible standards).

217. See *id.*

218. See CLARKE & REAGAN, *supra* note 4, at 50. As one publication on state legislative redistricting litigation, published by the Federal Judicial Center, indicates:

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not readily explainable and may, in fact, be completely arbitrary. However, even if the Court were to decide that the 10% rule should really be a 9.98% rule, clarity is critical. If the Court truly sought to disavow itself of any brightline rule to apply the stricter congressional standard to state legislative redistricting, the issue should have been fully briefed and argued—the states should not be left guessing in the aftermath of a summary affirmance.

C. Georgia Need Not Justify Its State Districting Plans Because Incumbent Politicians Are Not a Protected Class

Another reason to reject the result in *Cox*, which was not addressed by the district court, is that it hinges on the applicability of strict scrutiny. Neither the district court nor the Supreme Court indicated the application of strict scrutiny review, but by implication, this Note contends that the outcome of *Cox* necessarily but improperly implicated such a review. Specifically, the Georgia state legislative redistricting statute was neutral on its face, did not have the purpose or the effect of discriminating against a constitutionally protected class, and did not involve population deviations of sufficient size to make a prima facie case of a violation of the Equal Protection Clause. Thus, invalidating the redistricting statute because the state did not justify the deviations with some substantial state interest is nothing more than the misapplication of strict scrutiny review.

Generally, states are insulated from strict scrutiny by courts on state legislative redistricting plans unless there is evidence of invidious discrimination against a constitutionally protected class.²¹⁹

After deciding that “relatively minor” population deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case, *White v. Regester*, 412 U.S. 755, 764 (1973); *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973), the Court established a benchmark for determining whether a legislature’s redistricting plan violates the one person–one vote principle in *Brown v. Thompson*, 462 U.S. 835 (1983): “an apportionment plan with a maximum population deviation under 10% falls within [the] category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State.” *Id.* at 842–43 (citations omitted). Thus, if the maximum deviation is greater than 10%, the state must justify the population disparity by showing a rational and legitimate state policy for the districting plan.

Id.

219. See *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999); *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

Principally, evidence of racial discrimination will subject a redistricting plan to strict scrutiny,²²⁰ but a prima facie case of invidious discrimination can also be made by showing a total population deviation exceeding 10%.²²¹ However, in cases such as *Cox*, where no racial discrimination is at issue and where deviations exceeding 10% do not exist, the state need not show any compelling or traditional state interest.

1. Strict scrutiny for suspect classifications

Any laws that classify citizens on the basis of race, including districting schemes, are constitutionally suspect and subject to strict scrutiny.²²² Thus, if racial classifications in districting plans were explicit, “[no] inquiry into legislative purpose [would be] necessary.”²²³ Yet, “[d]istricting legislation ordinarily, if not always, classifies tracts of land, precincts, or census blocks, and is race neutral on its face.”²²⁴ Consequently, a districting law warrants strict scrutiny only if one can prove that the law was “‘motivated by a racial purpose or object,’”²²⁵ or if the law is “‘unexplainable on grounds other than race.’”²²⁶

Furthermore, strict scrutiny only applies “if race was the ‘predominant factor’ motivating the legislature’s districting decision” or “‘the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.’”²²⁷ In other words, strict scrutiny only applies when “the legislature subordinate[s] traditional race-neutral districting principles . . . to racial considerations.”²²⁸

220. *Miller*, 515 U.S. at 904–05.

221. *See Brown*, 462 U.S. at 842–43.

222. *See Hunt*, 526 U.S. at 546.

223. *See Shaw v. Reno*, 509 U.S. 630, 642 (1993).

224. *Hunt*, 526 U.S. at 547.

225. *Miller*, 515 U.S. at 913 (quoting *Shaw*, 509 U.S. at 644).

226. *Shaw*, 509 U.S. at 644 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *see also Miller*, 515 U.S. at 913.

227. *Hunt*, 526 U.S. at 547 (quoting *Miller*, 515 U.S. at 916).

228. *Miller*, 515 U.S. at 916; *see also CLARKE & REAGAN*, *supra* note 24, at 10.

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2. *Purely partisan objectives, absent other evidence of invidious discrimination, do not invoke strict scrutiny*

Districting primarily motivated by a desire for partisan advantage is not subject to strict scrutiny even if the redistricting is “performed with consciousness of race.”²²⁹ But, as Justice Scalia noted, there is no colorable contention that the population deviations in Georgia were based on race.²³⁰ The only evidence of “invidious discrimination” cited by Justice Stevens or the District Court was the partisan manipulation of district boundaries and populations for partisan, personal, and regional advantage.²³¹ In particular, both the district court and Justice Stevens seemed to focus on the unfair bias against incumbents. However, even if the effect of the state redistricting plan was to discriminate against certain incumbents, it does not follow that states should have to show some compelling traditional interest to justify the plans because incumbent politicians are not likely to be deemed a constitutionally protected class.

D. *“Politics as Usual” Is a Traditional Districting Criterion*

The district court’s opinion and Justice Stevens’s concurring opinion seem to improperly classify the extent of Georgia Democrats’ political influence as a form of invidious discrimination.²³² The inference is that because there was evidence of political influence, there was sufficient evidence of discrimination to require justification of the deviations in Georgia’s plans.²³³ Yet, as

229. See *Hunt*, 526 U.S. at 551; *Bush v. Vera*, 517 U.S. 952, 958 (1996).

230. *Cox v. Larios*, 124 S. Ct. 2806, 2809 (2004) (Scalia, J., dissenting).

231. See *id.* at 2806–07 (Stevens, J., concurring); *Larios*, 300 F. Supp. 2d at 1329–34. One court noted, “a [state] may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact.” *Hunt v. Cromartie*, 526, U.S. 541, 551 (1999). Thus, absent discriminatory racial effects, political gerrymandering is not subject to strict scrutiny. *Id.* at 551–52; see also *Vera*, 517 U.S. at 968; *id.* at 1001 (Thomas, J., concurring).

232. *Cox*, 124 S. Ct. at 2809 (Stevens, J., concurring)

[T]he unavailability of judicially manageable standards cannot justify a refusal ‘to condemn even the most blatant violation of a state legislature’s fundamental duty to govern impartially.’ I remain convinced that in time the present ‘failure of judicial will,’ will be replaced by stern condemnation of partisan gerrymandering that does not even pretend to be justified by neutral principles.

Id. (quoting *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1813 (2004).

233. See *id.* (Stevens, J., concurring).

Justice Scalia noted, this inference assumes that “‘politics as usual’ is not *itself* a ‘traditional’ districting criteria.”²³⁴

Ultimately, the question of “traditional” districting principles is not entirely settled.²³⁵ Even those cases making reference to them fall short of giving any real explanation as to their source or validity.²³⁶ However, as Justice Scalia implies, the issue of “traditional” redistricting criteria may be a determinative factor in redistricting and reapportionment cases.²³⁷ If a state has relied on these criteria, even a constitutionally suspect redistricting plan may survive scrutiny.

Some traditional principles discussed by the Court include compactness, population equality, contiguity, respect for political subdivisions, natural geographic boundaries, regularity, maintaining district cores, and other traditional elements.²³⁸ However, because the application of traditional districting criteria is not constitutionally

234. *Id.* at 2809 (Scalia, J., dissenting).

235. *See* HEBERT ET AL., *supra* note 36, at 59; *see also* Shaw v. Reno, 509 U.S. 630, 647 (1993) (indicating that traditional districting criteria are “objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines”). Professor Altman has argued that

Five of the least contested redistricting objectives are . . .

- 1) *Population equality*: this criterion is satisfied when there is no substantial deviation in population between districts;
- 2) *Contiguity*: a district is contiguous if it is possible to reach every point in the district from another point without crossing the district boundary;
- 3) *Compactness*: a district is compact if its shape is geometrically regular;
- 4) *Creating fair electoral contests*: there are many characteristics that could be attributed to “a fair contest.” The most common ones include maximal competitiveness, neutrality, and a constant swing ratio for each party; and
- 5) *Representational goals*: these goals seek to insure that all social sects have a political voice in an election; examples include the protection of communities of interest and non-dilution of minority representation.

Altman, *supra* note 38, at 99–100; *cf.* Hunt, 526 U.S. at 545 (discussing how the district court found evidence of discrimination where “[t]he legislature disregarded traditional districting criteria”) (quoting Jurisdictional Statement for Appellants at 21a–22a, Hunt v. Cromartie, 526 U.S. 541 (1999) (No. 4:96-CV-104-BO(3)), *available at* 1998 WL 34080897).

236. *See infra* note 238.

237. *See Cox*, 124 S. Ct. at 2809.

238. *See* Abrams v. Johnson, 521 U.S. 74, 84 (1997) (revealing the traditional districting principles of maintaining “district cores, four traditional ‘corner districts’ in the corners of the State, political subdivisions such as counties and cities, and an urban majority-black district”); Bush v. Vera, 517 U.S. 952, 959 (1996) (recognizing natural geographic boundaries, regularity, contiguity, compactness, and conformity to political subdivisions); *Shaw*, 509 U.S. at 639, 646 (recognizing compactness, contiguity, and respect for political subdivisions as traditional districting principles); United Jewish Orgs. v. Carey, 430 U.S. 144, 168 (1977) (recognizing sound districting principles such as compactness and population equality).

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required²³⁹ and may vary from state to state, there exists no comprehensive list.²⁴⁰ Furthermore, while these principles might be considered “traditional,” historically, there were very few, if any, laws truly governing districting.²⁴¹ Thus, it is both plausible and likely that politics is just as valid and traditional as any other “traditional” districting criteria, so long as it does not go too far.

Yet in *Cox*, the Court incorrectly determines that political and regional interests are improper motivations in state legislative redistricting. The reality is that legislatures consider more than compactness, contiguity, and municipal boundaries when setting district lines. Equally important are perhaps less obvious criteria inherent in the legislative process: any legislative deliberation, especially in the context of redistricting, will almost always include a measure of concern for local or regional interests, political expediency, legislative compromise, and even arbitrariness (such as personal opinion or instinct).²⁴² These factors are the essence of the legislative prerogative.²⁴³ So long as the legislative power, “wholly

239. See, e.g., *Vera*, 517 U.S. at 962 (holding that the Constitution does not mandate regularity of district shape). At least one scholar has noted that the constitutional mandate of population equality is at odds with the state interests of compactness and contiguity. See Micah Altman, *Traditional Districting Principles: Judicial Myths vs. Reality*, 22:2 SOC. SCI. HIST. 159, 188 (1998) (noting that districting “plans have become less compact since the Court’s requirements of equal population in districts”). Ironically, the very effort to equalize populations for the purpose of Equal Protection often inherently leads to oddly shaped districts, which in turn, could be used as evidence of racial or partisan gerrymandering.

240. Historically, many state constitutions provided that legislative representation was based upon other nonpopulation principles, such as the representation of counties, cities, or other geographical and political units. See MCKAY, *supra* note 17, 275–475. One districting criterion that dates back to the founding of the nation partially apportioned the Massachusetts and New Hampshire state legislatures according to the taxes paid in each district. *Id.* at 343, 370, 466, 468.

241. See Altman, *supra* note 239, at 167.

242. See *Russo v. Vacin*, 528 F.2d 27, 30 (7th Cir. 1976) (“[C]ourts have repeatedly recognized that as long as legislative bodies draw electoral district lines, the political impact of their work will not be ignored by such bodies.”); see also MCKAY, *supra* note 17, at 51–54.

243. For example, in the districting context, when a legislator is confronted with a seemingly arbitrary decision, such as which side of a city block to draw a boundary line, all else being equal, what criteria does a legislator use? Perhaps the legislator is interested in making sure that certain families or friends with whom he is familiar remain grouped together. Perhaps his constituents have expressed concerns that might persuade him one way or the other. Among myriad possible criteria, the author posits that if an incumbent has the opportunity to draw a political rival into a different district with the stroke of a pen, without creating a wide disparity in population among the districts, human nature and political self-interest might sway the pen to one side. Does this decision become arbitrary and invidious because one of a pair of political rivals is adversely affected? Probably not. See, e.g., *Christian Sci. Reading Room v. City*

within the domain of state interest,” is not used to circumvent a federally protected right, “it is insulated from federal judicial review.”²⁴⁴ And it is unlikely that an incumbent legislator has any federally protected right to an easy reelection campaign.

In weighing the political factors of districting with the constitutional requirements of apportionment, legislators are forced to strike a balance. Presumably, if legislators had no interests in redistricting and reapportionment, there would rarely be any litigated conflicts.²⁴⁵ Instead of the various social and political factors that might influence a legislator, pure statistics would dominate, leading to “ideal,” or statistically perfect, districts every time.²⁴⁶ The reality, however, is that redistricting and reapportionment plans are very contentious.

Legislators must consider the interests of the local constituencies they were elected to represent,²⁴⁷ the goals of the political party with which they are allied,²⁴⁸ the best interests of the state, the constitutional aims of equal protection, and their very own political

of S.F., 807 F.2d 1466, 1471 (9th Cir. 1986) (Norris, J., dissenting from rejection of a rehearing en banc) (discussing the nature of the legislative process as one that requires compromise); *Cuevas v. Royal D'Iberville Hotel*, 498 So. 2d 346, 359 (Miss. 1986) (“Compromises are reached. Votes are traded; you vote for my bill and I’ll vote for yours.” (discussing how vote pairing and compromise are a normal part of the legislative process)); see also Margaret Gilhooly, *Constitutionalizing Food and Drug Law*, 74 TUL. L. REV. 815, 872 (2000) (“The legislative process can bring together affected interests in formulating compromises on contentious issues. Compromise is at the heart of the legislative process and it produces approaches that warrant respect by the courts.”); Marc J. Randazza, *The Other Election Controversy of Y2K: Core First Amendment Values and High-Tech Political Coalitions*, 82 WASH. U. L.Q. 143, 233 (2004) (“Many judges and scholars agree that the very nature of the legislative process requires compromise . . .”).

244. *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960); see also *W. Union Tel. Co. v. Foster*, 247 U.S. 105, 114 (1918) (“Acts generally lawful may become unlawful when done to accomplish an unlawful end, and a constitutional power cannot be used by way of condition to attain an unconstitutional result.” (citation omitted)).

245. Cf. MCKAY, *supra* note 17, at 52 (“[T]o the affected legislators [reapportionment] involves no less an issue than political survival.”).

246. See generally HEBERT ET AL., *supra* note 36, at 6. The “ideal” district is found by dividing the total state population by the total number of districts. The goal of a neutral apportionment plan is to create districts that exactly match the “ideal,” resulting in a zero total deviation. See *id.*

247. See MCKAY, *supra* note 17, at 52 (“The manner in which reapportionment questions are resolved is important to political parties, to interest groups, to the integrity of the governmental process, and to the people generally.”).

248. See *id.* at 53 (“Party politics is obviously a factor in determining the form any particular apportionment will take . . .”).

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survival. In many cases, the most significant factor may arguably be the simple political reality of the need for legislative compromise.²⁴⁹ The final result is very unlikely to mirror the mathematical concept of the ideal district, but such perfection is not expected—at least not in the context of state legislative districts.²⁵⁰

This concept was reinforced in *Vieth* where, as Justice Scalia noted, “all but one of the Justices agreed that [politics as usual] is a traditional criterion, and a constitutional one, so long as it does not go too far.”²⁵¹ Even where there is strong evidence of partisan influence, it can scarcely be argued that the Democrat effort in Georgia went too far when it had virtually no effect on the political landscape—under the districting plans at issue, Democrats actually lost seven Democratic-leaning districts in the House and two in the Senate.²⁵² And while Republicans lost two of seventy-four seats held in the House, they actually gained two seats in the Senate, eventually assuming majority control.²⁵³ It could be argued, however, that Republicans might have increased even more in power had more favorable districts been drawn. However, it is unlikely that anyone can truly predict the outcome of a districting plan that seemingly favors one party.²⁵⁴

Even in those situations where a districting plan clearly favors one party, it cannot be said that it is necessarily unconstitutional.²⁵⁵ Consider what the Court announced in *Davis v. Bandemer*:

249. See, e.g., *id.* at 53–54 (discussing examples when legislators “joined forces” with competing factions to achieve common purposes: to affect population distribution).

250. *Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (“We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.” (citing *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931)). “We must remember that the machinery of government would not work if it were not allowed a little play in its joints.” *Bain*, 282 U.S. at 501.

251. See *Cox v. Larios*, 124 S. Ct. 2806, 2809 (2004) (Scalia, J., dissenting) (quoting *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1781–82 (2004)).

252. See *Larios v. Cox*, 300 F. Supp. 2d 1320, 1328 (2004).

253. *Id.* at 1326–27.

254. See Redwine, *supra* note 23, at 396–97 (“This is because party registration does not win elections, votes do.” (discussing the difficulty of predicting electoral outcomes on the basis of partisan voter registration)); see also, e.g., Larry Peterson, *Georgia Democrats Scramble To Capture 12th District Seat*, AUGUSTA CHRON., May 14, 2004, at B06 (describing how a little-known Republican beat out an incumbent Democrat in 2002 in a congressional district that was drawn heavily to favor Democrats).

255. See *Davis v. Bandemer*, 478 U.S. 109, 131–32 (1986).

[T]he mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm. This conviction, in turn, stems from a perception that the power to influence the political process is not limited to winning elections. . . . Thus, a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.²⁵⁶

Ultimately, districting decisions are political decisions and, except in the most egregious situations,²⁵⁷ fall exclusively within the "legislature's sphere of competence."²⁵⁸ As one court noted, "While the courts should continue to try to protect voters from the misuse of electoral machinery, we do not propose to supplant legislative judgment where the only alleged misconduct is considering political factors in the districting process."²⁵⁹

E. Regionalism Is Not Invidious so Long as It Does Not Go Too Far

Like politics, regional interests can and do play a role in legislative decisions.²⁶⁰ While regionalism may be an impermissible basis to justify discrimination—such as a population deviation greater than 10%²⁶¹—that does not mean that regional interests cannot be a legitimate factor, so long as they do not give one region of a state "vastly greater voting power than citizens in [other regions]."²⁶² Despite the usage of the word "vastly" in both the district court decision and Justice Stevens's concurrence, it is an overstatement to suggest that a 5% deviation from the ideal district size gives a particular district "vastly greater voting power."²⁶³

256. *Id.*

257. See generally *Russo v. Vacin*, 528 F.2d 27, 30 (7th Cir. 1976) ("This is not to say that circumstances could not be conceived where the actions of an elected body would be so egregious as to constitute a breach of public trust.").

258. See *Easley v. Cromartie*, 532 U.S. 234, 242 (2001).

259. *Russo*, 528 F.2d at 30.

260. See *MCKAY*, *supra* note 17, and text accompanying note 17.

261. See *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964) (holding that regionalism is an impermissible basis for population deviations).

262. See *id.* at 568–69.

263. As the State of Georgia argued in its Jurisdictional Statement to the Court:

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Furthermore, to the extent that regional interests played any role in the development of the Georgia plans, it could be just as easily stated that it was not a regional but political bias. It was conceded at trial and is stated in the district court's opinion that "rural and inner-city areas of the state" are "Democratic-leaning" while suburban areas tended to be "Republican-leaning."²⁶⁴ Clearly, to the extent that regionalism motivated Georgia Democrats' decision-making, it was undoubtedly secondary to, and derivative of, their partisan objectives.²⁶⁵

E. Rejecting the 10% Rule and Proscribing Political Influence Could Result in Increased and Costly Litigation and Increased Judicial Infringement on State Sovereignty

As Justice Scalia aptly stated, to say that a legislature goes too far when it stays within the 10% disparity in population "is to invite allegations of political motivation whenever there is population disparity."²⁶⁶ If the 10% rule is not recognized, anytime one party concocts an unsuccessful alternative plan that has even slightly less deviation, or divides fewer counties, or achieves any number of other, more desirable districting attributes, there will undoubtedly

The strained effort of the district court to square its rulings with the decisions of this Court is apparent from its untenable characterization of the deviations in this case. Remarkably, the district court characterized Georgia's slightly positive deviation districts as "vastly more overpopulated" than the slightly negative districts (J.S. 18a), notwithstanding the fact that all of the deviations are less than +-5% and all are "minor" as a matter of law under this Court's decisions. Labeling Georgia's deviations "vast" when they are not, cannot render unconstitutional what falls within the parameters of this Court's previous decisions.

See Jurisdictional Statement for Appellants at *23-24, *Cox v. Larios*, 124 S. Ct. 2806 (2004) (No. 03-1413), *available at* 2004 WL 882937. As this Note discusses, the Court's prior decisions paint total deviations below 10% as de minimis. It defies logic that a deviation can be both "vast" and de minimis at the same time. Rather, vastly greater voting power would result only where there are substantial deviations among districts. *See, e.g.*, John B. Manning, Jr., Comment, *Constitutional Law—The Equal Protection Clause in District Reapportionment: Representational Equality Versus Voting Equality—Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir.1990), cert. denied, 111 S. Ct. 681 (1991), 25 SUFFOLK U. L. REV. 1243, 1249 & n.40 (1991) (describing a situation in which one district had twice as much voting power as another as "vastly greater voting power").

264. *See Larios v. Cox*, 300 F. Supp. 2d 1320, 1334 (N.D. Ga. 2004).

265. *See, e.g., id.* at 1327 (listing the five primary goals of the Senate Reapportionment Committee chairman and listing partisan objectives ahead of regional objectives).

266. *Cox v. Larios*, 124 S. Ct. 2806, 2810 (2004).

be claims of partisan influence.²⁶⁷ Technology makes zero population deviation possible, but as the Supreme Court noted in *Gaffney*, just because “closer to zero deviation plans [are] possible” does not mean that the judiciary should review the propriety of such minor deviations.²⁶⁸ In fact, the court stated:

Involvements like this must end at some point, but that point constantly recedes if those who litigate need only produce a plan that is marginally “better” when measured against a rigid and unyielding population-equality standard. . . .

The point is, that such involvements should never begin. We have repeatedly recognized that state reapportionment is the task of local legislatures or of those organs of state government selected to perform it. Their work should not be invalidated under the Equal Protection Clause when only minor population variations among districts are proved.²⁶⁹

Even in the present case, Republicans provided their proposed redistricting plans, boasting lower deviations and fewer divided counties and precincts, as evidence of the undue Democratic influence.²⁷⁰ The reality is that there will be claims of undue influence anytime one political party realizes an advantage over another by virtue of redistricting legislation. Thus, removing a safe harbor threshold opens the door to an increase in politically motivated litigation.

Furthermore, according to the National Conference of State Legislatures, following the 2000 census, twenty-nine of forty-seven states surveyed had population deviations above 9% in at least one, and usually both, houses of their state legislatures.²⁷¹ Because of the obvious implication, there could be substantial challenges to the constitutionality of the state districting plans in the majority of states based on charges of improper political, or even regional bias. Not

267. See Rhonda Cook, *Justices OK New Districts; Court-Drawn Maps Favorable to GOP in Place for Primary*, ATLANTA J.-CONST., July 1, 2004, at 1A (stating that “political observers agreed with legal experts that [the *Cox* decision] might invite more redistricting lawsuits”).

268. See *Gaffney v. Cummings*, 412 U.S. 735, 740 (1973).

269. *Id.* at 750–51.

270. See *Larios v. Cox*, 300 F. Supp. 2d 1320, 1328 n.3 (N.D. Ga. 2004) (describing Republican plans with deviations far below the Democrats’ 9.98% deviation).

271. See Jurisdictional Statement for Appellants, *Cox* (No. 03-1413), available at 2004 WL 882937; see also NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 12.

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only could such actions inhibit state legislative prerogatives, but they will most assuredly cost the states millions of dollars in increased legal fees.²⁷²

Piercing the 10% rule also takes a first step towards complete judicial usurpation of state sovereignty over the districting process. The facts of the present case show that within the context of legislative process, politics is inherent. While the Court apparently did not recognize “politics as usual” as an acceptable and traditional districting criterion, as the dissent did, it clearly has an impact. In any legislative body, legislators debate, negotiate, and compromise to reach agreement and ultimately pass legislation, including districting plans.²⁷³ Consequently, state legislatures need “wobble room” to be able to reach political compromise. The trial court noted that “[a] legislature is not free to put forth an unconstitutional map, asserting that it did the best it could given the political constraints imposed by its members.”²⁷⁴ Of course, whether a legislature achieves a constitutional districting proposal depends, in large part, on the standard it must meet. Without the somewhat flexible standard of the 10% safe harbor, legislators may lose the ability to reach an effective compromise. In fact, in some circumstances it is possible that legislators may never agree on something as contentious as a redistricting plan. As the Supreme Court noted in *Karcher v. Daggett*:

[E]xperience proves that cases in which a federal court is called upon to invalidate an existing apportionment, and sometimes to substitute a court-ordered plan in its stead, frequently arise not because a newly enacted apportionment plan fails to meet the [constitutional criteria], but because partisan politics frustrate the efforts of a state legislature to enact a new plan²⁷⁵

272. See, e.g., Cook, *supra* note 20 (describing the cost of attorney fees relating to *Cox v. Larios* and related cases).

273. See, e.g., *Larios*, 300 F. Supp. 2d at 1326 (noting that incumbents had to compromise on a district proposal to ensure that the needed ninety-one votes were secured to ensure the plan’s passage); see also *id.* at 1336 (noting that “each vote in the Senate would be of critical importance, [so] the drafters could not afford to alienate any one senator by disregarding his or her personal desires”).

274. See *id.* at 1354 (citing *Kirkpatrick v. Preisler*, 394 U.S. 526, 533 (1969)).

275. *Karcher v. Daggett*, 462 U.S. 725, 734 (1983) (citing *Carstens v. Lamm*, 543 F. Supp. 68 (D. Colo. 1982)); see also *Shayer v. Kirkpatrick*, 541 F. Supp. 922 (W.D. Mo. 1982), *summarily aff’d*, 456 U.S. 966 (1982); *O’Sullivan v. Brier*, 540 F. Supp. 1200 (D. Kan.

If legislatures lose the ability to achieve political compromise influenced by partisan objectives, then legislatures may often find themselves unable to enact timely reapportionment plans. As a consequence, the federal courts will be called upon with increasing frequency to oversee or actually draw more and more redistricting plans, effectively stripping the states of this legislative function and grafting it onto the judicial branch.

And if the intention is to remove politics from redistricting, passing the baton to the courts may not achieve the desired apolitical end; federal courts are not entirely free of political influences and would merely become the forum for partisan intentions.²⁷⁶ Instead of removing political influences, federal court domination of this process may only shift the situs of the debate;²⁷⁷ this would represent a serious intrusion into an inherently local and legislative function²⁷⁸ that is contrary to the principles of both horizontal and vertical federalism.

V. CONCLUSION

The immediate impact of *Cox v. Larios* may not be readily apparent. Had the court summarily affirmed the case without filing any concurrence or dissenting opinions, the case may have gone unnoticed to all but those few unfortunate incumbents who failed to retain their elected office. Yet after every election and after every decennial census, the winners and losers will raise the debate and

1982); *Donnelly v. Meskill*, 345 F. Supp. 962 (D. Conn. 1972); *David v. Cahill*, 342 F. Supp. 463 (D. N.J. 1972); *Skolnick v. State Electoral Bd. of Ill.*, 336 F. Supp. 839 (N.D. Ill. 1971).

276. See Redwine, *supra* note 23, at 396 (“[J]udicial commandeering of the redistricting function will not immunize districting from political influence; it will merely change the battleground. As a result, such judicial overreach will likely end only in increased politicization of the courts.”).

277. See *id.* at 397 (“The bottom line is that if the redistricting function is allocated to the courts, the courts will simply end up determining for themselves what the appropriate allocation of partisan seats in the legislature will be.”).

278. See *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (reapportionment falls within the legislature’s exclusive “sphere of competence”); *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (“Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that ‘reapportionment is primarily the duty and responsibility of the state.’”) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). *But see* Note, *A New Map: Partisan Gerrymandering as a Federalism Injury*, 117 HARV. L. REV. 1196 (2004) (arguing that partisan gerrymandering and undue political influence by state legislatures actually injures federalism).

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rehash the recurring issues concerning the constitutionality of redistricting proposals.

In rejecting the 10% safe harbor, the Court radically departed from the precedent upon which most states have relied in setting state legislative districts. By requiring justification for de minimis population deviations, the Court also erased the longstanding distinction between congressional and state legislative redistricting jurisprudence. Forcing states to meet the stricter standard in state legislative districting will inevitably lead to more frequent, politically motivated law suits, costing taxpayers more money and causing everyone more headaches. States should be given the flexibility they need, within constitutional reason, to exercise legislative discretion, negotiate, and make compromises. The courts should also give states the utmost deference, absent invidious discrimination against constitutionally protected classes.

If the Court truly wanted to upset precedent and wade into the “forbidden political waters”²⁷⁹ of state party politics, it should not have done so by merely handing down a summary affirmation. Despite the naïve desire to sternly condemn partisan influences,²⁸⁰ the Court cannot blindly ignore the political nature of the state legislative process where the effect of politics is anything but de minimis. Politics is, after all, a part of the political process. There will always be political winners and losers; some incumbents may be forced out of office. Does this fact, absent evidence of racial discrimination or substantial population inequality among districts, justify judicial intervention? Only if incumbent politicians have become a constitutionally protected class.

James R. Dalton

279. See *Supreme Court Rules on Congressional Redistricting in Georgia*, NewsMax.com, June 30, 2004 (quoting the attorney representing the State of Georgia), at <http://www.newsmax.com/archives/articles/2004/6/30/111756.shtml> (last visited Sept. 20, 2004).

280. See *Cox v. Larios*, 124 S. Ct. 2806, 2809 (2004) (Stevens, J., concurring).