

## JUDICIAL INTERVENTION AS JUDICIAL RESTRAINT

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In Gill v. Whitford,<sup>1</sup> the Supreme Court turned aside the most promising vehicle for adjudicating partisan gerrymandering claims since the Court first fully addressed the issue more than thirty years ago in Davis v. Bandemer.<sup>2</sup> Though the Court has long been deeply divided on the constitutionality of partisan gerrymandering, especially on the threshold question of justiciability, Justice Kennedy, the decisive fifth vote and the Court's resident super median,<sup>3</sup> previously signaled, explicitly and strongly, his willingness to adjudicate these claims if putative plaintiffs would present him with judicially manageable standards.<sup>4</sup> The plaintiffs in Gill took up that challenge.

The Gill plaintiffs filed suit against a redistricting plan from the State of Wisconsin that, by almost all measures, constituted a successful attempt by the Republican Party to minimize the ability of Democrats to translate their electoral votes into legislative seats. The plaintiffs,

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<sup>1</sup> 138 S. Ct. 1916 (2018).

<sup>2</sup> 478 U.S. 109 (1986).

<sup>3</sup> Lee Epstein & Tonja Jacobi, Super Medians, 61 *Stan. L. Rev.* 37 (2008).

<sup>4</sup> See, e.g., Vieth v. Jubilerer, 541 U.S. 247, 306 (Kennedy, J., concurring in the judgment).

armed with a new test -- the efficiency gap<sup>5</sup> -- prevailed in the lower court.<sup>6</sup> Moreover, the issue of partisan gerrymandering appeared to have finally galvanized broad popular support. The stars seemed nicely aligned as Gill looked like the perfect opportunity for the Court to address the political gerrymandering question once and for all.

As further evidence of what seemed -- without the jolt of reality conferred only by hindsight -- to be the Court's intention to strike down egregious political gerrymanders, the Supreme Court agreed to hear a political gerrymandering case from Maryland, Benisek v. Lamone.<sup>7</sup> The Court also had a third case pending from North Carolina, Rucho v. Common Cause,<sup>8</sup> in which a three-judge court concluded that North Carolina's 2016 redistricting plan was a partisan gerrymander in violation of the Equal Protection Clause, the First Amendment and the Elections Clause.<sup>9</sup> The Maryland case was particularly noteworthy because the plaintiffs challenged a district gerrymandered by the Maryland Democratic Party. Taken together, Gill and Benisek presented the Court with gerrymandering claims by both major political parties and would have provided cover from cries of partisan favoritism. The cases also presented the Court with two different types of gerrymandering claims. The Gill plaintiffs focused on how their state's plan

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<sup>5</sup> The "efficiency gap" is a measure of partisan symmetry. "The efficiency gap assumes that the strategy of the dominant party, the party in control of the districting, is to group its voters as efficiently as possible and to group the voters of the out party as inefficiently as possible." **James A. Gardner & Guy-Uriel Charles, Election Law in the American Political System** 309 (2018). It measures the extent to which the dominant party maximizes the way it distributes its voters in voting districts and minimizes the out party's electoral changes by grouping their voters in a way that wastes their votes as much as possible. The efficiency gap was introduced by a political scientist, Professor Eric McGhee, see Eric McGhee, Measuring Partisan Bias in Single-Member District Electoral Systems, 39 **Legis. Stud. Q.** 55 (2014), and extended into law by Professor McGhee and Professor Nick Stephanopoulos, see Nicholas O. Stephanopoulos & Eric McGhee, Partisan Gerrymandering and the Efficiency Gap, 82 **U. Chi. L. Rev.** 831 (2015); Nicholas O. Stephanopoulos & Eric McGhee, The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering, 70 **Stan. L. Rev.** 1503 (2018).

<sup>6</sup> See Whitford v. Gill, 218 F. Supp. 3d 837 (W.D. Wis.2016).

<sup>7</sup> 138 S. Ct. 1942 (2018).

<sup>8</sup> 279 F. Supp. 3d 587 (M.D.N.C. 2018).

<sup>9</sup> **U.S. Const.** art. I, § 4.

affected political power throughout the state and the Benisek plaintiffs focused on how the composition of a particular district affected their right to vote. In addition, the two cases presented the Court with two different constitutional theories of the problem, one based upon the Equal Protection Clause and the other focused on the First Amendment. Between them, Gill and Benisek covered the waterfront of possibilities and provided the Court a range of options for a narrow or broad intervention. And if the Court wanted to strengthen its justifications for intervention and further expand its options, it had an ace in the hole with Common Cause v. Rucho, which combined all of the issues presented in Gill and Benisek in a single case. It seemed plausible, conceivable, and even ineluctable that the Court was about to subject the increasingly despised partisan gerrymander to meaningful judicial review.

To the surprise of many, the Court did not rule on the constitutionality of political gerrymandering claims. The Court anticlimactically resolved Gill on standing grounds. Writing for a unanimous Court,<sup>10</sup> Chief Justice Roberts explained that according to the plaintiffs' theory of their constitutional injury -- that they were "placed in legislative districts designed to 'waste' their votes in elections where their chosen candidates will win in landslides (packing) or are destined to lose by closer margins (cracking)" -- they must allege and prove their constitutional injury at the district level.<sup>11</sup> The Court remanded the case to allow plaintiffs to show standing.<sup>12</sup> The Court's decision in Benisek was even more prosaic. It simply affirmed the lower court's

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<sup>10</sup> Justices Thomas and Gorsuch joined all but the last part of Chief Justice Roberts's opinion, which remanded the case and gave the plaintiffs another opportunity on remand to demonstrate standing. Justices Thomas and Gorsuch would have dismissed the plaintiffs' claims.

<sup>11</sup> Gill, 138 S. Ct. at 1930 ("To the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific.").

<sup>12</sup> Id. at 1923.

decision to deny the plaintiffs' motion for an injunction.<sup>13</sup> And the Court vacated the lower court's decision in Rucho and remanded the case for reconsideration in light of its decision in Gill.<sup>14</sup> Bubbles burst.

As if the Court's decisions in Gill, Benisek, and Rucho were not enough to cast a pall indicating something other than the festive parade expected to accompany the resolution of the cases, Justice Kennedy announced his retirement from the Court at the end of the Term. Justice Kennedy's departure, and the unlikely prospect that his replacement will join the Court's liberal bloc on this issue, seem to signal the end of the road for political gerrymandering claims for the foreseeable future.

To us, however, it is too premature to write-off judicial supervision of political gerrymandering claims. There are clearly some Justices who do not believe that political gerrymandering claims are justiciable, particularly Justices Thomas and Gorsuch. There are also clearly some Justices who believe that these cases are justiciable, particularly Justices Breyer, Ginsburg, Kagan, and Sotomayor. As importantly, there is no doubt that Chief Justice Roberts is not yet convinced that the Court bears an institutional responsibility to address the problem of partisan gerrymandering. Indeed, he seemed disdainful of the proposition, which he attributed to the plaintiffs, that "the Court should exercise its power here because it is the 'only institution in the United States' capable of 'solving this problem.'"<sup>15</sup> We presume that this is one of the reasons why Justice Kagan spent part of her concurring opinion in Gill articulating the harms

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<sup>13</sup> Benisek, 138 S. Ct. at 1945.

<sup>14</sup> Rucho v. Common Cause, No. 17-1295, 2018 WL 1335406, at \*1 (U.S. June 25, 2018).

<sup>15</sup> Gill, 138 S. Ct. at 1929.

caused by partisan gerrymandering and making the case in favor of judicial intervention.<sup>16</sup>

Nevertheless, notwithstanding Chief Justice Roberts's, and perhaps Justice Alito's, skepticism about the utility of judicial supervision of partisan gerrymandering claims, it is also true and significant that they did not vote in Gill to hold partisan gerrymandering claims nonjusticiable. Rather than dismiss the case, as Justices Thomas and Gorsuch urged, they joined the liberal Justices and agreed to send the litigants back to the lower court to resolve the standing issues. The fact that the Court decided the case on standing grounds and provided political gerrymandering plaintiffs another opportunity to make their case is indicative that some of the Justices who are skeptical of judicial supervision are nevertheless worried, and rightly so, about the implications of nonintervention. They are not yet persuaded that there is a problem to which the Court ought to provide a solution; but they also have an intuition that nonintervention is a significant abdication of judicial responsibility. They need more time to further contemplate a justification for engagement for what they clearly view as a consequential decision. Deciding Gill on standing grounds and remanding the case is a holding pattern maneuver.

Although our argument differs from that offered by the literature, we join a growing consensus among an impressive group of election law scholars who argue that partisanship is a

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<sup>16</sup> We seem to have taken a step backwards. Instead of arguing about whether political gerrymandering claims are best adjudicated under the First or Fourteenth Amendments, or whether the efficiency gap adequately captures the harm of political gerrymandering, we are debating whether political gerrymandering claims cause constitutional harms at all and whether those harms are sufficient to compel the Court to intervene.

problem in districting and that the Court is authorized by the Constitution to intervene.<sup>17</sup> We advance two claims. First, in Part I, we provide a comprehensive account of the Court's skepticism of judicial supervision of democratic politics, an account that we call the narrative of nonintervention. We situate Gill v. Whitford and the Court's recent political gerrymandering cases within this narrative and argue that the debate over standing, jurisdiction, or judicially manageable standards is a red herring. The Court has previously offered the same set of objections in analogous contexts; specifically, when it refused to intervene to protect African Americans against widespread racial discrimination in the political process and when it refused to intervene to address the problem of grossly malapportioned districts. Judicial intervention in those prior moments was not determined by standing doctrine, the absence or presence of judicially manageable standards, or jurisdiction. The Court's reluctance to intervene was a function of the Court's institutional calculus that it ought to protect its standing and institutional capital when it engages in what look like political fights. The lesson of Part I is that the Court's refusal to intervene to address the problems of racial disenfranchisement and malapportionment -- its narrative of nonintervention in those contexts -- yielded to the current conditions of governance, to the political realities of the moment. In both the race and malapportionment contexts, the Court overcame its initial skepticism and responded to the needs of the time.

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<sup>17</sup> See, e.g., Christopher S. Elmendorf, From Educational Adequacy to Representational Adequacy: A New Template for Legal Attacks on Partisan Gerrymandering, 59 **Wm. & Mary L. Rev.** 1601 (2018); Levitt, Intent is Enough, supra \_\_\_; Levitt, The Partisanship Spectrum, supra \_\_\_; Nicholas O. Stephanopoulos, The Causes and Consequences of Gerrymandering, 59 **Wm. & Mary L. Rev.** 2115 (2018); Daniel Tokaji, Gerrymandering and Association, 59 **Wm. & Mary L. Rev.** 2159 (2018); Kang, supra note 5353. There are some important dissenting voices. Among the most creative and compelling see Franita Tolson, Benign Partisanship, 88 **Notre Dame L. Rev.** 395 (2012); Franita Tolson, Partisan Gerrymandering as Safeguard of Federalism, 2010 **Utah L. Rev.** 859.

In Part II we argue that the Court's posture of nonintervention in the political gerrymandering cases should yield as a consequence of the political reality of our moment, a political environment characterized by extreme partisan polarization. Though strong normative arguments support the justiciability of partisan gerrymandering claims, we argue, on utilitarian grounds, that the Court ought to occasionally make strategic interventions in the domain of law and politics, such as limiting partisan gerrymandering, where doing so are reasonably likely to avoid future problems that would lead to greater interventions. Thus, the Court ought to articulate a principle against partisanship in the construction of electoral structures because curbing partisan gerrymandering would have the benefit of curtailing a lot of other kinds of manipulations in the electoral system that are driven by the same type of partisan impulse that motivates partisan gerrymandering claims. The other kinds of manipulations we have in mind include voter identification rules, voter registration rules, voter purge practices, racial gerrymandering claims, election administration practices, disputes about location of polling places and the like. For ease of exposition, we refer to these types of claims as secondary claims or secondary disputes.<sup>18</sup> Ironically, and contra the narrative of nonintervention, judicial intervention in this context is an act of judicial restraint because it obviates the need for the Court to later take sides on substantive partisan disputes that are arguably the result of partisan manipulation of electoral rules by unconstrained state actors. Counterintuitively, this is

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<sup>18</sup> Justice Kagan astutely noted her concerns with the secondary effects of partisan gerrymandering in *Gill*. As she stated, "the evils of gerrymandering seep into the legislative process itself," which makes it harder for the political process to "negotiate[e] and compromise" and to reach "pragmatic, bipartisan solutions to the nation's problems." *Gill*, \_\_\_\_\_. Among the "evils of gerrymandering," is the desire to manipulate electoral rules, not just electoral districts, to maintain political power at all costs.

an argument for a utilitarian or instrumental conception of judicial restraint. The Court can do a little now -- rein in partisan gerrymandering claims -- so it can do a lot less later -- deter some forms of bad behavior it would otherwise have to deal with on the merits.

### I. Gill v. Whitford and the Narrative of Nonintervention

Gill v. Whitford is nominally a case about standing. Gill is best understood within a line of cases in which the Court articulates its reservations about policing the political process and its justifications for its posture of nonintervention. We call this articulation the narrative of nonintervention. Gill thus reflects two sentiments in tension with one another. On one hand, rooted within the narrative of nonintervention, the Court is skeptical that judicial review of partisan gerrymandering claims is necessary. On the other hand, the Court seems to intuit that judicial abdication would be problematic and is trying to come to terms with the implications of nonintervention for the democratic process and for the Court as an institution. The Court is ambivalent about the proper course, and Gill is a prudential reflection of this ambivalence. Section I.A explains the contours of the narrative of nonintervention. Section I.B turns to Gill and explains the Court's standing analysis as a function of its ambivalence, the pull of the narrative of nonintervention and the fear of its implication. Section I.C critiques the narrative of nonintervention as devoid of analytic content. The point of the narrative is simply that the Court is concerned about its standing and its political capital.

#### A. The Narrative

There is a story that the Court tells itself, and us, when it does not want to supervise the ground rules of democratic politics. It goes something like this. The Court cannot intervene in



political cases because to do so would be to unjustifiably insert itself in political and policy decisions that are reserved for the democratic process and not for judges. It cannot intervene because the Constitution only protects individual rights and does not permit judges to concern themselves with the distribution of power among groups or with the design of democratic institutions. It cannot intervene except where intervention is necessary to protect racial minorities but not political parties. It cannot intervene where it does not have an ex ante rule that cabins their discretion. The Court told us this story, in a slightly modified version, when it was asked to protect rights of political participation against racial discrimination; when it was asked to address malapportionment; and when it was asked to address partisan gerrymandering. The Court's core concern is not about individual rights, race, or rules, but that it is bad for the Court if it engages in the politics of the people by supervising the ground rules of democratic politics. We call this story the narrative of nonintervention.

The narrative has taken so strong a hold in the legal imagination that it is hard to remember a world without it. We can trace its roots to Justice Holmes in the anticanonical Giles v. Harris.<sup>19</sup> In Giles, a black voter from Alabama, Jackson W. Giles, sued county election officials for denying him and other black voters the right to register and to vote in violation of the Fourteenth and Fifteenth Amendments. At the beginning of the twentieth century, the state of Alabama amended its constitution as part of a statewide scheme to deprive African Americans of the right to vote and to effectively nullify the Reconstruction Amendments. The disenfranchisement was effectuated through the application of literacy tests that were

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<sup>19</sup> 189 U.S. 475 (1903). For the first and most thorough examination of *Giles*, See Richard H. Pildes, Democracy, Anti-Democracy, and the Cannon, 17 **Const. Comment.** 295 (2000). Professor Pildes argues that Giles should be restored from obscurity and ought to be central to the constitutional law and race and law fields.

discriminatorily applied so that they would have minimal impact on white voters and maximum impact on the state's African American population and through grandfather clauses that would have the effect of exempting whites but not African Americans from certain requirements.

In an opinion by Justice Holmes, the Court dismissed Mr. Giles's claims on jurisdictional grounds. Justice Holmes argued that the Court did not have the power to provide the equitable relief requested by the plaintiff. Justice Holmes stated that "equity cannot undertake . . . to enforce political rights."<sup>20</sup> According to Justice Holmes, the plaintiffs alleged "that the great mass of the white population intends to keep the blacks from voting."<sup>21</sup> If so, Justice Holmes concluded, "relief from a great political wrong . . . 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."<sup>22</sup>

The Court explicitly voiced its ambivalence in 1946, in the better known Colegrove v. Green.<sup>23</sup> In Colegrove, Justice Frankfurter famously concluded that the Court did not have jurisdiction to address Illinois's malapportioned congressional districts. Justice Frankfurter approached the issue with his characteristic bluntness. He stated that malapportionment claims did not implicate individual rights, such as the denial of the franchise on the basis of race.<sup>24</sup> Rather, citing Giles,<sup>25</sup> the case was an attempt to vindicate "a wrong suffered by Illinois

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<sup>20</sup> Id. at 487.

<sup>21</sup> Id. at 488.

<sup>22</sup> Id.

<sup>23</sup> 328 U.S. 549 (1946).

<sup>24</sup> Id. at 552.

<sup>25</sup> Id. at 552.

as a polity.”<sup>26</sup> Consequently, the case would not be resolved “by verbal fencing about ‘jurisdiction.’”<sup>27</sup> These disputes are about “politics, in the sense of party contests and party interests.”<sup>28</sup> As such, the Court should stay away because “[i]t is hostile to a democratic system to involve the judiciary in the politics of the people.”<sup>29</sup> He concluded that the “Constitution has left the performance of many duties in our governmental scheme to depend upon the fidelity of the executive and legislative action, and ultimately, on the vigilance of the people in exercising their political rights.”<sup>30</sup> Justice Frankfurter’s message was clear and direct: in order to preserve the Court’s standing and legitimacy as a legal institution, the Court “ought not enter this political thicket.”<sup>31</sup>

The Court overcame this ambivalence in Baker v. Carr<sup>32</sup> with a mere turn to the Equal Protection Clause. The plaintiffs in Baker argued that Tennessee’s malapportioned state legislative districts were justiciable under the Fourteenth Amendment, and in an opinion by Justice Brennan -- and over a vociferous dissent by Justice Frankfurter -- the Court agreed.<sup>33</sup> But Baker did not fully exiate the Court’s ambivalence nor did Baker indicate how far the Court would go in policing the ground rules of democratic politics.

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<sup>26</sup> Id.

<sup>27</sup> Id. (“This is one of those demands on judicial power which cannot be met by verbal fencing about ‘jurisdiction.’”).

<sup>28</sup> Id. at 554; see also id. at 553 (“Nothing is clearer that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof.”).

<sup>29</sup> Colegrove, 328 U.S. at 553 - 54.

<sup>30</sup> Colegrove, 328 U.S. at 556.

<sup>31</sup> Id. at 556.

<sup>32</sup> 369 U.S. 186 (1962)

<sup>33</sup> Baker, 369 U.S. at 237.

Gaffney v. Cummings,<sup>34</sup> a 1973 challenge to a Connecticut bipartisan gerrymander, is an apt example. The Court in Gaffney seemed bemused by the claim that the redistricting plan in question violated the Equal Protection Clause because it “was drawn with the conscious intent to . . . achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties.”<sup>35</sup> The majority explained that it “would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it.”<sup>36</sup> The Court was skeptical of the plaintiffs’ claim, but not because political gerrymandering claims were non-justiciable<sup>37</sup> -- the preoccupation with the justiciability of political gerrymandering claims is a later development. The Court was skeptical of the plaintiffs’ claim because those claims amounted to a complaint that the plaintiffs were assigned to electoral districts simply to produce an intended political outcome. The Court could not imagine a situation where partisan politics were removed from the design of electoral districts.<sup>38</sup> To sustain their complaint, plaintiffs were required to show not simply that the political process produced a political outcome, but that the line-drawers minimized or cancelled out their political strength. Because the Connecticut redistricting plan provided plaintiffs with rough proportional representation, the plaintiffs could not make such a showing.

Thirteen years later, when the Court next addressed a partisan gerrymander in Davis v.

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<sup>34</sup> 412 U.S. 735 (1973).

<sup>35</sup> Id. at 752.

<sup>36</sup> Id.

<sup>37</sup> Id. at 754 (“What is done in so arranging for elections . . . or allocate political power, is not wholly exempt from judicial scrutiny.”).

<sup>38</sup> Id. at 735 (“Politics and political considerations are inseparable from districting and apportionment.”).

Bandemer,<sup>39</sup> the Justices seemed less amused and more frustrated. In Bandemer, plaintiffs challenged the State's apportionment plan on partisan gerrymandering grounds. They argued that their voters were diluted by Republican partisans in charge of the redistricting process.<sup>40</sup> Importantly, a majority agreed that the claim was justiciable. But the Court could not agree on much more. Writing for a plurality, Justice White concluded that the plaintiffs could not show that they were subject to unconstitutional treatment. To prove a constitutional violation, Justice White argued that the plaintiffs would have to show both discriminatory intent and discriminatory effect. Justice White thought a showing of discriminatory intent "should not be very difficult to prove."<sup>41</sup> The question for the justices -- a question that remains to this day -- was in proving unconstitutional discriminatory effect. According to the plurality, discriminatory effect "occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."<sup>42</sup> The plaintiffs in Bandemer could not prevail because they could not show that their influence was consistently degraded.

The conclusion that political gerrymandering claims were justiciable provoked a very sharp and influential response by Justice O'Connor. Her argument against justiciability relied upon a series of dichotomous principles, which have set the terms for the debate over judicial

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<sup>39</sup> 478 U.S. 109 (1986).

<sup>40</sup> Bandemer, 478 U.S. at 113- 115.

<sup>41</sup> Davis v. Bandemer, 478 U.S. 109, 129 (1986). Justice White thought proving discriminatory intent ought to be easy to prove because the "reality is that districting inevitably has and is intended to have substantial political consequences." Reprising his theme from Gaffney, Justice White stated, "[p]olitics and political considerations are inseparable from districting and apportionment." Consequently, plaintiffs should be able to show intentionality, which ought to be a fairly low threshold.

<sup>42</sup> Bandemer, 478 U.S. at 132.

supervision of democratic politics and have also served as a rough guide indicating when judicial supervision of democratic politics is warranted. These principles largely mirrored the concerns of Justice Frankfurter, the chief advocate of judicial abstention and Justice O'Connor's intellectual forebear, who made the case successfully against supervision in Colegrove v. Green but famously lost in Baker v. Carr.

Bandemer evidenced and presaged what would become a fundamental and long-lasting divide on the Court with respect to two essential questions: whether these claims are justiciable and if so, what is the nature of the constitutional harm. That divide was in full display eighteen years later,<sup>43</sup> in Vieth v. Jubilerer.<sup>44</sup> Building on Justice Frankfurter, Justice O'Connor's opinion in Bandemer articulated four sets of dichotomous principles, which Justice Scalia would later rehearse with almost perfect pitch in his plurality opinion in Vieth.

1. Law and Politics. -- The first set is the law-politics tension. Justice O'Connor argued that political gerrymandering claims were nonjusticiable because they were inherently about partisan politics not law. In her view, the "legislative business of apportionment is fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out -- by the very parties that are responsible for this process -- present a political

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<sup>43</sup> Justice Scalia authored the opinion that announced the judgment of the Court but the reasoning of a plurality of Justices. Four Justices, Chief Justice Rehnquist and Justices Scalia, O'Connor, and Thomas, concluded that political gerrymandering claims were non-justiciable. And four Justices concluded that political gerrymandering claims were justiciable. That group consisted of Justices Stevens, Breyer, Souter, and Ginsburg. Justice Kennedy wrote separately to explain that even though he agreed that the plaintiffs claim ought to be dismissed, he would not foreclose the possibility that the Court might eventually develop judicial manageable standards. Consequently, he was not prepared to conclude that political gerrymandering claims were non-justiciable.

<sup>44</sup> 541 U.S. 247 (2004).

question in the truest sense.”<sup>45</sup> Like the Court in Gaffney, she could not imagine that redistricting could be non-partisan or apolitical. “The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of the politics in the United States.”<sup>46</sup> Fundamental choices about governance belong to the political process and not to the courts.<sup>47</sup> One can hear echoes of Frankfurter in Colegrove, stating emphatically that it “is hostile to a democratic system to involve the judiciary in the politics of the people.”<sup>48</sup> And like Justice Frankfurter before her, Justice O’Connor worried that to “turn these matters over to the federal judiciary is to inject the courts into the most heated partisan issues.”<sup>49</sup>

Justice Scalia would pick up the same law-politics refrain in Vieth. He began his analysis by quoting Chief Justice Marshall’s famous proposition in Marbury<sup>50</sup> -- “it is emphatically the province of the judicial department to say what the law is” -- but his main point is Frankfurterian. Shadowing Frankfurter, Justice Scalia wrote that “[s]ometimes the law is that the judicial department has no business entertaining the claim of unlawfulness -- because the question is entrusted to one of the political branches or involves no judicial enforceable rights.”<sup>51</sup> Or as Frankfurter would put it, the “Constitution has many commands that are not

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<sup>45</sup> Bandemer, 478 U.S. at \_\_\_ (O’Connor, J., concurring).

<sup>46</sup> Id. at 145.

<sup>47</sup> Id. (“I do not believe, and the Court offers not a shred of evidence of suggest, that the Framers of the Constitution intended the judicial power to encompass the making of such fundamental choices about how this Nation is to be governed.”).

<sup>48</sup> Colegrove v. Green, 328 U.S. 549, 553 - 54 (1946) (“It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law.”).

<sup>49</sup> Bandemer, 478 U.S. at 145.

<sup>50</sup> Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

<sup>51</sup> Vieth v. Jubelirer, 541 U.S. 267, 277 (2004).

enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action.”<sup>52</sup> Redistricting belongs to the political process and a political process naturally produces political outcomes.<sup>53</sup>

2. Individual Rights and Structure. -- The second set of dichotomous principles is the individual rights-structural rights divide. Noninterventionists have generally argued that the only proper purpose of judicial review of democratic politics is to vindicate violations of individual rights of liberty, autonomy, or dignity.<sup>54</sup> Correspondingly, noninterventionists have also argued that judicial review should not be deployed to guard against the maldistribution of political power among groups or to direct the manner in which political power is exercised through the institutions that structure and shape democratic politics. This is because the maldistribution of political power or the institutional arrangements of democratic politics reflect structural rights, which are not protected by the Constitution.

Justice O’Connor sided with the noninterventionists and argued that the Constitution is only concerned with individual rights violations in the domain of law and democracy. In her view, the Framers did not carve out a role for courts to adjudicate structural rights.<sup>55</sup> Accordingly,

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<sup>52</sup> Colegrove, 328 U.S. at 556.

<sup>53</sup> For powerful and persuasive rebuttals to the view that partisanship is a necessary condition of the redistricting process, see Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 **Wm. & Mary L. Rev.** 1993 (2018); Michael S. Kang, Gerrymandering and the Constitutional Norm Against Government Partisanship, 116 **Mich. L. Rev.** 351 (2017).

<sup>54</sup> See, e.g., Baker, 369 U.S. at 186 (Frankfurter, J., dissenting) (noting that malapportionment claims are “a wholly different matter from denial of the franchise to individuals because of race, color, religion or sex.”); see generally, **Richard H. Hasen, The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore**, 10 (2003).

<sup>55</sup> Bandemer, 478 U.S. at 147 (O’Connor, J., dissenting) (noting that group rights do not present a harm that the Constitution recognizes because “no group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment”).



political gerrymandering claims are not protected by the Constitution because political gerrymandering claims do not vindicate individual rights but call into question the distribution of power among groups and the institutional arrangements that channel political power in the polity.<sup>56</sup> Consequently, courts do not have a legal basis for arbitrating political power among groups or for restructuring political institutions.<sup>57</sup> Aware of the weight of reapportionment cases, she argued that those cases were inapposite here because the “right asserted [in those cases] was an individual right to a vote whose weight was not arbitrarily subjected to ‘debasement.’”<sup>58</sup>

This rights-structure distinction also made its way in Vieth. The plaintiffs in Vieth argued that the Constitution was violated when the state created district lines with a predominant intent to gain partisan advantage. Additionally, the plaintiffs claimed that in order to be constitutionally actionable a political gerrymandering claim must not only contain an element of discriminatory intent but also effect. They argued that the effects standard was met when district lines cracked and packed voters because of the voters’ political identity and where the totality of circumstances show that the voters are less able to translate their votes into legislative seats. Justice Scalia took issue with the plaintiffs’ effects standard on the ground that “it rests upon the principle that groups . . . have a right to proportional representation.”<sup>59</sup>

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<sup>56</sup> Id. at 149 (“The rights asserted in this case are group rights to an equal share of political power and representation.”).

<sup>57</sup> Id. at 147 (“If members of the major political parties are protected by the Equal Protection Clause from dilution of their voting strength, then members of every identifiable group that possesses distinctive interests should be able to bring similar claims. Federal courts will have no alternative but to attempt to recreate the complex process of legislative apportionment . . . in order to reconcile the competing claims of political, religious, ethnic, racial, occupational, and socioeconomic groups.”).

<sup>58</sup> Id. at 149.

<sup>59</sup> Vieth, 541 U.S. at 288.

This is not a constitutional principle, he argued, because the Constitution “guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. It nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers.”<sup>60</sup>

3. Race and Politics. -- The third set is the race-politics dichotomy. The animating move of the race-politics dichotomy is the idea that race is simply different (or maybe an exception). Within the parameters of this dichotomy, claims that allege racial discrimination in the political process are justiciable but claims that allege political or partisan discrimination are not. A central question is whether racial identity and partisan identity are sufficiently similar such that the Constitution should treat racial and partisan gerrymanders symmetrically. Justice O’Connor reasoned that the Court’s precedents on racial vote dilution and racial gerrymandering do not authorize the Court to resolve partisan gerrymandering claims. Justice O’Connor offered three reasons to distinguish claims by racial group from claims by parties.

First, citing Justice Frankfurter’s dissent in Baker, Justice O’Connor argued that the Fourteenth and Fifteenth Amendments were promulgated specifically to address the problem of racial discrimination, and with respect to the Fifteenth Amendment, specifically the problem of racial discrimination in voting. Consequently, they provide a textual directive to courts and a justification for courts to supervise the use of race in the design of electoral districts.<sup>61</sup> Justice Scalia similarly argued in Vieth that a purpose to discriminate on the basis of race is a violation

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<sup>60</sup> Id.

<sup>61</sup> Bandemer, 478 U.S. at \_\_\_ (O’Connor, J., dissenting).

of the Constitution whereas “a similar purpose to discriminate on the basis of politics” is not.<sup>62</sup> Additionally, “our country’s long and persistent history of racial discrimination in voting -- as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race” support the supposition that racial and political gerrymanders are not subject to the same level of scrutiny.<sup>63</sup>

Second, Justice O’Connor explained that racial groups are different from parties because racial minorities “are a discrete and insular group vulnerable to exclusion from the political process by . . . [a] dominant group.”<sup>64</sup> Unlike racial groups, the major political parties are “the dominant groups,” able to protect themselves in the political process. Moreover, race is an immutable characteristic, whereas partisan identity is not.<sup>65</sup> Third, she maintained that protecting political parties from the diminution of their political power would enshrine a right of proportional political representation, a right not found in the Constitution.<sup>66</sup> Therefore, Justice O’Connor concluded that racial identity and partisan identity are not comparable identity categories for constitutional purposes. The Court has a constitutional reason for guaranteeing the political equality of racial groups that it does not have for political groups.

4. Rules and Standards. -- Finally, the fourth set of tensions is best articulated as a rules-standards distinction. The language the Court uses, “judicially manageable standards,” seems to focus the inquiry on the existence of “standards” as opposed to “rules” to adjudicate political

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<sup>62</sup> Vieth, 541 U.S. at 293.

<sup>63</sup> Id. (quoting Shaw v. Reno, 509 U.S. 630, 650 (1993)).

<sup>64</sup> Bandemer, 478 U.S. at 152 (O’Connor, J., dissenting).

<sup>65</sup> Id. at 156.

<sup>66</sup> Id. at 156 - 57.

gerrymandering claims. But the language of “judicially manageable standards” is a term of art.<sup>67</sup> Notwithstanding the phrase “judicially manageable standards,” the Court’s jurisprudence is actually looking for ex ante rules to cabin the discretion of courts and preclude judges from using their public policy preferences to decide claims of political rights. As Justice Scalia would declare emphatically, but also confusingly, in Vieth, the judicial power under Article III requires that “judicial action must be governed by standard, by rule.”<sup>68</sup> “Rule” is meant to qualify “standard.” Given that there is no rule available, that is, a “reasoned distinction[]” to constrain judicial discretion and policy preferences, the federal courts do not have power to hear these claims.<sup>69</sup>

This was a leading theme in Justice O’Connor’s opinion in Bandemer, where she derided “the nebulous standard a plurality of the Court fashions today,”<sup>70</sup> a standard that allowed the Court to enact its public policy choices into law. The Bandemer plurality argued that it was simply following the path of Baker v. Carr, which made reapportionment claims justiciable and subject to equal protection standards. But in her view, Baker was not the proper precedent. Baker adopted a nebulous “arbitrary and capricious” standard that “threatened to prove unmanageable,” save for the fact that “the difficulty was pretermitted when a relatively simple and judicially manageable requirement of population equality among districts was adopted . . . in Reynolds v. Sims.”<sup>71</sup> Baker, like the plurality in Bandemer, relied upon a nebulous

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<sup>67</sup> See Luis Fuentes-Rohwer, Who's Afraid of the Hated Political Gerrymander, 104 KY. L.J. 561 (2016).

<sup>68</sup> Vieth, 541 U.S. at 278.

<sup>69</sup> Id.

<sup>70</sup> Bandemer, 478 U.S. at 145 (O’Connor, J., dissenting).

<sup>71</sup> Id. at 149.

standard, whereas Reynolds fashioned a rule. From Justice O'Connor's perspective, the best the plurality could do was to emulate Baker, which was not good enough. Thus, political gerrymandering claims are not justiciable because no rule was available.<sup>72</sup>

### B. Gill as Placeholder

Using the framework of the narrative of nonintervention, we can better understand the Court's decision in Gill v. Whitford. Nominally, Gill is a standing case. In order to have standing, a plaintiff must show that (a) she has suffered an injury in fact; (b) that the defendant caused the plaintiff's injury; and (c) that the injury is redressable if the plaintiff prevails. The most important element is the injury-in-fact requirement, which the Court has interpreted to mean that the plaintiff must plead and show that the defendant's conduct has infringed upon "a legally protected interest."<sup>73</sup> Chief Justice Roberts relied upon the plaintiffs' own theory and articulation of their constitutional harm to argue that the plaintiffs' "legally protected interest" was the dilution (to borrow from the racial gerrymandering context) or debasement (to borrow a term from the reapportionment context) of their vote for partisan purposes. Because Republicans were in charge of the redistricting process, they placed plaintiffs, who identified as Democrats, inside and outside of legislative districts -- packed and cracked them -- in order to maximize the electoral power of the Republican Party and thereby minimize the plaintiffs' voting power. The Court then went on to conclude unanimously that in order to have standing to challenge the redistricting plan, plaintiffs must show that they lived in districts that were

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<sup>72</sup> Id. at 147 (noting that the "Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims").

<sup>73</sup> Gill, 138 S. Ct. at 1929 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

either packed or cracked and that the cracking or packing resulted in the debasement or dilution of their vote. Chief Justice Roberts argued that the plaintiffs did not show that they resided in districts that were packed or cracked, so they did not prove that they suffered an injury in fact. Consequently, they did not have standing to bring this claim.

Though a case about standing, Gill bears the markers of the narrative of nonintervention. The Court relied on both the law-politics and individual rights-structural rights dichotomies, particularly the latter, as necessary complements of its standing argument. Invoking both the individual rights-structural rights and the law-politics distinctions, Chief Justice Roberts stated that the plaintiffs' case "is a case about group political interests, not individual legal rights.

. . . The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it."<sup>74</sup> In stating the importance of standing, the Court invoked the law-politics distinction: standing is a "threshold requirement [that] 'ensures that we act as judges, do not engage in policymaking properly left to elected representatives.'"<sup>75</sup> And in support of the argument that standing is "district specific," the majority quoted the reapportionment cases to argue that "the right to vote is 'individual and personal in nature.'"<sup>76</sup> Importantly, the Court stated numerous times that the standing inquiry is not focused on structural harms such as the plaintiffs' "'collective representation in the legislature'" or their interest in "influencing the legislature's overall 'composition and policymaking,'" or their "abstract interest in policies adopted by the legislature."<sup>77</sup>

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<sup>74</sup> Id. at 1933.

<sup>75</sup> Id. at 1923 (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013)).

<sup>76</sup> Id. at 1929 (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)).

<sup>77</sup> Id. at 1931.

Yet, the Court's standing analysis left open some unanswered questions. Two particular points are worth noting. First, scholars of the law of democracy universally agree that vote dilution claims are structural claims and not individual rights claims.<sup>78</sup> Take for example the cracking claim -- the contention that the State broke apart a group of voters who would otherwise have constituted a majority of voters in the district and as consequence made it impossible for these voters, who are now a numerical minority, to elect their candidate of choice. A cracking claim is only sensible as a group right.<sup>79</sup> As long as an individual is not denied the right to vote, all claims about the composition of the electorate, including racial gerrymandering, malapportionment, and partisan gerrymandering, are structural claims.<sup>80</sup> The individual rights-structural rights distinction is not a coherent distinction.<sup>81</sup>

Second, Gill is unclear about the relationship between standing and the constitutional harm. As Professors Issacharoff and Karlan stated in an analogous context, "a coherent concept of standing grows out of a clear definition of the relevant injury."<sup>82</sup> We put the cart before the

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<sup>78</sup> Perhaps the foundational article here is Lani Guinier, Groups, Representation, and Raceconscious Districting: A Case of the Emperor's Clothes, 71 **Tex. L. Rev.** 1589 (1993); see also Heather Gerken, Understanding the Right to an Undiluted Vote, 114 *Harv. L. Rev.* 1663 (2001); Samuel Issacharoff & Pamela S. Karlan, Groups, Politics, and the Equal Protection Clause, 58 *U. Miami L. Rev.* 35 (2003).

<sup>79</sup> This is also true for packing claims.

<sup>80</sup> See, e.g., Richard H. Pildes, The Theory of Political Competition, 85 **Va. L. Rev.** 1605 (1999); Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 **Stan. L. Rev.** 643 (1998).

<sup>81</sup> For an important account see Richard H. Pildes The Constitutionalization of Democratic Politics, 118 **Harv. L. Rev.** 28 (2004).

<sup>82</sup> Samuel Issacharoff & Pamela S. Karlan, Standing and Misunderstanding in Voting Rights Law, 111 **Harv. L. Rev.** 2276, 2288 (1995).

horse when we talk about standing without a clear definition of the injury.<sup>83</sup> Gill is an anomaly in the Court's law and politics jurisprudence as the first case [check] where the Court has addressed the question of standing without first addressing whether there is a constitutional or legal claim. Prior to Gill, standing doctrine had not been determinative in any of the Court's forays into the political thicket. Standing did not matter when the Court decided the reapportionment cases; or when the Court intervened in the 2000 presidential election in Bush v. Gore.<sup>84</sup> Standing did not matter when the Court recognized "an analytically distinct" claim in Shaw v. Reno, the racial gerrymandering case.<sup>85</sup> Indeed, in the Shaw line of cases, the Court first decided whether there was a constitutional injury -- which the majority understood as an "expressive harm" -- and then two years later, in United States v. Hays,<sup>86</sup> addressed the standing question.

How then can we make sense of the Court's decision in Gill to decide the case on standing grounds? In our view, the Court's standing analysis reflects a skepticism of some members of the Court and a deep disagreement about the justiciability of the plaintiffs' claim, a skepticism rooted in the narrative of intervention. Standing doctrine is a prudential artifact that allows the justices to take up and evade questions as they deemed necessary and appropriate.<sup>87</sup> Justice Roberts's opinion is peppered with aphorisms that serve as admonitions about the limits and

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<sup>83</sup> Justice Kagan recognized this problem in her concurring opinion when she noted that the lower court will have to decide what evidence is relevant for the plaintiffs to show standing "without guidance from this Court . . . [on] the elements [that] make up a vote dilution claim in the partisan gerrymandering context." Gill, 138 S. Ct. at 1937 (Kagan, J., concurring).

<sup>84</sup> 531 U.S. 98 (2000).

<sup>85</sup> 509 U.S. 630 (1993).

<sup>86</sup> 515 U.S. 37 (1995).

<sup>87</sup> Mark Tushnet, Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine, 80 N.C. L. Rev. 1203 (2002).



limitations of the Court’s power.<sup>88</sup> A unanimous decision on standing by a Court that is clearly divided on the justiciability of these claims reflects a Court that is not yet ready to square up to the justiciability question. Characterizing Gill as a standing case blithely masks the Court’s deep ambivalence and disagreement with respect to the merits of the case.

Ambivalence, however, has two sides. Though it is true that the Court has strong reservations about entering this part of the political thicket, it is also true that the Court is not yet ready to abdicate this field altogether. The Court could have followed the nonintervention script and dismiss these cases on the ground that there are no judicially manageable standards. In the alternative, it could have remanded the case to the lower court with instructions to dismiss on jurisdictional grounds, as Justices Thomas and Gorsuch believed was required by longstanding precedents. Instead, the Court gave political gerrymandering plaintiffs, not just the Gill plaintiffs, another bite at the apple on the theory that “[t]his is not the usual case. It concerns an unsettled kind of claim this Court has not agreed upon, the contours and justiciability of which are unresolved.”<sup>89</sup>

Deciding Gill on standing grounds and remanding the case is a holding pattern maneuver. The Court is deadlocked on justiciability, ambivalent about where to go next. Chief Justice Roberts acknowledged as much.<sup>90</sup> Though the Court is clearly not yet persuaded that there is

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<sup>88</sup> See, e.g., Gill, 138 S. Ct. at 1929 (“Our power as judges . . . is . . . grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff’s particular claim of right.”); id. (noting that standing functions to “ensure that the Federal Judiciary respects ‘the proper -- and properly limited -- role of the courts in a democratic society’” (quoting Allen v. Wright, 468 U.S. 737, 750 (1984))).

<sup>89</sup> Id. at 1933 - 34.

<sup>90</sup> As he stated, “[o]ver the past five decades this Court has repeatedly asked to decide what judicially enforceable limits, if any, the Constitution sets on the gerrymandering of voters along partisan lines. . . . Our efforts to sort through these considerations have generated conflicting views both of how to conceive of the injury arising partisan gerrymandering and of the appropriate role for the Federal Judiciary in remedying that injury.” Id. at 1926.

an injury or that it has a role to play in addressing that injury, it also has some intuition that nonintervention is a significant abdication of judicial responsibility. In order to follow that intuition, it needs to shed the burden of the narrative of nonintervention.

### C. The Critique

This narrative of nonintervention has served as a conceptual and ultimately doctrinal straightjacket for proponents of judicial review of partisan gerrymandering claims. The narrative of nonintervention relies upon these supposedly categorical distinctions that are presented as outcome-determinative when they are not. Examples of the permeability of the categories, and how they simply reflect a default assumption of nonintervention, abound.

Take first the race-party pairing, the argument that the Court is authorized to protect racial minorities but not political parties. In Giles v. Harris, the Court refused to intervene in order to protect the rights of African Americans. But in Lane v. Wilson,<sup>91</sup> a case indistinguishable from Giles, Justice Frankfurter wrote an opinion preventing Oklahoma from doing to African American voters precisely what it allowed Alabama to do in Giles.<sup>92</sup> Justice Frankfurter attempted to distinguish the two cases on the ground that one was about racial discrimination,

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<sup>91</sup> 307 U.S. 268 (1939).

<sup>92</sup> In Lane, an African American citizen of Oklahoma, I. W. Lane, sued county officials for denying him the right to register and vote because he was black. Mr. Lane was the victim of a registration scheme that used a grandfather clause to allow white voters to register for life but to disenfranchise black voters. The grandfather clause was struck down in Guinn v. United, but it was essentially reenacted with the same effect. Following Guinn, Oklahoma enacted a statute that allowed those disenfranchised by the grandfather clause the opportunity to register if they did so between April 30 and May 11, 1916. If they failed to register during that time period, they were disenfranchised for life.

Lane, and the other was about political participation, Giles.<sup>93</sup> Given the factual similarities between the two cases, that distinction is patently unpersuasive.<sup>94</sup> Moreover, even if Justice Frankfurter could distinguish Giles from Lane, he could not distinguish it from Gomillion v. Lightfoot, a case in which African American plaintiffs challenged Alabama’s redistricting scheme that removed almost all of the black residents from the City of Tuskegee.<sup>95</sup> Justice Frankfurter authored the opinion for the Court in Gomillion and reversed the lower court’s decision that the plaintiffs’ complaint was non-justiciable. Justice Frankfurter concluded that the plaintiffs were entitled to vindicate their right to vote and right to equal treatment guaranteed by the 15<sup>th</sup> and 14<sup>th</sup> Amendments, respectively. Following Gomillion, there was no longer any doubt that race cases, even those alleging political rights, such as the right to vote, were firmly within the Court’s ambit.<sup>96</sup>

Turn now to the rules-standard dichotomy. Why was race on one side of the dichotomy in 1903 but on the other side in 1939 when the Court decided Lane v. Wilson, or in 1960 when it

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<sup>93</sup> Lane, 307 U.S. at 274 (“The basis of this action is inequality of treatment . . . not denial of the right to vote.”).

<sup>94</sup> For an argument that Justice Frankfurter’s attempt to distinguish Giles and Lane is unpersuasive, see Guy-Uriel Charles, Judging Politics, 103 *Mich. L. Rev.* 1099, 1122-1123 (2005).

<sup>95</sup> 364 U.S. 339 (1960).

<sup>96</sup> The inability to distinguish the race case from the politics or party cases is the reason why many scholars have argued that the distinction between racial gerrymandering and political gerrymandering is incoherent. See e.g., Guy-Uriel E. Charles & Luis Fuentes-Rohwer, Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA, 59 *William & Mary L. Rev.* 1559 (2018); Richard L. Hasen, Race or Party, Race as Party, or Party all the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases, 59 *William & Mary L. Rev.* 1837 (2018); Samuel Issacharoff, Gerrymandering and Political Cartels, 116 *Harv. L. Rev.* 593, 630-31 (2002). For a wonderful rejoinder, see Ellen D. Katz, Reviving the Right to Vote, 68 *Ohio St. L.J.* 1163 (2007) (defending the racialization of partisan claims).

decided Gomillion v. Lightfoot?<sup>97</sup> Why was malapportionment on one side of the dichotomy in 1946 in Colegrove, but on the other side in 1962 in Baker when the Court decided that malapportionment cases were justiciable? We cannot explain these cases on rules-standards terms. Note that Holmes's reason for noninterference in Gill is almost identical to that provided by Frankfurter more than forty years later in Colegrove v. Green, except for the fact that Colegrove was about malapportionment and not race. It is the same story that O'Connor and Scalia told in Bandemer and Vieth, respectively, except that those cases were not about race and malapportionment, which were now within the purview of judicial review, but about partisan gerrymandering, which was decidedly not. In 1903 the Court would not intervene to protect African Americans against the deprivation of their political rights; until the Court did, because this was a problem of the political process; until it was not. In 1946, the Court would not intervene to protect voters against the debasement of their vote by malapportionment; until it did, because relief must be given not by the courts but the political process; until the Court decided that it would provide relief.

The argument about judicially manageable standards is inapposite here because the Court did not develop or rely on any new standards in Lane and Gomillion. Rather, they simply told the local white communities so feared by Holmes in Giles to stop discriminating. The Court also did not develop judicially manageable standards between Colegrove and Baker. Recall Justice O'Connor's point that when the Court decided that malapportionment claims were justiciable in Baker it did so without a judicially manageable standard. The Court did not "discover" one until Reynolds v. Sims, two years later.

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<sup>97</sup> 364 U.S. 339 (1960).

Consider these cases in the context of the politics-law dichotomy. If the Court's change in posture in Lane, with respect to race, and Baker, with respect to malapportionment, was not a function of the "availability of judicially manageable standards," does this then mean that the Court was doing politics in Lane and Gomillion? No one today lauds Holmes's decision in Giles.<sup>98</sup> By contrast, the Court's decisions in Lane and Gomillion have no detractors. Similarly, though no one today questions the appropriateness of judicial review of malapportionment, are we to conclude that Baker is an unconstitutional intervention in democratic politics because there were no judicially manageable standards when the Court decided the case?

Finally, take the rights-structure divide. Recall Justice O'Connor's characterization of the reapportionment cases in Bandemer as cases that vindicate individual rights and not structural rights. This characterization is understandable, though it is striking. It is understandable because a contrary conclusion would compel Justice O'Connor to concede the argument to Justice White in Bandemer that the reapportionment cases were controlling precedent and thus political gerrymandering cases ought to be justiciable. Given the similarities between reapportionment claims and partisan gerrymandering claims, opponents of judicial review of partisan gerrymandering claims are continually tasked with distinguishing these two types of claims. We can understand why Justice O'Connor would view the reapportionment cases as individual rights cases.

However, Justice O'Connor's characterization of reapportionment claims as individual rights claims is a reclassification of the reapportionment cases and betrays a core element of Justice

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<sup>98</sup> See, e.g., Pildes, supra note 19,

Frankfurter's objection, in Colegrove and Baker, to judicial intervention in reapportionment context. Frankfurter's main argument against justiciability was that reapportionment claims were structural claims, claims that challenged the structural arrangements of representative institutions. As he argued in Colegrove, the basis for the harm was not that an individual was deprived of a right to vote, but that the polity suffered harm as a polity.<sup>99</sup> As many commentators have argued, Frankfurter was certainly right that apportionment claims (along with race claims and political gerrymandering claims) are structural claims and not individual rights claims.<sup>100</sup> By reclassifying the reapportionment cases as individual rights claims in her Bandemer opinion, Justice O'Connor essentially moved the goalposts.

The narrative of nonintervention is like a fairy tale. Like a good fairy tale, it contains an important lesson, which is that the Court must be concerned about its legitimacy and political capital.<sup>101</sup> Not surprisingly, Justice Frankfurter famously articulated the point in his dissent in Baker: "The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements."<sup>102</sup>

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<sup>99</sup> Colegrove, 328 U.S. 549, 552 (1946) ("This is not an action to recover for damages because of the discriminatory exclusion of a plaintiff from rights enjoyed by other citizens. The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity. In effect this is an appeal to the federal courts to reconstruct the electoral process of Illinois in order that it may be adequately represented in the councils of the Nation.").

<sup>100</sup> 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, 512 (2004)

<sup>101</sup> As John Hart Ely put it, the Court's concern is that the idea that it should supervise the ground rules of democratic politics is "unusually calculated to get the Court in trouble, dangerously to decrease its prestige." **John Hart Ely, Democracy and Distrust: A Theory of Judicial Review** 121 (1980).

<sup>102</sup> Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter J., dissenting). This led Justice Clark to retort, "[n]ational respect for the courts is more enhanced by the forthright enforcement of . . . [representational] rights

Chief Justice Roberts also articulated his worry in Gill in similar terms. As he stated at oral argument, unless the Court can explain to the “intelligent man on the street” why it is adjudicating partisan claims, the Court risks “caus[ing] very serious harm to the status and integrity of the decisions of this Court in the eyes of the country.”<sup>103</sup>

However, the narrative does not decide actual cases. It simply reflects the Court’s conclusion that the Constitution does not provide judicially manageable standards for resolving political gerrymandering claims, a conclusion whose terms are offered as a magical incantation designed to ward off the evil spirit of judicial intervention. Because the categories do not do the analytical work that the Court assumes that they do, the narrative of nonintervention sends putative plaintiffs on a fool’s errand. As the Court appears to cry out for satisfactory standards (or putative plaintiffs), like a parent attempting to placate a fussy baby, plaintiffs willingly offer anything and everything that has the possibility of bringing respite, only to have the baby petulantly spit out any and all offerings while demanding more.

## II. Judicial Supervision of Democratic Politics in the Age of Partisanship

Scholars of law and democracy have advanced a number of justifications for judicial supervision of the ground rules of democratic politics. These justifications share one common theme: they identify a pathology within the political process and urge the Court to provide a remedy because the political process is unable to fix itself. However, these theories misinterpret the lesson of the narrative of nonintervention. While these theories do a very

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rather than by rendering them nugatory through the imposition of subterfuge.” Baker v. Carr, 369 U.S. 186, 262 (1962) (Clark J., concurring).

<sup>103</sup> Gill v. Whitford, Transcript Oral Argument at 37-38.

good job of articulating why political gerrymandering is bad for the political process, they are nonetheless unresponsive to the Court’s core concern. The Court is not asking whether judicial engagement would be good for the political process -- in fact, it eschews that inquiry -- rather it is asking whether judicial engagement is bad for the Court. Additionally, they treat the Court as if it resides outside the political process, unaffected by the pathology identified within the system. This is a view of the Court as “a deus ex machina, an exogenous force, the god that would deliver us all from the predicaments created by our rulers.”<sup>104</sup> Professors Eric Posner and Adrian Vermeule identify this problem as the inside/outside fallacy.<sup>105</sup> As a consequence, the theories are incomplete in at least two respects, they are not responsive to the Court’s core concern -- that intervention is bad for the Court -- and they do not avoid the inside/outside fallacy.

In this Part we respond to both shortcomings. We argue that if the justices are concerned about judicial restraint and how the mass public perceives the Court, they must, paradoxically, curb partisan gerrymandering as a way of limiting the partisan manipulation of electoral rules across other domains of election law. This is because in a political environment characterized by tribal or negative partisanship,<sup>106</sup> political elites have an incentive to rig electoral rules to

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<sup>104</sup> Guy-Uriel E. Charles & Luis Fuentes-Rohwer, Reynolds Reconsidered, 67 *Alabama L. Rev.* 485, 525 (2015).

<sup>105</sup> See Eric A. Posner & Adrian Vermuele, Inside or Outside the System, 80 *U. Chi. L. Rev.* 1743 (2013). As they explain, the fallacy occurs when theorists adopt “an external perspective that attempts to explain the behavior of actors within the constitutional order as endogenous product of self-interested aims, and an internal perspective that assumes the standpoint of the judge and asks how the judge ought to behave so as to promote the well-being of the constitutional system and the nation.” *Id.* at 1744; see also *id.* at 1745.

<sup>106</sup> Professor Justin Levitt defines tribal partisanship as a preference for “public action purely because the policy



maximize a favorable outcome.<sup>107</sup> Political losers will turn to the courts to vindicate their rights. As a consequence, the courts will be continually enmeshed in partisan fights. A rule against partisan excess in the gerrymandering context might not simply limit partisanship in gerrymandering but it might also eliminate it in related domains, which would save the Court from having to referee these secondary partisan fights. Just as importantly, the Court cannot evade questions of partisan bias as simply as some justices might wish. Chief Justice Roberts openly worried that judicial involvement might lead “the intelligent man on the street”<sup>108</sup> to perceive the Court as partisan. Chief Justice Roberts should worry instead about noninvolvement as a signal to political elites and the mass public that the Court is in fact an accomplice in “the new politics of voter suppression.”<sup>109</sup> In enforcing a rule against partisanship, ironically, the Court will also protect itself against charges of partisanship. Thus, prohibiting partisanship in gerrymandering is not simply a normative good; it is also an exercise

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in question is perceived to benefit those with a shared partisan affiliation, or because the policy in question is perceived to injure partisan opponents, wholly divorced from - - or stronger yet, contrary to - - the policymaker’s conception of the policy’s other merits.” Levitt, *supra* note \_\_\_\_, at 1798.

<sup>107</sup> We are not the first to be concerned with the problem that extreme polarization poses the various domains of election law. *See, e.g.*, Levitt, *supra* note 53; Kang, *supra* note 53; Samuel Issacharoff, Outsourcing Politics: Political Parties and the Theory of the Firm, 54 *Hous. L. Rev.* 845 (2017); Heather K. Gerken, Playing Cards in a Hurricane: Party Reform in an Age of Polarization, 54 *Hous. L. Rev.* 911 (2017); David Schleicher, Things Aren’t Going that Well over There Either: Party Polarization and Election Law in Comparative Perspective, 2015 *U. Chi. Legal F.* 433; Justin Levitt, *The Partisanship Spectrum*, 55 *Wm. & Mary L. Rev.* 1787 (2014); Richard H. Pildes, Romanticizing Democracy, Political Fragmentation, and the Decline of American Government, 124 *Yale L.J.* 804 (2014); Richard H. Pildes, Why the Center does not Hold: The Causes of Hyperpolarized Democracy in America, 99 *Cal. L. Rev.* 273 (2011); Daryl J. Levinson & Richard H. Pildes, Separation of Parties not Powers, 119 *Harv. L. Rev.* 2311 (2006); Samuel Issacharoff, Collateral Damage: The Endangered Center in American Politics, 46 *Wm. & Mary L. Rev.* 415 (2004). But whereas others worry about the effects of hyperpartisanship on the political process, we are concerned with the consequences of hyperpartisanship for the Court itself.

<sup>108</sup> Transcript of Oral Argument at 37, *Gill v. Whitford*, 137 S. Ct. 2268 (2017) (No. 16-1161).

<sup>109</sup> **Spencer Overton, *Stealing Democracy: The New Politics of Voter Suppression* (2007); see Carol Anderson, *One Person, No Vote: How Voter Suppression Is Destroying Our Democracy* (2018); Tova Andrea Wang, *The Politics of Voter Suppression: Defending and Expanding Americans' Right to Vote* (2012).**

of judicial restraint by limiting the Court’s prospective entanglement in partisan fights.

Our argument is divided in two parts. The first part describes the realities of modern democratic practices in our hyper-partisan age. The second part turns Justice Frankfurter’s presumption on its head. Whereas Justice Frankfurter famously worried about the dangers of intervention, we argue that judicial supervision of political gerrymandering claims is a prudential move that could curb the deployment of partisanship in areas outside of the domain of political gerrymandering.

A. Parties and Partisanship in Modern American Politics

Classical democratic theory envisions campaigns and elections as real contests of ideas that ought to turn on substantive issues.<sup>110</sup> Voters are expected to vote for candidates and parties depending upon the candidates’ and parties’ stance on the issues of the day.<sup>111</sup> Additionally, in the classical account, the voter is positioned horizontally vis-a-vis her representative. There is a clear sense of who is the principal—the voter—and who is the agent—the representative.<sup>112</sup> Minimalist democratic theories expect much less of voters.<sup>113</sup> The role of

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<sup>110</sup> See, e.g., James A. Gardner, *What Are Campaigns For?: The Role of Persuasion in Electoral Law and Politics* 13 (2009) (“We take it for granted today that campaigns for elective office ought to be deliberative. Candidates, we believe, ought to inform voters of the facts, offer thoughtful positions on serious issues, and work hard to persuade voters of the merits of their positions and qualifications so as to earn any support they receive.”)

<sup>111</sup> Chris Achen and Larry Bartels refer to this as the “folk theory” of democracy. Christopher H. Achen & Larry M. Bartels, *Democracy for Realists: Why Elections Do Not Produce Responsive Government* (2016).

<sup>112</sup> See, e.g., D. Theodore Rave, *Fiduciary Voters?* 66 *Duke L.J.* 331, 342 (2016); Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 *Va. L. Rev.* 1687, 1636-39 (1999).

<sup>113</sup> See generally, Giovanni Sartori, *Democratic Theory* (1962); Robert Dahl, *A Preface to Democratic Theory* (1956); Joseph Schumpeter, *Capitalism, Socialism and Democracy* (1942).

voters in the minimalist account is to choose among competitors vying for the right to exercise political power.<sup>114</sup> In either the classical or minimalist account, authority flows from principal to agent. The principal is thought to have the capacity to hold the agent accountable, or retroactively approve the decisions of the agent by making a merit-based evaluation of the agent's decision.<sup>115</sup> Not to tax our linguistic syntax and our conceptual categories too significantly, modern democratic theory assumes that the voter is "agentic," a political agent capable of making and expected to make merit-based decisions.

Notwithstanding the expectations of democratic theory, its assumptions are severely strained by the realities of contemporary democratic practice. Democratic politics have become so partisan and tribal that, on average, voters are unlikely to make merit-based evaluations of their political rulers. Because voters increasingly frame their political evaluations through a partisan lens, we cannot expect them to serve the basic checking function that our theories of democracy expect of voters.

American political parties and American political elites are more divided along partisan and ideological lines than they have been in a very long time.<sup>116</sup> Moreover, and perhaps more importantly, though there are important dissenting voices,<sup>117</sup> there is a growing literature

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<sup>114</sup> See, e.g., Schumpeter, *supra* note \_\_, at 269.

<sup>115</sup> See generally, Hanna Fenichel Pitkin, *The Concept of Representation* 47 (1967); Morris Fiorina, *Retrospective Voting in American National Elections* (1981); Jane Mansbridge, *Rethinking Representation*, 97 *Am. Pol. Sci. Rev.* 515, 516 (2003)

<sup>116</sup> See, e.g., Nolan McCarty, Keith T. Poole & Howard Rosenthal, *Polarized America: The Dance of Ideology and Unequal Riches* (2006); Joseph Bafumi & Robert Y. Shapiro, *A New Partisan Voter*, 71 *J. Pol.* 1 (2009).

<sup>117</sup> See *id.*; Morris P. Fiorina & Samuel J. Abrams, *Disconnect: The Breakdown of Representation in American Politics* (2009); Matthew Levendusky, *The Partisan Sort: How Liberals Became Democrats and Conservatives Became Republicans* (2009); Paul DiMaggio, John Evans, & Bethany Bryson, *Have American's Social Attitudes*

demonstrating that polarization among the mass public increasingly mirrors polarization among the elite.<sup>118</sup> Americans have sorted themselves into partisan camps.<sup>119</sup> Taking their cues from the ruling class, voters have aligned their political ideology with the appropriate political party. On average, conservatives are also Republicans and liberals are also Democrats.<sup>120</sup> There is also very strong evidence that the more politically knowledgeable or engaged members of the public are undeniably polarized and virtually indistinguishable from political elites.<sup>121</sup> Additionally, our partisan identities also correspond with our social and demographic identities.<sup>122</sup> On average, you are likely a Democrat if you are a person of color (black, Latino, Asian, or Native American), or a gender minority, or Jewish, or secular, or young.<sup>123</sup> Conversely,

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*Become More Polarized*, 102 *Am. J. Soc.* 690 (1996) (concluding that there has not been great polarization in public opinion on social issues since the 1970s.).

<sup>118</sup> As one scholar stated clearly and emphatically: “America is polarized. Our political parties are highly polarized and the American electorate is highly polarized. . . . The polarization of the American electorate is real and widespread. . . . American is a politically divided nation, it has been so for some time, and has become more so in recent decades.” **James E. Campbell**, *Polarized: Making Sense of a Divided America* 1 (2016); see also **Alan I. Abramowitz**, *The Polarized Public: Why American Government is So Dysfunctional* (2013). One of the best explanations of the phenomenon of polarization is provided by Lilliana Mason and her account of social polarization. She argues that Americans are only mildly polarized in their policy preferences. However, Americans manifest a distinctive prejudice and anger toward members of the other party “that grows out of the increasing alignment between our partisan, ideological, racial, and religious social identities.” She observes that an “electorate that increasingly treats its political opponents as enemies, with ever-growing levels of prejudice, offensive action, and anger, is a clear sign of partisan polarization occurring within the citizenry.” **Lilliana Mason**, *Uncivil Agreement: How Politics Became our Identity* 77 (2018).

<sup>119</sup> **Fiorina, Abrams & Pope**, *supra* note Error! Bookmark not defined., at 99; **Levendusky**, *supra* note Error! Bookmark not defined.; Marc J. Hetherington, *Resurgent Mass Partisanship: The Role of Elite Polarization*, 95 *Am. Pol. Sci. Rev.* 619 (2001).

<sup>120</sup> See, e.g., **Levendusky**, *supra* note Error! Bookmark not defined.; **Campbell**, *supra* note 92.

<sup>121</sup> **Alan I. Abramowitz**, *The Disappearing Center: Engaged Citizens, Polarization, & American Democracy* (2010).

<sup>122</sup> For thorough treatments see **Alan I. Abramowitz**, *The Great Alignment: Race, Party Transformation, and the Rise of Donald Trump* (2018) and **Mason**, *supra* note 92.

<sup>123</sup> On the relationship between religion and partisan identity see **Geoffrey Layman**, *The Great Divide: Religious and Cultural Conflict in American Party Politics* (2001); Geoffrey Layman, *Religion and Political Behavior in the United States: The Impact of Beliefs*, 61 *Pub. Op. Q.* 288 (1997); **James Davison Hunter**, *The Culture Wars: The Struggle to Control the Family, Art, Education, Law, and Politics* (1992). On the relationship between race and partisan identity see generally **Edward G. Carmines & James Stimson**, *Issue Evolution: Race and the Transformation of American Politics* (1989); Maurice Mangum, *The Racial Underpinnings of Party Identification*

you are likely a Republican if you are white, or older, or an evangelical protestant, or live in certain parts of the country.<sup>124</sup> As the author of a recent and comprehensive study explained:

The American electorate has sorted itself into two increasingly homogenous parties, with a variety of social, economic, geographic, and ideological cleavages falling in line with the partisan divide. This creates two megaparties, with each party representing not only policy positions but also an increasing list of other social cleavages. Parties, then, draw convenient battle lines between an array of social groups.<sup>125</sup>

Political scientists and political psychologists have identified two different types of partisan divisions. The first is ideological polarization, which describes the fact that Americans are predictably divided along ideological and partisan lines. The second is affective or social polarization, which describes the fact that Americans are at least as much divided by their socio-demographic identities as their policy divisions.<sup>126</sup> The title of a recent paper identified the emotion that opposing partisans have for each other as “fear and loathing.”<sup>127</sup> And if the title were not sufficiently alarming, the well-respected researchers went on to conclude that “[c]ompared with the most salient social divide in American society -- race -- partisanship elicits more extreme evaluations and behavioral responses to ingroups and outgroups.”<sup>128</sup> Partisan

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and Political Ideology, 94 *Soc. Sci. Q.* 1222 (2013). On gender see Barry C. Burden, The Social Roots of the Partisan Gender Gap, 72 *Pub. Op. Q.* 65 (2008); Karen M. Kaufmann, Culture Wars, Secular Realignment, and the Gender Gap in Party Identification, 24 *Pol. Behav.* 283 (2002).

<sup>124</sup> See sources cited supra note **Error! Bookmark not defined.**

<sup>125</sup> **Mason**, supra note 92, at 19 - 20.

<sup>126</sup> See, e.g., **Mason**, supra note 92; Shanto Iyengar & Sean J. Westwood, Fear and Loathing Across Party Lines: New Evidence on Group Polarization, 59 *Am. J. Pol. Sci.* 690 (2015); Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, Affect, not Ideology: A Social Identity Perspective on Polarization, 76 *Pub. Op. Q.* 405 (2012).

<sup>127</sup> Iyengar & Westwood, supra note **Error! Bookmark not defined.**

<sup>128</sup> Id. at 703.

animus rivals and perhaps surpasses racial animus in both belief and motivation for behavior. This is because of the non-applicability of egalitarian norms. These norms, which are supported by large majorities, discourage the manifestation of behavior that may be construed as discriminatory. In contemporary America, the strength of these norms has made virtually any discussion of racial differences a taboo subject to the point that citizens suppress their true feelings. No such constraints apply to evaluations of partisan groups.<sup>129</sup> Put differently, though not less alarmingly, “American partisans today are prone to stereotyping, prejudice, and emotional volatility.”<sup>130</sup> These phenomena are “increasing quickly” and are defined by “prejudice, anger, and activism on behalf of that prejudice and anger.”<sup>131</sup> Partisans hate each other.

Not surprisingly, partisans respond to facts differently and interpret facts consistently with their partisan priors. As a political scientist strikingly noted, “partisanship is a powerful and pervasive influence on perceptions of political events.”<sup>132</sup> We increasingly live in a political environment in which it makes less and less sense to inquire about what Americans think of a particular public policy issue. Voters understand their position on the issues of the day through their partisan identities and take their cues on public policy issues from political elites.<sup>133</sup>

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<sup>129</sup> *Id.* at 704.

<sup>130</sup> **Mason**, *supra* note 92, at 4.

<sup>131</sup> *Id.*

<sup>132</sup> Bartels, *supra* note **Error! Bookmark not defined.**, at 120.

<sup>133</sup> *See, e.g.*, James N. Druckman et al., How Elite Partisan Polarization Affects Public Opinion, 107 **Am. Pol. Sci. Rev.** 57, 74 (2013); Peter K. Enns & Gregory E. McAvoy, The Role of Partisanship in Aggregate Opinion, 34 **Pol. Behav.** 627 (2012); Geoffrey Evans & Mark Pickup, Reversing the Causal Arrow: The Political Conditioning of Economic Perceptions in the 2000 - 2004 U.S. Presidential Election Cycle, 72 **J. Pol.** 1226 (2010); Jennifer Jerit & Jason Barabas, Partisan Perceptual Bias and the Information Environment, 74 **J. Pol.** 672 (2012); Larry M. Bartels, Beyond the Running Tally: Partisan Bias in Political Perceptions, 24 **Pol. Behav.** 117, 120 (2002); Paul Goren, Character Weakness, Partisan Bias and Presidential Evaluation, 46 **Am. J. Pol. Sci.** 627 (2002); Brian J. Gaines et al.,

Political psychologists and political scientists have explained the role of partisanship on political decisionmaking as largely attributable to partisan motivated reasoning.<sup>134</sup> According to one prominent study, “partisans in a polarized environment follow their party regardless of the type or strength of the argument that the party makes. Moreover, when individuals engage in strong partisan motivated reasoning, they develop increased confidence in their own opinions. This means they are less likely to consider alternative positions and more likely to take action based on their opinion.”<sup>135</sup> Thus, the relevant inquiry is not, what do Americans think about a particular issue but, what do Republicans and what do Democrats think? Furthermore, what the rank-and-file Republican or Democrat thinks about a particular public policy issue is often strongly influenced if not determined by the cues the rank-and-file receive from partisan elites and how the issue has been framed by these elites.<sup>136</sup>

To be sure, the use of partisanship as a basis for evaluation can be normatively defended.<sup>137</sup> For example, parties are useful heuristics that minimize the voter’s information deficit. However, when partisanship becomes the exclusive basis for substantive evaluations, voters are not expected to provide democratic accountability. My party is correct -- because it is my

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Same Facts, Different Interpretations: Partisan Motivation and Opinion on Iraq, 69 *J. Pol.* 957 (2007).

<sup>134</sup> See, e.g., Toby Bolsen et al., The Influence of Partisan Motivated Reasoning on Public Opinion, 36 *Pol. Behav.* 235 (2014). For a particularly insightful exploration of the phenomena see Dan M. Kahan, Ideology, Motivated Reasoning and Cognitive Reflection, 8 *Judgment and Decision Making*, 407 (2013).

<sup>135</sup> James N. Druckman et al., supra note **Error! Bookmark not defined.**, at 74.

<sup>136</sup> On the role of elite opinion on foreign policy see Richard A. Brody & Catherine R. Shapiro, Policy Failure and Public Support: The Iran-Contra Affair and Public Assessment of President Reagan, 11 *Pol. Behav.* 353 (1989).

<sup>137</sup> See, e.g., NANCY ROSENBLUM, ON THE SIDE OF ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP (2010); Lisa Disch. For a parsimonious review see Thomas J. Leeper and Rune Slothuus, Political Parties, Motivated Reasoning, and Public Opinion Formation, 35 *Advances in Political Psychology*, 129 (2014).

party -- right or wrong.<sup>138</sup> Thus, voters cannot be counted to be an effective check on the exercise of power by political elites. Indeed, representatives and institutions of representation are not expected to conform to the preferences of the citizen. Instead the citizen is expected to be responsive to the political preferences of her political leaders.<sup>139</sup> The voters' role here is purely instrumental: to allow political elites to lay claim to the legitimate exercise of power because they tallied more votes than their political opponents.

Within its proper framework, partisanship is instrumental to democratic politics by, inter alia, organizing ideas, mobilizing people, achieving policy goals, giving a voice to citizens, and providing a vehicle to ambitious political elites to channel their political goals.<sup>140</sup> In this view, partisanship serves the aims of democratic politics, not the other way around. Partisanship ought to facilitate representation.<sup>141</sup>

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<sup>138</sup> For a trenchant take on the accountability problem with respect to economic performance, see Christopher J. Anderson, The End of Economic Voting?: Contingency Dilemmas and the Limits of Democratic Accountability, 10 **Ann. Rev. Pol. Sci.** 271 (2007). As one political scientist remarked, dryly, “[i]f partisans simply bend reality to make it fit their preconceptions, holding incumbents accountable . . . seems rather difficult.” Martin Bisgaard, Bias Will Find a Way: Economic Perceptions, Attributions of Blame, and Partisan-Motivated Reasoning During Crisis, 77 *JOP* 849 (2015).

<sup>139</sup> See Don Herzog, Happy Slaves: A Critique of Consent Theory 179-81, 209 (1989).

<sup>140</sup> For an introduction see generally, John H. Aldrich, Why Parties: The Origin and Transformation of Political Parties in America (1995); see also Nathaniel Persily & Bruce Cain, The Legal Status of Political Parties: A Reassessment of Competing Paradigms, 100 *Colum. L. Rev.* 775 (2000) (examining the place of political parties within the legal landscape).

<sup>141</sup> The legal status of parties and thus partisanship must be dependent upon its functional utility for democratic politics. See, e.g., Nathaniel Persily, Toward a Functional Defense of Political Party Autonomy, 78 **N.Y.U. L. Rev.** 750 (2001); see also Joseph Fishkin & Heather K. Gerken, The Party's Over: McCutcheon, Shadow Parties, and the Future of the Party System, 2014 **Sup. Ct. Rev.** 175.



From this perspective, we can easily link the problem of partisanship to the problem of political gerrymandering. Leaving aside the material harm that partisan gerrymandering might cause,<sup>142</sup> partisan gerrymandering violates a norm of constitutional morality because the practice communicates to political elites that the only thing that matters is partisanship and also because it treats citizens as mere instruments to the ambitions of political elites. Partisanship becomes its own self-justifying appeal. Instead of partisanship being instrumental to the political representation of citizens, citizens become instrumental, as ciphers devoid of political agency, to the acquisition of political power by political elites.<sup>143</sup>

It is true that one can then say that gerrymandered districts are responsive to the preferences of the majority of citizens and representative of the views of the electorate.<sup>144</sup> But as Hanna Pitkin has noted, there is a “difference between changing subjects to suit [the] ruler, and changing the ruler to suit his subjects.”<sup>145</sup> And, “[a]djusting what is to represent until it is aligned with what is to be represented may be a part of the activity of representing, but the converse adjustment is not. The leader who molds his followers to suit his aims and interests is,

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<sup>142</sup> This is the harm inherent to malapportionment, or vote dilution more generally. *See* **Stephen Ansolabehere and James M. Snyder, Jr., *The End of Inequality: One Person, One Vote and the Transformation of American Politics*** 17 (2008) (documenting the material harms to American politics from malapportionment and the “resulting dramatic changes in political power and public policies that resulted from the Court’s decisions”).

<sup>143</sup> This is a form of paternalism that is despotic because it deprives the represented of their autonomy. *See* **Nadia Urbinati, *Representative Democracy: Principles and Genealogy*** 103 (2006) (explaining this Kantian account of representation).

<sup>144</sup> *See, e.g.,* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 *Harv. L. Rev.* 649 (2002).

<sup>145</sup> **Pitkin**, *supra* note \_\_, at 108.

if anything, making them represent him.”<sup>146</sup> Partisan gerrymandering gets it backwards: it does not ask representatives to conform to the preferences of the electorate or face their retrospective judgment but rather, representatives choose the electorate to conform to their preferences.

Election law has long been concerned with this instrumental view of representation.<sup>147</sup> Reynolds v. Sims, in which plaintiffs challenged the malapportionment of Alabama’s state legislative districts,<sup>148</sup> evinced a clear concern for the political agency of the represented. “Legislators,” Chief Justice Warren wrote for the Court, “are elected by voters.”<sup>149</sup> In a key passage, Chief Justice Warren argued that “representative government is in essence self-government . . . and each citizen and every citizen has an inalienable right to full and effective participation.”<sup>150</sup> More importantly, Chief Justice Warren explained that “[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen.”<sup>151</sup>

Reynolds has been criticized for its reliance on an individual rights framework, and perhaps rightly so.<sup>152</sup> But Reynolds is iconic in part because it is animated by the classical account of representation in which voters are expected to have the capacity to choose and in fact choose

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<sup>146</sup> Id. at 110.

<sup>147</sup> For a critical account see Bertrall L. Ross II, The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard, 81 **Fordham L. Rev.** 175 (2012).

<sup>148</sup> 377 U.S. 533 (1964).

<sup>149</sup> Reynolds, 377 U.S. at 562.

<sup>150</sup> Reynolds, 377 U.S. at 565.

<sup>151</sup> Id. at 567.

<sup>152</sup> See, e.g. Samuel Issacharoff, Gerrymandering and Political Cartels, 116 **Harv. L. Rev.** 593 (2002).

their representative. “As long as our is a representative form of government,” the Court stated, “and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.”<sup>153</sup> Reynolds, like the Court’s apportionment cases and its racial gerrymandering cases, reminds us that judicial intervention is necessary whenever the government attempts to change the subjects to suit the ruler, as opposed to allowing the subjects to pick their rulers. This is the traditional way of thinking about problem of partisan gerrymandering. In the following part we offer a new way of justifying judicial intervention that links partisan gerrymandering to the broader questions in election law.

B. Judicial Intervention as Restraint, Nonintervention as Partisan

Models of judicial review in the field of election law generally depict the Court as democratic savior, willing and able to save our politics from its worst excesses. However, as we show in Part I, the Court has been at times reluctant, almost callously so, to address the structural pathologies of the democratic process. This reluctance, prominently articulated by Justice Frankfurter, counsels against the Court placing itself as referee of partisan politics because to do so would harm the Court. Justiciability of law and politics claims would involve the Court continually in partisan disputes, which would threaten its legitimacy.

However, the proposition that the Court can refrain from refereeing partisan disputes by abstaining from supervising the ground rules of democratic politics is belied by our partisan era. Given the hyperpartisanship of our current political environment, in which political elites

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<sup>153</sup> Reynolds, 377 U.S. at 562.

attempt to manipulate or rig electoral rules, norms, and practices in order to maximize their desired political outcomes, the courts will be continually enmeshed in partisan fights. This is the political reality of our moment. Partisans will manipulate electoral lines, implement strict voter identification rules, purge voting rolls, change voting hours, move polling places, modify registration rules, etc., all for the purposes of partisan gains. Like birds of a feather, manipulative devices flock together.

A central lesson from the Court's experience with reapportionment frames our argument. Reflecting in his memoirs on what he considered to be the greatest case of his judicial tenure, Chief Justice Earl Warren did not cite Brown v. Board of Education, the case that many consider the most important and consequential case of the Warren Court, but Baker v. Carr and the one-person, one-vote cases.<sup>154</sup> Chief Justice Warren reasoned, if African Americans had been "accorded the right to participate in government," the Brown decision would have been unnecessary. More specifically, he explained that if Congress had passed remedial voting legislation prior to Brown, "blacks and other minorities would have achieved their rights by the middle of the twentieth century."<sup>155</sup> And crucially for our purposes, "much of the emotional heat undoubtedly would have been avoided."<sup>156</sup>

Warren drew from this experience that courts may impose limits on the political process even if indifferent or unconvinced that malapportionment violates the Constitution. The Court

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<sup>154</sup> Earl Warren, The Memoirs of Earl Warren 306 (1977).

<sup>155</sup> Id. at 306-07.

<sup>156</sup> Id. at 307. Scholars have made similar claims about the Court's approach to racial equality in Brown v. Board, 347 U.S. 483 (1954). Akhil Reed Amar, The Warren Court and the Constitution (With Special Emphasis on Brown and Loving), 67 SMU L. Rev. 671 (2014) (stating that the Court in Brown fashioned sub-rules to guide judges, litigants and other actors charged with implementation in order to effectively implement a broad rule of racial equality.)

may not even be motivated by the harm of malapportionment as such. Rather, the Court may be concerned that malapportioned districts will lead to discrimination against African American voters in the political process; or that African American voters may not be able to press their claims in legislative arenas. As a consequence, the Court might need to adjudicate these disputes in the future, perhaps at a cost to the institution.

This lesson from the reapportionment cases is equally applicable in the gerrymandering context. A Court unconvinced by the substantive harms of partisan gerrymandering might nevertheless impose constitutional constraints on the practice. Without constraints, there will likely be secondary effects of partisanship -- substantive disputes that would likely not arise except for the fact that the Court did not move to rein in partisan gerrymandering. These secondary disputes will likely make their way from the political process to the courts for adjudication and resolution. Within this framework, a Court concerned with its institutional credibility and hesitant to involve itself in partisan disputes is faced with two realistic choices. It can abstain from adjudicating the ground rules but address the secondary substantive cases that flow out of its refusal to set clear ground rules. Alternatively, it can set clear ground rules, which would likely result in fewer secondary disputes in the political process and therefore fewer cases flowing from the political process to the courts for adjudication. This means that the minimalist move -- a little now to avoid more later -- might be for the Court to set ground rules in order to limit or avoid these secondary claims. The Court should curb partisan gerrymandering to limit the propensity of political elites to manipulate election rules for partisan gains and thereby averting the need for the Court to adjudicate what will clearly be political disputes. Judicial restraint, in other words, counsels in favor and not against the

justiciability of partisan gerrymandering claims.

Our argument is framed around two crucial points. First, the posture of nonintervention underestimates the expressive and consequential dimensions of partisan gerrymandering as a normative political practice. Political gerrymandering is the most salient and perhaps most consequential expression and representation of the manipulation of electoral rules for partisan gain. If the Court does not rein in partisan gerrymandering, it will communicate to political elites not just that partisan gerrymandering is normatively acceptable, but also that partisan manipulation of electoral rules is permissible, as long as they can get away with it.<sup>157</sup> By addressing the most visible manifestation of partisan-motivated manipulation, the Court can and will constrain the propensity of political actors to manipulate electoral rules for partisan gain by communicating its intent to strike down electoral rules motivated primarily by partisan motivation. Intervening now will allow the Court to play a less interventionist role down the road because fewer or different cases will be presented for review. Thus, judicial supervision of partisan gerrymandering claims bears the hallmarks of judicial restraint.

Second, judicial supervision in the field of law and democracy affects the behaviors of political elites and constrains their options.<sup>158</sup> Noninterventionists, such as Justice Frankfurter in the reapportionment cases, have long worried that political elites will ignore judicial

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<sup>157</sup> See Ansolabehere and Snyder, supra note , at 18 (“It is vitally important that the courts remain open to appeals in cases involving political representation, as difficult as it may be to resolve the claims. The threat of judicial intervention hangs above the legislatures like the sword of Damocles. Removing that threat only invites those in power to do what they can to remain there.”).

<sup>158</sup> See, e.g., **Ansolabehere and Snyder**, supra note , at 18; see also Morgan Kousser, Reapportionment Wars: Party, Race, and Redistricting in California, 1971-1992 in **Race and Redistricting in the 1990s**, at 134, 186 (Benard Grofman ed., 1998)

directives that are inimical to the interests of those elites. But Justice Frankfurter was wrong. Political elites complied with the directive of one-person one vote. The Court's racial gerrymandering cases are also instructive. In Shaw v. Reno and its progeny, the Court sent a message to political elites that it would strike down districts that were excessively gerrymandered along racial lines. Notwithstanding the political incentives, political elites responded and complied with the Court's message and refrained from constructing extreme racial gerrymanders. This is understandable because, as observers of the Court's political equality cases have remarked, "the possibility of judicial review exerts a pressure on the legislatures to behave."<sup>159</sup> Moreover, political elites are risk-averse. They are not likely to enact self-interested rules that they know are likely to be struck down by the courts. If the Court communicates to legislatures that it is serious about eliminating the partisan manipulation of electoral rules, political elites and legislatures, notwithstanding the political incentives, will strike different bargains.

This last point makes clear the need for judicial intervention in our partisan age, where the impulse of political elites to use electoral rules to acquire and secure political power is almost irresistible and self-reinforcing. Though standard democratic theory focuses us on the importance of ideas, contemporary democratic practice emphasizes the importance of winning at almost all cost. Winning is all that matters.<sup>160</sup> This is particular true in the context of elections. Voter turnout in our current political environment is the pivot around which

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<sup>159</sup> See, e.g., Ansolahehere and Snyder, *supra* note , at 286.

<sup>160</sup> Mason, *supra* note 92, at 139 (stating that "the current alignment of social identities within the two parties is promoting a greater focus on partisan victory than on good of the nation").

everything turns.<sup>161</sup> Political campaigns in the age of partisanship are less about persuading voters to join your side, but as Jim Gardner has very persuasively demonstrated, campaigns and elections are tabulatory events: convincing more of the people who are already on your side to turn out to vote than the ones who are on the other side.<sup>162</sup> Importantly, anger and emotion are important to political participation.<sup>163</sup>

Because elections are more about turnout than persuasion, because voters are differentially situated on the basis of their partisan identity, and because winning is all that matters, partisan elites have an incentive to use election law, practice, and custom strategically and for rent-seeking purposes -- to acquire political power. Any electoral legal rule, practice, or custom that is outcome-determinative, that will allow political elites to acquire and maintain political power, is ipso facto a candidate for manipulation. As Professor Barbara Sinclair stated in a comprehensive analysis of political polarization in Congress but articulating a generalizable principle: "Each side really does see the other's policy and electoral success as disastrous for the country; and this sometimes generates a feeling that anything goes, anything is justified to avert such a catastrophe."<sup>164</sup>

This observation is particularly apt in the domain of election law where the rules are directly relevant to the acquisition of political power. Election law can be used to maximize the probability that one's partisans will turn out and minimize the probability that the other side's

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<sup>161</sup> As Professor Sinclair has noted, the strategy in federal elections in the last few election cycles has been about turning out the base. **Barbara Sinclair, Party Wars: Polarization and the Politics of National Policy Making** 349 - 50 (2006).

<sup>162</sup> See **Gardner**, supra note 148.

<sup>163</sup> **Mason**, supra note 92, at 86 (stating "anger and enthusiasm are the primary emotional drivers of political action").

<sup>164</sup> **Sinclair**, supra note **Error! Bookmark not defined.**, at 346.



partisans will turn out. Given the importance of turnout, given that elites have become quite sophisticated at identifying likely partisans, and given that we can predict the effect of electoral rules on turnout -- on our team and theirs -- the opportunity for rent-seeking by political elites is ubiquitous. For example, we know that on average, photo voter identification requirements are likely to have a negative differential impact on the socio-demographic group that tends to identify with the Democratic Party than on those who tend to identify with the Republican Party.<sup>165</sup> Because political elites know, *ex ante*, the likely distributional effects of electoral rules and with minimal restraint, the insiders will attempt to manipulate electoral rules to allow them to maintain or acquire more power.

As partisans press their advantage and increasingly change the electoral rules and the norms to maximize partisan gain, the political process losers will turn to the courts for redress. They will turn to the courts whether or not the courts provide a realistic opportunity for redress; the partisans will view these fights as existential. Recall Professor Sinclair's observation, that each side really does see the other side's success as disastrous for the country. Moreover, political losers might feel especially aggrieved to the extent that a particular outcome was achieved by changing or manipulating electoral rules. Additionally, as Professor Gillian Hadfield stated in a slightly different, though no less apt context, "people who feel as though the rules don't care about them, don't care about the rules."<sup>166</sup> Thus, not only will partisans press their claims in the courts, they might do so with greater expectation and desperation. They will expect that

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<sup>165</sup> Bernard L. Fraga & Michael G. Miller, *Who Does Voter ID Keep from Voting?*, manuscript (July 23, 2018).

<sup>166</sup> Gillian K. Hadfield, *Rules for a Flat World: Why Humans Invented Law and How to Invent it for a Complex Global Economy* 79 (2017).

courts' response will be commensurate to the threat -- to the rule of law, to individual rights of political participation -- posed by "the other side," as they see it. Legal arguments that were "off the wall," will move to "on the wall."<sup>167</sup>

A posture of nonintervention on the ground that the Court is preserving its legitimacy or neutrality in the age of partisanship presumes that the Court sits outside the political process and will not be influenced by that process. That presumption is false. Federal judges are nominated by a political process that is increasingly viewed through the lens of partisan polarization. There is growing empirical evidence of rising dissatisfaction with the Supreme Court and the dissatisfaction is associated with partisan polarization.<sup>168</sup> In fact, a pair of researchers concluded that the public sees the Court as highly politicized and prefers justices chosen on political and ideological grounds.<sup>169</sup> You have your justices, we have our justices and the goal is to have more justices than you do. The polarization over the Court is likely to increase as we currently have -- not surprisingly, in light of the polarization of the judicial nominating process -- ideological and partisan alignment among the Justices; the Court's conservatives were appointed by Republican presidents and the Court's liberals were appointment by Democrat presidents.

The perception of the Court as political is now a staple of intellectual elites and increasingly

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<sup>167</sup> See Jack M. Balkin, From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream, **The Atlantic** (June 4, 2012), <https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/> ("Off-the-wall arguments are those most well-trained lawyers think are clearly wrong; on-the-wall arguments, by contrast, are arguments that are at least plausible, and therefore may become law, especially if brought before judges likely to be sympathetic to them.").

<sup>168</sup>  
<sup>169</sup> See, e.g., Brandon L. Bartels & Christopher D. Johnston, Political Justice? Perceptions of Politicization and Public Preferences Toward the Supreme Court Appointment Process, 76 **Pub. Op. Q.** 105 (2012).

of legal elites as well. One need only peruse journalistic accounts of recent Court cases to see how intellectual elites view the Court. The titles alone tell the story. After Husted v. Randolph,<sup>170</sup> the Ohio voter purge case, we saw the following examples: “Supreme Court’s conservative justices uphold Ohio’s voter purge system.”<sup>171</sup> Or: “The Supreme Court’s Husted Decision Will Make It More Difficult for Democrats to Vote.”<sup>172</sup> A brief internet search uncovers many other examples. They are now commonplace. The most damning piece came from scholars Lee Epstein and Eric Posner, writing in the opinion pages of the New York Times. They asked, “If the Supreme Court Is Nakedly Political, Can It Be Just?”<sup>173</sup> They documented how the Court “has come to be rigidly divided by both ideology and party” and wondered whether it could “sustain public confidence for much longer.” The justices are now exactly where Frankfurter did not want them to be.

Consider in this vein the recent battles over confirmation. The sudden death of Justice Scalia led to a sudden and perhaps surprising though ultimately inescapable change in the norms of the Senate. Then-President Obama sent a nominee to the Senate, but Republican leaders refused to grant him a hearing. Some Republican Senators took their opposition further and promised to block any nominee sent to the Senate by a future President Clinton. The debate over the nomination of Judge Kavanaugh to replace Justice Kennedy on the Court is in

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<sup>170</sup> 138 S. Ct. 1833 (2018).

<sup>171</sup> German Lopez, Supreme Court’s conservative justices vote to uphold Ohio’s voter purge system, **Vox** (June 11, 2018, 2:13 PM), <https://www.vox.com/policy-and-politics/2018/6/11/17448742/ohio-voter-purge-supreme-court-ruling>.

<sup>172</sup> Jeffrey Toobin, The Supreme Court’s Husted Decision Will Make It More Difficult for Democrats to Vote, **The New Yorker** (June 11, 2018), <https://www.newyorker.com/news/daily-comment/the-supreme-courts-husted-decision-will-make-it-more-difficult-for-democrats-to-vote>.

<sup>173</sup> Lee Epstein & Eric Posner, If the Supreme Court Is Nakedly Political, Can It Be Just?, **N.Y. Times** (July 9, 2018), <https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html>.

line with this recent history. One wonders if the Democrats regain control of the Senate, whether they will retaliate if a Supreme Court vacancy arises under a Republican president. Some law professors have suggested “Democrats may have to turn to more radical measures -- like adding more justices to the court . . . -- when they come back into power in order to make up for the Merrick Garland nomination that was blockaded by McConnell in 2016.”<sup>174</sup> Two prominent Yale law professors, Ian Ayres and John Witt, have recently argued that Democrats should add two seats to the Court when they regain the Presidency and the Senate as the Party’s response to the “Garland travesty.”<sup>175</sup> The game is now afoot.

Another prominent law professor, Harvard’s Mark Tushnet, wrote soon after the end of the Term a brief if scathing account of the Court’s jurisprudential turn.<sup>176</sup> In a blog post entitled, “The Standing-on-One-Leg Version of Constitutional Law, circa and post-2018,” he described the state of constitutional law as follows:

1. Statutes, policies, and practices that strengthen the Republican Party, and those that weaken the Democratic Party, are constitutionally permissible.
2. Statutes, policies, and practices that strengthen the Democratic Party are unconstitutional.

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<sup>174</sup> Richard L. Hasen, The Only Thing that Might Stop Trump From Replacing Kennedy with a Scalia Clone, **Slate** (June 27, 2018, 3:40 PM), <https://slate.com/news-and-politics/2018/06/trump-will-replace-kennedy-with-a-scalia-clone-only-one-thing-might-stop-him.html>.

<sup>175</sup> See Ian Ayres & John Fabian Witt, Democrats Need a Plan B for the Supreme Court. Here’s One Option, **Wash. Post** (July 27, 2018), [https://www.washingtonpost.com/opinions/democrats-need-a-plan-b-for-the-supreme-court-heres-one-option/2018/07/27/4c77fd4e-91a6-11e8-b769-e3fff17f0689\\_story.html?noredirect=on&utm\\_term=.6e91478387d8](https://www.washingtonpost.com/opinions/democrats-need-a-plan-b-for-the-supreme-court-heres-one-option/2018/07/27/4c77fd4e-91a6-11e8-b769-e3fff17f0689_story.html?noredirect=on&utm_term=.6e91478387d8). Professors Ayres and Witt recognize that the Republicans will likely retaliate should they regain control. But they explain, “[b]y connecting the proposal to the constitutional wound of the Senate’s failing to consider the nomination of Merrick Garland in 2016, Democrats can apply crampons to stop the partisan slide to ever more justices.”

<sup>176</sup> Mark Tushnet, The Standing-on-One-Leg Version of Constitutional Law, circa and post-2018, **Balkinization** (June 27, 2018, 3:53 PM), <https://balkin.blogspot.com/2018/06/the-standing-on-one-leg-version-of.html>.

3. If leading Republicans are indifferent about a statute, policy, or practice, and leading Democrats favor it, and if the statute, policy, or practice does not strengthen the Democratic Party, the statute, policy, or practice might or might not be constitutionally permissible.

4. If leading Republicans are indifferent and leading Democrats oppose a statute, policy, or practice, it might be unconstitutional.

All the rest is commentary.

The Roberts Court is increasingly regarded as a Republican Court by the journalists who report its cases and by some of the legal elites who comment on its rulings. Given the flow of public opinion from elites to the mass, it won't be long before the public also forms a view of the Roberts Court as a Republican Court, which Republicans will find congenial and Democrats will not. The potential harm to the Court is real and maybe even probable. The Court cannot put its head in the sand and be agnostic about the state of American politics. And if Justice Kagan's recent public comments are indicative, these issues are not too far from the minds of the Justices.<sup>177</sup>

Even if the Court is ambivalent about limiting political gerrymandering, it ought to do so in order to address the second-order effects of this expression of partisanship, the manipulation of electoral rules for partisan gain. Partisan gerrymandering is the most salient expression of

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<sup>177</sup> Justice Kagan stated that the partisan battles over the judicial confirmation process makes the justices look like "junior varsity politicians." She went on to lament that the confirmation of the justices along partisan lines "makes it seem that we're an extension of the political process." She went on to say, "long term I think that's very unhealthy for the Court." See Jamie Ehrlich, Kagan: Confirmation Gridlock Makes Supreme Court Look Like 'junior varsity politicians.' **CNN** (July 25, 2018, 3:51 PM), <https://www.cnn.com/2018/07/25/politics/kagan-kavanaugh-junior-varsity-politicians/index.html>.

the normativity of partisanship as a justification for constructing electoral rules in order to maintain or acquire political power. In the context of election law, political gerrymandering is the quintessential and most vexing deployment of partisanship as the central vehicle of acquiring political power. Whether the Court believes it or not, the practice of creating electoral districts simply for the purpose of partisan advantage sends a clear message to political elites that partisanship is justifiably the coin of the realm. There are spillover effects for other areas of election; the failure to hold the line on partisan manipulation in the domain of political gerrymandering sends a message of tacit approval of the manipulation of electoral rules for maintaining or acquiring partisan power in other domains.<sup>178</sup> The failure of the Court to rein in the practice of political gerrymandering will only encourage political elites to press their partisan advantage further.<sup>179</sup> Recall here Shanto Iyengar and Sean Westwood's claim that partisan animus surpasses racial animus in both belief and motivation because there are no norms to constrain partisan impulse. Fundamentally, both nonintervention and judicial supervision are interventionist choices that matter for our constitutional democracy. The question is not whether or not to intervene, but whether to intervene a little -- by shutting the door on rigging electoral rules for partisan gain -- or a lot -- by adjudicating secondary claims.

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<sup>178</sup> Michael Kang has made an argument along the same lines. See Kang, *supra* note 53.

<sup>179</sup> The similarities to the reapportionment revolution are unmistakable. See Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 233 ("It was unrealistic to expect that an undemocratic distribution of power could be reformed democratically. Consequently, if the judiciary did not act, it if failed to establish a yardstick for assessing the democratic content of electoral structures, the door would be open to a wide range of abuses.").

## Conclusion

Soon after the Supreme Court ushered a new era of judicial supervision of democratic politics, some Justices immediately recognized that “[t]he question of the gerrymander is the other half of Reynolds v. Sims.”<sup>180</sup> Half a century later, the question remains. The political gerrymandering cases are the logical extension of the reapportionment revolution and the Reynolds’ promise of substantial equality. However compelling judicial intervention was in Baker, it is even more so now.

As we have argued here, judicial abstention cannot be justified by the narrative of nonintervention. Limiting partisan gerrymandering is important for its own sake. But it is also important to save the Court from having to adjudicate second-order partisan cases that are the product of manipulation of electoral rules for the purposes of partisan gain. The Court will increasingly be thrust in the middle of contentious partisan disputes over electoral laws. This is no longer 1986, when Bandemer was decided, or 2004, the year of Vieth. “Sometimes,” as John Ely aptly put it, “more is less.”<sup>181</sup> The Court has intervened successfully in the political process before. The Court’s intervention in Baker and Reynolds are widely regarded as its finest hour, rivaled perhaps by its intervention in Brown. It can and should do so again. It ignores this important role in our politics at its own peril.

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<sup>180</sup> Whitcomb v. Chavis, 403 U.S. 124, 176 (1971) (Douglas, J., dissenting).

<sup>181</sup> **John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 125 (1980).**