

DEMOCRACY AND DISTORTION

Guy-Uriel E. Charles†

This Article contends that judicial supervision of excessive manipulation of electoral lines for partisan purposes—political gerrymandering—may be justified in a mature democracy. The Article responds to the debate among courts and commentators over whether political gerrymandering presents any constitutionally relevant harms and, further, whether courts may be able to resolve the structural issues presented by political gerrymandering claims. Drawing from political theory and political science, this Article develops a theory of institutional distortion and provides a justification for aggressive judicial review of questions of democratic governance. The Article does not argue that the United States Supreme Court should regulate political gerrymandering; instead, it argues that such regulation can be justified. This Article also develops a framework of election law dualism to resolve the structural challenges that political gerrymandering poses to adjudication.

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† Russell M. & Elizabeth M. Bennett Professor of Law, University of Minnesota Law School. Thanks to Michelle Adams, Stuart Benjamin, Richard Briffault, Erwin Chemerinsky, Jim Chen, Doriane Coleman, Michael Dorf, Ariela Dubler, Luis Fuentes-Rohwer, Jim Gardner, Beth Garrett, Heather Gerken, Rachel Godsil, Ed Hartnett, Jill Hasday, Don Horowitz, Sam Issacharoff, Shavar Jeffries, Pam Karlan, Ellen Katz, Jonathan Katz, Tom Lee, Erik Lillquist, David McGowan, Miranda McGowan, Gillian Metzger, Henry Monahan, Bob Mosteller, Dan Ortiz, Michael Paulsen, Rick Pildes, Jeff Powell, Jed Purdy, Barak Richman, Daria Roithmayr, Laura Underkuffler, Jeremy Waldron, Tim Wu, and Larry Zelenak for extremely helpful comments and criticisms. Thanks also to participants at faculty workshops at Columbia, Duke, Harvard Law School, Minnesota, Seton Hall, University of San Diego Law School, and the University of Southern California where this paper was presented. I also wish to express my deepest appreciation to the editors of the *Cornell Law Review*.

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INTRODUCTION

The United States Supreme Court continues to struggle mightily with the complexity of democratic governance. Since its early and successful, yet controversial, foray into politics in *Baker v. Carr*,¹ the Court has played a significant role in defining the contours of democratic politics. Yet, notwithstanding its active involvement, the Court has failed to develop a coherent theory of judicial oversight of politics.² This is a fundamental problem because it yields a jurisprudence that lacks a clear sense of the constitutional harm that judicial review is envisaged to vindicate.³ Perhaps no controversy better illustrates

¹ 369 U.S. 186 (1962).

² See Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411, 1413–14 (2002) (arguing that the Court lacks a coherent theory of politics and noting the resultant costs).

³ See Judith Reed, *Sense and Nonsense: Standing in the Racial Districting Cases as a Window on the Supreme Court's View of the Right to Vote*, 4 MICH. J. RACE & L. 389, 456–57 (1999) (“Without a better defined theory of democracy or an appreciation of representation issues and the problems jurisdictions face, the Court has condemned itself to *ad hoc* decision making because it lacks a framework.”).

the Court's ambivalence toward establishing the proper demarcation between law and politics than its struggles with the justiciability of political gerrymandering. While the Court's political gerrymandering decisions occasionally reflect an intuition that judicial review is necessary to cabin overreaching by state actors, it has failed to operationalize this intuition into a sound and coherent framework.⁴

This is not to say that the Court has not tried. Indeed, it has attempted to resolve the constitutional status of political gerrymanders in two extremely fractured cases: *Davis v. Bandemer*⁵ and *Vieth v. Jubelirer*.⁶ Neither case produced a majority opinion, and both cases left open several crucial questions, including the threshold inquiry of whether political gerrymandering claims are justiciable.⁷ Further, the Court has also failed to resolve several other important issues, namely: explaining the constitutional harm caused by political gerrymandering, settling upon a doctrinal approach to resolve political gerrymandering claims, providing a manageable standard, and offering a justification for judicial supervision of partisan line drawing.⁸ This confusion, illustrated by the crosscutting opinions in *Vieth*, is the con-

⁴ See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 597 (2002).

⁵ 478 U.S. 109 (1986). The Court's fragmented decision in *Bandemer* featured three significant opinions. See *id.* While six Justices agreed that political gerrymandering was justiciable, they differed markedly in their rationales. See *id.*

⁶ 541 U.S. 267 (2004). In *Vieth*, four Justices, per Justice Antonin Scalia's plurality opinion declaring the judgment of the Court, concluded that political gerrymandering claims are not justiciable because the law does not provide any judicially manageable standards to apply in these cases. See *id.* at 305–06 (plurality opinion). Justice Scalia, the late Chief Justice William H. Rehnquist, Justice Sandra Day O'Connor, and Justice Clarence Thomas would thus declare defeat and abdicate the field altogether. See *id.* (plurality opinion). Four other Justices concluded that political gerrymandering claims are justiciable based on three different rationales. Justice David Souter, joined by Justice Ruth Bader Ginsburg, would adopt a five-part test based on the racial vote dilution case of *Thornburg v. Gingles*, 478 U.S. 109 (1986), that would employ the burden-shifting framework of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), the landmark employment discrimination case. See *Vieth*, 541 U.S. at 346–53 (Souter, J., dissenting). Justice John Paul Stevens would use the bizarre-shape test announced by the Court in the paradigm-shifting racial gerrymandering case of *Shaw v. Reno*, 509 U.S. 630 (1993). See *Vieth*, 541 U.S. at 334–36, 339 (Stevens, J., dissenting). Justice Stephen Breyer would employ a flexible standard that would attempt to distinguish unjustified entrenchment of majoritarian power from justified entrenchment based upon legitimate electoral results. See *id.* at 365–67 (Breyer, J., dissenting). Lastly, Justice Anthony Kennedy maintained that he “would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.” *Id.* at 306 (Kennedy, J., concurring).

⁷ The Court ultimately clarified this issue in its most recent law and politics case, *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006).

⁸ As Professor Gardner stated, “*Vieth* thus appears to resolve nothing, while inviting litigants to continue bringing what have proven uniformly to be fruitless actions in the hope of stumbling blindly upon some legal standard that might supply the as-yet unknown incantation necessary to evoke judicial relief.” James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION L.J. 643, 643 (2004).

sequence of a Court that is utterly at sea with respect to its role in policing the manipulation of democratic outcomes by political elites.

Unfortunately, the academic literature on law and politics is similarly divided. Some, whom I term structuralists, point to the need for courts to stem the structural pathologies of democratic politics, such as the lack of competitiveness in elections, and argue in favor of meaningful judicial review of political gerrymandering plans.⁹ Others, whom I term individualists, respond that courts are only suited for resolving individual rights claims, e.g., racial gerrymandering disputes.¹⁰ They maintain that structural questions, which raise difficult baseline problems such as how to determine the appropriate level of competitiveness in elections, are the responsibility of elected officials and best addressed by the political process rather than by the judicial system.¹¹ Individualists further contend that there are no judicially manageable standards available to resolve political gerrymandering disputes.¹² Consequently, they conclude that courts are ill-suited for resolving structural claims and must not involve themselves in these divisive questions of politics and policy.¹³

The challenge individualists pose seems formidable. Structuralists on the Court have focused their attention on the fateful exercise of determining whether political groups are similar enough to racial groups to justify judicial involvement.¹⁴ Structuralists in the academy have emphasized the shortcomings of individualism and the importance of competition to democratic elections.¹⁵ However, these structuralist responses have mainly served to highlight the fact that structuralism has not sufficiently evolved to provide a comprehensive framework for directing judicial supervision of democratic politics or a compelling account of the harm that political gerrymandering causes.

This Article addresses the shortcomings of the structuralist model and responds to the challenge of the individualists. Part I argues that the central harm of political gerrymandering is what I term institutional distortion—political elites' manipulation of governance institu-

⁹ See, e.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648 (1998).

¹⁰ See *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971); *Baker v. Carr*, 369 U.S. 186, 287 (1962) (Frankfurter, J., dissenting); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 727 (1998).

¹¹ See, e.g., Bruce E. Cain, *Garrett's Temptation*, 85 VA. L. REV. 1589, 1600 (1999).

¹² See *Vieth v. Jubelirer*, 541 U.S. 267, 281–306 (2004) (plurality opinion).

¹³ See Cain, *supra* note 11, at 1600.

¹⁴ See *Vieth*, 541 U.S. at 267; *Davis v. Bandemer*, 478 U.S. 109 (1986).

¹⁵ See H. B. MAYO, AN INTRODUCTION TO DEMOCRATIC THEORY 61 (1960); HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 234 (1967); Richard H. Pildes, *The Supreme Court 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 53 (2004).

tions or electoral structures to distort electoral outcomes in order to produce a particular result. This Part concludes that institutional distortion undermines the principles that legitimate democratic practices and interferes with the central aim of electoral systems, which is to reflect as accurately as possible the preferences of the relevant electorate.¹⁶

Part II explains why the Court has struggled with the problem of political gerrymandering and demonstrates how the Court has relied upon the racial dilution cases to help it make sense of the harm caused by political gerrymandering. This Part also argues that this race-politics dialectic is part of a long-running doctrinal dispute with respect to the proper characterization of claims alleging racial discrimination in the political process, the utility of race as a guide for thinking about politics, and the constitutional limitations on judicial review of the political process.

Part III explains why the inquiry into judicially manageable standards for resolving gerrymandering claims is not a useful one: Commentators have misunderstood Justice Antonin Scalia's argument in *Vieth* to be a descriptive one about judicial administrability rather than a prescriptive one about the proper role of the Judiciary in supervising questions of political governance.

Part IV explores the justifications for judicial review of democratic governance claims and addresses the central points of the individualists by exploring their arguments in depth. In addition, this Part develops a framework that I term "election law dualism" for addressing the structural challenges that political gerrymandering poses to adjudication. This framework demonstrates that to effectively resolve democratic governance claims, courts must be willing to explicitly deploy a rights-based approach that ostensibly focuses on the individual while self-consciously employing a structural account that seeks to understand the pathologies of the political process in institutional terms. The Court successfully navigated these issues in the reapportionment context, and it may do so in the context of political gerrymandering as well. Lastly, Part V argues that the administrability barrier to political gerrymandering claims may be overcome and suggests several judicially administrable standards that courts could apply to resolve these claims.

¹⁶ This is the first article in a series. In this Article, I address only the questions of harm and justification for judicial review of partisan line drawing. The second article will offer the First Amendment as a doctrinal framework for thinking about political gerrymandering claims. I have previously sketched out the contours of this approach in two law review articles. See Guy-Uriel E. Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1131-40 (2005) [hereinafter Charles, *Politics*]; Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209 (2003) [hereinafter Charles, *Identity*].

This Article concludes that judicial review of the rules that constitute governance institutions is justifiable. To be clear, the argument advanced in this Article is not that courts *must* involve themselves in the political process to address the structural pathologies of that process. Rather, the point is that courts *can* engage in the political process, even in an aggressive way, and that such involvement would be justified. Part of the inquiry here is to explore whether it matters if we take fundamental democratic principles seriously even in a mature democracy. I suggest that it does matter, and thus, there is no need to fret over the possibility of greater judicial supervision of democratic politics.

I

INSTITUTIONAL DISTORTION

In order to address the problem of political gerrymandering, one must have a theory of harm. A jurisprudence that lacks a clear and concrete articulation of the constitutional harm it seeks to vindicate causes doctrinal incoherence because without a conception of the harm, it is difficult for the courts to distinguish among doctrinal approaches and, likewise, to settle on one. Thus, without a clear articulation of the harm political gerrymandering causes, courts are currently open to any and all doctrinal frameworks that promise relief, no matter how phantasmic. Indeed, as some commentators have noted, courts have been willing to entertain a series of varied doctrinal possibilities in an attempt to limit political gerrymandering, including several provisions of the Constitution, sundry judge-made rules, various federal statutes, and numerous state law doctrines.¹⁷

The voluminous literature on political gerrymandering also lacks a clear description of the specific harm that the manipulation of electoral institutions and the distortion of political outcomes yield.¹⁸ While commentators have argued that the federal courts should vindicate the constitutional values that political gerrymandering infringes,¹⁹ the literature has not developed a coherent account of the

¹⁷ See, e.g., Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 542 (2004).

¹⁸ For some thoughtful articulations of the harm on other grounds, see Issacharoff, *supra* note 4, at 600 (defining the harm as anticompetitive behavior); Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 304–05 (1991) (arguing that “[g]errymandering violates the American constitutional tradition by conceding to legislatures a power of self-selection” and by permitting legislatures to “insulat[e] themselves from the popular will”).

¹⁹ See, e.g., Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 783 (2005) (asserting that the “excessive partisanship” gerrymandering enables violates the Constitution); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 534 (1997) (“Gerrymandering has nothing to commend it—the practice is

harm. Without such an account, it is difficult to understand whether political gerrymandering is a structural pathology of the political process that must be corrected by judicial review or merely a natural self-correcting outgrowth of normal politics.²⁰

Part I.A argues that the harm political gerrymandering causes is the manipulation of the very rules that both constitute governance institutions and legitimize their outcomes as democratic by self-interested political actors using the power of the state.²¹ Although this articulation of the harm may appear at first to be elementary, the Court has surprisingly been unable to articulate the harm in anything other than extremely vague and intuitive generalizations. In fact, the plurality opinion in *Bandemer* neglected even to discuss the harm caused by political gerrymandering aside from ambiguously stating that “the issue is one of representation.”²² This significant limitation precluded the Court from developing a framework that would vindicate constitutional values. Thus, it is not surprising that all nine Justices abandoned the hapless *Bandemer* plurality, and that, as Part I.B explains, the Justices in *Vieth* struggled mightily to articulate the harm caused by political gerrymandering.

A. Political Gerrymandering

This subpart argues that the problem with political gerrymandering is the intentional manipulation of democratic institutions by state actors.²³ This manipulation undermines the democratic principles that legitimate democratic practices. It is this loss of legitimacy that is

entrenchment, pure and simple.”); Michael E. Lewyn, *How to Limit Gerrymandering*, 45 FLA. L. REV. 403, 407 (1993) (arguing that gerrymandering is antimajoritarian).

²⁰ See Larry Alexander, *Lost in the Political Thicket*, 41 FLA. L. REV. 563 (1989); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002); Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325 (1987).

²¹ To be clear, I am concerned in this Article with the composition of electoral structures or election systems as they affect governance institutions only—not all institutions of democratic governance. Governance institutions are the fundamental mechanism of legitimacy and accountability in democratic politics. This Article is concerned with the rules that constitute these institutions and the manipulation of those rules by state actors.

²² *Davis v. Bandemer*, 478 U.S. 109, 124 (1986). For criticism of *Bandemer* along these lines, see Daniel Hays Lowenstein, *Bandemer's Gap: Gerrymandering and Equal Protection*, in *POLITICAL GERRYMANDERING AND THE COURTS* 64, 74–79 (Bernard Grofman ed., 1990).

²³ Note that the argument here is not about competition, the conception of harm advanced by Professors Issacharoff and Pildes. See Issacharoff, *supra* note 4, at 600; Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 ELECTION L.J. 685, 686 (2004). Instead, it concerns institutional distortion, which envisages a broader framework than that advanced by the competition model. In the institutional distortion framework, competition is one important democratic value among many. The argument advanced here is thus fully consistent with the competition model. However, the focus here is on mirroring the underlying preferences of the electorate as opposed to artificially interjecting competition into the electoral process where the process is inherently noncompetitive.

the harm of political gerrymandering. To support this argument, I employ political theory, social choice theory, and political science to demonstrate that there is a tension between how democratic practices ought to work according to democratic theory and how democratic practices do in fact work according to political scientists and social choice theorists. Thus, the problem underlying political gerrymandering is the struggle to reconcile democratic theory with democratic practices.

1. *On Democratic Theory*

Democratic politics depends upon the existence of a series of principles and values from which it draws its legitimacy.²⁴ One of the essential principles is that fundamental electoral outcomes ought to be the consequence of the preferences of democratic citizens. As John Locke stated, “[t]he Constitution of the Legislative is the first and fundamental Act of Society . . . without which no one Man, or number of Men, amongst them, can have Authority of making Laws, that shall be binding to the rest.”²⁵

The central purpose of electoral systems is to accurately register the preferences of the relevant electorate. Under the standard democratic account, the democratic ideal is responsiveness.²⁶ Some astute students of the democratic process have maintained that democracy “involves a connection between the policy preferences of citizens . . . and what their governments do.”²⁷ Or, as Hanna Pitkin stated, “representing . . . means acting in the interest of the represented, in a manner responsive to them.”²⁸

A foundational tenet of representative democracy is the principle that self-government is actuated through the process of meaningful

²⁴ See generally John D. Lewis, *The Elements of Democracy*, 34 AM. POL. SCI. REV. 467 (1940) (discussing the essential elements of democratic theory).

²⁵ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 425–26 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) (emphasis omitted).

²⁶ See SIDNEY VERBA & NORMAN H. NIE, *PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY* 300 (1972) (“Responsiveness is what democracy is supposed to be about . . .”). For a definition of responsiveness, see Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretative Approach of Baker v. Carr*, 80 N.C. L. REV. 1103, 1149 (2002) (“Responsiveness conveys how well democratic institutions track the substantive preferences of the electorate. The more democratic institutions react antiphonally to the expressed preferences of the electorate the more they can be classified as responsive.”); Bernard Manin et al., *Introduction to DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION* 9 (Bernard Manin et al. eds., 1999) (“A government is ‘responsive’ if it adopts policies that are signaled as preferred by citizens.”).

²⁷ BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, *THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS’ POLICY PREFERENCES* 383 (1992).

²⁸ HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 209 (1967).

periodic elections in which voters choose their representatives.²⁹ Elections, as some commentators have noted, “are at the core of the American political system. They are the way we choose government leaders, a source of the government’s legitimacy, and a means by which citizens try to influence public policy.”³⁰ Or, as George Kateb explained:

In a representative democracy the source of law and public policies is a collection of officeholders who have attained office by winning contested elections. The contested elections, by their very nature, provide some general guidance to the winners concerning public opinion and preferences on laws and public policies that have been and are to be made. . . . Thus, the fundamental institution of representative democracy is the electoral system.³¹

However, in order for elections to fulfill their purpose in a polity, they must be meaningful. That is, at the very least, their processes must provide the opportunity for genuine contestation, and their outcomes must not be preordained by the design of institutional structures. In this democratic ideal, representation is the result of a contest among competing and self-defined constituencies. State actors and political elites pervert and violate this ideal whenever they distort the contest and assign representation. If elections are barely contested and democratic outcomes are largely predetermined by state-prescribed institutional arrangements, one cannot operationalize fundamental concepts of democracy such as self-government, consent of the governed, responsiveness, and free association. As democratic theorists rightly remind us, these abstract concepts are rendered operative and meaningful through the medium of democratic institutions.³² Pitkin stated the point best: “Representative gov-

²⁹ See DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 199 (1989) (“Voters . . . who choose between competing candidates . . . are . . . masterless men.”); BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* 85–86 (1997) (noting the crucial connection between consent and elections). As Giovanni Sartori maintained:

Since in order to have democracy we must have, to some degree, a government of the people, let us immediately ask: When do we find a “governing people,” the demos in the act or the role of governing? The answer is: At elections. This is no belittlement, for the democratic process is indeed encapsulated in elections and electing.

GIOVANNI SARTORI, *THE THEORY OF DEMOCRACY REVISITED* 86 (1987).

³⁰ RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, *WHO VOTES?* 1 (1980); see also MAYO, *supra* note 15, at 61 (“[C]hoosing the policy-makers (representatives) at elections held at more or less regular intervals” is the “institutional embodiment of the principle [of popular control of policy-makers that is] universally regarded as indispensable in modern democracies.”).

³¹ George Kateb, *The Moral Distinctiveness of Representative Democracy*, 91 *ETHICS* 357, 357 (1981); see also Pildes, *supra* note 23, at 686 (“[E]lections tie, however loosely, the exercise of public power to the interests and values of citizens. . . . At a minimum, elections make the identity of those who wield public power accountable to the vote of citizens.”).

³² See e.g., HERZOG, *supra* note 29, at 203–08.

ernment is not defined by particular actions at a particular moment, but by long-term systematic arrangements—by institutions and the way in which they function.”³³

Moreover, if democratic institutions are severely compromised, they cannot provide any guidance to winners regarding the preferences of the electorate, and they fail to serve their accountability functions.³⁴ Indeed, minimizing the ultimate accountability function of elections—the electorate’s ability to vote out unsatisfactory representatives—is the goal of gerrymandering.

Elections are necessary to democracy because they legitimate democratic practices by ensuring responsiveness and accountability.³⁵ Elections in a democracy are the primary mechanism for institutionalizing responsiveness and accountability.³⁶ This function, captured in the pithy phrase “consent of the governed,”³⁷ is what differentiates elections from selection by lot and legitimates the political order.³⁸

2. *On Democratic Practices*

As compelling as the standard democratic account is, it is complicated by the role of institutions and political elites in the formation of citizen preferences. This complication occurs because citizen preferences are sometimes exogenous and other times endogenous.³⁹ That is, sometimes citizens have fixed preferences, and those preferences drive political outcomes; in those instances, citizen preferences are exogenous. In other instances, citizen preferences are a function of their political context; in those cases, preferences are endogenous because they are the product of external contextual stimuli. As a result, in those cases, political outcomes cannot be explained accurately solely in terms of citizen preferences.

³³ PITKIN, *supra* note 28, at 234.

³⁴ See Gary C. Jacobson, *Strategic Politicians and the Dynamics of U.S. House Elections, 1946–86*, 83 AM. POL. SCI. REV. 773, 773 (1989) (“Free, competitive elections are supposed to encourage leaders to govern responsibly because voters can fire them if they do not. But the kind of accountability elections enforce depends on the structure of electoral politics.”).

³⁵ See Manin et al., *supra* note 26, at 10 (“Governments are ‘accountable’ if citizens can discern representative from unrepresentative governments and can sanction them appropriately, retaining in office those incumbents who perform well and ousting from office those who do not.”).

³⁶ See PITKIN, *supra* note 28, at 234 (“Our concern with elections and electoral machinery, and particularly with whether elections are free and genuine, results from our conviction that such machinery is necessary to ensure systematic responsiveness.”).

³⁷ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³⁸ See HERZOG, *supra* note 29, at 198–208.

³⁹ For useful and brief introductory material to the literature in various disciplines on preference formation, see James N. Druckman & Arthur Lupia, *Preference Formation*, 3 ANN. REV. POL. SCI. 1 (2000).

Debates in political science with respect to party identification demonstrate the distinction between exogenous and endogenous preferences. One model of party identification posits that citizens have stable party identifications that are largely unaffected by changes in issues or events.⁴⁰ These party identifications are fixed, exogenous preferences that explain not only presidential election outcomes but also how citizens evaluate issues, candidates, and political events.⁴¹ An alternative, revisionist model maintains that partisan identification is both exogenous and endogenous; it shifts in response to political elites, candidates, the emergence or disappearance of political issues, and other political variables.⁴² Under that theory, in order to understand political events, one would have to understand the political variables and institutions that alter party identifications.

A similar debate exists with respect to the formation of public opinion and the extent to which the political process responds to public opinion versus the extent to which it creates public opinion. The standard democratic account envisions a positive and consequential relationship between the public's opinion and the actions of elected officials.⁴³ That is, elected officials and political institutions will respond to citizens' political preferences.⁴⁴ But the empirical evidence for this exogenous account is at best mixed. While there is some indication that public opinion may sometimes serve exclusively as an inde-

⁴⁰ See ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* (1960); Donald Philip Green & Bradley Palmquist, *How Stable Is Party Identification?*, 16 *POL. BEHAV.* 437 (1994); Donald Philip Green & Bradley Palmquist, *Of Artifacts and Partisan Instability*, 34 *AM. POL. SCI. REV.* 872 (1990). But see PAUL R. ABRAMSON, *GENERATIONAL CHANGE IN AMERICAN POLITICS* 51-70 (1975).

⁴¹ As Campbell and his colleagues stated:

For virtually any collection of states, counties, wards, precincts, or other political units one may care to examine, the correlation of the party division of the vote in successive elections is likely to be high. Often a change of candidates and a broad alteration in the nature of the issues disturb very little the relative partisanship of a set of electoral units, which suggests that great numbers of voters have party attachments that persist through time.

CAMPBELL ET AL., *supra* note 40, at 121.

⁴² The path-breaking article here both in terms of methodology and theory is John E. Jackson, *Issues, Party Choices, and Presidential Votes*, 19 *AM. J. POL. SCI.* 161 (1975). For further discussion of this theory, see Janet M. Box-Steffensmeier & Renee M. Smith, *The Dynamics of Aggregate Partisanship*, 90 *AM. POL. SCI. REV.* 567 (1996); Charles H. Franklin, *Issue Preferences, Socialization, and the Evolution of Party Identification*, 28 *AM. J. POL. SCI.* 459 (1984); Charles H. Franklin, *Measurement and the Dynamics of Party Identification*, 14 *POL. BEHAV.* 297 (1992); Charles H. Franklin & John E. Jackson, *The Dynamics of Party Identification*, 77 *AM. POL. SCI. REV.* 957 (1983); Elisabeth R. Gerber & John E. Jackson, *Endogenous Preferences and the Study of Institutions*, 87 *AM. POL. SCI. REV.* 639 (1993); Benjamin I. Page & Calvin C. Jones, *Reciprocal Effects of Policy Preferences, Party Loyalties and the Vote*, 73 *AM. POL. SCI. REV.* 1071 (1979).

⁴³ See, e.g., PAGE & SHAPIRO, *supra* note 27, at 383.

⁴⁴ See, e.g., PITKIN, *supra* note 28, at 209. The standard account also assumes that citizens have the capacity for making political judgments. See, e.g., *id.* at 43, 232.

pendent influence on the political process,⁴⁵ the evidence is overwhelming that there is a reciprocal relationship between public opinion and public policy: Social and political institutions and actors mediate—and in some instances manipulate—public opinion, which in turn serves as a justification for political action.⁴⁶

Consider in this vein the study that political scientists Lawrence Jacobs and Robert Shapiro conducted of Bill Clinton's welfare reform program and Newt Gingrich's "Contract with America."⁴⁷ With respect to Clinton's welfare reform, Jacobs and Shapiro stated:

[T]he president and his aides used polls and focus groups to craft their presentations in order to most effectively "win" public backing. They attempted to move public opinion to close the gap with what most Americans preferred Public opinion research, then, did not guide policymaking; rather, policy decisions guided the research on public opinion in order to identify the language, arguments, and symbols most likely to persuade Americans.⁴⁸

They concluded that instead of trying to follow public opinion, politicians "use research on public opinion to pinpoint the most alluring words, symbols, and arguments in an attempt to move public opinion to support their desired policies."⁴⁹

Summarizing the research on the formation of public opinion, some commentators have concluded that "common patterns of political thinking in mass publics can be viewed as politically constructed outcomes."⁵⁰ Indeed, the observation is applicable to explain not only the formation of public opinion or partisan identification but also

⁴⁵ See Robert S. Erikson et al., *Dynamic Representation*, 89 AM. POL. SCI. REV. 543, 559 (1995) ("[L]arge-scale shifts in public opinion yield corresponding large-scale shifts in government action.").

⁴⁶ See BENJAMIN GINSBERG, *THE CAPTIVE PUBLIC: HOW MASS OPINION PROMOTES STATE POWER* (1986); SHANTO IYENGAR & DONALD R. KINDER, *NEWS THAT MATTERS* (1987); LAWRENCE R. JACOBS & ROBERT Y. SHAPIRO, *POLITICIANS DON'T PANDER: POLITICAL MANIPULATION AND THE LOSS OF DEMOCRATIC RESPONSIVENESS* (2000); PAGE & SHAPIRO, *supra* note 27; JOHN R. ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* (1992); see also Kim Quaile Hill & Patricia A. Hurley, *Dyadic Representation Reappraised*, 43 AM. J. POL. SCI. 109 (1999) (examining circumstances in which the relationship between public opinion and democratic representation is most likely to be reciprocal); Thomas E. Nelson & Donald R. Kinder, *Issue Frames and Group-Centrism in American Public Opinion*, 58 J. POL. 1055 (1996) (concluding that public opinion is more strongly defined by social group identities if issues are framed to explain benefits to particular social groups).

⁴⁷ JACOBS & SHAPIRO, *supra* note 46.

⁴⁸ *Id.* at 76. Their findings on Gingrich's "Contract with America" were very similar. See *id.* at 263–77.

⁴⁹ *Id.* at xv.

⁵⁰ Suzanne Mettler & Joe Soss, *The Consequences of Public Policy for Democratic Citizenship: Bridging Policy Studies and Mass Politics*, 2 PERSP. ON POL. 55, 58 (2004); see also GINSBERG, *supra* note 46, at 148 ("[T]he marketplace of ideas is dominated by the views of elite strata. The more exposed they are to the market, the more likely ordinary people are to see the world through the eyes of the upper classes.").

that of political outcomes more generally.⁵¹ Perhaps Josep Colomer stated it best when he concluded that “political institutions shape actors’ strategies, and . . . the latter produce collective outcomes. Institutions provide information, opportunities, incentives, and constraints for both citizens and leaders choosing certain strategies, and it is only through the intermediation of actors’ strategic decisions that collective outcomes can be explained.”⁵²

The observation that institutions shape public opinion is not new, although we are only beginning to come to grips with its implications. Social choice theorists and political scientists have long appreciated that political institutions exert independent influence on the distribution of political power, public policy, and political outcomes.⁵³ As William Riker stated in making the case for studying and understanding political institutions, public policy “outcomes are not . . . wholly random and unexpected.”⁵⁴ In fact, these outcomes are fairly predictable because “decisions are customarily made within the framework of known rules, which are what we commonly call institutions.”⁵⁵ Thus, in a process I term institutionalism, institutions shape the substance of political decisions and public policy outcomes.

Examples abound of the relationship between public policy outcomes and political institutions.⁵⁶ Some scholars have argued that American electoral structures and political institutions are partly responsible for the failure of the United States to develop a welfare state similar to the one in Europe.⁵⁷ Others have argued that the United States’ two-party system is not necessarily the product of public policy preferences of the electorate but instead may reflect the propensity of

⁵¹ See JOSEP M. COLOMER, *POLITICAL INSTITUTIONS: DEMOCRACY AND SOCIAL CHOICE* 4 (2001).

⁵² *Id.*

⁵³ See, e.g., William H. Riker, *Implications from the Disequilibrium of Majority Rule for the Study of Institutions*, 74 AM. POL. SCI. REV. 432, 443 (1980) (“[T]he particular structure of an institution is at least as likely to be predictive of socially enforced values as are the preferences of the citizen body.”).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See *id.* For an introduction to the purposes that different types of electoral systems serve, see Donald L. Horowitz, *Electoral Systems and Their Goals: A Primer for Decision Makers*, 14 J. DEMOCRACY 115 (2003).

⁵⁷ See, e.g., Alberto Alesina et al., *Why Doesn't the United States Have a European-Style Welfare State?*, 2 BROOKINGS PAPERS ON ECON. ACTIVITY 187 (2001). For related examples, see Riker, *supra* note 53, at 443.

single-member districts to produce and maintain two dominant⁵⁸ and centrist parties.⁵⁹

Furthermore, other scholars have recently demonstrated that the design of electoral structures profoundly affects the allocation and distribution of public funds.⁶⁰ Specifically with respect to malapportionment, or unequal representation, these scholars concluded that the Court's decision in *Baker v. Carr*⁶¹ "fundamentally transformed the politics of public finance in the American states" by introducing and implementing the equipopulation principle.⁶² Thus, the distribution of public funds from states to counties is not merely a function of intentional public policy choices.⁶³ An important implication of this study is that the composition of electoral structures yields predictable and often intentional public policy outcomes with distinct and directional biases.⁶⁴ We are only beginning to appreciate the relationship between electoral structures and public policy effects.⁶⁵

3. *Reconciling Democratic Theory with Democratic Practice*

Institutionalism calls into question some basic assumptions of the standard democratic account. Democratic theory envisions an ideal of consequential political participation by citizens.⁶⁶ "Ancient liberty," legal theorist Don Herzog maintains, "is the right to participate

⁵⁸ See MAURICE DUVERGER, *POLITICAL PARTIES* 217 (1959) (concluding that a "simple-majority single-ballot system" tends to produce a two-party system); E.E. SCHATTSCHEIDER, *PARTY GOVERNMENT* 80-84 (1942). For further refinements, see William H. Riker, *The Number of Political Parties: A Reexamination of Duverger's Law*, 9 COMP. POL. 93 (1976); William H. Riker, *The Two-Party System and Duverger's Law: An Essay on the History of Political Science*, 76 AM. POL. SCI. REV. 753 (1982).

⁵⁹ See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 114-25 (1957).

⁶⁰ See Stephen Ansolabehere et al., *Equal Votes, Equal Money: Court-Ordered Redistricting and Public Expenditures in the American States*, 96 AM. POL. SCI. REV. 767, 776 (2002) (asserting that malapportionment "affects the distribution of funds—who gets what"); see also Mathew D. McCubbins & Thomas Schwartz, *Congress, the Courts, and Public Policy: Consequences of the One Man, One Vote Rule*, 32 AM. J. POL. SCI. 388, 388 (1988) ("[T]he continuing reallocation of federal policy benefits from rural to nonrural Americans . . . [is] a consequence of court-ordered congressional redistricting based on the One Man, One Vote rule.").

⁶¹ 369 U.S. 186 (1962).

⁶² Ansolabehere et al., *supra* note 60, at 767.

⁶³ See *id.*

⁶⁴ *Id.* at 770 ("Controlling for other factors, the estimated effect of representation on the distribution of public policy expenditures is very large and highly significant."); McCubbins & Schwartz, *supra* note 60, at 409 ("[A] large-scale change in the congressional representation of certain interests produce[s] a like change in policy.").

⁶⁵ See, e.g., W. Mark Crain, *Districts, Diversity, and Fiscal Biases: Evidence from the American States*, 42 J.L. & ECON. 675 (1999) (examining how districting affects pork barrel politics and arguing that "the configuration of legislative districts and not merely the number of districts matters for fiscal performance").

⁶⁶ See, e.g., Donald W. Keim, *Participation in Contemporary Democratic Theories*, in PARTICIPATION IN POLITICS 1, 1 (J. Roland Pennock & John W. Chapman eds., 1975) ("The simplest definition of democracy, rule by the people, implies participation.").

in political decision making or to vote in elections for popular representatives.”⁶⁷ As Professor Herzog intimates by equating elections with political participation, voting is the quintessential expression of democratic participation.⁶⁸ Similarly, the political philosopher Dennis Thompson noted recently that “[e]lections can occur without democracy, but democracy cannot endure without elections.”⁶⁹

But elections can fulfill their function only if they are not manipulated by those who would be our governors.⁷⁰ Voters must have genuine choices, and those choices must be consequential.⁷¹ Put differently, political elites cannot predetermine political outcomes.⁷² As the Court has stated, truly democratic processes must assure that elected officials are “the free and uncorrupted choice[s] of those who have the right to take part in that choice.”⁷³

Gerrymandering subverts democratic principles by limiting the impact of citizen choice when that choice is incompatible with the preferences of state actors. If gerrymandering practices are taken to their logical extreme, what is the purpose of elections?⁷⁴ When the “fundamental institution[s] of representative democracy”⁷⁵ are controlled by self-interested political actors, these institutions’ claims to democratic legitimacy are open to severe challenge.

Political gerrymandering causes harm by distorting the fundamental democratic institutions from which the democratic process derives its legitimacy. If one takes democratic principles seriously, one cannot permit self-interested electoral officials to apportion political power and generate public policy outcomes based on false, self-serving criteria to the detriment of a heterogeneous society with manifold

⁶⁷ HERZOG, *supra* note 29, at 219; *see also* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 246 (2002) (describing “the people’s right to an active and constant participation in collective power” as an “ancient liberty”).

⁶⁸ *See* HERZOG, *supra* note 29, at 219; *see also* DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW: CASES AND MATERIALS* 29 (3d ed. 2001) (“[V]oting is the most elemental form of democratic participation.”).

⁶⁹ DENNIS F. THOMPSON, *JUST ELECTIONS* 1 (2002); *see also* Manin et al., *supra* note 26, at 5 (“This is what is distinct about democracies: Rulers are selected through elections.”).

⁷⁰ PITKIN, *supra* note 28, at 232 (“When a ruler manipulates an inert mass of followers to accord with his will, we hesitate to say that he represents them. In the same way, if an interest group engages in a vast propaganda campaign to persuade the public in favor of some measure, we do not regard this activity as representation of the public.”).

⁷¹ *See id.*

⁷² *See id.*; MICHAEL SAWARD, *THE TERMS OF DEMOCRACY* 50 (1998) (“The [democratic] requirement of effective inputs holds that inputs must determine outcomes; they must not merely add to a sense of efficacy or belonging via political participation. Inputs must make a difference, must be more than symbolic or tokenistic.”).

⁷³ *Ex Parte Yarbrough*, 110 U.S. 651, 662 (1884).

⁷⁴ *See* Samuel Issacharoff, *Why Elections?*, 116 HARV. L. REV. 684 (2002).

⁷⁵ Kateb, *supra* note 31, at 357.

crosscutting identities.⁷⁶ In essence, extreme gerrymandering causes harm because it inverts the democratic process, artificially constrains voter choice, distorts election outcomes, and minimizes the legitimacy of the democratic order. This is the true harm toward which the Court is gesturing vigorously but an articulation of which has escaped it with wraithlike elusiveness.

B. No Clear Conception of Harm

To appreciate the Court's difficulty in articulating the harm, return once more to *Vieth*, which presented a fairly clear-cut partisan gerrymandering claim.⁷⁷ As a consequence of population shifts reflected by the 2000 census, Pennsylvania became entitled to only nineteen congressional representatives instead of the previous twenty-one.⁷⁸ The Republicans, who held the majority in both houses and the governor's office, controlled the redistricting process and sought to maximize their partisan advantage.⁷⁹

The Republican Party created a classic gerrymander. They split political subdivisions including voting precincts, counties, and cities, drew oddly shaped districts, used irregular lines, paired Democratic incumbents against one another, and created an open seat.⁸⁰ Consequently, the Republicans secured a decisive advantage in a state that the Democrats maintained was evenly split.⁸¹ The Democrats filed suit in both state and federal court alleging political gerrymandering under *Bandemer*; they lost both cases in the lower courts and did not fare any better before the Supreme Court.⁸²

Vieth is remarkable in that the Court found great difficulty in agreeing even upon the threshold question presented by the case, which was identifying the constitutional harm caused by political gerrymandering. Justice Scalia's plurality opinion seemed indifferent to the question of harm. While he appeared to agree with Justice John Paul Stevens that "severe partisan gerrymander[ing is incompatible] with democratic principles,"⁸³ he also characterized the proposition

⁷⁶ See Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. REV. 257, 271-76 (1985) (discussing the relationship between political structures and political values).

⁷⁷ See *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

⁷⁸ See *id.* at 272 (plurality opinion).

⁷⁹ See *id.* As the plurality explained in *Vieth*: "Prominent national figures in the Republican Party pressured the General Assembly to adopt a partisan redistricting plan as a punitive measure against Democrats for having enacted pro-Democrat redistricting plans elsewhere." *Id.*

⁸⁰ See *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 674 (M.D. Pa. 2002).

⁸¹ See *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 536 (M.D. Pa. 2002).

⁸² See *Vieth*, 541 U.S. at 273, 305-06 (plurality opinion).

⁸³ *Id.* at 292; see also *id.* at 293 (assuming that "an excessive injection of politics is unlawful").

that there is “a judicially enforceable constitutional obligation . . . not to apply too much partisanship in districting” as “dubious.”⁸⁴ Whether gerrymandering presents a constitutional harm or not, Scalia does not believe that the Constitution has delegated to courts the task of remedying any such harm.⁸⁵ Consequently, he would have dismissed the case on manageability grounds.⁸⁶

Justice Anthony Kennedy would have concluded that as the “object of districting is to establish ‘fair and effective representation for all citizens,’”⁸⁷ the harm in political gerrymandering cases is to “representational rights.”⁸⁸ But Kennedy sought to dismiss the plaintiffs’ claims on justiciability grounds because of the “lack . . . of any agreed upon model of fair and effective representation” and the “absence of rules to confine judicial intervention.”⁸⁹

Justice Stevens argued that the constitutional harm in gerrymandering cases is “representational” at the district-level.⁹⁰ Legislators, explained Justice Stevens, ought to be responsive to their constituents.⁹¹ Drawing in particular on *Shaw v. Reno*, the racial gerrymandering case, he maintained that politically gerrymandered districts “subvert that representative norm because the winner of an election in a gerrymandered district inevitably will infer that her success is primarily attributable to the architect of the district rather than to a constituency defined by neutral principles.”⁹²

Like Justice Kennedy, Justice David Souter would begin with the proposition that fairness in districting is the ultimate criterion.⁹³ Unlike Justice Kennedy, however, he did not define the lack of fairness as a problem of representational rights, but instead as “a species of vote dilution,”⁹⁴ which involves “cracking a group into impotent fractions, to packing its members into one district for the sake of marginalizing them in another.”⁹⁵

Justice Stephen Breyer took another approach altogether. He identified majoritarianism as the constitutional value that is vindicated

⁸⁴ *Id.* at 286.

⁸⁵ *Id.* at 277, 286.

⁸⁶ *Id.* at 305–06.

⁸⁷ *Id.* at 307 (Kennedy, J., concurring) (quoting *Reynolds v. Sims*, 377 U.S. 533, 565–68 (1964)).

⁸⁸ *Id.* at 308, 313.

⁸⁹ *Id.* at 307.

⁹⁰ *Id.* at 330 (Stevens, J., dissenting).

⁹¹ *Id.* at 329.

⁹² *Id.* at 330.

⁹³ *Id.* at 343 (Souter, J., dissenting).

⁹⁴ *Id.* at 354.

⁹⁵ *Id.* at 343.

by judicial review of political gerrymandering claims.⁹⁶ Justice Breyer stated that the constitutional harm caused by political gerrymandering is the “*unjustified* use of political factors to entrench a minority in power.”⁹⁷ He defined entrenchment to mean “that the minority’s hold on power is purely the result of partisan manipulation and not other factors,” such as reliance upon traditional districting criteria.⁹⁸

While Justice Kennedy and the dissenters took admirable steps to articulate the harm caused by political gerrymandering, each of the dissenting opinions mischaracterizes the full nature of that harm. Furthermore, even if one accepts the dissenters’ conceptions of the harm on their own terms, their formulations leave much to be desired.

Justice Stevens described the harm engendered by political gerrymandering as the fact that “the representative will perceive that the people who put her in power are those who drew the map rather than those who cast ballots, and she will feel beholden not to a subset of her constituency, but to no part of her constituency at all.”⁹⁹ For Justice Stevens, then, gerrymandering disrupts “representational norms” and “imposes a [constitutionally] cognizable ‘representational harm’” by making the representative unresponsive to her constituents.¹⁰⁰

The problem with Justice Stevens’s approach is that his conception of the constitutional harm is rather odd, and its principal assumptions may not bear empirical scrutiny. First, gerrymandering can sometimes increase, rather than decrease, responsiveness.¹⁰¹ The purpose of gerrymandering is to make the challenged district—the district in which a putative plaintiff would have standing—more responsive to the constituency selected by the gerrymander. Thus, the kind of gerrymandering that involves redistricting—in contrast to the silent gerrymanders of *Baker v. Carr*¹⁰² and its progeny—may actually increase the fit between the representative and his or her constituency. In fact, that is its whole purpose.

Second, it strains credibility to assume that a rational representative even in an extremely gerrymandered district would completely ignore all of her constituents and be beholden *only* to those drawing the map because a representative who abandons his or her constituency

⁹⁶ See *id.* at 356 (Breyer, J., dissenting) (“There must also be a method for transforming the will of the majority into effective government.”).

⁹⁷ *Id.* at 360.

⁹⁸ *Id.*

⁹⁹ *Id.* at 331 (Stevens, J., dissenting).

¹⁰⁰ *Id.* at 329–30.

¹⁰¹ See Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 550, 553 (1994).

¹⁰² See 369 U.S. 186, 187–88 (1962).

will lose.¹⁰³ In such a case, it is apparent that the political process is working as it should,¹⁰⁴ thus leaving no constitutional value for judicial review to vindicate.

Justice Stevens's construction of the harm is odd in a third respect. If there is a group of voters that should concern Justice Stevens, it is the "filler people" in an extremely gerrymandered district.¹⁰⁵ Filler people are voters whose presence in a district is intended solely to satisfy the mandate of the Court's requirement that all districts have the same population and not to affect the preordained outcome.¹⁰⁶ Thus, state actors specifically designate filler people as political losers.¹⁰⁷ As the ones least likely to be protected by the political process, filler people are arguably the object of the Court's concern in *Shaw*.¹⁰⁸ If anyone has a claim to misrepresentation, it is the filler people—the district's political minority—not the district's majority.¹⁰⁹ Thus, for all of the reasons noted above, Justice Stevens's construction is puzzling at best.

Justice Souter's conception is similarly flawed, as he would define the harm as vote dilution at the district level.¹¹⁰ Under this concep-

¹⁰³ Political scientists who study Congress have repeatedly found that the care and handling of constituents is the key focus for a representative during her tenure in office. David Mayhew has gone so far as to describe members of Congress as "single-minded seekers of reelection." DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 5 (1974). Richard Fenno has shown how members' attention and behavior focus on building and maintaining electoral support within their districts for purposes of their re-election campaigns. See RICHARD F. FENNO, JR., *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* 33 (1978). Even those members who hold what some might consider "safe" seats dedicate time and resources to constituent service. See *id.* As other scholars have explained, this is most likely because representatives tend "to overestimate their visibility to the local public" when considering whether their official actions could lead to electoral sanction. Warren E. Miller & Donald E. Stokes, *Constituency Influence in Congress*, 57 AM. POL. SCI. REV. 45, 54 (1963).

¹⁰⁴ As Justice Scalia noted in *Vieth*: "We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold." 541 U.S. at 287 (plurality opinion).

¹⁰⁵ T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 601 (1993).

¹⁰⁶ See *id.* at 631.

¹⁰⁷ See *id.* at 601.

¹⁰⁸ 509 U.S. 630, 648 (1993) ("When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole."); see also Aleinikoff & Issacharoff, *supra* note 105, at 631 ("Indeed, it is in the name of the filler people that the Court ultimately reacted in *Shaw*.").

¹⁰⁹ Recognizing the effect that gerrymandering has on a district's political minority, in his *Vieth* dissent, Justice Stevens maintained that "[g]errymandering always involves the drawing of district boundaries to maximize the voting strength of the dominant political faction and to minimize the strength of one or more groups of opponents." 541 U.S. at 335 (Stevens, J., dissenting). But he did not choose to define the state's intentional designation of a political group as preordained political losers as the harm caused by political gerrymandering.

¹¹⁰ See *id.* at 354 (Souter, J., dissenting).

tion, the inquiry would be whether “each political group in a State [has] the same chance to elect representatives of its choice as any other political group.”¹¹¹ There are two central and related problems with Justice Souter’s approach. First, as some commentators have noted, one cannot assess vote dilution by simply examining a single district because one needs a statewide baseline to provide a rough sense of what a political group’s strength ought to be.¹¹² Second, and more fatally, as we have previously examined, political outcomes can be both exogenous and endogenous.¹¹³ That is, political outcomes can be the result of fixed voter preferences or political outcomes can be shaped by the political environment.¹¹⁴ Exogenous political outcomes mean that citizens have fairly fixed preferences that political institutions can register or aggregate.¹¹⁵ Endogenous outcomes imply that citizen preferences significantly depend upon political context¹¹⁶ and, as a result, changing the political context, in turn, changes the outcome.¹¹⁷ Thus, from the point of endogeneity, citizens do not have real preferences—preferences outside of their political electoral contexts.¹¹⁸

The problem with Justice Souter’s conception of the harm is that he assumes we are in a political world in which political outcomes are only exogenous.¹¹⁹ In such a world, no baseline problem exists because citizens have true preferences against which to measure political outcomes.¹²⁰ However, in a world where citizen preferences are endogenous, it is senseless to talk about what political outcomes should be because political outcomes can only be what they turn out to be.¹²¹

¹¹¹ *Id.* at 343 (quoting *Davis v. Bandemer*, 478 U.S. 109, 124 (1986)).

¹¹² *See, e.g.*, Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 510 (2004).

¹¹³ *See* Mettler & Soss, *supra* note 50.

¹¹⁴ *See* James H. Kuklinksi & Gary M. Segura, *Endogeneity, Exogeneity, Time, and Space in Political Representation*, 20 LEGIS. STUD. Q. 3 (1995); Mettler & Soss, *supra* note 50.

¹¹⁵ *See* ANGUS CAMPBELL, PHILIP E. CONVERSE, WARREN E. MILLER & DONALD E. STOKES, *THE AMERICAN VOTER* 121 (1960).

¹¹⁶ *See* Jackson, *supra* note 42.

¹¹⁷ For a theoretical application of this principle, see Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory*, 33 UCLA L. REV. 1, 60 (1985) (“If districts change, the candidates change, their strengths and weaknesses change, their campaigns change, their ability to raise money changes, the issues change—everything changes.”). For a very innovative empirical application, see David T. Canon et al., *The Supply Side of Congressional Redistricting: Race and Strategic Politicians 1972–1992*, 58 J. POL. 846 (1996).

¹¹⁸ *See* Gerber & Jackson, *supra* note 42, at 639.

¹¹⁹ *See* *Vieth v. Jubelirer*, 541 U.S. 267, 343 (2004) (Souter, J., dissenting).

¹²⁰ *See* Gerber & Jackson, *supra* note 42, at 639 (describing exogenous preferences as fixed individual preferences). If preferences are fixed, one may predict the voting outcome of an election in a district based on members’ political parties. *See id.*

¹²¹ This point is aptly advanced by Larry Alexander. As he stated, assuming a world “in which majorities shift depending upon the issue or personality under consideration[,] . . . the concept of vote dilution becomes indeterminate.” *See* Alexander, *supra* note 20, at 571.

Thus, even if Justice Souter were to try to assess dilution by looking at a state as a whole, the baseline problem would only become a more pressing issue.¹²²

Justice Breyer's opinion in which he characterizes the harm as minority entrenchment is similarly disappointing. The problem with his opinion is that majoritarianism is not the constitutional value that political gerrymandering offends. As the Court in *Bandemer* recognized, political gerrymandering and malapportionment are two different problems.¹²³ Majoritarianism was the constitutional value vindicated by *Baker* and its progeny.¹²⁴ In those cases, such as *Reynolds v. Sims*, a minority successfully defied the will of a majority of voters by manipulating institutional structures of representation in order to artificially maintain its hold on political power.¹²⁵ It is thus not surprising that Justice Breyer cited *Reynolds* to support his conception of the constitutional harm that political gerrymandering inflicts.¹²⁶

Admittedly, political gerrymandering claims are often couched in majoritarian tones. However, framing political gerrymandering claims as a problem with entrenchment by political minorities is misleading and unhelpful. As both *Bandemer* and *Vieth* illustrate, the problem of political gerrymandering is not necessarily that of minority entrenchment.¹²⁷ The goal of gerrymandering is to manipulate electoral structures in order to maximize the political power of the party that controls the redistricting process while concomitantly minimizing the political power of the other party.¹²⁸ Outside of the malapportionment context, terms such as majority, minority, and entrenchment are not very useful. In *Bandemer*, the controlling Republican Party received 48% of the vote for the Indiana House of Representatives but translated that support into 57% of the seats.¹²⁹ Under the structures challenged in *Vieth*, the Republican Party, which controlled the districting process, acquired twelve congressional district seats out of nineteen in a state in which only 41% of the voters were registered Republicans and 51% of the voters voted for Al Gore in the 2000 pres-

¹²² This Article does not identify competition as the harm of political gerrymandering for precisely this reason. We do not know what the appropriate level of competition ought to be, even if we look at the state as a whole. In *infra* Parts IV and V, I suggest how we might resolve the endogeneity-exogeneity problem.

¹²³ See 478 U.S. 109, 131–32 (1986) (plurality opinion).

¹²⁴ Charles, *supra* note 26, at 1146–48.

¹²⁵ See *Reynolds v. Sims*, 377 U.S. 533, 565, 570 (1964).

¹²⁶ *Vieth v. Jubelirer*, 541 U.S. 267, 360–61 (2004) (Breyer, J., dissenting).

¹²⁷ See *id.* at 297 (plurality opinion) (asserting that Justice Souter's argument that the harm is "vote dilution" fails to look at the "electoral success, the electoral opportunity, or even the political influence" that characterize gerrymanders); *Bandemer*, 478 U.S. at 131–32 (plurality opinion).

¹²⁸ See *Vieth*, 541 U.S. at 274 (plurality opinion).

¹²⁹ See *Bandemer*, 478 U.S. at 115 (plurality opinion).

idential election.¹³⁰ Are the Republicans a minority in Pennsylvania? Until recently, both of the state's U.S. Senators were Republicans and "[s]ince 1955 the two major parties have alternated in the governor's office every eight years."¹³¹ The current governor is a Democrat and was preceded by a Republican.¹³² It is thus not clear that either *Bandemer* or *Vieth*—or any modern political gerrymandering case for that matter—seriously raises the problem of minority entrenchment. Consequently, Justice Breyer's approach is also unavailing.

II

RACE AND POLITICS

The Court's struggles with articulating the harm of extreme political gerrymandering have led to an argument among commentators and the Justices themselves regarding whether the federal courts have anything to contribute to resolving the problem. While this argument has centered on terms of race and politics—whether the race cases can serve as an adjudicatory guide for the political cases—it is really an argument about rights and structures, specifically, whether structural political claims are justiciable.

A. Background

In the conventional rendering of election law claims, the purpose of judicial review is to vindicate individual rights.¹³³ As Professors Lowenstein and Steinberg have stated, this is because "intervention in the political system by the Court in the name of individual rights has a presumptive legitimacy in the American tradition."¹³⁴ This individualist account presupposes that courts deploy judicial review to protect individual autonomy or individual choice and that individual rights trump competing state interests.¹³⁵ Standing is conferred as a consequence of personal injury suffered by the plaintiff.¹³⁶ Additionally,

¹³⁰ See MICHAEL BARONE ET AL., *THE ALMANAC OF AMERICAN POLITICS* 2004, at 1349–50 (2003).

¹³¹ *Id.* at 1348, 1352.

¹³² See *id.* at 1352–53. The current governor is Ed Rendell, a Democrat. The previous governor was Tom Ridge, a Republican. See *id.* at 1352–53.

¹³³ See, e.g., RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 139 (2003); Lowenstein & Steinberg, *supra* note 117, at 15. For a more extensive introduction, see Charles, *Politics*, *supra* note 16, at 1113–20 (detailing the genesis of the debate); Heather K. Gerken, *supra* note 112, at 507 n.19 (describing different issues that are relevant to the debate).

¹³⁴ Lowenstein & Steinberg, *supra* note 117, at 15.

¹³⁵ See Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 882–84 (1995); Pildes, *supra* note 10.

¹³⁶ See Issacharoff & Pildes, *supra* note 9, at 645 (noting that standing is traditionally based on "individualistic conceptions of harm").

the injury and the remedy are both conceived of in individualist terms.

By contrast, a competing account in law and politics is that election law claims are structural and necessarily so.¹³⁷ Structuralism refers to a methodological concept of constitutional interpretation and the teleological orientation of that methodology. More specifically, for the purposes of this Article, structuralism is (a) the “method of inferring constitutional principles . . . from the overall structure” of the Constitution “without clear guidance from the text”¹³⁸ for (b) the purposes of regulating “the institutional arrangements within which politics is conducted” as opposed to protecting individual or personal rights.¹³⁹ For structuralists, election law claims concern the proper relationship among democratic institutions; structuralists contend that the proper role of judicial review is to assure that democratic institutions reflect democratic values.¹⁴⁰ Richard Pildes, a leading structuralist, maintained that the “justification for judicial review itself entails . . . that courts address structural problems and enforce structural values concerning the democratic order as a whole.”¹⁴¹ Structuralism focuses on the manner in which electoral “rules advantage and disadvantage different types of institutional players relative to each other, and how the rules change incentives for various types of political behavior.”¹⁴² With respect to standing in the structural conception, the plaintiff is truly “standing in for and representing the structural values” that are allegedly undermined by the state.¹⁴³

Unlike any other election law issue, the battle over the justiciability of political gerrymandering claims has forced the Court and commentators to confront the extent to which election law claims are truly structural and, if truly structural, the extent to which the federal courts can successfully adjudicate those claims in election law. On one side of the debate are the individualists, Justices and commentators who argue that political gerrymandering claims do not implicate any constitutionally relevant individual rights and are therefore not

¹³⁷ See Gerken, *supra* note 112, at 507.

¹³⁸ Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 137 (1999).

¹³⁹ Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345, 1346 (2001). This Article focuses on the teleological concept of structuralism rather than the methodological concept. However, the methodological concept is a necessary background against which the teleological concept is understood. Later works, however, shall return more explicitly to the methodological concept. For a methodological defense of structuralism as such, see Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253 (2006).

¹⁴⁰ See, e.g., Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217, 1218 (1999); Pildes, *supra* note 15, at 44.

¹⁴¹ Pildes, *supra* note 15, at 44.

¹⁴² Ortiz, *supra* note 140, at 1218.

¹⁴³ Charles, *Politics*, *supra* note 16, at 1117.

justiciable.¹⁴⁴ Individualists find fault with structuralism for privileging the Court's theory of democracy over those of duly elected officials,¹⁴⁵ thereby leading to greater judicial involvement in the political process.¹⁴⁶ Professor Richard Hasen, a leading individualist, has argued that structuralism's principle weakness is its requirement that courts make contested normative judgments that they are incapable of making.¹⁴⁷

Structuralists, however, contend that an individual rights framework "does not fully capture what is at stake" in election law claims.¹⁴⁸ For example, under the structuralist conception, an individual rights framework fails to acknowledge that politics involves the aggregation and mobilization of interest groups that influence the political process.¹⁴⁹ An individual rights framework also misconceives the constitutional harm and leads to greater judicial intrusion into the political process.¹⁵⁰ Because election law claims are essentially structural, courts cannot resolve these claims using an individual rights framework.¹⁵¹

For the most part, the pro-justiciability Justices have accepted the implicit assumption of the argument against structuralism that vindicating individual rights as opposed to structural values is a more legitimate exercise of judicial review.¹⁵² Consequently, they have tried to

¹⁴⁴ See, e.g., Lowenstein & Steinberg, *supra* note 117, at 12–15.

¹⁴⁵ See, e.g., Cain, *supra* note 11, at 1600 (criticizing the structural approach on the ground that it would "limit the polity's freedom to adopt forms of government and representation that are most appropriate for its needs").

¹⁴⁶ See, e.g., *id.* ("The structural approach leads inevitably to intrusive judicial involvement in states' political arrangements."); Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—And Be Thankful for Small Favors*, in *THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS* 245, 264 (David K. Ryden ed., 2000).

¹⁴⁷ See HASEN, *supra* note 133, at 154; see also Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering "Fair Representation" and an Exegesis into the Judicial Role*, 78 *NOTRE DAME L. REV.* 527, 538 (2003) ("When courts intervene, they simply take sides in highly politicized debates. They do very little else.").

¹⁴⁸ Gerken, *supra* note 112, at 507; see also Issacharoff & Pildes, *supra* note 9, at 645 (noting that an individual rights framework "is too narrow to capture the range of considerations the courts actually take into account").

¹⁴⁹ Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 *HARV. L. REV.* 1663, 1681 (2000) (defining vote dilution as an aggregate harm that cannot be understood properly from an individual rights perspective); Issacharoff, *supra* note 135, at 884 (noting that the "rhetoric of rights" is not "well-suited to group-based claims" but that "the right to effective voting is incomprehensible without that conception of the group"); Issacharoff & Pildes, *supra* note 9, at 645 ("[T]he focus on rights poorly explains the nature of vote dilution claims, in which individuals can only show harm as part of an aggregate entity."); Pildes, *supra* note 15, at 53 ("[P]olitics involves, at its core, the organization and mobilization of groups and coalitions for effective concerted action.").

¹⁵⁰ See, e.g., Issacharoff, *supra* note 4, at 611; Issacharoff & Karlan, *supra* note 17, at 575.

¹⁵¹ See, e.g., Charles, *Politics*, *supra* note 16, at 1124; Issacharoff, *supra* note 4, at 609.

¹⁵² See Charles, *Politics*, *supra* note 16, at 1123 ("[T]he individual rights-structure distinction simply becomes an element of the Court's justiciability doctrine: Individual rights claims are justiciable and structural claims are nonjusticiable.").

fit their conception of the constitutional harm within the individualist frame. In particular, they have naturally gravitated to the racial dilution cases in which the Court has long addressed and domesticated the structural difficulties of adjudicating political process claims.¹⁵³ Moreover, for individualists (and also structuralists), the quintessential example of legitimate judicial review of democratic politics is the involvement by the federal courts in the democratic process to guard against racial discrimination in electoral politics.¹⁵⁴

But race in this context is a fallible guide.¹⁵⁵ To provide some context for this point and to better understand why race is even considered a potential aid in these cases for resolving political disputes, one has to understand the debate concerning the relevance of race to political gerrymandering claims as part of a long-running dispute on the usefulness of race as an appropriate model for directing judicial supervision of the democratic process. Part II.B explores the contours of this debate with particular emphasis on the arguments of the Justices who viewed race as an exception to judicial involvement in politics. Part II.C explains why the distinction between race and politics collapsed, which helps us to understand why race was germane in *Bandemer* and in *Vieth* and why it continues to influence the debate over the justiciability of political gerrymandering claims.

B. The Race-Politics Distinction

An apt place to begin is with *Giles v. Harris*,¹⁵⁶ a case that established the principle that it is not the role of the courts to provide relief

¹⁵³ See, e.g., *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).

¹⁵⁴ See Richard Briffault, *Race and Representation After Miller v. Johnson*, 1995 U. CHI. LEGAL F. 23, 23 (noting that the Supreme Court has been examining the role of race in vote dilution for the past three decades).

¹⁵⁵ In a recent and extremely thoughtful article, Professor Terry Smith explored the harm to voters of color when the Court combines its jurisprudence on race and politics. See Terry Smith, *Autonomy Versus Equality: Voting Rights Rediscovered*, 57 ALA. L. REV. 261 (2005). Professor Smith explains:

The Supreme Court and lower courts have systematically over-determined race when minority control is at stake by failing to demarcate the boundaries of racial classifications from political classifications. When race is over-determined, the goal of eliminating it becomes elusive. Conversely, courts have treated race as a proxy for partisanship when doing so has facilitated curtailing minority political autonomy. Similarly, the Supreme Court engages in racially correlative doctrinal shifts in defining the nature of the right to vote and in implementing that right, finding voting to be a fundamental right when the interests of whites are at stake, but insisting on a showing of racially discriminatory intent when the plaintiffs are people of color. The ironic effect of this doctrinal inconsistency is to gratuitously racialize equal protection doctrine and, in the process, politics itself.

Id. at 264.

¹⁵⁶ 189 U.S. 475 (1903).

for political—structural—claims.¹⁵⁷ The plaintiff in *Giles*, an African American citizen in Alabama, filed suit on behalf of over five thousand African Americans.¹⁵⁸ The plaintiff objected to the state's effort to disenfranchise them and all African American citizens of Alabama.¹⁵⁹ The plaintiff asked for a declaration that the discriminatory disenfranchising scheme was void, and he sought to have all qualified members of his race added to the voting lists.¹⁶⁰ Writing for the Court, Justice Oliver Wendell Holmes, Jr. stated that it is "impossible" for the Court to grant the plaintiff equitable relief because "the traditional limits of proceedings in equity have not embraced a remedy for political wrongs."¹⁶¹ Justice Holmes intimated that the role of the Court is to provide relief from individual harm; apart from that, "relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States."¹⁶²

Holmes's *Giles* opinion is relevant for our purposes because in it he framed the case, which alleged racial discrimination in the political process, as being about political rights as opposed to race. Holmes then suggested that political rights cases are not justiciable and that the political process itself must supply the remedy to political wrongs.¹⁶³ If race cases are truly political rights cases, and political rights cases are not justiciable, then *Giles* clearly imports that claims alleging racial discrimination in the political process are also nonjusticiable.

This was precisely the argument that the defendants advanced in *Nixon v. Herndon*.¹⁶⁴ However, in *Nixon*, Holmes, again writing for the Court, prosaically struck down Texas's attempt to prohibit African American voters from voting in the democratic primary.¹⁶⁵ When the defendants essentially argued *Giles*, Holmes summarily retorted that the "objection that the subject-matter of the suit is political is little more than a play upon words."¹⁶⁶ Conceding that the "petition concerns political action,"¹⁶⁷ Holmes distinguished *Nixon* from *Giles* on the ground that the plaintiffs in *Nixon* sought to recover for private

¹⁵⁷ For the structural and individual rights dimensions of *Giles*, see Charles, *Politics*, *supra* note 16, at 1121–23.

¹⁵⁸ See *Giles*, 189 U.S. at 482.

¹⁵⁹ See *id.* at 482–84.

¹⁶⁰ See *id.* at 482.

¹⁶¹ *Id.* at 486.

¹⁶² *Id.* at 488.

¹⁶³ See *id.*

¹⁶⁴ 273 U.S. 536 (1927).

¹⁶⁵ See *id.* at 540–41 (explaining that Texas's statute cannot be sustained because it violates the Fourteenth Amendment).

¹⁶⁶ *Id.* at 540.

¹⁶⁷ *Id.*

damage¹⁶⁸: "That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years."¹⁶⁹

But this law-equity distinction is not entirely persuasive. As Professor Pildes has noted, though Justice Holmes in *Giles* did not foreclose the possibility that an action for damages would be successful, "no court ever acted on that option."¹⁷⁰ In fact, Giles himself filed an action for damages, but to no avail.¹⁷¹ Moreover, the fact the defendants in *Nixon* could argue in good faith that race discrimination claims in the political process were nonjusticiable political rights more than two full decades after *Giles* may be indicative of the fact that the issue was not as settled as Holmes made it out to be in *Nixon*.¹⁷²

Indeed, the issue of whether race discrimination claims in the political process are nonjusticiable political rights was pressed again in the 1939 case of *Lane v. Wilson*,¹⁷³ addressing an attempt by Oklahoma to prevent African American voters from registering to vote.¹⁷⁴ The plaintiffs argued that Oklahoma's discriminatory registration scheme violated the Fifteenth Amendment.¹⁷⁵ The defendants, like those in *Nixon*, made a *Giles* argument. This time Justice Felix Frankfurter, writing for the Court, offered two grounds for distinguishing *Giles*. First, Frankfurter reiterated Holmes's explication in *Nixon*: *Giles* was a case about the limitations of equitable claims, whereas *Lane* was an action at law.¹⁷⁶ Second, Frankfurter offered a distinctive and significant justification for distinguishing the two cases: The plaintiff in *Lane*, unlike the plaintiff in *Giles*, was not alleging a "denial of the right to vote."¹⁷⁷ Rather, the plaintiff in *Lane*, like the plaintiff in *Nixon*, was alleging a right to be free from racial discrimination, which is protected by the Fifteenth Amendment (and *Nixon*).¹⁷⁸

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Richard H. Pildes, *Keeping Legal History Meaningful*, 19 CONST. COMMENT. 645, 648 n.7 (2002).

¹⁷¹ See Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 308 (2000).

¹⁷² See *Nixon*, 273 U.S. at 540.

¹⁷³ 307 U.S. 268 (1939).

¹⁷⁴ See *id.* at 269–71; see also *Guinn v. United States*, 238 U.S. 347 (1915) (challenging an amendment to the Oklahoma Constitution requiring citizens to pass a literacy test in order to vote).

¹⁷⁵ See *Lane*, 307 U.S. at 269.

¹⁷⁶ See *id.* at 272–73.

¹⁷⁷ *Id.* at 274; see also *Giles v. Harris*, 189 U.S. 475, 482 (1903) (describing the plaintiff's cause of action). In addition, Frankfurter noted that the plaintiff in *Giles* asked for specific performance, which the Court could not provide since he was also claiming that the registration scheme was unconstitutional. See *Lane*, 307 U.S. at 272–73.

¹⁷⁸ See *Lane*, 307 U.S. at 274 ("The Fifteenth Amendment secures freedom from discrimination on account of race in matters affecting the franchise."); see also *Nixon v.*

Lane is thus significant for two reasons. First, it not only confirmed that cases alleging racial discrimination in the political process were justiciable—a task substantially performed by *Nixon*—but it also provided a justification for treating race cases differently: viz., the text of the Fifteenth Amendment explicitly prohibits racial discrimination in the political process.¹⁷⁹ Second, in modifying the *Giles* framework, Justice Frankfurter in *Lane* firmly established the race-politics distinction. The Court has a responsibility to address claims of racial discrimination in the political process, but no responsibility to claims of political discrimination.¹⁸⁰

The race-politics distinction is useful to explain the Court's decisions in *Colegrove v. Green*¹⁸¹ and *Gomillion v. Lightfoot*.¹⁸² In *Colegrove*, Justice Frankfurter deployed Holmes's reasoning in *Giles* as he had refined it in *Lane* to dismiss a suit challenging Illinois's malapportioned congressional districts.¹⁸³ Concluding that malapportionment suits are nonjusticiable, Justice Frankfurter remarked that the Court was being asked to resolve a dispute that was "of a peculiarly political nature and therefore not meet for judicial determination."¹⁸⁴ The Court professed that its role was to decide cases involving individual rights as opposed to disputes involving the structure of the political process.¹⁸⁵ Echoing Holmes, Frankfurter maintained that "[t]he Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights."¹⁸⁶

In *Gomillion*, the State argued that the plaintiffs' claim was a redistricting or apportionment claim and thus not justiciable in light of *Colegrove*.¹⁸⁷ Writing for the Court, Justice Frankfurter disagreed strongly.¹⁸⁸ *Colegrove*, Justice Frankfurter stated, "involved a complaint

Herndon, 273 U.S. 536, 540 (1927) (discussing the plaintiff's argument that a statute that discriminates on the basis of race violates the Fourteenth and Fifteenth Amendments).

¹⁷⁹ See U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); *Lane*, 307 U.S. at 274.

¹⁸⁰ This distinction guided the Court's political process inquiry for over two decades—until *Baker v. Carr*, 369 U.S. 186 (1962). See *infra* Part II.C.

¹⁸¹ 328 U.S. 549 (1946).

¹⁸² 364 U.S. 339 (1960).

¹⁸³ See 328 U.S. at 550–51.

¹⁸⁴ *Id.* at 552.

¹⁸⁵ See *id.* ("The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity.").

¹⁸⁶ *Id.* at 556.

¹⁸⁷ *Gomillion*, 364 U.S. at 346.

¹⁸⁸ See *id.* ("The decisive facts in this case . . . are wholly different from the considerations found controlling in *Colegrove*.").

of discriminatory apportionment of congressional districts” and political vote dilution.¹⁸⁹ By contrast, in *Gomillion*, as Frankfurter notes:

The petitioners here complain that affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords. When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment. In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines whereby approval was given to unequivocal withdrawal of the vote solely from colored citizens. Apart from all else, these considerations lift this controversy out of the so-called “political” arena and into the conventional sphere of constitutional litigation.¹⁹⁰

Furthermore, citing Holmes in *Nixon* and amplifying his own reasoning in *Lane*, Frankfurter noted that while the subject of the suit may be political, that categorization was immaterial.¹⁹¹ “While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights. That was not *Colegrove v. Green*.”¹⁹² *Colegrove*, Frankfurter argued, was a case in which the state “exercise[d] power wholly within the domain of [its] interest.”¹⁹³ Consequently, the state’s action was justifiably “insulated from federal judicial review.”¹⁹⁴ By contrast—recall here *Lane*—in *Gomillion*, “state power [was] used as an instrument for circumventing a federally protected right,”¹⁹⁵ which is safeguarded by the Fifteenth Amendment.¹⁹⁶ Accordingly, the insulation of state action that ap-

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 346–47. Frankfurter’s concern for cabinining the justiciability of vote dilution claims to contexts involving racial vote dilution thus explains his characterization of the plaintiffs’ claim not as “an ordinary geographic redistricting measure within familiar abuses of gerrymandering.” *Id.* at 341. Rather, Frankfurter described the claim as “tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.” *Id.*

¹⁹¹ *See id.* at 347.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *See id.* at 342. Explicitly relying upon *Lane*, Frankfurter maintained that the allegations implicated the Fifteenth Amendment, which “nullifies sophisticated as well as simple-minded modes of discrimination.” *Id.* The race-politics distinction may explain why Frankfurter relied upon the Fifteenth Amendment in *Gomillion*, notwithstanding the path-dependence of *Lane* as precedent for the Fifteenth Amendment. Having committed to the proposition that the Court cannot adjudicate political rights because the Constitution does not address those problems, Frankfurter may have regarded the Fifteenth Amendment, which explicitly forbids denial of the franchise on the basis of race, as the best guardian of that principle. While the Fourteenth Amendment may have been equally applicable in

plied in the political rights context could not be "carried over" into the racial context.¹⁹⁷

The race-politics distinction is also useful to explain the Court's decisions in *Whitcomb v. Chavis*¹⁹⁸ and *White v. Regester*.¹⁹⁹ In *Whitcomb*, African American plaintiffs residing in Marion County, Indiana challenged a redistricting plan for the Indiana legislative assembly alleging racial vote dilution, a consequence of the plan's multimember districts.²⁰⁰ From the Court's perspective, the fundamental question in *Whitcomb* was whether the plaintiffs were Democrats who were victims of the natural vagaries of the political process and happened to be African American or whether they were victims of intentional, invidious, racial discrimination who happened to be Democrats.²⁰¹ In an opinion by Justice Byron Raymond White, the Court rejected the plaintiffs' challenge on the ground that they had failed to prove that they "had less opportunity than did [white] Marion County residents to participate in the political processes and to elect legislators of their choice."²⁰² The Court defined "less opportunity . . . to participate" as an inability to register, vote, or choose the political party of one's choice; exclusion from party governance; racial discrimination in the nomination of candidates; and racial discrimination in representation.²⁰³ Having noted that the multimember districts did not deprive the plaintiffs of an opportunity to participate in state politics as determined by the Court's process-centric definition, the Court dismissed the plaintiffs as mere political process losers.²⁰⁴

For Justice White and the majority, *Whitcomb* was not a case about race, but instead a case about politics. Justice White intimated that if the plaintiffs were victims of racial discrimination in the political process, the Court would be compelled to vindicate their political rights because the Court bears a special responsibility for protecting voters

Gomillion, as Justice Charles Evans Whitaker articulated in his concurrence to that decision and Justice O'Connor reinforced in *Shaw v. Reno*, Frankfurter may have rightfully perceived that reliance on the Fourteenth Amendment would inevitably enmesh the Court in the "political thicket." See *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

¹⁹⁷ See *Gomillion*, 364 U.S. at 347.

¹⁹⁸ 403 U.S. 124 (1971).

¹⁹⁹ 412 U.S. 755 (1973).

²⁰⁰ See *Whitcomb*, 403 U.S. at 128-29.

²⁰¹ See *id.* at 154 ("But are poor Negroes of the ghetto any more underrepresented than poor ghetto whites who also voted Democratic and lost, or any more discriminated against than other interest groups or voters in Marion County with allegiance to the Democratic Party . . . ?").

²⁰² *Id.* at 149.

²⁰³ *Id.* at 149-50.

²⁰⁴ See *id.* at 153 ("The voting power of [the plaintiffs] may have been 'cancelled out' as the District Court held, but this seems a mere euphemism for political defeat at the polls.").

of color against racial discrimination.²⁰⁵ However, Justice White concluded that there was no such evidence²⁰⁶: The plaintiffs in *Whitcomb* experienced the political process as Democrats, and not as African Americans.²⁰⁷

However, in *White v. Regester*, Justice White, writing for the Court, held that the use of multimember districts in certain counties in Texas constituted racial vote dilution.²⁰⁸ The Court concluded that the plaintiffs, African Americans and Mexican Americans, “had less opportunity than did other residents . . . to participate in the political processes and to elect legislators of their choice.”²⁰⁹ The Court relied upon evidence showing a “history of official racial discrimination in Texas” that prevented the plaintiffs from registering, voting, and “participat[ing] in the political processes.”²¹⁰ Moreover, the County, as part of a one-party state, “did not need the support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community.”²¹¹ The Court also went on to note some structural features of Texas’s electoral structures that “enhanced the opportunity for racial discrimination.”²¹²

C. Race as a Model for Politics

As committed as the Court (and Justice Frankfurter in particular) was to the race-politics distinction, it proved fragile and difficult to sustain. An important weakness became evident in 1944 in the lesser-known case of *Snowden v. Hughes*.²¹³ Joseph E. Snowden was a Republican primary candidate for the state legislature.²¹⁴ Under the state’s partisan proportional representation scheme, the Republicans were to nominate two candidates and the Democrats were to nominate one.²¹⁵ After tabulating the votes, the county canvassing board certified that Snowden received the second-highest number of votes in the Republi-

²⁰⁵ See *id.* at 149 (“[I]t needs no emphasis here that the Civil War Amendments were designed to protect the civil rights of Negroes and that the courts have been vigilant in scrutinizing schemes allegedly conceived or operated as purposeful devices to further racial discrimination.”).

²⁰⁶ See *id.* (“[T]here is no suggestion here that Marion County’s multi-member district, or similar districts throughout the State, were conceived or operated as purposeful devices to further racial or economic discrimination.”).

²⁰⁷ See *id.* at 153–55.

²⁰⁸ See 412 U.S. 755, 765–67 (1973).

²⁰⁹ See *id.* at 766.

²¹⁰ *Id.*

²¹¹ *Id.* at 767.

²¹² *Id.* at 766–67.

²¹³ 321 U.S. 1 (1944).

²¹⁴ See *id.* at 3.

²¹⁵ See *id.*

can primary.²¹⁶ Snowden argued that under Illinois law, he should have been one of the two Republican candidates on the ballot, which would have guaranteed his election to the state legislature as a state representative under this proportional representation scheme.²¹⁷ However, even though it had certified the results, the state canvassing board refused to place Snowden's name on the ballot.²¹⁸ Snowden filed suit alleging that the board's refusal to place him on the ballot violated the Fourteenth Amendment.²¹⁹

In a rather laborious and poorly reasoned opinion by Justice Harlan Fiske Stone, the Court affirmed the dismissal of Snowden's complaint on the ground that Snowden failed to adequately plead that the state acted with purposeful discrimination.²²⁰ But, as Justice William O. Douglas correctly stated in his dissenting opinion:

[The complaint] charge[d] a conspiracy to willfully, maliciously and arbitrarily refuse to designate him as one of the nominees of the Republican party, that such action was an "unequal" administration of the Illinois law and a denial to him of the equal protection of the laws, and that the conspiracy had that purpose.²²¹

Even Justice Frankfurter, who concurred in the majority opinion, admitted that the majority's reading of the plaintiff's complaint as insufficiently pled was "constrained."²²² He explained the Court's limited reading of the complaint as "reflect[ing] the most exacting attitude against drawing into the federal courts controversies over state elections."²²³ In fact, the Court stated that "[i]t was not intended by the Fourteenth Amendment and the Civil Rights Acts that all matters formerly within the exclusive cognizance of the states should become matters of national concern."²²⁴ Yet, the Court refused to take the easy way out, and citing the *White Primary* cases in particular, stated that "[w]here discrimination is sufficiently shown, the right to relief

²¹⁶ See *id.* The Republican candidate receiving the highest number of votes, incumbent A. Andrew Torrence, was killed the day before the primary by a disgruntled former employee. See *Illinois Legislator Slain in His Office*, N.Y. TIMES, Apr. 9, 1940, at 18. Snowden likely assumed that, as the Republican candidate who received the next highest number of votes, he was entitled to the nomination. See *Snowden*, 321 U.S. at 4. Instead, the canvassing board declared a vacancy and named someone else to replace Torrence. See *id.*

²¹⁷ See *Snowden*, 321 U.S. at 3.

²¹⁸ See *id.* at 3-4.

²¹⁹ See *id.* at 2.

²²⁰ See *id.* at 7 ("There is no allegation [in the complaint] of any facts tending to show that in refusing to certify petitioner as a nominee, the Board was making any intentional or purposeful discrimination between persons or classes.").

²²¹ *Id.* at 18 (Douglas, J., dissenting).

²²² *Id.* at 14 (Frankfurter, J., concurring).

²²³ *Id.*

²²⁴ *Id.* at 11.

under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.”²²⁵

From this perspective, the Court’s decision in *Baker v. Carr* not only settled a dispute regarding the justiciability of political rights cases, but it also attempted to settle one about the relevance of race.²²⁶ For the Court to justify its conclusion that malapportioned districts, which some have referred to as silent gerrymanders,²²⁷ were justiciable, it had to overcome the presumption established by Justice Frankfurter in *Colegrove v. Green* that political rights cases are nonjusticiable.²²⁸ Citing *Nixon v. Herndon*,²²⁹ one of the *White Primary Cases*, Justice William J. Brennan, writing for the Court, observed that “the mere fact that the suit seeks protection of a political right does not mean it presents a political question.”²³⁰ Justice Brennan further reasoned that political rights claims are justiciable by relying on another Frankfurter opinion, *Gomillion v. Lightfoot*,²³¹ which had been decided the prior term, to argue that the state did not have the power to “effect[] a discriminatory impairment of voting rights” in violation of the Constitution.²³²

Justice Brennan’s reliance on the race cases to support the justiciability of political rights claims prompted a sharp dissenting response from Justice Frankfurter, who retorted that Justice Brennan had misused *Gomillion*.²³³ *Baker*, Frankfurter explained, “is not a case in which a State has, through a device however oblique and sophisticated, denied Negroes or Jews or redheaded persons a vote, or given them only a third or a sixth of a vote. That was *Gomillion v. Lightfoot*.”²³⁴

However, Justice Frankfurter’s attempts to distinguish *Baker* from *Gomillion* and constrain judicial review of politics to cases of racial discrimination were in vain. Ironically, his own opinion in *Gomillion* had unwittingly laid the groundwork for the Court’s later decisions in *Baker*, *Bandemer*, and *Vieth*. This inadvertent effect resulted in part because parrying the contention that racial discrimination cases are nonjusticiable political questions required Frankfurter to confront the then-prevalent argument that matters affecting voting are within the

²²⁵ *Id.*

²²⁶ See 369 U.S. 186 (1962).

²²⁷ See e.g., Luis Fuentes-Rohwer, *Baker’s Promise, Equal Protection, and the Modern Redistricting Revolution: A Plea for Rationality*, 80 N.C. L. REV. 1353, 1366–67 (2002); Leroy C. Hardy, *Considering the Gerrymander*, 4 PEPP. L. REV. 243, 249 (1977).

²²⁸ See 328 U.S. 549, 552 (1946).

²²⁹ 273 U.S. 536 (1927).

²³⁰ *Baker*, 369 U.S. at 209.

²³¹ 364 U.S. 339 (1960).

²³² *Baker*, 369 U.S. at 229–31.

²³³ See *id.* at 300 (Frankfurter, J., dissenting).

²³⁴ *Id.* (citation omitted).

province of the states and outside of the purview of the Judiciary.²³⁵ Frankfurter did so by maintaining that political rights are within the domain of the states except where a state's action infringes upon an explicit constitutional command.²³⁶ For example, in *Gomillion*, Frankfurter stated that "the Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution."²³⁷ An important corollary of this reply is that the Constitution limits the state's prerogative only in cases involving racial discrimination in voting.²³⁸ Recall also Frankfurter's statement in *Snowden* that "the disposition of state offices, the manner in which they should be filled and contests concerning them, are solely for state determination, always provided that the equality of treatment required by the Civil War Amendments is respected."²³⁹

Nonetheless, Justice Frankfurter's attempt to distinguish *Colegrove* in *Gomillion* and to limit judicial review of politics to instances involving racial discrimination proved difficult to sustain.²⁴⁰ Once he provided the opening in *Gomillion* with the argument that state supremacy in political rights cases is cabined by the Constitution, it became difficult to limit the exception to cases in which "a legislature . . . singles out a readily isolated segment of a racial minority for special discriminatory treatment."²⁴¹ Because Justice Frankfurter's principle rested, essentially, on the existence of a constitutional hook for judicial supervision of politics, which the majority in *Baker* readily found in the Equal Protection Clause,²⁴² the opening became a cavern. Hence, in

²³⁵ See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960) ("The respondents invoke generalities expressing the State's unrestricted power—unlimited, that is, by the United States Constitution—to establish, destroy, or reorganize by contraction or expansion its political subdivisions, to wit, cities, counties, and other local units.").

²³⁶ See, e.g., *id.* at 347 ("When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."). Justice White used similar reasoning in *Guinn v. United States*, noting that state governments retain control over suffrage but that the Fifteenth Amendment constrains states' power to deny a citizen the right to vote based on race. See 238 U.S. 347, 362 (1915).

²³⁷ 364 U.S. at 344–45.

²³⁸ See, e.g., *Baker*, 369 U.S. at 285–86 (Frankfurter, J., dissenting) (noting that the race cases "are no exception to the principle of avoiding federal judicial intervention into matters of state government" because those cases vindicate the express directives of the Civil War Amendments).

²³⁹ *Snowden v. Hughes*, 321 U.S. 1, 15 (1944).

²⁴⁰ For a very nice argument about deferring to Congress to address racial discrimination similar to Frankfurter's distinction, see Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341 (2003).

²⁴¹ *Gomillion*, 364 U.S. at 346.

²⁴² 369 U.S. at 237.

Baker, Justice Brennan seized upon Justice Frankfurter's opening in *Gomillion* to restyle *Gomillion* as a case involving the "impairment of voting rights"²⁴³ in order to support the contention that political rights cases are justiciable.²⁴⁴

D. Race and Politics in *Bandemer* and *Vieth*

This, in turn, was the approach that the Court adopted explicitly in *Bandemer* and *Vieth*. In *Bandemer*, the plaintiffs, Indiana Democrats, filed suit challenging the state's reapportionment plan.²⁴⁵ The plaintiffs argued that the plan constituted a political gerrymander, which was designed to dilute their votes in violation of the Fourteenth Amendment's Equal Protection Clause.²⁴⁶ *Bandemer* presented two questions that are of continued relevance. First, the Court addressed whether political gerrymandering claims are justiciable.²⁴⁷ Second, the Court considered whether, if they are justiciable, there are standards to govern such claims.²⁴⁸

The Court divided sharply on the question of justiciability but resolved the issue by analogizing political gerrymandering claims to racial dilution claims.²⁴⁹ In the section of his opinion joined by a majority of the Court, Justice White maintained that the issue in both political and racial gerrymandering cases "is one of representation."²⁵⁰ In both instances, the inquiry is whether a political or racial group in a state has the same chance to elect representatives as any other political or racial group.²⁵¹ Thus, the constitutional harm, intimated the Court, is the reduced opportunity of the relevant group to elect a representative of its choice or to affect the political process.²⁵² The Court concluded that the racial dilution cases "support a conclu-

²⁴³ *Id.* at 229 ("And only last Term, in *Gomillion v. Lightfoot*, we applied the Fifteenth Amendment to strike down a redrafting of municipal boundaries which effected a discriminatory impairment of voting rights, in the face of what a majority of the Court of Appeals thought to be a sweeping commitment to state legislatures of the power to draw and redraw such boundaries." (citation omitted)).

²⁴⁴ *See id.* at 229–30.

²⁴⁵ *Davis v. Bandemer*, 478 U.S. 109, 115 (1986) (plurality opinion).

²⁴⁶ *See id.*

²⁴⁷ *See id.* at 118.

²⁴⁸ *See id.* at 127 (plurality opinion).

²⁴⁹ *See id.* at 125 (noting the "futility" of attempting to distinguish political gerrymandering claims from racial gerrymandering claims on justiciability grounds); *id.* at 131 n.12 (plurality opinion) ("[T]he principles developed in [the race cases] would apply equally to claims by political groups in individual districts.").

²⁵⁰ *Id.* at 124.

²⁵¹ Compare the Court's characterization of the issue in political gerrymandering cases as whether "each political group in a State [has] the same chance to elect representatives of its choice as any other political group" with its description of the issue in racial gerrymandering cases as whether "an identifiable racial or ethnic group had an insufficient chance to elect a representative of its choice." *Id.*

²⁵² *See id.*

sion that [political gerrymandering claims are] justiciable.”²⁵³ In resolving the second issue regarding whether a judicially manageable standard exists, the plurality was “not persuaded” that no such standards exist.²⁵⁴

While *Bandemer* was decided in a context in which the Court was not as concerned with the explicit use of race by the state to benefit voters of color, by the middle of the 1990s, the Court became more attentive to the use of race itself regardless of which race was benefited by the state’s action. With respect to districting, in *Shaw v. Reno*,²⁵⁵ Justice Sandra Day O’Connor, writing for the Court, noted that race-conscious districts “require careful scrutiny under the Equal Protection Clause regardless of [the state’s] motivations.”²⁵⁶ Two terms later in *Miller v. Johnson*,²⁵⁷ the Court concluded that the Equal Protection Clause is violated when a claimant shows “that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.”²⁵⁸

It is against this backdrop that the Court returned to the problem of political gerrymandering in *Vieth*.²⁵⁹ As in *Bandemer*, *Vieth* presented two issues: First, whether political gerrymandering claims are justiciable,²⁶⁰ and second, whether a manageable standard for resolving such claims exists.²⁶¹ Once again, the principal debate within the Court was whether the Court’s racial dilution jurisprudence was helpful in understanding the harms presented by political gerrymandering and in fashioning a judicially manageable standard.

The plaintiffs had argued in favor of a two-pronged test requiring proof of intent and effect patterned after the Court’s standard in the racial gerrymandering case, *Miller v. Johnson*.²⁶² The intent requirement the plaintiffs advocated would demand a showing that redistricters drew lines “with a predominant intent to achieve partisan advantage.”²⁶³ As in the racial gerrymandering cases, predominance would be established by evidence showing that the state abandoned or subordinated legitimate redistricting criteria in favor of partisan considerations.²⁶⁴ The Court split in its decision. Four Justices con-

²⁵³ *Id.* at 125.

²⁵⁴ *Id.* at 123.

²⁵⁵ 509 U.S. 630 (1993).

²⁵⁶ *Id.* at 645.

²⁵⁷ 515 U.S. 900 (1995).

²⁵⁸ *Id.* at 916.

²⁵⁹ 541 U.S. 267 (2004).

²⁶⁰ *See id.* at 272 (plurality opinion). In other words, the plurality considered whether to overturn *Bandemer*. *See id.*

²⁶¹ *See id.*

²⁶² *See id.* at 284–85 (citing *Miller*, 515 U.S. at 900).

²⁶³ *Id.* at 284 (emphasis and quotation omitted).

²⁶⁴ *See id.*

cluded that political gerrymandering claims are nonjusticiable because there are no judicially manageable standards to apply.²⁶⁵ Four others concluded that they are justiciable but had three different rationales for what standard should apply.²⁶⁶ The remaining Justice concluded that he would not declare such claims nonjusticiable because the Court might still find a manageable standard to apply.²⁶⁷

The plaintiffs found a particularly receptive ear in Justice Stevens.²⁶⁸ Stevens, who disagreed with the plurality that no judicially manageable standards exist to apply,²⁶⁹ argued in his dissent that the racial dilution cases are useful precedential guides because “the critical issue in both racial and political gerrymandering cases is the same: whether a single nonneutral criterion controlled the districting process to such an extent that the Constitution was offended.”²⁷⁰ For Stevens, the Constitution contains a norm of impartiality.²⁷¹ Redistricters violate this norm of impartiality when they subordinate all other legitimate criteria for partisan or racially discriminatory purposes.²⁷² Relying upon *Gomillion* and the *Shaw* line of cases, Justice Stevens noted that “a district’s peculiar shape might be a symptom of an illicit purpose in the line-drawing process.”²⁷³ Peculiarity of shape would indicate the redistricters’ failure to govern impartially and to subsume legitimate criteria to the singular pursuit of partisan advantage.²⁷⁴ Justice Stevens concluded that “the racial gerrymandering cases therefore supply a judicially manageable standard for determining when partisanship, like race, has played too great of a role in the districting process.”²⁷⁵

²⁶⁵ See *id.* at 305–06.

²⁶⁶ See *id.* at 334–39 (Stevens, J., dissenting); *id.* at 346–53 (Souter, J., dissenting); *id.* at 365–67 (Breyer, J., dissenting).

²⁶⁷ See *id.* at 306 (Kennedy, J., concurring).

²⁶⁸ See *id.* at 339 (Stevens, J., dissenting) (“I would apply the standard set forth in the *Shaw* cases and ask whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles.”).

²⁶⁹ See *id.* at 318.

²⁷⁰ *Id.* at 326.

²⁷¹ See *id.* at 317 (“The concept of equal justice under law requires the State to govern impartially.”).

²⁷² See *id.* at 318 (“In my view, when partisanship is the legislature’s sole motivation—when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage—the governing body cannot be said to have acted impartially.”).

²⁷³ *Id.* at 321.

²⁷⁴ See *id.* at 321–22.

²⁷⁵ *Id.* at 336. Justice Stevens was not the only dissenter influenced by the race cases. Compare the relationship between elements for political vote dilution in Justice Souter’s framework, *id.* at 346–53 (Souter, J., dissenting), with the elements of the Court’s racial vote dilution framework under § 2 of the Voting Rights Act (VRA) in *Thornburg v. Gingles*, 478 U.S. 30, 49–51 (1986).

It is against this equivalence of racial and political gerrymandering that Justice O'Connor, writing in concurrence in *Bandemer*,²⁷⁶ and Justice Scalia, writing for the plurality in *Vieth*,²⁷⁷ reacted. It is not surprising that the principal fault line in the political gerrymandering cases is the relevance of race as a model for thinking about politics. The relationship between racial and political gerrymandering is a recurring debate within the Court.²⁷⁸ Thus, in *Bandemer* and *Vieth*, the Justices were performing a much-scripted *pas de deux*; their moves were familiar, predictable, and path-dependent.

III

NOT LOOKING FOR STANDARDS IN ALL THE RIGHT PLACES²⁷⁹

Yet there is a fundamental problem with using the racial gerrymandering cases to reason that political gerrymandering claims are justiciable: They are completely unsuited for the task. This is not because they do not provide manageable standards, which was the reason advanced by Justice Scalia in *Vieth*²⁸⁰ and shared by a host of commentators.²⁸¹ Instead, it is because the "searing question of race"²⁸² obscures the extent to which problems of institutional electoral design in democratic politics are deeply structural and the need for the federal courts, if they are truly resolved to police the excesses of democratic politics, to directly confront these structural difficulties.²⁸³ Race obscures these concerns and leads to inquiries—such as the perennial question of whether political groups are sufficiently like racial groups to render political gerrymandering claims justiciable—that blur instead of clarify the Court's political gerrymandering jurisprudence.²⁸⁴ As a consequence of this futile inquiry, the Court has

²⁷⁶ See 478 U.S. 109, 144 (1986) (O'Connor, J., concurring).

²⁷⁷ See 541 U.S. at 305–06 (plurality opinion).

²⁷⁸ See *supra* Part II.

²⁷⁹ With apologies to my good friend Rick Hasen. See Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims After Vieth*, 3 ELECTION L.J. 626 (2004).

²⁸⁰ See 541 U.S. at 305–06 (plurality opinion).

²⁸¹ See *infra* Part III.

²⁸² Issacharoff, *supra* note 4, at 597.

²⁸³ See *infra* Part IV.

²⁸⁴ Consider here Justice O'Connor's opinion in *Bandemer*, concurring in the judgment and responding to Justice White's plurality opinion on the equivalence of racial and political gerrymandering claims. See *Davis v. Bandemer*, 478 U.S. 109, 144 (1986) (O'Connor J., concurring). Justice O'Connor maintained that the Court should be solicitous of racial groups who are "characterized by the traditional indicia of suspectness and [are] vulnerable to exclusion from the political process." *Id.* at 151 (quotation omitted). The voters who are so characterized "enjoy some measure of protection against intentional dilution of their group voting strength by means of racial gerrymandering." *Id.* Additionally, Justice O'Connor argued that unlike judicial review of political gerrymandering controversies, judicial review of racial gerrymandering is supported by the "central thrust" of the Equal Protection Clause. *Id.* at 161. That provision, she noted, gives "greater war-

been unable to discover an animating justification for judicial review of political gerrymandering claims.

It is not that pro-justiciability Justices do not recognize the structural element of political gerrymandering claims. For example, in *Vieth*, Justice Kennedy argued that preserving fair and effective representation is the principle to be vindicated in political gerrymandering claims.²⁸⁵ Moreover, Justice Kennedy strongly, and correctly, intimated that the First Amendment is implicated when the state manipulates the constitutive rules of governance institutions to single out individuals or groups for disfavored treatment on the basis of their political identities.²⁸⁶ Similarly, Justice Stevens also identified the harm as the failure of representation.²⁸⁷ Recall Justice Stevens's claim that gerrymandering is constitutionally harmful because it "disrupt[s] the representational norms that ordinarily tether elected officials to their constituencies as a whole."²⁸⁸ Justice Souter also referenced structuralist concerns when he focused on vote dilution achieved by cracking and packing voters into districts,²⁸⁹ as did Justice Breyer when he conceptualized the injury as the inability of a majority to capture its share of seats due to manipulation by a political minority.²⁹⁰

In essence, each of these Justices was advancing a claim with respect to the appropriate design and composition of governance institutions. Each claim was insuppressibly structural.²⁹¹ In fact, this was one point of significant agreement among all of the Justices in *Vieth*: Political gerrymandering claims are structural. As I shall argue in this

rant . . . [to] the federal courts to intervene for protection against racial discrimination." *Id.* at 151.

Consider also Justice Scalia's response to Justice Stevens in *Vieth*. See 541 U.S. at 292–95 (plurality opinion). As Justice Scalia argued, the Constitution evinces a particular concern for racial considerations in the political process that is absent in the context of political gerrymandering. See *id.* at 293 ("A purpose to discriminate on the basis of race receives the strictest scrutiny under the Equal Protection Clause, while a similar purpose to discriminate on the basis of politics does not."). Moreover, he intimated, race is an immutable characteristic, while political affiliation is not. See *id.* at 287. It "may shift from one election to the next; and even within a given election, not all voters follow the party line." *Id.*

²⁸⁵ See 541 U.S. at 307 (Kennedy, J., concurring) ("The object of districting is to establish 'fair and effective representation for all citizens.'" (quoting *Reynolds v. Sims*, 377 U.S. 533, 565–68 (1964))); *id.* at 309 (noting the "challenge in finding a manageable standard for assessing burdens on representational rights").

²⁸⁶ See *id.* at 315 ("If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest.").

²⁸⁷ See *id.* at 329 (Stevens, J., dissenting).

²⁸⁸ *Id.*

²⁸⁹ See *id.* at 343, 354 (Souter, J., dissenting).

²⁹⁰ See *id.* at 360 (Breyer, J., dissenting).

²⁹¹ See, e.g., Gerken, *supra* note 112, at 506–07, 526–28.

Part, this is the best way to make sense of Justice Scalia's argument about standards.

Where the Justices disagreed, however, is on the question of whether these types of structural claims are justiciable and judicially administrable. The dissenters' greatest flaw was their choice of a guide; using the race cases as a template doomed the enterprise from the outset. Justices Kennedy, Souter, and Breyer bemoaned the difficulties of resolving this issue²⁹² but concluded that "[s]ince this Court has created the problem no one else has been able to solve, it is up to us to make a fresh start."²⁹³

This problem *is* complex. It is difficult for courts to adjudicate structural claims, and this is precisely how individualists have made their living. For example, they have complained, rather successfully, that structuralism asks courts to do political philosophy, which is best left to political philosophers, and to make difficult political judgments, which would be better left to elected politicians.²⁹⁴

Justice Scalia also joined in bemoaning the difficulties of the matter, stating that there is no way that courts can make "principled, rational, and . . . reasoned distinctions" using a framework that is as open-ended as structuralism.²⁹⁵ That is why, he maintained, that these structural decisions are best left to the political branches.²⁹⁶

Justice Scalia asserted that *Bandemer* ought to be abandoned because Justice White's standard, which was "misguided when proposed," is not manageable.²⁹⁷ The conventional wisdom about *Vieth* is that the Court divided on the issue of judicially manageable standards.²⁹⁸ But scholars have misunderstood the meaning of judicial manageability and have mistakenly interpreted the phrase to refer to the concept of judicial administrability, which refers to developing a standard for determining the legality of political gerrymandering.²⁹⁹ This misunderstanding has led to what can only be a fruitless search for judicially manageable standards. As this Part argues, *Vieth* is not at all about the availability of judicially administrable standards. Moreo-

²⁹² See *Vieth*, 541 U.S. at 306–07 (Kennedy, J., concurring); *id.* at 344 (Souter, J., dissenting); *id.* at 356 (Breyer, J., dissenting).

²⁹³ *Id.* at 345 (Souter, J., dissenting).

²⁹⁴ See, e.g., HASEN, *supra* note 133, at 139.

²⁹⁵ *Vieth*, 541 U.S. at 278 (plurality opinion).

²⁹⁶ See *id.* at 305–06.

²⁹⁷ *Id.* at 283.

²⁹⁸ See, e.g., Berman, *supra* note 19, at 810; Gardner, *supra* note 8, at 643; Richard Hasen, *supra* note 279, at 626; Frederick McBride & Meredith Bell-Platts, *Extreme Makeover: Racial Consideration and the Voting Rights Act in the Politics of Redistricting*, 1 STAN. J. C.R. & C.L. 327, 346 (2005).

²⁹⁹ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 120–21 (1980) (advancing a similar point with respect to the "one person, one vote" principle).

ver, Justice Scalia's point was not a positive claim regarding the availability of standards. Rather, it was a normative claim about constitutional interpretation. In fact, the standards argument Justice Scalia made plainly reflects his refusal to adjudicate what he clearly views as structural claims.

A. On Standards

In *Bandemer*, Justice White, speaking for the plurality, identified the harm caused by political gerrymandering as a reduced opportunity to affect the political process, particularly as it relates to electing a candidate of choice.³⁰⁰ The plurality operationalized its conception of the harm—whether an electoral structure “consistently degrade[s] a voter’s or a group of voters’ influence on the political process as a whole”³⁰¹—by maintaining that plaintiffs alleging political vote dilution must “prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.”³⁰² The plurality did not mean for the intent requirement to impose a significant barrier; as it stated, “[p]olitics and political considerations are inseparable from districting and apportionment.”³⁰³ Thus, “[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.”³⁰⁴

The effects requirement, in contrast, was intended as a formidable obstacle to claims of political gerrymandering. The plurality felt itself constrained by two unenviable choices. On the one hand, it did not want to mandate proportional representation in districting,³⁰⁵ though the Court flirted with the concept as a rough baseline measure.³⁰⁶ On the other hand, the plurality was also reticent to present a ready opportunity for perpetual litigation of districting plans.³⁰⁷ Thus, it erected an overwhelming standard: A statewide plan violates the effects prong “where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively.”³⁰⁸ This lack of influence is evidenced by the “continued frustration of the will of a majority of the voters or effec-

³⁰⁰ See *Davis v. Bandemer*, 478 U.S. 109, 132–33 (1986) (plurality opinion).

³⁰¹ *Id.* at 132.

³⁰² *Id.* at 127.

³⁰³ *Id.* at 128.

³⁰⁴ *Id.* at 129.

³⁰⁵ See *id.* at 130.

³⁰⁶ See *id.* at 125 n.9 (stating that the Court’s decision was “not a preference for proportionality *per se* but a preference for a level of parity between votes and representation sufficient to ensure that . . . majorities are not consigned to minority status”).

³⁰⁷ See *id.* at 133 (plurality opinion) (noting that “a low threshold for legal action would invite attack on all or almost all reapportionment statutes”).

³⁰⁸ *Id.*

tive denial to a minority of voters of a fair chance to influence the political process.”³⁰⁹

Justice Scalia’s responsive move in *Vieth* was to sound the retreat. Justice Scalia argued that *Bandemer* ought to be abandoned because Justice White’s plurality opinion failed to provide judicially manageable standards.³¹⁰ No court, he maintained, had ever effectively struck down a redistricting plan on *Bandemer* grounds.³¹¹ “[I]n *all* of the cases we are aware of” in which plaintiffs challenged supposed political gerrymanders, “relief was denied.”³¹² Moreover, because Scalia found that neither race nor any of the myriad standards suggested by the dissenters could be useful for assessing political gerrymandering, he concluded that political gerrymandering claims were nonjusticiable.³¹³

What does it mean to say that the *Bandemer* standard is unmanageable? The plurality’s opinion does not tell us explicitly. To best understand why Justice Scalia was not looking for standards and did not truly want to find any, let us explore what he might have meant by the proposition that the *Bandemer* standard is unmanageable by examining the three possibilities that we can cull from the opinion.

B. A Standard that Works

First, a manageable standard might mean one that works or, in other words, results in judicial intervention. Justice Scalia noted that while *Bandemer* has generated a fair amount of litigation, the case “‘has served almost exclusively as an invitation to litigation without much prospect of redress.’”³¹⁴ Seemingly, a standard is not manageable if after a significant period—eighteen years—the Court has nothing to show for its efforts.³¹⁵ Justice Scalia concluded that the failure of the lower courts to find a single violation of *Bandemer*’s standard is tantamount to a holding that gerrymandering claims are nonjusticiable.³¹⁶ The standard is unmanageable because it does not “work.”³¹⁷

³⁰⁹ *Id.*

³¹⁰ See *Vieth v. Jubelirer*, 541 U.S. 267, 278–81 (2004) (plurality opinion).

³¹¹ See *id.*

³¹² *Id.* at 279–80.

³¹³ See *id.* at 305–06.

³¹⁴ *Id.* at 279 (quoting SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 886 (2d ed. 2002)).

³¹⁵ See *id.* at 281 (“Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Bandemer* exists.”).

³¹⁶ See *id.* at 279–81.

³¹⁷ *Id.* at 303 (“The lower courts were set wandering in the wilderness for 18 years not because the *Bandemer* majority thought it a good idea, but because five Justices could not agree upon a single standard, and because the standard the plurality proposed turned out not to work.”).

But it is not clear what relief has to do with manageability. That the claim is justiciable does not mean that a violation ought to be found. "A conclusion that a claim is justiciable is a prerequisite to deciding—not a decision of—the question whether the conduct complained of violates the Constitution."³¹⁸ Note that Justice Scalia's claim is not that there are violations but lower courts have not been able to provide relief because the *Bandemer* standard is unmanageable.³¹⁹ Rather, his claim is that lower courts have not found that any claims violate the *Bandemer* standard.³²⁰ The obvious answer is that lower courts have not found any violations because there are no violations, or, at least, lower courts have not found any violations of the type that *Bandemer* was meant to detect.

Of course, Justice Scalia may be making a claim about the decision costs (or even the error costs) of resolving gerrymandering claims under the *Bandemer* standard. There are various costs to the legal system that arise from allowing litigation and adjudication of these gerrymandering claims. What is the point of incurring these decision costs when the outcome is invariable? The decision costs argument would be correct if one assumes that the costs of arriving at a correct decision outweigh the benefits of judicial review. In order to decide whether to abandon *Bandemer* on these grounds, one has to weigh the deterrent effects of justiciability against the decision costs. Put differently, we would have to know what the behavior of political elites would be like in the absence of *Bandemer* and compare it with the costs of deciding claims under *Bandemer* to decide whether the decision costs are too much to bear.

Justice Scalia's point is the somewhat implausible contention that the justiciability of political gerrymandering claims has no impact on the behavior of redistricters because the Court has not yet found a violation. If this point is empirically correct, then Justice Scalia's position in *Vieth* is the right one. However, to arrive at that conclusion, one would have to assume that redistricters would behave exactly the same in a world in which the Constitution imposed no limitations on extreme political gerrymandering as they would in a world in which there were some vague limitations. It is true that there are other structural or political restraints on the ability of redistricters to gerrymander willy-nilly.³²¹ But it is hard to deny that judicial review is consequential, whether one agrees with the consequences or not.³²²

³¹⁸ Lowenstein, *supra* note 22, at 66.

³¹⁹ See *Vieth*, 541 U.S. at 279–81 (plurality opinion).

³²⁰ See *id.*

³²¹ See, e.g., Gelman & King, *supra* note 101.

³²² For a brilliant analysis of the consequences of judicial review with respect to the reapportionment revolution, see GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY'S*

Second, if *Bandemer* is to be applied only in extreme cases of political gerrymandering, actual violations in fact would be rare. Justice Scalia's criticism of Justice White's opinion on the ground that *Bandemer* "'has served almost exclusively as an invitation to litigation without much prospect of redress'"³²³ is thus truly unconvincing. Nonjusticiability is not the only resolution within the legal framework for lowering decision costs. If plaintiffs are filing meritless claims, they should be sanctioned. Moreover, lower courts should of course feel free to dismiss meritless claims on 12(b)(6) grounds as called for under the Federal Rules of Civil Procedure.³²⁴ It is not clear why a holding of nonjusticiability is the proper method of curing "pointless litigation"³²⁵ under *Bandemer* when the traditional procedural mechanisms for minimizing the ubiquitous incentives to litigate are available.³²⁶

C. A Standard that Provides Relief

Second, one can maintain that a standard is unmanageable because lower courts are simply incapable of applying the standard. Implying that his conceptualization of unmanageability means the inability of lower courts to apply the standard, Justice Scalia noted that "in the lower courts, the legacy of [*Bandemer*] is one long record of puzzlement and consternation."³²⁷ But Justice Scalia's evidence to support that point is particularly misleading. He implies that lower courts have not provided relief because they are frustrated by *Bandemer*, while in fact, those who have expressed such frustration constitute the minority of lower courts who have addressed partisan gerrymandering claims.³²⁸ Most lower courts, however, have applied *Bandemer* without expressing any difficulty at all.³²⁹ Indeed, one lower court actually praised *Bandemer* for clearing up the confusion that sur-

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³²³ *Vieth*, 541 U.S. at 279 (plurality opinion) (quoting ISSACHAROFF ET AL., *supra* note 314, at 886).

³²⁴ FED. R. CIV. P. 12(b)(6).

³²⁵ *Vieth*, 541 U.S. at 306 (plurality opinion).

³²⁶ Justice Scalia might also be saying that the *Bandemer* standard is not administrable, i.e., lower courts cannot apply the standard. This is a descriptive claim that available evidence refutes. See *infra* text accompanying notes 327–29.

³²⁷ *Vieth*, 541 U.S. at 282–83 (plurality opinion).

³²⁸ See *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004), *vacated and remanded sub nom.* *Henderson v. Perry*, 543 U.S. 941 (2004); *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002); *O'Lear v. Miller*, 222 F. Supp. 2d 850 (E.D. Mich. 2002).

³²⁹ See *La Porte County Republican Cent. Comm. v. Bd. of Comm'rs of the County of La Porte*, 43 F.3d 1126 (7th Cir. 1994); *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394 (D. Md. 1991); *Republican Party of Virginia v. Wilder*, 774 F. Supp. 400 (W.D. Va. 1991); *Bandham v. Eu*, 694 F. Supp. 664 (N.D. Ca. 1988).

rounds political gerrymandering claims.³³⁰ Thus, at least in this case, judicial manageability cannot mean the inability of lower courts to ascertain and apply the standard of the case.

D. A Principled Rule

Finally, one could argue that a judicially manageable standard is a principled and rational rule. Justice Scalia maintained that what it means to be an Article III court is that “judicial action must be governed by *standard*, by *rule*.”³³¹ While “[l]aws promulgated by the Legislative Branch can be inconsistent, illogical and ad hoc[,] law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.”³³² While Justice Scalia’s point is unclear, consider two possible interpretations of his statements.

The first interpretation is that Justice Scalia is arguing that, as a descriptive matter, *Bandemer* does not articulate a principled rule or standard. This view would be consistent with the conventional reading of the *Vieth* plurality opinion that political gerrymandering claims are not justiciable because manageable standards are completely absent.³³³ But this reading is off the mark. As some scholars have rightly argued, *Bandemer* does present judicially manageable standards, defined as a principled rule or standard.³³⁴ For example, Professor Lowenstein has argued that “the gerrymandering claims the plurality is prepared to recognize are claims brought by political groups that have suffered from discrimination to the degree that their status under the Equal Protection Clause is analogous to the status of racial minorities.”³³⁵ From Professor Lowenstein’s perspective, a plaintiff would be entitled to relief to the extent that she can show that she is part of a group that suffers from extensive discrimination and that the districting plan discriminates significantly against her group.³³⁶

Professors Grofman and Fuentes-Rohwer have also extracted judicially manageable standards from the *Bandemer* plurality. In Professor Grofman’s view, “[i]f partisan gerrymandering effects are to be held unconstitutional they must be shown to be (1) serious in nature, and

³³⁰ See, e.g., *Duckworth v. State Admin. Bd. of Election Laws*, 332 F.3d 769, 774 (4th Cir. 2003) (stating that the Court in *Bandemer* had provided “clear” and “specific” guidance to resolve political gerrymander claims).

³³¹ *Vieth*, 541 U.S. at 278 (plurality opinion).

³³² *Id.*

³³³ See, e.g., Berman, *supra* note 19, at 810; Gardner, *supra* note 8, at 643; Hasen, *supra* note 279, at 626; McBride & Bell-Platts, *supra* note 298, at 346.

³³⁴ See, e.g., Bernard Grofman, *Toward a Coherent Theory of Gerrymandering*; Bandemer and Thornburg, in *POLITICAL GERRYMANDERING AND THE COURTS*, *supra* note 22, at 29, 30; Lowenstein, *supra* note 22, at 66–67.

³³⁵ Lowenstein, *supra* note 22, at 81.

³³⁶ See *id.* at 85.

(2) likely to be persistent in duration.”³³⁷ Under *Bandemer*, only the most egregious political gerrymanders are unconstitutional.³³⁸ Similarly, Professor Fuentes-Rohwer has explained:

Bandemer . . . signals a judicial propensity to safeguard the democratic process gingerly. As long as the process functions properly, the Court will remain uninvolved; only when the process malfunctions, to the point of collapse, will the Court intervene and afford litigants a remedy, in the name of democratic principles.³³⁹

Judicial intervention is reserved only for the most “extreme cases.”³⁴⁰

Though one could disagree with how Professors Lowenstein, Grofman, and Fuentes-Rohwer interpret *Bandemer*, it would be difficult to deny that their readings of *Bandemer* present the Court with options for choosing standards that are judicially manageable—defined as a standard based upon a principled and rational rule³⁴¹—to address the problem of political gerrymandering. Thus, *Bandemer* cannot truly be said to have lacked a manageable standard so defined because it did in fact offer principled rules based upon reasoned distinctions.

Curiously, Justice Scalia’s plurality opinion in *Vieth* does not explain why the standards enunciated in *Bandemer* are not judicially manageable.³⁴² In fact, the opinion does not analyze the manageability of the *Bandemer* standard at all.³⁴³ Instead, Justice Scalia merely rehashed others’ criticisms of the standard: Justice O’Connor and Justice Lewis F. Powell did not believe that the standard was manageable,³⁴⁴ lower courts have had difficulty applying the standard,³⁴⁵ and academics have criticized the standard.³⁴⁶ Justice Scalia then moved on to conclude that the standard is not judicially manageable without actually explaining why that is so.³⁴⁷ Consequently, we are forced to reject the first interpretation as implausible.

The second possibility is that Justice Scalia meant to invoke Justice Frankfurter’s arguments in *Colegrove* and *Baker* that the apportionment cases were nonjusticiable because “standards meet for judicial

³³⁷ Grofman, *supra* note 334, at 37.

³³⁸ *Id.* at 57–58.

³³⁹ Fuentes-Rohwer, *supra* note 147, at 562.

³⁴⁰ *Id.* at 565.

³⁴¹ See *Vieth v. Jubelirer*, 541 U.S. 267, 278–306 (2004) (plurality opinion).

³⁴² See *id.* at 305–06.

³⁴³ See *id.* at 281–84.

³⁴⁴ See *id.* at 282.

³⁴⁵ See *id.* at 282–83.

³⁴⁶ See *id.* at 283.

³⁴⁷ See *id.* at 283–84.

judgment are lacking.”³⁴⁸ As I have shown elsewhere,³⁴⁹ Frankfurter’s concern in those cases was not that the Court could not promulgate a rule, principle, or standard. Rather, his point was that whatever standard the Court promulgated, it would not derive from the text, structure, or tradition of the Constitution.³⁵⁰ There is some support in *Vieth* that Justice Scalia was channeling Justice Frankfurter. Specifically, Justice Scalia noted that a rule or standard “is not *whatever* judges choose to do . . . or even *whatever* Congress chooses to assign them.”³⁵¹ Instead, an Article III court legitimately announces a rule or standard when it is “act[ing] in the manner traditional for English and American courts.”³⁵²

But what does it mean to “act in the manner traditional for English and American courts”? To answer that question, one must appreciate how Justice Scalia began the opinion as opposed to how he ended it. One must also understand how truly Frankfurterian Scalia is in this context. He began the opinion with what some commentators have called “an intriguing feint”³⁵³—the statement that “[p]olitical gerrymanders are not new to the American scene.”³⁵⁴ Echoing Frankfurter’s opinion in *Colegrove*, Scalia then went on to state that “[i]t is significant that the Framers provided a remedy for such practices in the Constitution[,]” which placed the ultimate authority for dealing with such matter in the hands of Congress.³⁵⁵ Furthermore, Congress, Scalia stated, has not failed in its duties.³⁵⁶ Rather, it is aware that political gerrymandering is a problem and has been in the process of crafting a resolution for some time.³⁵⁷ In fact, he noted, “[s]ince 1980, no fewer than five bills have been introduced to regulate gerrymandering in congressional districting.”³⁵⁸ Yet after beginning the opinion this way, Justice Scalia seemed to retreat from the idea and divert from the path Justice Frankfurter took in *Colegrove*. However, when one looks below the surface, it becomes clear that perhaps this appearance of a divergence is misleading.

Recall that for Justice Frankfurter, a judicially manageable standard is one that derives from the text or structure of the Constitu-

³⁴⁸ *Baker v. Carr*, 369 U.S. 186, 289 (1962) (Frankfurter, J., dissenting); see *Colegrove v. Green*, 328 U.S. 549, 552–53 (1946) (plurality opinion).

³⁴⁹ See Charles, *supra* note 26, at 1123–29.

³⁵⁰ See *id.* at 1126.

³⁵¹ *Vieth*, 541 U.S. at 278 (plurality opinion) (citations omitted).

³⁵² *Id.*

³⁵³ Issacharoff & Karlan, *supra* note 17, at 559.

³⁵⁴ *Vieth*, 541 U.S. at 274 (plurality opinion).

³⁵⁵ *Id.* at 275.

³⁵⁶ *Id.* at 276 (“The power bestowed on Congress to regulate elections, and in particular to restrain the practice of political gerrymandering, has not lain dormant.”).

³⁵⁷ See *id.* at 276–77.

³⁵⁸ *Id.*

tion.³⁵⁹ For Frankfurter, the constitutional structure does not allocate power to the federal courts to resolve all issues that come within the ambit of the Constitution. Instead, some constitutional commands fall under the exclusive jurisdiction of the other branches. For example, in *Colegrove*, Justice Frankfurter stated, "The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action."³⁶⁰ I will refer to these as structural commands. Commands falling within the purview of judicial action include the resolution of private wrongs but not disputes regarding "the general frame and functioning of government."³⁶¹ The Constitution delegates disputes arising from these structural commands to "the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights."³⁶² Similarly, in *Nixon*,³⁶³ the late Chief Justice William H. Rehnquist stated:

[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.³⁶⁴

Disputes that circumscribe the circumstances for judicial action are judicially manageable not necessarily because the Constitution itself specifies a precise or explicit standard. Rather, they are manageable because the federal courts have a constitutionally mandated duty to provide a federal forum for the vindication of individual rights.³⁶⁵ Conversely, disputes that invoke the structural commands of the Constitution are not judicially manageable because the Constitution does not give the federal courts a role to play.³⁶⁶ Thus, Justice Scalia stated in *Vieth*, while it is the role of the Court "to say what the law is[,] . . . [s]ometimes . . . the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is

³⁵⁹ See Charles, *supra* note 26, at 1123–29. The Court then affirmed Frankfurter's construction in *Nixon v. United States*. See 506 U.S. 224, 228–29 (1993) ("[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.").

³⁶⁰ *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion).

³⁶¹ See *Baker v. Carr*, 369 U.S. 186, 287 (1962) (Frankfurter, J., dissenting).

³⁶² *Colegrove*, 328 U.S. at 556 (plurality opinion).

³⁶³ 506 U.S. 224 (1993).

³⁶⁴ *Id.* at 228–29.

³⁶⁵ See, e.g., *Baker*, 369 U.S. at 287–88 (Frankfurter, J., dissenting).

³⁶⁶ See, e.g., *id.*; *Colegrove*, 328 U.S. at 554, 556 (plurality opinion).

entrusted to one of the political branches or involves no judicially enforceable rights.”³⁶⁷

If this point is correct—if Justice Scalia is not advancing a descriptive claim with respect to the availability of standards, but rather a claim that the Constitution has not delegated the authority to resolve political gerrymandering claims to the federal courts but to Congress—the “feint”³⁶⁸ in *Vieth* is not the argument about how the Constitution has delegated the remedy for political gerrymandering to Congress.³⁶⁹ Instead, the feint is the argument about standards. From this perspective, it becomes clear that Justice Scalia was not truly worried about finding manageable standards—plenty of those were available. As I noted earlier, Justice Scalia did not even bother to explain why Justice White’s standard in *Bandemer* was not manageable.³⁷⁰ Indeed, as Justice Scalia himself stated in *Vieth* in response to Justice Kennedy’s opinion, the case presented the Court with only two options: “We can affirm because political districting presents a nonjusticiable question; or we can affirm because we believe the correct standard which identifies unconstitutional political districting has not been met; we cannot affirm because we do not know what the correct standard is.”³⁷¹ Thus, one cannot take seriously the claim in *Vieth* that standards are absent.

For the *Vieth* plurality’s argument about standards to make sense, it has to be a claim about the role of the Judiciary and whether it should entertain these types of structural claims. In other words, it has to be an argument about structuralism. Thus, Justice Scalia’s main point in *Vieth* was that the federal courts cannot entertain structural claims in the context of political rights because the Constitution commits those claims to the political process.³⁷²

IV

THE RIGHTS-STRUCTURES DEBATE IN LAW AND POLITICS

Justice Scalia’s point is an important one, and his challenge has served as a stumbling block for those Justices on the Court and structuralists in the academy who maintain that political gerrymandering claims are justiciable. This Part unpacks the individualists’ arguments and shows how the Court can address and resolve structural claims in

³⁶⁷ *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality opinion) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

³⁶⁸ Issacharoff & Karlan, *supra* note 17, at 559.

³⁶⁹ Or to put the point more accurately: If Justice Scalia’s descriptive claim is wholly dependent upon the normative claim, then it is the normative claim that is doing all of the work and not the descriptive one.

³⁷⁰ See *supra* notes 342–47 and accompanying text.

³⁷¹ *Vieth*, 541 U.S. at 305 (plurality opinion).

³⁷² See *id.* at 277.

the law of politics by developing an approach that I call "election law dualism."³⁷³ Election law dualism explains how federal courts engaged in structural analysis can borrow "a well-established and shared set of conventions for cabin[ing] judicial discretion" from the individual rights framework.³⁷⁴ These conventions include doctrines such as "standing, ripeness, limits upon who can represent whom in a suit, restrictions on the type of judicial remedies available, etc."³⁷⁵ Part IV.A addresses the argument that courts should not make contested democratic judgments and privilege their theory of democracy to that of other, more democratically legitimate actors. Part IV.B responds to the arguments that structuralism is too abstract a theory to be the basis of courts' jurisprudence.

A. Judges and Contested Value Judgments

Individualists have generally advanced two arguments against structuralism as a method of constitutional interpretation for resolving conflicts in law and politics. First, individualist scholars have argued that structuralism asks judges to make difficult decisions about politics that are best left to elected officials.³⁷⁶ Individualists further contend that because elected officials are democratically elected, it is their responsibility to make contested judgments about representation.³⁷⁷ Structuralism, they explain, would permit judges to privilege their theory of democracy—particularly when that theory does not concern a fundamental democratic principle—to that of elected political officials.³⁷⁸ Consequently, they maintain, structuralism "leads inevitably to intrusive judicial involvement in states' political arrangements."³⁷⁹

At the outset, it is worth noting that there is an essential difference between, on the one hand, a *per se* objection to structural theories in principle as an interpretive approach to resolving problems of law and politics and, on the other hand, objecting to particular applications of structuralism to specific problems in law and politics.³⁸⁰ That structuralism may not be able to resolve all of the problems of

³⁷³ Election law dualism builds upon suggestions that Professor Heather Gerken and I have made independently with respect to how structuralism might be reconceived to better direct judicial review and cabin judicial discretion in democratic politics. See Charles, *Politics*, *supra* note 16, at 1113–30; Gerken, *supra* note 112, at 517–39.

³⁷⁴ Gerken, *supra* note 112, at 530.

³⁷⁵ *Id.*

³⁷⁶ See, e.g., HASEN, *supra* note 133 *passim*.

³⁷⁷ See, e.g., Persily, *supra* note 20, at 677–79.

³⁷⁸ See Cain, *supra* note 11, at 1600; Persily, *supra* note 20, at 678.

³⁷⁹ Cain, *supra* note 11, at 1600; see also HASEN, *supra* note 133, at 139 (characterizing structural theories as "misguided and dangerous" because they "require great intrusion by the judiciary into the political processes without sufficient justification").

³⁸⁰ I am grateful to Rick Pildes for pointing out this distinction.

democratic politics does not mean that it is not a useful or essential approach to thinking about law and politics. While structuralism might arguably be less useful in helping us to work out the more difficult problems in election law, the strength of that evaluation would necessarily depend upon whether competing approaches prove even more successful in achieving those tasks. I take individualists, however, to be interested in the broader claim—that structuralism as a theoretical approach is not useful for guiding judicial review of democratic politics. I also understand part of that claim to include a subsidiary element that structuralism is not a useful approach because it cannot resolve the most difficult challenge of the field, the problem of political gerrymandering.

In the remainder of this Part, I confront directly this broader argument and its subsidiary element. The essential point here is that structuralism is the best framework to respond to the problems of law and politics, including, in particular, the problem of political gerrymandering. In the course of making that argument, I offer three specific reasons why the individualists' objections are off the mark.

1. *Elections as Legitimizing Devices*

First, individualists cannot use elections as a legitimating device in order to justify their preference for the judgments of elected officials to those of judges. This is because elected officials seek to manipulate the very entities—governance institutions or electoral structures—that legitimate their actions as elected officials. Put differently, the fact of an election as a democratic event is meaningless if the “winner” of that election or her allies manipulated the election.

Perhaps more pointedly, after almost a decade of judicial regulation of the fundamental rules of democratic politics, it may be time to acknowledge the virtue of the distinction between judicial regulation of the fundamental rules of the democratic process and judicial involvement in ordinary politics.³⁸¹ This distinction reflects an underlying assumption of judicial supervision in this context. We would be concerned, and rightly so, if the Court took it upon itself to substitute its judgment on ordinary public policy matters for those of political

³⁸¹ This argument is akin to Hamilton's argument in Federalist No. 78 that the federal courts are responsible for giving effect to the Constitution “as a fundamental law,” which is designed to constrain, direct, and legitimate the actions of the elected class. THE FEDERALIST No. 78, at 229 (Alexander Hamilton) (Roy P. Fairfield ed., 1966). An important Hamiltonian insight from Federalist No. 78 is that the legislative body cannot be the judge of its own constitutive powers. *See id.* If the concept of representation is to be meaningful—if we are to prevent “the representatives of the people [from] substitut[ing] their *will* to that of their constituents,” one needs the courts as “an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.” *Id.*

elites. The appropriate response to judicial meddling in ordinary politics would be to raise the objection that public policy decisions appropriately are the province of elected officials, and not judges.³⁸² The presumption in favor of elected officials and against judicial meddling in the context of ordinary political judgments militates against judicial involvement barring the traditional exceptional circumstances (e.g., legislation enacted with a discriminatory racial purpose).

By contrast, disputes regarding the constitutive rules of democratic politics should come with much less of a presumption in favor of the actions of elected officials and, in turn, much less of a presumption against judicial supervision because elections and the constitutive rules of the political process matter as legitimating devices. Because they matter as legitimating devices, they cannot be bootstrapped into legitimating distorted outcomes. Thus, it is incongruously tautological to argue that courts should defer to the judgment of political elites—and allow them to manipulate electoral structures to facilitate their own elections—because they were elected by the political process.

2. *Got No Theory*³⁸³

Second, individualists have failed to present an alternative and compelling theory of democracy to support institutional distortion of electoral outcomes by political elites. An essential component in the individualists' argument against structuralism is the objection that courts are supplanting the legitimate democratic judgments of political actors with the judges' understanding of what democracy requires.³⁸⁴

This second response to individualists draws on recent work by Professor Daniel Ortiz and goes more to the substance of the individualists' argument.³⁸⁵ Professor Ortiz calls the proposition that "the Court must defer to the political branches in these political cases to avoid freezing one particular theory of politics into the structure of governance" the "got theory" argument.³⁸⁶ The proposition further states that "[n]o matter how certain the Court is that a particular theory of equality, representation, or political behavior is right . . . it should nonetheless refrain from striking down conflicting arrangements, because doing so would displace the state's own choice among competing and acceptable political theories."³⁸⁷

³⁸² See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

³⁸³ See Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459 (2004).

³⁸⁴ See *id.*

³⁸⁵ See *id.*

³⁸⁶ *Id.* at 460.

³⁸⁷ *Id.*

As Professor Ortiz argues, though it implies that electoral structures are the product of democratic choice, the “got theory” argument is misleading and unhelpful because it “fails even to inquire whether an alternative” theory of democracy actually supported how the governance institution at issue was composed.³⁸⁸ Put differently, individualists do not—and probably cannot—demonstrate that the state proposed and enacted the electoral structure at issue because the state was trying to effectuate a particular theory of democracy. As Professor Ortiz rightly concludes:

Despite its rhetorical progressiveness, the “got theory” argument . . . amounts to a cry to protect the status quo. It fails on its promise to encourage states to choose a political theory. By simply hypothesizing legitimate purposes that could underlie [the composition of electoral structures], it forecloses discussion about the very issues it claims are so important.³⁸⁹

Professor Michael Klarman goes even further than Professor Ortiz to argue that there is no theory of democracy to support institutional distortion, unless entrenchment is such a theory.³⁹⁰ As Professor Klarman argues, while malapportionment could have been defended on the ground that political actors wanted to overrepresent rural interests because of the importance of agriculture to the economy, no such judgment can support political gerrymandering.³⁹¹ Fundamentally, the composition of electoral structures cannot be defended on the grounds that the Court would be undermining the political prerogatives of state actors to make contested judgments about representation until and unless individualists can show that state actors were motivated by the pursuit of democratic ideals.³⁹²

3. *Vindicating Institutional Values*

The third response to individualists is that they are simply wrong that structuralism leads courts to make contested value judgments they otherwise do not have to make. Courts must make value judgments in adjudicating election law claims no matter what framework they use.³⁹³ In fact, almost all of the value judgments the Court has

³⁸⁸ *Id.* at 471.

³⁸⁹ *Id.* at 475.

³⁹⁰ See Klarman, *supra* note 19, at 533–34.

³⁹¹ See *id.* at 531–33. Ironically, individualists are generally supportive of the Court’s intervention in the malapportionment cases but object to judicial intervention in political gerrymandering. See *Vieth v. Jubelirer*, 541 U.S. 267, 285–86 (2004) (plurality opinion).

³⁹² Cf. Klarman, *supra* note 19, at 551–52 (arguing that judicial review of entrenchment claims would be favorable depending on the scope of the entrenchment problem, its ability to correct itself, if there are entrenchment explanations for the legislature’s behavior, and if there are judicially manageable standards).

³⁹³ See generally HASEN, *supra* note 133.

made have been rendered under the purported guise of an individual rights framework.³⁹⁴

Individualists can certainly contend that courts should not supervise the electoral process and instead abdicate the field altogether. Of course, in that case, individualists would have to confront what Professor Elizabeth Garrett has termed the problem of “self-interest in institutional design,” which arises acutely “when elected officials determine the rules” of the game.³⁹⁵ One possibility is to sacrifice the accountability function of representative institutions and acquiesce to self-entrenchment as a democratic good so long as the “representatives” truly “represent” the views of their constituents.³⁹⁶ For example, one arguably would not worry about malapportionment or political gerrymandering because, by enabling the representatives to choose whom they would represent, there would be closer fit between the views of representatives and their constituents.³⁹⁷

The problem with this view is that it renders the concept of representation incoherent. It minimizes the agency of the electorate and eliminates the idea of responsiveness, which is a crucial component of what we mean by representation.³⁹⁸ More precisely, outside of a process-oriented concept of representation (viz., elections) one has no way of knowing or guaranteeing that officials are representative of the polity.³⁹⁹ If the justification for entrenchment is representation—defined as a close fit between what the people want and what their representatives promulgate—that justification cannot be sustained. Recall here Pitkin’s claim that representation is defined in great part in institutional terms.⁴⁰⁰ “No particular act of compliance with popular demands is proof of a representative government”⁴⁰¹ Without an institutional account of representation, one cannot speak of a representative government; without representation in a putatively represen-

³⁹⁴ See *infra* text accompanying notes 421–438.

³⁹⁵ Elizabeth Garrett, *Who Chooses the Rules?*, 3 ELECTION L.J. 139, 139 (2005).

³⁹⁶ For a recent articulation of this view, see Persily, *supra* note 20, 667–73 (arguing that gerrymandering frequently produces proportional representation, reinforces political diversity, and produces candidates close to voters’ ideological preferences).

³⁹⁷ See *id.*

³⁹⁸ See Erickson et al., *supra* note 45 (asserting that representatives respond to and align their policies with public opinion).

³⁹⁹ See MAYO, *supra* note 15, at 61. In fact, some would argue that though contested elections are necessary conditions to representation, they are not sufficient. See Pildes, *supra* note 15, at 43 (“All theories of representative democracy require, at a minimum, that those who exercise power be regularly accountable through elections to those they represent; accountability is a necessary, even if not sufficient, condition of democracy.”).

⁴⁰⁰ See PITKIN, *supra* note 28, at 234.

⁴⁰¹ *Id.*

tative system of government, one cannot talk about the consent of the governed.⁴⁰²

This institutional account of representation is so compelling that it has served to justify the Court's intervention in *Baker v. Carr* and in the subsequent malapportionment cases.⁴⁰³ If the concept of representation is to be at all meaningful, electoral outcomes must be traceable to voter preferences that have not been manipulated by political elites. Indeed, the "one person, one vote" principle, which was a highly contested value judgment when the Court articulated it in the reapportionment cases,⁴⁰⁴ is now regarded as a core component of democratic equality⁴⁰⁵ precisely for this reason.

Thus, value judgments are not a consequence of a rights or structures framework but instead of adjudication itself. Individualists and structuralists should not concern themselves with whether the Court is using a rights or structures frame because not much rides on that distinction. Instead, they should concentrate on the types of values that judicial review is supposed to vindicate. In other words, the focus ought to be on either the *telos* of judicial supervision of democratic politics, whether the Court has anything useful to contribute to resolve the problem of the distortion of governance institutions, or whether the federal courts can limit political elites' ability to manipulate institutional rules to produce their desired—often self-entrenching—electoral outcomes.

B. The Abstractness of Structuralism and Election Law Dualism

Unlike the argument that judges should not make contested value judgments, the second argument that individualists advance has substantial merit. Here individualists argue that structuralism's principles are too abstract for courts to adjudicate.⁴⁰⁶ This argument embodies two important components. The first component implies something about structuralism itself—that structuralism is too vague

⁴⁰² See HERZOG, *supra* note 29, at 208 ("One can imagine (just barely) a society happy to live under the rule of an unresponsive state. I'd call them happy slaves; no matter how happy they were, we couldn't, in my view, invoke the consent of the governed in describing their situation.").

⁴⁰³ But cf. Robert J. Pushaw, Jr., *The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane*, 29 FLA. ST. U. L. REV. 603 (2001).

⁴⁰⁴ See Bruce E. Cain, *An Ethical Path to Reform: Just Elections Considered*, 4 ELECTION L.J. 134, 137 (2005).

⁴⁰⁵ See Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1269 (2002) (referring to the "one-person, one-vote" rule as a "fundamental maxim" and "the most pervasive legacy of *Baker*").

⁴⁰⁶ The corollary to this argument is that only individual rights claims are capable of adjudication, and therefore courts should only decide such claims. See *Baker v. Carr*, 369 U.S. 186, 287 (1962) (Frankfurter, J., dissenting); Pildes, *supra* note 10.

to direct judicial intervention in the political process.⁴⁰⁷ The second component implies something about the judges themselves and reflects a Frankfurterian concern about judicial competence.⁴⁰⁸ For Frankfurter, judges do not have the expertise to resolve

a subject of extraordinary complexity, involving—even after the fundamental theoretical issues concerning what is to be represented in a representative legislature have been fought out or compromised—considerations of geography, demography, electoral convenience, economic and social cohesions or divergencies among particular local groups, communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, respect for proven incumbents of long experience and senior status, mathematical mechanics, censuses compiling relevant data, and a host of others.⁴⁰⁹

On this view, it makes as much sense to ask judges to resolve election law disputes as it does to ask them to prove or disprove the Heisenberg Uncertainty Principle, the nature of God, or whether the triangle offense is superior to its rivals. These are not the types of considerations that “lend themselves to evaluations of a nature that are the staple of judicial determinations or for which judges are equipped to adjudicate by legal training or experience or native wit.”⁴¹⁰

Structuralists have offered two primary responses. One response has been simply to argue that election law claims are best understood as structural and to reiterate their central complaint that the problem with adjudication in law and politics is the dominance of an ill-fitting rights framework, a central weakness of which is this conception of rights as trumps.⁴¹¹ But this argument quickly loses steam when one acknowledges that it is not clear that constitutional law anywhere treats rights as trumps.⁴¹² In most areas of constitutional law, the rights claimant does not win simply because her right conflicts with an interest of the state.⁴¹³ Rather, the claimant must make the case that she is entitled to prevail.⁴¹⁴ Even the First Amendment, which would seem to present the best case for the application of a purely individualist framework if such a case could be made, is not best understood in

⁴⁰⁷ See *Baker*, 369 U.S. at 323–24 (Frankfurter, J., dissenting).

⁴⁰⁸ See Charles, *Politics*, *supra* note 16, at 1126–29.

⁴⁰⁹ *Baker*, 369 U.S. at 323 (Frankfurter, J., dissenting).

⁴¹⁰ *Id.* at 324.

⁴¹¹ See generally Pildes, *supra* note 10.

⁴¹² Richard Pildes convincingly advances this argument. See *id.*

⁴¹³ For an example of a case where the state's rights prevailed despite the conflicting rights of individuals, see *Griswold v. Connecticut*, 381 U.S. 479 (1965). On the structural conceptions of equality, see DON HERZOG, POISONING THE MINDS OF THE LOWER ORDERS (1998); Don Herzog, *How to Think About Equality*, 100 MICH. L. REV. 1621, 1634–38 (2002).

⁴¹⁴ See, e.g., *Griswold*, 381 U.S. at 479.

individualist terms.⁴¹⁵ Thus, while this notion of rights as trumps is a wonderful trope, it dimly reflects existing constitutional doctrine.⁴¹⁶

The first response is unhelpful because it characterizes the rights-structure debate simply as one about essentialism—whether election law claims should be viewed as essentially structural or individualist. The problem with this view is that both individualists and structuralists are mistaken in their belief that the debate is one about essentialism, because the Court has not generally viewed election law claims in such essentialist terms.⁴¹⁷ A second and more helpful response has been to point out that “the ‘rights’ at stake in political cases are already structured and conditioned by . . . prior institutional-design choices.”⁴¹⁸ To understand the content of political rights, one must come to terms with the “institutional structures within which those rights exist.”⁴¹⁹ Thus, one must make judgments—structural judgments—about the content of democratic politics.

In the next subpart, I build upon this second response by showing specifically in the contexts of malapportionment and race how judgments that seem to be about individual rights reflect underlying structural considerations. In addition, I also show how the Court has handled the rights-structure issue and adjudicated election law claims. Specifically, in the malapportionment context, the Court has generally understood election law claims as reflecting dualist properties.⁴²⁰ I define a dualistic claim as a political rights claim that cannot be resolved effectively unless courts address the manner in which individuals or groups are affected by political institutions. To effectively address most cases of political rights, particularly political gerrymandering, courts must be willing to explicitly deploy a rights-based framework that focuses on the individual while also employing a structural account that seeks to understand the pathologies of the political process in institutional terms. This is how the Court has responded to

⁴¹⁵ See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 57–91 (1948); ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 268–89 (1995); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005) (asserting that First Amendment jurisprudence distinguishes between kinds of speech, not kinds of speakers).

⁴¹⁶ See Pildes, *supra* note 10, at 725–26. It also does not reflect the understandings of liberal (philosophically, not politically) theorists. See Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 21 J. LEGAL STUD. 201 (2000).

⁴¹⁷ For example, contrast *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959), which contains no language about the importance of individual rights in the voting context, and *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), which characterizes voting as an essential liberty. See Pildes, *supra* note 10, at 745–46. As Pildes noted, “the Court itself has never seen the contradiction or tension between these pivotal voting-rights cases that many commentators see.” *Id.* at 746.

⁴¹⁸ Pildes, *supra* note 15, at 52.

⁴¹⁹ *Id.*

⁴²⁰ See *infra* pp. 660–70.

the twin individualist challenges of vagueness and judicial incompetence in the reapportionment context, and it is how the Court must approach political gerrymandering if it is to address the problem successfully.

1. *Rights*

Take the *Gray*⁴²¹-*Wesberry*⁴²²-*Reynolds*⁴²³-*Lucas*⁴²⁴ reapportionment quartet of cases, which some view as archetypal individual rights cases. To some extent, that view is justified because the Court has at times articulated the constitutional harm in those cases in individualist terms. Consider *Gray v. Sanders*, in which the Court held Georgia's county unit-based system of representation unconstitutional.⁴²⁵ *Gray*, the Court stated, did not involve the structural problems of gerrymandering that were involved in *Baker v. Carr*, which concerned the limits on state authority "in designing the geographical districts from which representatives are chosen,"⁴²⁶ or in *Gomillion v. Lightfoot*, involving the exclusion "of a minority group from participation in municipal affairs."⁴²⁷ Citing the *White Primary Cases*, the Court noted that *Gray* is an individual rights case—"only a voting case."⁴²⁸ Unlike the structural cases, *Baker* and *Gomillion*, *Gray* implicated the "constitutionally protected right" of "qualified voters" to cast their votes and have them counted.⁴²⁹ The constitutional harm that the voter suffers is the state's failure to respect the voter's "dignity" by diluting his or her vote.⁴³⁰ If the voter's dignity interest is to be vindicated, the "conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."⁴³¹

In subsequent cases, the Court continued to articulate its approach in individualist terms. In addition to the "one person, one vote" mantra in *Gray*, the Court famously went on in *Wesberry v. Sanders*⁴³² to state that the Constitution, specifically Article I § 2, "means that as nearly as is practicable one man's vote in a congressional elec-

⁴²¹ *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

⁴²² *Wesberry v. Sanders*, 376 U.S. 1 (1964).

⁴²³ *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁴²⁴ *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964).

⁴²⁵ See 372 U.S. at 381. Georgia determined representation not on a per person basis but on a per county basis. See *id.* at 370-71.

⁴²⁶ *Id.* at 376.

⁴²⁷ *Id.*

⁴²⁸ *Id.* at 378.

⁴²⁹ *Id.* at 380.

⁴³⁰ *Id.*

⁴³¹ *Id.* at 381.

⁴³² 376 U.S. 1 (1964).

tion is to be worth as much as another's."⁴³³ Similarly, in *Reynolds v. Sims*,⁴³⁴ the Court explained that "[a] predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature."⁴³⁵ Reiterating the dignitary interests that it argued were in jeopardy in *Gray*, the Court explained, "To the extent that a citizen's right to vote is debased, he is that much less a citizen."⁴³⁶ And in *Lucas v. Forty-Fourth General Assembly*, the Court stated that a malapportionment scheme was not immune from judicial review on the ground that it was adopted by a majority of the voters.⁴³⁷ The Court admonished that "[a]n individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause."⁴³⁸ In light of the Court's own framing of the right at issue in the reapportionment cases, one could understand why those cases would be viewed as quintessential individual rights cases.

2. *Structure*

But to categorize those cases as such is to miss an important part of the story. When one examines those cases at a deeper level, they are also inherently structural. The principle that makes the reapportionment cases coherent and intelligible is that the composition of electoral institutions—or what Frankfurter called the "structure and organization of the political institutions"⁴³⁹—matters.

Recall the legitimate complaint of individualists that structuralism is too amorphous for courts to adjudicate.⁴⁴⁰ Recall also the observation made earlier in this Article that sometimes political outcomes legitimately are the product of endogenous preferences, and sometimes they are illegitimately the product of exogenous stimuli (e.g., manipulation by political elites).⁴⁴¹ If this is true, how do we know whether a political outcome is the legitimate product of voter preferences or the product of illegitimate external stimuli? That is, how do we know whether the outcome is endogenous or exogenous?

⁴³³ *Id.* at 7–8.

⁴³⁴ 377 U.S. 533 (1964).

⁴³⁵ *Id.* at 561.

⁴³⁶ *Id.* at 567.

⁴³⁷ *See* 377 U.S. 713, 736 (1964).

⁴³⁸ *Id.*

⁴³⁹ *Baker v. Carr*, 369 U.S. 186, 284 (1962) (Frankfurter, J., dissenting).

⁴⁴⁰ *See, e.g., id.* at 323.

⁴⁴¹ *See supra* pp. 610–14.

The truth is that we simply do not know. Justice Souter's baseline problem is not only his problem but ubiquitous to this domain. Returning to the factual circumstances of *Vieth*, prior to the post-2000 redistricting, the Republicans maintained an 11-10 edge in Pennsylvania's congressional delegation.⁴⁴² Following the redrawing of the lines, the Republicans increased their advantage to 12-7, which was disappointing because their goal was 13-6.⁴⁴³ Is the 12-7 outcome the result of manipulation? What if the outcome had been 11-8 or 13-6? When is an election a real contest as opposed to a politically manipulated event? How much manipulation is too much? What level of competition or responsiveness is enough? What baseline should courts use to measure responsiveness? Should courts measure responsiveness at the district level or at the state level?⁴⁴⁴ Should courts measure responsiveness against the median voter or voters at either end of the distribution?

These are not questions that courts in mature democracies can truly answer in most cases, particularly ex post (in the context of an actual dispute after the election has taken place). Moreover, they are simply the wrong questions to ask. They lurk constantly in the background of the Court's political gerrymandering and racial vote dilution jurisprudence. To settle a familiar theme, this is precisely how the racial vote dilution cases have failed courts. Because the extent of a state's use of race is often so clear-cut, racial vote dilution cases have provided courts with a false confidence that they are unquestionably vindicating individual rights and measuring harm against actual external baselines.⁴⁴⁵ As such, the racial cases have elided courts' deeply structural judgments.

a. *Structural Considerations in the Race Cases*

Consider *Thornburg v. Gingles*⁴⁴⁶ in which the Court sought to give content to § 2 of the prohibition of the Voting Rights Act (VRA) against voting practices or procedures that "result[] in a denial or abridgement of the right" to vote on the basis of race.⁴⁴⁷ There, the plaintiffs argued that the state's use of multimember districts violated § 2.⁴⁴⁸ The Court explained that in order to make out a § 2 claim,

⁴⁴² See BARONE ET AL., *supra* note 130, at 1350.

⁴⁴³ See *id.* at 1349, 1350-51.

⁴⁴⁴ Recall the debate in *Vieth* over whether harm ought to be measured at the district level or at the state level. See *Vieth v. Jubelirer*, 541 U.S. 267, 285-87 (2004) (plurality opinion).

⁴⁴⁵ See Fuentes-Rohwer, *supra* note 147, at 593 (making similar arguments about early political gerrymandering cases).

⁴⁴⁶ 478 U.S. 30 (1986).

⁴⁴⁷ *Id.* at 36.

⁴⁴⁸ See *id.* at 35.

plaintiffs must show first that they are “sufficiently large and geographically compact to constitute a majority in a single-member district.”⁴⁴⁹ Thus, where voters of color are sufficiently large but geographically diffuse, they are not protected by the Court’s understanding of § 2’s reach and scope.⁴⁵⁰

Note that the Court’s involvement in *Gingles*—in the ostensibly quintessential context of individual rights—raises precisely the same questions brought up in the supposedly structural context of political gerrymandering. Is the inability of African American North Carolinians to elect their preferred voters a consequence of the normal workings of the political process, and thus endogenous, or the consequence of prejudice by white voters, and thus exogenous?⁴⁵¹ How much racial discrimination—or manipulation—is too much?⁴⁵² Finally, with respect to the baseline, why should single-member districts be the baseline for measuring racial representation as against other structural arrangements? All other things being equal, is it self-evident that geographically diffuse African American voters in State A should not be protected by § 2 but geographically compact African American voters in State B ought to be protected?⁴⁵³ These are precisely the same questions that are raised by judicial supervision of partisan line-drawing. Moreover, they are no less difficult to resolve in the context of race than in the context of politics.

This is one of the primary lessons of *Gomillion v. Lightfoot*.⁴⁵⁴ When one reviews the facts of *Gomillion*, it is very clear that something untoward had occurred. As Justice Frankfurter stated, when a city redraws its municipal boundaries to remove 395 out of 400 African American Tuskegee residents, it is clear that the exercise is “not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering. . . . [It is] tantamount for all practical purposes to a mathematical demonstration” of unambiguous vote dilution.⁴⁵⁵ In that case, the egregiousness of the facts served as the relevant baseline.⁴⁵⁶

⁴⁴⁹ *Id.* at 50. Plaintiffs must also show that they are politically cohesive and that white voters vote as a bloc to defeat the preferred candidates of voters of color. *See id.* at 51.

⁴⁵⁰ *See id.* at 50–51.

⁴⁵¹ *See id.* at 51 (noting a difference between “structural [vote] dilution from the mere loss of an occasional election”); *see also id.* at 57 (stating that the “loss of political power through vote dilution is distinct from the mere inability to win a particular election”).

⁴⁵² *See id.* at 55–56 (admitting that “the degree of bloc voting which constitutes the threshold of legal significance will vary from district to district”).

⁴⁵³ Professor Guinier perceptively advanced this point in her book. *See* Lani Guinier, *Tyranny of the Majority: Fundamental Fairness in Representative Democracy* (1994).

⁴⁵⁴ 364 U.S. 339 (1960).

⁴⁵⁵ *Id.* at 341.

⁴⁵⁶ This is reminiscent of what John Hart Ely said about the Court’s reaction to *Shaw v. Reno*. Ely argued that in its holding in *Shaw*, the Court essentially stated: “We don’t know

The baseline problem reemerges with a vengeance in the racial vote dilution context when the extent of the state's use of race is not so obvious. Suppose that in *Gomillion*, instead of leaving four or five African American citizens in Tuskegee, the city had left 150 African American citizens and moved some white citizens out of the city. One could certainly not say that the city's action amounted "for all practical purposes to a mathematical demonstration" of clear-cut vote dilution.⁴⁵⁷ What would the Court do in this revised *Gomillion* in which the racial harm is not so straightforward? As it turns out, the answer is not so apparent.

A useful example here is the Court's recent decision in *Georgia v. Ashcroft*.⁴⁵⁸ Prior to *Ashcroft*, the Court had concluded in *Beer v. United States*⁴⁵⁹ that the Justice Department must approve any districting plan submitted to them for preclearance by jurisdictions covered by § 5 of the VRA⁴⁶⁰ so long as the plan is not retrogressive, which the Court defined as not making voters of color worse off than they were before.⁴⁶¹ With respect to districting and majority-minority districts, retrogression meant that covered jurisdictions could not reduce the number of majority-minority districts as compared to the previous districting plan, which served as the relevant baseline. Thus, *Beer* established a fairly clear-cut (though no less arbitrary) baseline that only challenged the Justice Department's ability to subtract.

However, in *Ashcroft*, the Court maintained that the state can use alternative electoral structures, such as coalition districts (districts in which voters of color in coalition with white voters can elect their representative of choice) or influence districts (districts in which voters of color may be able to influence though not control the outcome of elections), to provide representation for voters of color without violating § 5.⁴⁶² The choice of electoral structure to effectuate racial representation, the Court maintained, depends upon one's theory of representation.⁴⁶³ "Section 5," the Court stated, "gives States the flexibility to choose one theory of effective representation over the other."⁴⁶⁴

The problem in *Ashcroft* is that the Court is certainly right that alternative electoral structures, in particular coalition districts, should

how, we don't know why, but this district has got to be unconstitutional." See John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576, 579-80 (1997).

⁴⁵⁷ *Gomillion*, 364 U.S. at 341.

⁴⁵⁸ 539 U.S. 461 (2003).

⁴⁵⁹ 425 U.S. 130 (1976).

⁴⁶⁰ These jurisdictions are required to submit—preclear—proposed changes with respect to voting with the Department of Justice.

⁴⁶¹ *Id.* at 138-41.

⁴⁶² See *Ashcroft*, 539 U.S. at 482-83.

⁴⁶³ See *id.* at 481.

⁴⁶⁴ *Id.* at 482.

not violate § 5.⁴⁶⁵ However, as the dissent powerfully argues, once one opens up the door for coalition and influence districts, it becomes almost impossible to ascertain an administrable baseline for determining retrogression.⁴⁶⁶ Thus, it is a mistake to rely on the race cases as perfect examples of adjudication on the basis of individual rights; once one removes the evidentiary challenges in the race context, the background structural assumptions made by the courts, which give content to the “individual right,” become easier to perceive.

Both *Miller v. Johnson*⁴⁶⁷ and *Easley v. Cromartie*⁴⁶⁸ are cases in which the state (Georgia and North Carolina respectively) manipulated electoral lines in order to facilitate the representation of African American voters.⁴⁶⁹ The district at issue in *Miller*, however, was much more “bizarrely shaped”⁴⁷⁰ than the district at issue in *Easley*. The Court found a constitutional violation in *Miller*⁴⁷¹ but not in *Easley*.⁴⁷² *Miller* can be understood as the Court’s reaction to the graphically demonstrable extent of the state’s manipulation.⁴⁷³ By contrast, the Court did not exhibit the same visceral reaction in *Easley*, even though it involved comparable race-conscious line-drawing by the state.

Similarly, compare *Whitcomb v. Chavis* in which the plurality concluded that there was no racial vote dilution,⁴⁷⁴ with *White v. Regester* in which the Court held that there was racial vote dilution.⁴⁷⁵ *Whitcomb* and *White* are fairly analogous cases with one exception: In *White*, the extent of the history of discrimination against African and Mexican Americans in Texas played a large role in persuading the Court.⁴⁷⁶ Thus, *Miller* and *White* present examples of states’ uses of race that are more offensive—from the perspective of the Court—than *Easley* and *Whitcomb*.

One must resist the temptation to view these cases in evidentiary terms—that the plaintiffs provided better evidence in *Gomillion*, *White*, and *Miller* than did the plaintiffs in *Whitcomb* and *Easley*. The point here is that these cases were not really governed by a theory of harm

⁴⁶⁵ See *id.* at 482–83.

⁴⁶⁶ See *id.* at 492–96 (Souter, J., dissenting).

⁴⁶⁷ 515 U.S. 900 (1995).

⁴⁶⁸ 532 U.S. 234 (2001).

⁴⁶⁹ See *id.* at 237 (North Carolina); *Miller*, 515 U.S. at 903 (Georgia).

⁴⁷⁰ See *Shaw v. Reno*, 509 U.S. 630, 655–56 (1993) (discussing the appellants’ claim regarding the district’s irregular shape).

⁴⁷¹ See 515 U.S. at 918.

⁴⁷² See 532 U.S. at 258.

⁴⁷³ See, e.g., 515 U.S. at 924 (“It would appear the Government was driven by its policy of maximizing majority-black districts.”).

⁴⁷⁴ 403 U.S. 124, 163 (1971) (plurality opinion).

⁴⁷⁵ 412 U.S. 755, 769–70 (1973).

⁴⁷⁶ See *id.* at 768–69.

but instead by the Court's visceral reaction to the state's distortion. This intuitive reaction to the nature of the facts created a misleading sense that a baseline actually existed, when in fact it did not.

While the race cases may be helpful for thinking about politics, the true lesson is one about manipulation, not race or individual rights. Consider the case of *United Jewish Organizations v. Carey (UJO)*.⁴⁷⁷ In *UJO*, New York State divided the Williamsburg Hasidic community between two state senate districts and two state assembly districts, ostensibly in order to meet the requirements of § 5 of the VRA.⁴⁷⁸ In the previous iteration of its redistricting plan, New York had placed its Hasidic community of approximately 30,000 individuals in one senate district and one assembly district.⁴⁷⁹ New York argued that it needed to split the Hasidic community in order to increase the population of voters of color in that assembly district from 61% to 65%.⁴⁸⁰

Plaintiffs, representing members of the Hasidic community, sued to enjoin the districting plan.⁴⁸¹ They argued that the plan diluted their votes in violation of the Fourteenth Amendment and that the plan constituted a racial gerrymander in violation of the Fifteenth Amendment.⁴⁸² In a highly fractured plurality opinion authored by Justice White, the Court upheld the plan on the ground that it was consistent with the aims of the VRA and did not violate the Fourteenth and Fifteenth Amendments.⁴⁸³

UJO presents in stark terms the primary, recurrent, and unavoidable question regarding the degree to which the Constitution limits the discretion of state actors in controlling electoral outcomes. Despite the state's overt use of race, religion, and ethnicity in *UJO*, one must not focus blindly on the "searing question of race" in the design of electoral institutions.⁴⁸⁴

Admittedly, race-conscious districting has become much more controversial since the series of racial districting decisions starting with *Shaw v. Reno*.⁴⁸⁵ Though one may argue that the Constitution should accord special solicitude to the electoral concerns of voters of color, the Court has repeatedly rejected the argument both in equal protection cases and cases dealing with law and the democratic pro-

⁴⁷⁷ 430 U.S. 144 (1977).

⁴⁷⁸ See *id.* at 152.

⁴⁷⁹ See *id.*

⁴⁸⁰ See *id.*

⁴⁸¹ See *id.* at 152-53.

⁴⁸² See *id.*

⁴⁸³ See *id.* at 166-68 (plurality opinion).

⁴⁸⁴ Issacharoff, *supra* note 4, at 597.

⁴⁸⁵ Easley v. Cromartie, 532 U.S. 234 (2001); Bush v. Vera, 517 U.S. 952 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

cess.⁴⁸⁶ Consequently, the Court today might be less likely to uphold the *UJO* redistricting plan to the extent that it is understood to represent an instance of excessive racialization of democratic institutions.⁴⁸⁷

Conversely, one could argue that racial considerations are invidious and should therefore be eliminated from the design of electoral structures. However, that argument also does not reflect current doctrine,⁴⁸⁸ and justifiably so, because removing race as a consideration in the design of electoral structures would infringe upon the associational interests of voters of color when race and political identity are correlated.⁴⁸⁹ Accordingly, one should not focus on the use of race in *UJO*. Indeed, focusing on race helps only to the extent that it leads one to reject the twin extremes of excessive race-consciousness and race-blindness. Whatever troubles us about cases such as *UJO* must therefore reach beyond the state's racial motivation. Thus, race-conscious districting is not the real problem in *UJO*.⁴⁹⁰

UJO illustrates quite vividly how political elites, as opposed to the preferences of the electorate, selected political winners and losers by the manner in which the state constructed electoral institutions. The Hasidim lost the political power they held in their assembly and senate districts not because the voter preferences changed, but because political elites wielding the power of New York State decided to manipulate political outcomes. African American and Latino voters maintained or increased their political power not because of different political tastes, but because the state decided to trade off the electoral interests of the Hasidic community for those of voters of color.

The Hasidim, in effect, became the ultimate "filler people."⁴⁹¹ Their preassigned task, as explained by Professor Issacharoff with characteristic eloquence, was "to play the role of inert gases in the political atmosphere: sufficiently numerous to create the needed population density of a district, but not so substantial as to alter the functioning of the prearranged political balance."⁴⁹² In other words, the state dictated *ex ante* that the Hasidim would be political losers and expected them to accept that determination.

Though the Court in *UJO* focused exclusively on race, its fundamental problem, also seen in the Court's racial and political gerry-

⁴⁸⁶ See Briffault, *supra* note 154.

⁴⁸⁷ See Aleinikoff & Issacharoff, *supra* note 105, at 597.

⁴⁸⁸ See *Easley v. Cromartie*, 532 U.S. 234 (2001); Charles, *Identity*, *supra* note 16, at 1212.

⁴⁸⁹ See Charles, *Identity*, *supra* note 16, at 1215–16.

⁴⁹⁰ *Id.* at 1212–13; Fuentes-Rohwer, *supra* note 147, at 580–81; Issacharoff, *supra* note 4, at 596–97.

⁴⁹¹ Aleinikoff & Issacharoff, *supra* note 105, at 601.

⁴⁹² Issacharoff, *supra* note 135, at 902–03.

mandering cases, is the virtually unfettered discretion of state actors in distorting political outcomes by manipulating electoral institutions.⁴⁹³ The use of race, in *UJO* specifically and in racial districting cases generally, illuminates how political elites distort electoral structures and the consequences of such distortions.⁴⁹⁴ Put differently, courts must look beyond qualms about race-consciousness conceived so grotesquely in racial terms, which preoccupied the Court in *UJO* and the *Shaw* line of cases, to the fact and extent of the state's manipulation. They must also come to terms with the proposition that these manipulations challenge our deepest principles of representative democracy because they alter or undermine democratic outcomes.

This explains the difficulty in determining the constitutional harm in *Gomillion* (and in the racial vote dilution cases in general). The harm cannot be a denial of the right to vote. The plaintiffs could vote; they would simply have had to do so in another city.⁴⁹⁵ In addition, the harm cannot simply be that the state took race into account.⁴⁹⁶ The vote dilution cases partly implicate race, but they also implicate (and maybe more so) the distortion of the very mechanism that legitimates democratic outcomes.

Thus, the pressing question is whether we ought to be less troubled, as a constitutional matter, if we substitute the Hasidim in *UJO* with Republicans and the voters of color with Democrats.⁴⁹⁷ To paraphrase the Court in *Shaw v. Reno*, is there not a constitutional principle that is at war with the notion that the state can prescribe that District A must be represented by a Democrat and District B by a Republican?⁴⁹⁸ Given the importance of political identity, which is at least as important as racial identity in the electoral context, courts must justify permitting the state to manipulate political identity willy-nilly.⁴⁹⁹ For those judges who would find political gerrymandering

⁴⁹³ See Issacharoff, *supra* note 4, at 597; see also Aleinikoff & Issacharoff, *supra* note 105, at 629 ("Under any discretionary districting system, state authorities arrogate to themselves the ability and authority to determine how representation will be allocated, and which individuals or groups will be frustrated participants in the electoral marketplace.").

⁴⁹⁴ See Issacharoff, *supra* note 4, at 597 (noting that the racial districting cases "reveal[] not only ongoing doctrinal battles over the application of the antidiscrimination norm to state action deemed beneficial to racial minorities, but also something deeper about the relation between constitutional law and politics").

⁴⁹⁵ See *Gomillion v. Lightfoot*, 364 U.S. 339, 349 (1960) (Whitaker, J., concurring).

⁴⁹⁶ See *Easley v. Cromartie*, 532 U.S. 234 (2001); *UJO*, 430 U.S. 144 (1977).

⁴⁹⁷ See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 123 (1986) (stating that political gerrymandering claims are no less justiciable than racial gerrymandering claims).

⁴⁹⁸ See 509 U.S. 630, 648 (1993).

⁴⁹⁹ This is the reverse of the argument advanced by Jamin Raskin that the Court's racial districting doctrine maintains a double standard by recognizing all other bases of political identification as legitimate but excluding racial identity as the only illegitimate basis for political identification. See Jamin B. Raskin, *The Supreme Court's Racial Double Standard in Redistricting: Unequal Protection in Politics and the Scholarship that Defends It*, 14 J.L. & POL. 591 (1998).

nonjusticiable, the central task is devising a compelling justification for a constitutional posture that would allow the state to predetermine winners and losers by the manner in which it designs electoral institutions.

The race cases therefore involve considerations that are no less structural because of their adjudication in the context of race rather than the context of politics. Furthermore, as the race cases perhaps demonstrate, these structural considerations cannot be ignored simply because we must come to terms with some first-order difficulties in order to make use of them.

b. *Structural Judgments in the Political Dilution Cases*

The problem for courts that address structural claims is that while a structural approach more directly and honestly confronts the issues that the courts are actually addressing and the considerations that direct the courts' resolution of those issues, the courts themselves are at sea when it comes to translating those structural values into workable adjudicatory principles. It is difficult for courts to directly answer questions such as whether political gerrymandering is consistent with the Constitution, or, whether elections are contested or responsive. Courts often lack the traditional doctrinal principles—culled particularly from the individual rights context—that guide the adjudicatory process and define the role of the judiciary in other contexts. To resolve these problems in the reapportionment context, the Supreme Court often uses rights-speak to direct judicial review, even where the Court's reasoning belies structuralist concerns.⁵⁰⁰

Consider once more *Gray* and the constitutionality of Georgia's county unit system, which allocated more weight to rural counties than to urban counties.⁵⁰¹ The Court's attempt to equate malapportionment with a denial of the right to vote bespeaks a conception of how the design of electoral structures affects political power that is sophisticated, functional, and structural—as opposed to sterile, formalistic, or individualist. Notwithstanding the individualist reference to the voter's dignity, the Court clearly recognized that the functional problem with Georgia's county unit system was that it “weigh[ed] the rural vote more heavily than the urban vote and . . . some small rural counties heavier than other larger rural counties.”⁵⁰² Similarly, in *Wesberry*, the Court relied upon a structural approach to support its conclusion that judicial review of the manner in which votes are

⁵⁰⁰ See, e.g., *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963).

⁵⁰¹ See *Gray*, 372 U.S. at 379.

⁵⁰² *Id.*

counted vindicates structural values.⁵⁰³ Ballot stuffing, which the Court viewed as analogous to malapportionment, did not offend the dignity of the voter—an individualist value—but did undermine the integrity of the political process—a structural value.⁵⁰⁴

As the Court recognized in the above apportionment cases, the state had created an electoral structure that would be responsive to the needs of an incrementally smaller but more powerful political minority. The state intended the design of the electoral structure to make the political process less sensitive to majoritarian preferences. Or perhaps more accurately, the state intended the structure to set an upper limit beyond which the political process would not be responsive to majority interests.

Representative democracy, however, depends on electoral institutions to facilitate the central aims of democratic politics.⁵⁰⁵ Electoral structures matter because they are the medium through which the ideals of democratic principles, such as the notion of self-government, are realized.⁵⁰⁶ The Court essentially said as much in *Wesberry*, the Georgia congressional malapportionment case:

To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People,' a principle tenaciously fought for and established at the Constitutional Convention.⁵⁰⁷

Thus, the Court concluded that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."⁵⁰⁸

Recall also that in *Lucas*, the plaintiffs challenged a reapportionment scheme that voters in Colorado enacted that apportioned the State House, but not the State Senate, on a per-population basis.⁵⁰⁹ *Lucas* differed from the other apportionment cases—*Baker*, *Gray*, *Wes-*

⁵⁰³ See *Wesberry*, 376 U.S. at 17–18.

⁵⁰⁴ See *id.* at 17 (asserting that ballot stuffing infringes upon the constitutionally mandated voting process).

⁵⁰⁵ See, e.g., *Reynolds*, 377 U.S. at 561–62.

⁵⁰⁶ See, e.g., *id.*

⁵⁰⁷ *Wesberry*, 376 U.S. at 8.

⁵⁰⁸ *Id.* at 17. As the Court famously stated in *Reynolds*:

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

377 U.S. at 561–62.

⁵⁰⁹ See 377 U.S. at 713, 717–18 ("Amendment No. 7 . . . provided for the apportionment of the House of Representatives on the basis of population, but essentially maintained the existing apportionment in the Senate, which was based on a combination of population and various other factors.").

berry, and *Reynolds*—in a number of respects. First, unlike those cases, *Lucas* was not a case about entrenchment as a consequence of neglect as political actors did not attempt to thwart the accountability function of elections by refusing to apportion. Colorado had reapportioned the state's legislature every decade, with one exception, since the adoption of the state's constitution.⁵¹⁰ In fact, the state had redistricted the year before *Lucas* came before the Court.⁵¹¹ Second, the state provided for an initiative process that the voters used on a number of occasions, including the apportionment scheme that was at issue in *Lucas*, to enact their preferences into law.⁵¹² So, this was not a case about self-interested political actors attempting to rig the rules of the game in their favor. Third, a majority of the State's voters, including majorities in each county, voted in favor of the scheme at issue in Colorado.⁵¹³ Moreover, in the very same election in which the voters adopted the reapportionment plan, they rejected a competing initiative that would have mandated population equality.⁵¹⁴ Therefore, this was not a case about minority entrenchment. Lastly, because one of the two houses was apportioned substantially on a per-population basis,⁵¹⁵ *Lucas* did not present a clear-cut case of minority rule.

Notwithstanding that the Court cast the constitutional violation in individual rights terms, what individual right did the Colorado's apportionment scheme violate? The only hint in the opinion is the statement that "[a]n individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate."⁵¹⁶ From an individualist perspective, this is a puzzling statement. Was the Court really concerned about the minority of voters—almost one out of three—who could not persuade the majority of voters *not* to divest themselves of political power? Supposing that a substantial majority of Colorado's voters had agreed to provide two votes to rural residents and one vote to urban residents, would it be sensible to frame this intentional choice as an individual rights problem?

To make any sense of *Lucas*, one must look beyond the Court's assertions about individual rights to an inchoate, but more robust, concern with the primary rules that govern fundamental democratic representative institutions. *Lucas* is really a case about institutional de-

⁵¹⁰ See *id.* at 723.

⁵¹¹ See *id.* at 727.

⁵¹² See *id.* at 732 ("[T]he initiative device provides a practicable political remedy to obtain relief against alleged legislative malapportionment . . .").

⁵¹³ See *id.* at 717, 731 ("[T]he Colorado electorate adopted proposed Amendment No. 7 by a vote of 305,700 to 172,725 . . .").

⁵¹⁴ See *id.* at 717.

⁵¹⁵ See *id.* at 727.

⁵¹⁶ *Id.* at 736.

sign and institutional distortion. The question in *Lucas* was whether the state's urban majority consented to provide greater political power to the state's rural minority as a matter of institutional design.⁵¹⁷ For the Court, the principle of majoritarian responsiveness as a question of institutional design was so strong that it would not acquiesce to the voters' choice unless a majority of Colorado's citizens made a "clear-cut" choice in favor of an electoral structure that was less responsive to majoritarian interests.⁵¹⁸ The Court concluded that the choice was not clear-cut because of structural defects in the decision-making process.⁵¹⁹ For example, the Court explained that the "[b]allots were long and cumbersome."⁵²⁰

The Court also made some interesting comments on the role of representatives in the preference formation of citizens. As a consequence of the use of at-large multimember districts, the Court stated, "[n]o identifiable constituencies *within* the populous counties resulted, and the residents of those areas had no single member of the Senate or House elected specifically to represent them."⁵²¹ This is why the Court concluded that the voters of Colorado had not made a choice about institutional structure that the Court should respect.⁵²²

Fundamentally, the rights discourse that permeates *Lucas* and the reapportionment cases reflects the traditional deployment of rights not as trumps, but as instrumental devices "to regulate the institutional arrangements within which politics is conducted."⁵²³ In so doing, the Court uses rights discourse to domesticate amorphous structural concepts—such as fairness—and render them amenable to judicial review.

V

ADMINISTRABILITY AND POLITICAL GERRYMANDERING

From the insight of the dilution cases, the problem of administrability—developing a standard for determining the legality of political gerrymandering—becomes a more manageable inquiry. In the political gerrymandering cases, the Court has come to terms with the fact that harm, defined as distortion of electoral structures by political elites, cannot be evaluated *ex post* in an atomized, case-by-case context. Drawing once again on and paraphrasing Pitkin, harm is de-

⁵¹⁷ See *id.* at 732.

⁵¹⁸ *Id.* at 731.

⁵¹⁹ See *id.*

⁵²⁰ *Id.*

⁵²¹ *Id.*

⁵²² See *id.* at 732 ("[T]he assumption of the court below that the Colorado voters made a definitive choice between two contrasting alternatives and indicated that 'minority process in the Senate is what they want' does not appear to be factually justifiable.").

⁵²³ See Karlan, *supra* note 139, at 1346.

financed not necessarily by examining particular elections at particular moments, but rather by the long-term effect of manipulation on governance institutions and the way they function.⁵²⁴ If this institutional account of harm is correct, then courts cannot, except under the most egregious facts, directly answer these difficult questions posed by individualists in the context of specific cases—e.g., how much manipulation is too much, the appropriate level of competition, and whether endogeneity or exogeneity applies.

A. Ex Ante Administrable Standards

The genius of the political gerrymandering cases is the Court's recognition of the need for ex ante rules to cabin the discretion of political elites in order to minimize the predilection of state actors to engage in institutional distortion.⁵²⁵ To facilitate that goal, the Court developed a series of devices that minimize, if not resolve, the administrability problem. The following three are worth considering.

1. *Equipopulation Principle*

The first device that minimizes the administrability problem is the equipopulation principle.⁵²⁶ The one-person, one-vote standard, generally viewed as the quintessential expression of an individual right,⁵²⁷ is actually better understood as a judicially imposed structural limitation on the ability of state actors to design electoral institutions.⁵²⁸

Indeed, treating the equipopulation principle as conferring an individual right raises a host of troubling questions.⁵²⁹ For example, some have noted that the Census Bureau's methods for counting individuals are disturbingly inaccurate.⁵³⁰ Further, to the extent that the census is accurate, it is probably accurate for only the first election in

⁵²⁴ See PITKIN, *supra* note 28, at 234.

⁵²⁵ See Issacharoff, *supra* note 4, at 643 (outlining the advantages of an ex ante approach).

⁵²⁶ See Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 741 (1998).

⁵²⁷ See *id.* ("One person, one vote is the paradigmatic 'objective' rule.").

⁵²⁸ See Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1669 (1993) ("One can understand the role of the one-person, one-vote rule as that of an externally imposed constraint prompted by the failure of legislative bodies to bind themselves to a meaningful precommitment strategy for apportionment.").

⁵²⁹ See Richard Briffault, *The Contested Right to Vote*, 100 MICH. L. REV. 1506, 1509 (2002) (book review) ("The significance of popular voting in our political process remains a matter of politics as much as it is a matter of rights.").

⁵³⁰ See *e.g.*, *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 322–23 (1999) (noting that the census "has always failed to reach . . . a portion of the population," and that "certain minorities . . . have historically had substantially higher undercount rates than the population as a whole"); Nathaniel Persily, *Color by Numbers: Race, Redistricting, and*

a ten-year cycle; in many jurisdictions, individuals reside in districts that are quite unequal by the end of the ten-year redistricting cycle.⁵³¹ Finally, viewing the equipopulation principle as an individual right does not explain why the Court refuses to tolerate even minor deviations in population equality with respect to congressional districts but tolerates substantial inequality with respect to state and local districts.⁵³² If, however, the purpose of the one-person, one-vote rule is simply to serve as an external check on manipulation by political elites, then these shortcomings are significant only to the extent that they inhibit the rule from performing its instrumental purpose.

2. *Presumption of Unconstitutionality*

The second device is a presumption of unconstitutionality. In *Reynolds v. Sims*,⁵³³ the Court constrained the behavior of political elites by establishing a presumption of unconstitutionality with respect to a certain type of state inaction.⁵³⁴ In *Reynolds*, the Court advised the states to reapportion every ten years; otherwise, the Court would deem any extant apportionment presumptively unconstitutional.⁵³⁵ The Court stated:

While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation. And we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable. But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect.⁵³⁶

As one commentator observed, by coupling the de facto decennial apportionment with the equipopulation principle, the Court “provided the functional equivalent of a first-order precommitment strategy.”⁵³⁷

3. *Shaw’s Bizarre-Shape Test*

The third device is the bizarre-shape test principle, which is found in the line of cases that begins with *Shaw v. Reno*.⁵³⁸ In *Shaw*

the 2000 Census, 85 MINN. L. REV. 899 (2001) (discussing the “endemic undercount[ing]” of some minority groups and the attempt to remedy it in the 2000 census).

⁵³¹ See Levinson, *supra* note 405, at 1278–80.

⁵³² Cf. Grofman, *supra* note 334, at 41–43 (discussing the Court’s differential treatment of statewide and district-specific gerrymandering claims).

⁵³³ 377 U.S. 533 (1964).

⁵³⁴ See *id.* 583–84.

⁵³⁵ See *id.*

⁵³⁶ *Id.* at 563–64.

⁵³⁷ Issacharoff, *supra* note 528, at 1669.

⁵³⁸ 509 U.S. 630 (1993).

and its progeny, the Court used the shape of the district to identify institutional distortions *ex ante* and to constrain what it viewed as the willingness of political elites to distort electoral lines for racial purposes.⁵³⁹ *Shaw* is similar to the political gerrymandering cases in that while the excessive manipulation of electoral lines to achieve representation for voters of color troubled the Court, it was not prepared to hold that race could not be a factor in the line-drawing process.⁵⁴⁰ Thus, the Court needed to develop a standard that would distinguish permissible from impermissible race-consciousness.

An important part of the problem here is evidentiary: How is a court to know whether the state actor was motivated by too much race consciousness or just enough? In the early *Shaw* cases, the evidentiary question was much less salient because elected officials admitted that race primarily influenced the lines.⁵⁴¹ The Court also resolved the evidentiary problem in part by focusing on the shape of the district itself.⁵⁴² The Court explained that “redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting” is justiciable under the Fourteenth Amendment.⁵⁴³ The Court developed what has come to be known as the bizarre-shape test, by which it meant that “highly irregular” race-conscious line-drawing may violate the Constitution if the district’s shape becomes too bizarre.⁵⁴⁴

There are a number of ways to understand *Shaw*’s standard. First, one could view *Shaw* as the Court’s attempt to identify only “extreme” instances of manipulation for racial purposes.⁵⁴⁵ This reading would concede that while the Constitution may idealize color blindness, practical considerations—such as evidentiary difficulties or the fact

⁵³⁹ See *Vieth v. Jubelirer*, 541 U.S. 267, 321 (2004) (Stevens, J., dissenting); *Shaw*, 509 U.S. at 646.

⁵⁴⁰ See *supra* Part II.D.

⁵⁴¹ Granted, the officials thought the VRA defended their actions, but once the Court decided that the VRA did not require the officials’ actions, the evidentiary problem was solved when states admitted that race influenced the line-drawing. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 917–28 (1995).

⁵⁴² See *Shaw*, 509 U.S. at 642, 646.

⁵⁴³ *Id.*

⁵⁴⁴ *Id.* at 646. In *Miller v. Johnson*, the Court introduced a different test—the predominant factor test—which provided that a state violates the Equal Protection Clause when it uses race as the predominant factor in redistricting. See 515 U.S. at 901. However, the bizarre-shape test continues to functionally direct the inquiry. See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium: Hunt v. Cromartie as a Case Study*, 58 WASH. & LEE L. REV. 227, 250 (2001).

⁵⁴⁵ E.g., *Miller*, 515 U.S. at 929 (O’Connor, J., concurring) (describing “*Shaw*’s basic objective” as “making extreme instances of gerrymandering subject to meaningful judicial review”); Charles & Fuentes-Rohwer, *supra* note 544, at 302 (noting that *Shaw* applied to “extreme cases of racial redistricting”).

that race continues to be a basis for political identity—may necessitate a compromise.⁵⁴⁶

Second, *Shaw* can be viewed as a signaling case. Prior to *Shaw*, one could have argued that redistricters were not aware that there were constitutional limitations on their ability to manipulate electoral lines in order to facilitate representation on behalf of voters of color. Alternatively, one could argue that to the extent that redistricters were aware of constitutional limitations prior to *Shaw*, they doubted whether the Court would enforce those limitations.⁵⁴⁷ *Shaw* signaled the fact that there were limitations, and *Shaw*'s progeny signaled the Court's willingness to police those boundaries.⁵⁴⁸ Under this reading, what matters is not whether the Court communicated a clear standard for bizarreness; indeed, the assumption here is that the standard was rather vague.⁵⁴⁹ What mattered instead is that the Court sent a clear signal that it was going to enforce the constitutional limitations. The clarity of the signal thus reduced the possibility that the vague standard would provide an incentive to litigate.⁵⁵⁰

A third reading of *Shaw*, which would harmonize it with *Reynolds*, would be to view it as resting on an irrebuttable presumption, or per se rule, that districts that are both race-consciously drawn and bizarrely shaped are presumptively unconstitutional.⁵⁵¹ *Shaw*'s bizarre-shape test, then, could be understood as a prophylactic rule designed to cabin the discretion of political elites.⁵⁵²

B. Application to Political Gerrymandering

These above devices constitute a number of options for a court confronting the problem of administrability in the context of political gerrymandering. First, where the state admits that partisanship was its primary motivation in promulgating a redistricting plan, courts may strike down the plan. There is no administrability or evidentiary problem when the statements of relevant state actors are clear and une-

⁵⁴⁶ Charles & Fuentes-Rohwer, *supra* note 544, at 237–41.

⁵⁴⁷ *See id.* at 300–03.

⁵⁴⁸ The fact that redistricters changed their behavior supports this reading. As demonstrated by *Easley v. Cromartie*, 532 U.S. 234 (2001), state actors have tended to draw fewer majority-minority districts or, at least, to draw them less bizarrely after the *Shaw* cases.

⁵⁴⁹ The Court did not define bizarreness and did not rely upon objective tests that measure a district's shape.

⁵⁵⁰ *See* Aleinikoff & Issacharoff, *supra* note 105, at 604 (“[V]ague norms, especially norms that may not be enforced at all, will produce costly litigation and serious uncertainty about important political events.”). *But see* Pildes, *supra* note 15, at 67–68 (accrediting the paucity of *Shaw* litigation in the post-2000 round of redistricting to state actors' having internalized the message of *Shaw*).

⁵⁵¹ *See* Melissa L. Saunders, Essay, *Reconsidering Shaw: The Miranda of Race-Conscious Districting*, 109 YALE L.J. 1603 (2000).

⁵⁵² *See id.* at 1605–11.

quivocal. The Court employed this technique in the racial gerrymandering cases rather successfully. Admittedly, redistricters could respond by trying to conceal their intentions. If redistricters attempt to conceal their intentions, however, this will likely also reduce the probability that states will be able to enact extreme political gerrymanders.

Second, following in the tradition of the reapportionment cases, courts could enact, *ex ante*, a *per se* rule. Assuming that courts are right to be troubled, as a constitutional matter, by excessive partisan manipulation of redistricting lines, and assuming that courts are unable to distinguish excessive from nonexcessive partisan manipulation, courts could conclude that redistricting conducted by elected officials would be—to use the language of the Court in *Reynolds*—“constitutionally suspect.”⁵⁵³ This proposal would adequately address the evidentiary problem. It would also be administrable, given that courts could provide a safe harbor for redistricting conducted by nonpartisan redistricting or advisory commissions.⁵⁵⁴

Third, following from *Shaw v. Reno*, courts could constrain redistricters by limiting the structural devices at the redistricters’ disposal. For example in *Shaw*, the Court focused on bizarrely shaped majority-minority districts. Perhaps an analogous device in the context of political gerrymandering is single-member districting. The capability of drawing multiple lines—a state of affairs maximized by the option of drawing single-member districts—facilitates the ability to engage in gerrymandering.⁵⁵⁵ If one limits the number of lines that redistricters could draw, one could impose some constraints on their ability to gerrymander.⁵⁵⁶ One possibility, then, is for courts to apply strict scrutiny when state actors use single-member districts in their redistricting plans or to prohibit state actors from using single-member districts altogether.

⁵⁵³ Sam Issacharoff recently advanced these suggestions, and commentators have heavily criticized him for it. See Issacharoff, *supra* note 4, 630–38. If the arguments advanced in this Article are right, however, then the criticisms of Issacharoff’s proposal were largely misplaced.

⁵⁵⁴ For a nice exposition on the benefits of advisory commissions, see Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366 (2005).

⁵⁵⁵ Of course one would have to use alternative voting structures to protect the rights of citizens protected by the Voting Rights Act when appropriate or numerical minorities more broadly.

⁵⁵⁶ This would not eliminate gerrymandering, as it is possible to gerrymander even in multimember systems. But it would make gerrymandering more difficult and in some cases—particularly when the state is trying to maximize a number of values—extremely difficult.

Fourth, courts could simply declare that partisan intent or excessive partisan intent is unconstitutional.⁵⁵⁷ Of course, this declaration would run into evidentiary problems. However, to the extent that the problem is the failure of the courts to send a clear message that they are willing to strike down extreme political gerrymanders—as opposed to the problem being shirking, a propensity by state actors to evade constitutional norms—one should expect compliance from political elites even if the substantive standard is vague. This is what happened following both the reapportionment revolution and the modern racial gerrymandering cases.

CONCLUSION

An important part of the inquiry that underlies the dispute over the constitutionalization of the democratic process is whether it is sensible to try to give full effect to fundamental democratic principles in a mature democracy. We have elections that can be contested and are generally respected. Moreover, candidates and voters can speak freely, gather together, and campaign. This may be the best that we can expect in a mature democracy. We can also expect the courts to assure minimum contestation and free elections—but not much more.

However, maybe we can expect our democratic principles to be given more than minimum effect. In that case, we might have a more responsive political process, and one in which participation is sufficiently consequential. Perhaps the rules of the game do matter a great deal more than we think.

In this Article, I have advanced a theory of political equality that raises questions about the role of political elites in designing governance institutions. I have argued that though courts need not address the problem of manipulation of electoral structures by elected officials, courts can do so within the framework that they have established for addressing other problems of the law of democracy. Indeed, as the Article points out, the reapportionment cases are useful models for thinking about political gerrymandering. Once the Court appreciated the nature of the harm in these cases, it employed an appropriate remedy. Moreover, there are clues in *Vieth* that the Court is capable of rising to the challenge. In particular, all of the Justices in *Vieth* identified the harm in structural terms.⁵⁵⁸ What they were really disagree-

⁵⁵⁷ The effect of this declaration—making all districts in the country unconstitutional—would be similar to what happened after *Baker v. Carr* and the reapportionment cases, and the republic survived then; I suspect it would continue to survive were the Court to go down the path of declaring partisan intent or excessive partisan intent unconstitutional.

⁵⁵⁸ See *supra* p. 639.

ing over was whether these types of structural issues are capable of adjudication.⁵⁵⁹

If the pro-justiciability Justices are going to tackle the problem of political gerrymandering, they are going need to do so within a different paradigm. They are going to have to come to terms with what I have called here the harm of institutional distortion, and they are going to have to grow accustomed to using a dualistic framework—an individual rights framework crafted to address a structural problem.

It may be that the law of politics has nothing useful to say about representation and institutional distortion, and it may also be the case that courts have nothing to offer in the resolution of this problem. However, before going down that path and leaving us to the wolves, the Court owes us all the obligation of making a better effort.

⁵⁵⁹ See *supra* p. 640.

