Partisan Gerrymandering and the Illusion of Unfairness

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Partisan gerrymandering, the legislative practice of drawing electoral districts to benefit the party in power, is in the gunsights of election law reformers. While there is consensus that partisan gerrymandering can cause unfair representation, there has been fierce dispute over if the judiciary can effectively police it. A new generation of scholars, drawing heavily on quantitative methods, claims to have developed conclusive tests to identify partisan gerrymandering, and federal courts have applied these tests to strike down districting plans. However, this Article argues that the threat from partisan gerrymandering is illusory. Parties are responsive to external conditions, including the composition of legislative districts. Therefore, voters, candidates, and party leaders can adapt to compete for the constituencies of redrawn districts. When partisan gerrymandering appears harmful, the true culprit is the fracturing of the electorate due to voters' underlying preferences. The appropriate forum for resolving such substantive disputes among citizens is democratic contestation, not rights-based judicial intervention. Subsequently, reformers' hope that eliminating partisan gerrymandering will fix American democracy is misplaced. To challenge the prevalent view, this Article draws on social science analysis of political behavior, and offers a unified perspective on party affiliation, voter preference, and constitutional rights.

Contents

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INTRODUCTION

It is a new dawn in the war against partisan gerrymandering.[1] The practice, which allocates voters to representative districts by partisan identity to benefit the dominant party, is blamed for distorting electoral outcomes and making democracy less responsive to popular will.[2] For decades, attempts to develop a test that courts could use to reliably identify partisan gerrymandering foundered. Tellingly, the dispositive Supreme Court case on the issue resulted in a badly fragmented bench, with a plurality of justices denying there could ever be a discernible standard for managing partisan gerrymandering, and the remaining justices disagreeing over what might be a valid test.[3] However, innovative reformers finally claim that they can provide courts with the tools to identify, and, where appropriate, strike down politicized districting.[4] This movement

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[1] *See Whitford v. Gill*, --- F.Supp.3d ---, No. 15-CV-421-BBC, 2016 WL 6837229 (W.D. Wis, Nov. 21, 2016); *Raleigh Wake Citizens Assoc. v. Wake County Bd. Of Elections*, 827 F.3d 333 (4th Cir. 2016); *Shapiro v. McManus*, --- F.Supp.3d ---, Nov 1:13-cv-03233-JKB, 2016 WL 4445320 (D. Maryland, Aug. 24, 2016). Appeals are likely to be heard before the Supreme Court in these cases. Joe Forward, *Redistricting: Republican Maps Likely Headed to the U.S. Supreme Court*, THE STATE BAR OF WISCONSIN, Vol. 8, December 2016, *available at http://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=8&Issue=23&ArticleID=25242*.

[2] *See, e.g.*, Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L. J. 400, 416-418 (2015) (classifying partisan gerrymandering as an entrenchment practice that operates by distorting electoral outcomes, and summarizing judicial and scholarly perspectives); Michael J. Klarman, Majoritarian Judicial Review: The Entrenchment Problem, 85 GEO. L. J. 491, 516 (1997) (characterizing partisan gerrymandering as "indefensibly anti-majoritarian").

[3] *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

[4] *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015); Jowei Chen and Jonathan Rodden, *Cutting Through the Thicket: Redistricting Simulations and the Detection of Partisan Gerrymanders*, 14 ELECTION L. J. 331 (2015). Stephanopoulos has served as lead counsel for *Whitford*, and his work on the "efficiency gap" was cited in the case. *Whitford*, 2016 WL 6837229 at *4. Chen served as an expert witness for the plaintiff in *Raleigh*, and the district court's failure to adequately consider his quantitative analysis was a central reason the 4th Circuit overturned the decision. 827 F.3d at 344. This trend may receive further momentum from the growing sense that party should be treated as a proxy for race in the defense of

would revolutionize the electoral landscape and solve one of the thorniest problems in modern constitutional jurisprudence.[5] There is already celebration that this may mean the end of partisan gerrymandering and usher in an era of fair representation in American democracy.[6]

This Article demonstrates that such a response to partisan gerrymandering would misinterpret constitutional rights, infringe popular political autonomy, and distort the conditions of democratic contestation. These conclusions derive from the nature of party identity as instrumental and fluid.[7] Voters and politicians use parties to achieve their ultimate policy goals. Consequently, party platforms are determined by negotiation between these political actors, with each seeking the best possible satisfaction of its preferences.[8] When the composition of a district shifts – including by partisan gerrymandering – the various actors should adapt by reconstituting their party coalitions to remain competitive.[9] Parties alter their platforms to try to secure a majority of voters in as many districts as possible, while each voter considers which party should best satisfy

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election law rights, including protection against harmful districting. *See* Richard L. Hasen, *Race or Party, Party as Race, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 58 WM. & MARY L. REV. at 36 (forthcoming 2018) (interim working draft, Feb. 6 2017), *available at https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2912403* ("Recent experience with the race or party problem is causing me to [think] it certainly seems a more sensible approach to police partisanship in redistricting directly….").

[5] This thorniness is expressed by the plurality opinion in *Vieth*, 541 U.S. at 281 (2004) ("no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged").

[6] *See, e.g.*, Mark Joseph Stern, *Death to the Gerrymander*, SLATE, Jan. 9, 2017, *available at* http://www.slate.com/articles/news_and_politics/jurisprudence/2017/01/death_to_the_gerrymander_paul_smith_might_defeat_unconstitutional_redistricting.html; Ian Millhiser, *One of the biggest legal guns in the country is coming for partisan gerrymandering*, THINKPROGRESS, Jan. 4, 2017, *available at* https://thinkprogress.org/one-of-the-biggest-legal-guns-in-the-country-is-coming-for-partisan-gerrymandering-4e6d3a0385fe#.n0qj68vet.

[7] This view is commonly accepted in American political science. *See, e.g.*, ANGUS CAMPBELL ET. AL., ELECTIONS AND THE POLITICAL ORDER (1966) 162 (building on the theory of ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957) to offer a classic account of the spatial model).

[8] This observation is analyzed extensively in Section II.B.1 *infra*.

[9] *Cf.* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 600 (2002) (arguing that partisan gerrymandering can be a practice that inhibits "accountability to shifting voter preferences"). The argument of this Article is that, at root, it is not districting that can inhibit such accountability, but other features or conditions in an electoral dynamic. *See generally* Michael Kang, *Race and Democratic Contestation*, 117 YALE L. J. 734, 738-39 (2008) (observing that electoral competition is only one form of competition by which political allegiances and thereby political outcomes may be achieved).

the voter's preferences in the new political landscape. Given this dynamic, politicized districting merely reshuffles the electorate, inducing a round of adaptation and compromise.

While the realities of politics are not always conducive to efficient adaptation, politicized districting itself does not cause harm to representation. This article identifies two conditions that can impair adaptation, and make the effects of partisan gerrymandering an intermediate symptom of political pathology. The first such condition is strong first-order attachment by voters to parties (partisan loyalty). The second is clustering of voter preferences such that voters naturally fall into antagonistic groups (preference bundling). Either of these circumstances can hamper rearrangement of party coalitions following a partisan gerrymander, and allow political elites to exploit the practice to entrench themselves.[10] Both party loyalty and preference bundling, however, are substantive political realities, and properly resolved by electoral, rather than judicial, action.[11]

The reciprocal relationship between party instrumentality, political adaptation, and substantive politics explains why the judiciary has repeatedly misfired in its attempts to articulate a coherent rights-based law of partisan gerrymandering. When courts prohibit consideration of party identity in districting, they fix the geographic constituencies of parties, and thereby artificially constrain party identity itself. Without a clear constitutional mandate, such judicial enforcement of the terms of popular political engagement intrusively restricts voter control over

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[10] This analysis clarifies how partisan gerrymandering can be used as a tool for elite entrenchment. *See, e.g.*, Issacharoff, *supra* note 9; Samuel Issacharoff and Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Partisan Gerrymanders*, 153 U. PA. L. REV. 541 (2004). *See generally* Such problems of elite domination pose a general obstacle to democratic rule. *See, generally* Levinson & Sachs, *supra* note 2, at 407 (describing the character of entrenchment as a practice, and observing it can either occur through legal means or functional means, and suggesting partisan gerrymandering is a form of functional/electoral entrenchment); BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 207 (1997) (describing the problem of elite control of representative apparatus); MARTY COHEN ET AL., THE PARTY DECIDES 13, 187 (2008) (describing the role of elite-driven "invisible primaries" in selecting candidates). *Cf.* Samuel Issacharoff, *Outsourcing Politics: The Hostile Takeovers of Our Hollowed Out Political Parties*, __ HOUS. L. REV. ___ (2017), *available at https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2888064* (arguing that parties no longer have the same level of control over their apparatus, and seemingly mourning this in part, because parties "are complex institutional actors that play an essential coordinating role in politics").

[11] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 101 (1980) (the constitution protects processes, not outcomes).

democratic contestation.[12] This effect raises deeper normative concerns about judicial interference with democratic self-determination. Consequently, such determinations by courts elicit the political question doctrine with regards to the proper reach of judicial power, which has haunted contemporary partisan gerrymandering jurisprudence.[13]

The malleability of party identity and its implications for rights-based judicial intervention have been underappreciated by scholars and commentators. This Article seeks to fill this lacuna. It 1) demonstrates how political adaptation undermines the case against litigating partisan gerrymandering and 2) provides a framework for understanding the democratic maladies for which partisan gerrymandering is typically blamed. More generally, it cautions against the impulse to use individual rights jurisprudence to solve deeply rooted political crises.[14]

The Article begins with a brief recap of the contemporary partisan gerrymandering jurisprudence, as Section I focuses on *Davis v. Bandemer*,[15] *Vieth v. Jubelirer*,[16] and the most noteworthy cases currently at play in the federal system. The Article then explores the initial challenges facing the treatment of partisan gerrymandering as a rights violation given the flexibility of parties.

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[12] *See* Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1330 (1987) (counselling against "even…limited intervention because the available judicial remedies would almost certainly create grave political and constitutional risks."); Nathaniel Persily, *Reply: In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 667 (2002) (questioning if the benefit conferred by gerrymandering justifies "judicial intrusion into politics", and that such a principle would result in extraordinarily judicial overreach).

[13] *Vieth*, 541 U.S. at 277-78 (in addition to the problem of manageable standards, partisan gerrymandering seems to evoke question of the appropriate political department and the question of if the issue at stake is a policy determination).

[14] Thus this article is concerned with "justifiability of standards" rather than "consistency of results". Rick Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims after Vieth*, 3 ELEC. L. J. 626, 635 (2004). It is possible (and in vogue) to use metrical analysis to ensure consistency of results by some objective standard; but if that objective standard serves neither a logic of rights nor a deeper political logic, it is irrelevant.

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

[16] 541 U.S. 267 (2004).

Section II turns to the structural problems facing judicial management of partisan gerrymanders. It offers two models – an exemplary thought experiment, and a formula that aspires to capture central aspects of voter-party relations[17] – to demonstrate that the reactions to partisan gerrymandering can in principle be fully managed by adaptation by political actors, and may, in certain circumstances, prove beneficial. To support this analysis, the article relies on methods and interpretations used in the social sciences to predict how parties and citizens behave when struggling for political power.

Section III considers what conditions may inhibit adaptation to partisan gerrymandering. The Article identifies partisan loyalty and bundled preferences as the two primary 'spoilers' that can result in partisan gerrymanders harming realization of electoral will. These 'spoilers' provide an effective lens for understanding the long-running disputes over partisan gerrymandering in both the legal scholarship and the courts.

Section IV considers rights-based understanding of party identity in the context of the Article's structural observations. It observes, in particular, that judicial intervention to protect partisan identity might enforce artificial baselines for the shifting network of voter allegiances and party platforms. Unless a substantive analysis of voter preference is incorporated into any test, deeming partisan gerrymandering justiciable would comprise a uniquely political type of judicial intervention. In particular, it would artificially fix the terms by which parties determine their constituencies and platforms. The Article finally observes that when in the past courts have engaged in such aggressive forays into politics, they have frequently ended poorly.

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[17] This Article looks to a question posed in Samuel Issacharoff and Richard H. Pildes, *Politics As Markets: Partisan Lockups of Democratic Process*, 50 STAN. L. REV. 643, 681, by offering a model of "partisan political competition." (The article has been described by another leading election law scholar as "the finest article written in the field," Heather K. Gerken, *Playing Cards in a Hurricane: Party Reform in an Age of Polarization*, __ HOUS. L. REV. ___ (2017), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2893745*). In order to do so it must make certain simplifying assumptions – particularly through ignoring transaction costs of coalition coordination – but at least, under certain constraints, solves a part of the puzzle.

This Article is ideological in neither its motivation nor its analysis. It is driven by two concerns: the strange failure of lawyers and scholars to appreciate how reallocation of voters into different districts *alone* cannot harm party efficacy; and the lack of rigorous consideration regarding what judicial intervention into substantive politics that would entail. This Article thereby seeks to dispel the myth that judicial regulation of partisan gerrymandering will fix the crisis of representative accountability.

I. PARTISAN GERRYMANDERING AND THE CHARACTER OF PARTIES

This Section offers an overview of the state of the law, and describes some of the initial challenges that face management of partisan gerrymandering through a rights framework. The responsive and instrumental traits of party identity obscure what voter rights are harmed by partisan districting. These challenges explain both the tangled law on partisan gerrymandering, and the difficulty courts have faced in trying to address it.

A. A Brief History of the Law of Partisan Gerrymandering

The partisan gerrymandering jurisprudence has a terse but tangled legacy.[18] It is among the most hotly contested results of the Court's conclusion that it should protect "fair representation."[19] Fair representation is crucial to legitimate political process, specifically the sufficient opportunity

[18] The path of the case law has been well covered elsewhere. For a detailed blackletter review, see *Whitford*, 2016 WL 6837229 at 21-36 (summarizing all Supreme Court opinions, concurrences, and dissents directly bearing on partisan gerrymandering from *Gaffney v. Cummings*, 412 U.S. 735 (1973) through *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) (hereinafter, *LULAC*). *See also generally* Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 785-809 (2005) (providing an extensive overview of partisan gerrymandering from the Court's first foray into substantive election law through *Vieth*, with a detailed analysis of each *Vieth* opinion).

[19] *Bandemer*, 478 U.S. at 123. That partisan gerrymandering is about principles of fair representation proved a popular academic lens for partisan gerrymandering prior to the emergence of the 'metricizing' tendency to resolve the justiciability question (a pivot that may have occurred in response to the *Vieth* plurality refocusing the analysis towards question of lack of manageable standards, 541 U.S. at 281). *See, e.g.*, Heather Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 508 (2004) (suggesting that resolving partisan gerrymandering requires a "theory of representation"); Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, "Fair Representation", and an Exegesis into the Judicial Role*, 78 N. D. L. REV. 527, 529 (2003) (characterizing the post-*Baker* election jurisprudence as enquiring into "full and effective representation" as opposed to just procedures of vote tabulation).

of citizens in a republic to determine policy outcomes through selection of representatives.[20] In the context of districting, fair representation can be infringed when the allocation of voters to districts means each citizen's vote does not have equal weight in the electoral selection process.[21] The most unequivocal form of such a violation is allocation of voters to districts in unequal numbers, thereby violating one-person one-vote.[22] The other well-established form of such violation is allocation of voters to districts by race.[23] Both types of this impairment of representation through districting can be readily classified as a violation of equal protection – voters who suffer such treatment have inferior voting rights.

The Court indicated that partisan gerrymandering comprises a wrong appropriately addressed by judicial intervention in *Davis v. Bandemer*, but left unclear when courts should find it illegal. While the *Bandemer* plurality focused on such politicized districting as a wrong best understood under the vote dilution framework, it provided little guidance as to when such vote dilution would comprise a material violation of individual rights.[24] 18 years later, *Vieth v. Jubelirer*

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[20] One challenge to this enquiry is that just representation itself is a theoretically "deep" concept requiring both a set of normative assumptions (about fair politics) and descriptive assumptions (about human nature). *See generally* HANNAH FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967) (offering an influential analysis of the role of representation, particularly the mandate-trustee dispute); Manin, *supra* note 10, (offering both a historically grounded taxonomy of approaches to representation); *see also* Fuentes-Rohwer, *supra* note 18, at 545 ("questions of democratic theory are both complex and often intractable").

[21] For a general description of how vote dilution operates (albeit oriented towards the race rather than partisan gerrymandering context), *see* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1671-72 (2001) (when voters are polarized around candidates and districts arranged to exploit this polarization, voters can be arranged into districts to have inferior power).

[22] *See Reynolds v. Sims*, 377 U.S. 533 (1964). *See generally* BRUCE E. CAIN, THE REAPPORTIONMENT PUZZLE 55 (1984) (offering an overview of the early and foundational jurisprudence). Others have questioned if the formulaic simplicity of one-person one-vote conceals unaddressed normative questions. *See* Fuentes-Rohwer, *supra* note 18, at 529 (the rule is formulaic); Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N. C. L. REV. 1269, 1286 (2002) (observing that equality in number of voters per representative does not mean equal power of votes). However, these problems exist at a higher level of abstraction than the problem with conceptualizing of partisan gerrymandering defined in this Article.

[23] *See generally* Gerken, *supra* note 19; Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself – Social Science and Voting Rights in the 2000s*, 80 N. C. L. REV. 1517, 1539-41 (2002) (observing the conflict between the Voting Right Act's § 2 prohibition of voting practices that discriminate on the basis of race, including vote dilution, and the mandate in *Shaw v. Reno*, 509 U.S. 630 (1993) to satisfy strict scrutiny when using any racial classification in districting).

[24] The nearest thing offered by a formula in *Bandemer*, 478 U.S. at 128, 133 is the following:

further scrambled the jurisprudence through a split decision:[25] a plurality of four conservative justices deemed partisan gerrymandering to be generally non-justiciable for lack of a viable test;[26] four liberal justices, in a set of fragmented dissents, declared partisan gerrymandering justiciable and the case at hand a violation, and offered a diverse set of tests for identifying when it comprised a constitutional wrong;[27] and the swing vote, Justice Kennedy, did not find the case at hand a violation (or offer a clear standard), but refused to categorically find the practice non-justiciable. Further muddying the waters, Justice Kennedy suggested that an approach that focused on the First Amendment might offer a more promising path forward than the right to an undiluted vote protected by the Fourteenth Amendment (the basis for finding districting illicit in the existing jurisprudence).[28]

> [P]laintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group…[A]n equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.

As the *Vieth* plurality observes, 541 U.S. at 287, this is a "vague test" that gives little guidance regarding actual discriminatory effect (*Bandemer*, 478 U.S. at 129, concluded that proving intent is not especially challenging). This can be traced to the *Bandemer* plurality's reliance on underinformed concepts. *See* Schuck, *supra* note 12; Fuentes-Rohwer, *supra* note 18.

[25] For a detailed critical review of each of the *Vieth* opinions, see Hasen, *supra* note 14; Berman, *supra* note 18.

[26] 541 U.S. at 281 ("no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable").

[27] 541 U.S. at 339 (Stevens, J. dissenting) (arguing the standard of the *Shaw* cases should be applied and politicized district lines invalidated when "partisan considerations [] dominate and control the lines drawn, forsaking all neutral principles"); *id.* at 345-46 (Souter, J., dissenting) (making a "fresh start" and innovating a test derived from the burden-shifting test used to assess discrimination on a protected category in the employment context from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)); *id.* at 360 (Breyer, J., dissenting) (identifying, at a minimum, unjustified entrenchment – "in which a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power…purely [as] the result of partisan manipulation" – indicative of justiciable partisan gerrymandering). As described in Section III.B.1.b, the conceptions of Stevens and Souter analogize partisan identity to race; the function of this to entire Article is to assuage Breyer's anxieties regarding the ability of partisan gerrymandering to be the true source of entrenchment (thus entrenchment must inevitably be attributed to "'other' factors," *id.*).

[28] *Id.* at 311 (Kennedy, J., concurring) ("That no such standard [for assessing partisan gerrymandering] has emerged in this case should not be taken to prove that none will emerge in the future…The First Amendment may be the more relevant constitutional provision in future cases").

In light of the deeply fragmented and increasingly fractious politics in the contemporary United States, there has been a resurgent interest in partisan gerrymandering jurisprudence, with those arguing for its illegality offering a number of arguments in lower federal courts. In *Whitford,* the case that has attracted the most attention, the majority relied on both First Amendment associational rights and the Equal Protection Clause to deem a severe partisan gerrymander unconstitutional discrimination.[29] The district court suggested the *sine qua non* of illegality of politics in districting is "abuse of power", marked by "absence of any relationship to a legitimate legislative objective," itself marked by "excessiveness" that demonstrates "an intent to entrench a political party in power."[30] To identify where this point of excessiveness is reached, the court relied on the novel efficiency gap metric,[31] which tests the severity of a partisan gerrymander. However, neither the Court nor the efficiency gap metric adverts to a principle theory of representation to explain *why* or *when* a particular degree of partisanship marks illegitimate legislative action. As demonstrated *passim*, the negative impacts of partisan action can be traced to substantive politics; neither the efficiency gap nor any other proposed metric explains the relationship between a given level of politicized districting it identifies and these substantive political conditions.

This emphasis on quantitative analysis of politicized district to guide legal enquiries is a common feature of the current district court cases. This trend suggests that a partisan districting should be illegal when certain tangible and objective thresholds are breached.[32] Other district court

[29] 2016 WL 6837229 at 33 (right to association protected by the First Amendment); 36 (the significance of the equal protection clause).
[30] *Whitford*, 2016 WL 6837229 at 36-38.
[31] *Whitford*, 2016 WL 6837229 at 50. The efficiency gap test is enumerated in Stephanopolous and McGhee, *supra* note 4, at 851 (the formula is the number of parties respective 'wasted' votes (defined as those votes cast for a losing candidate, or for a victorious candidate by in excess needed for victory) divided by the total number of votes cast in the election).
[32] The court of appeals founded its reversal of a district court dismissal in *Raleigh Wake Citizens Association*, 827 F.3d 333, 344-45 (2016), on a conclusion that the court had failed to properly consider expert testimony. This testimony asserted, through use of computer simulations to randomly generate alternate districts based on traditional redistricting criteria, that the districting at issue could only be the product of partisan bias. *Cf. LULAC*, 548 U.S. at

innovations have relied on the First Amendment rights, buttressed by Justice Kennedy's approbation of that path, to deem partisan gerrymandering justiciable, but have left unsettled the precise degree of politicized districting that will render a plan illegal.[33]

B. Political Questions and Politicized Districting

The attempt to clarify the rights-based legality of partisan gerrymandering through quantitative metrics obscures the conceptual complexity of the practice. The overarching question is if partisan gerrymandering is justiciable by the lights of the political question doctrine, which requires, inter alia,[34] that the Court only resolve disputes that can be managed by a "judicially discernable and manageable standard."[35] The conservatives in *Vieth* argued that no court (including the liberal dissenters in *Vieth*) has offered a unified or coherent test for when partisan gerrymandering reaches the point of constitutional violation;[36] defenders of the justiciability of the practice have argued that since *Baker* it has been the remit of the Court to protect the right to fair representation.[37] The deeper question, however, is not if partisan districting occurs, or what degree of severity makes it illegal, but rather if such allocation of voters to districts on the basis of partisan identity impairs "fair representation" in a manner that violates a protected right.

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419 (describing Justice Kennedy's skepticism towards the partisan symmetry quantification standard for testing partisan gerrymandering); *id*. at 466 (describing Stevens' approval of the same standard); Bernard Grofman and Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after* LULAC v. Perry, 6 ELEC. L. J. 1 (2007) (describing the partisan symmetry test in detail). The analysis of Grofman and King presumes the static character of party identity, a feature more fully analysed as undergirding the liberal view of partisan gerrymandering in Section III.B.1.b *infra*.

[33] *See Shapiro v. McManus*, 2016 WL 4445320 at 9-11. The First Amendment associational approach to partisan gerrymandering is addressed more thoroughly in Section III.B.2.b *infra*. *See also Whitford*, 2016 WL 6837229, at 33. *Shapiro* and *Whitford* drew in particular from the First Amendment associational rights in politics established by *Anderson v. Celebrezze*, 460 U.S. 870 (identifying associational rights in ballot access cases), so this Article focuses on the associational right as the general basis for the political right. For a full analysis of this point, *see generally* Daniel P. Tokaji, *Voting is Association,* 43 Fl. St. L. Rev. 763 (2016).

[34] This is the prong of the political question doctrine that has been the crux of the debate since *Vieth*; for the full test, see *Baker v. Carr*, 369 U.S. 186, 217 (1962).

[35] *Bandemer*, 478 U.S. at 121-22; *Vieth*, 541 at 277-78.

[36] *Id*. at 280.

[37] *See Bandemer*, 478 at 122-23; *see also supra* note 22.

Given the Court's constitutional mandate, the justiciability query necessarily devolves into questions about rights: is a legally protected right infringed when voters are allocated into districts by partisan identity, and can such a right be coherently protected by the courts? Two understandings of this voter right have had resilience:[38] the right not to suffer illegitimately discriminatory government action, guaranteed by the Equal Protection Clause and understood in the districting context as a right to an undiluted vote;[39] and the right, protected by the First Amendment to form associations free from governmental interference.[40] The justiciability question could be answered in the affirmative – and thus partisan gerrymandering regulated by the Courts – if either of these rights could be used to consistently identify when politicized districting illegitimately impairs voters' right to fair representation.

Both approaches require that voters' affiliation with a political party stand as firm and meaningful enough to validate protection by the given rights framework. In the case of vote dilution, voters only suffer the harm of less meaningful votes on the basis of partisan gerrymandering if the significance of their votes can be impaired due to their affiliation with the disadvantaged party.[41] Likewise, voters only suffer associational harms on the basis of partisan gerrymandering if their ability to form associational groups is harmed when district lines are redrawn taking party identity into account.

If partisan gerrymandering is to be found justiciable, it must be because courts can consistently identify when voters suffer as a result of being shifted among districts on account of

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[38] Interestingly, none of the innovations offered by the *Vieth* dissents, *supra* note 27, have become engines for the current round of partisan gerrymandering litigation.

[39] *See generally* Gerken, *supra* note 21; *see also Whitford*, 2016 WL 6837229 at 70 (observing the harm at issue is "the ability of Democrats to translate their votes into seats").

[40] *See* Tokaji, *supra* note 33; *see generally* John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 155 (2010).

[41] *See* Gerken, *supra* note 21, at 1703 (the injury of vote dilution falls on all voters in the protected class, "regardless of where they live.").

party affiliation. The most well-established context in which allocating voters to districts on account of their attributes inflicts a wrong is racial gerrymandering. There, however, the deprivation is palpable: racial minorities can be fenced into geographical distributions that are disadvantageous vis-à-vis these immutable attributes, producing an insoluble unfairness.[42]

For voters to claim like harms when they are re-allocated on account of party affiliation, however, poses a puzzle. Party affiliation is not just an attribute around which voters coalesce, like typical wedge issues; rather it is the very *mechanism* by which voters engage in the political process to advance their policy goals.[43] A comparison to race is clarifying: racial minorities wish to avoid persecution, so (it is tacitly assumed) that they tend to form (or join) a party as a block.[44] Avoiding racial discrimination at the hands of elected representatives is the goal; a party affiliation is a means to advance that goal. Generally stated, a voter is harmed by deprivation of fair representation because that voter has less than equal capacity to advance or achieve her policy goals. However, party affiliation (and, transitively, the success of any *particular* party) is not an intrinsic goal.

Thus, when a voter is moved from one district to another on account of party affiliation in a manner that makes that party affiliation less effective, it is peculiar to state that the nature of the harm is the inability of the voter to realize her partisan identity. Rather, the nature of the harm

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[42] In part because of the vividness of its facts, the classic expression of this may be *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), though that case relied on the Fifteenth Amendment to invalidate the grossly discriminatory districting.

[43] The opinion in *Shapiro*, 2016 WL 4445320, dances around this question by observing that the First Amendment prohibits penalization on the basis of preferences, at 9, while failing to engage with the defendants' response that "voting patterns are dynamic," at 11. Voting patterns are dynamic *precisely because they are a mechanism for realizing other preferences*.

[44] *But see Shaw*, 509 U.S at 647 (requiring strict scrutiny for use of race in districting on the grounds that presuming minority voters think alike is an "impermissible racial stereotype[]"; Gerken, *supra* note 21, at 1727 (observing an underlying "essentialization" problem in treating all voters of the same race as having the same political preferences). For the conflict entailed in the attempt to reconcile these views with preventing racial gerrymandering, *see generally* Levinson, *supra* note 22 (antidilution requirement and strict scrutiny of race create a near-insoluble conflict in districting).

appears to be to undermine the organization by which the voter hopes to achieve her substantive political goals. If the voter is worse off, it is because she cannot expect the same level of efficacy from the coordinating institution she had previously relied upon to express her interests.

C. The Adaptive Instrumentality of Party Identity

Yet all is fair in love and war;[45] and politics is war by other means.[46] Unlike features such as race or religion, citizens might be reasonably expected to abandon their commitments to a party when it ceases to serve their ends – that is, when it is no longer beneficial for achieving their substantive political goals.[47] A citizen might elect to do so because their once-chosen party has come to deviate from the substantive goals desired by the citizen, or because the party, despite still holding fast to the citizens' values, is no longer able to effectively advance those values (including because it has suffered a partisan gerrymander).

The judicial debate over partisan gerrymandering dances around but never confronts the relevant question: what is the ontology of commitment to a party?[48] Without taking this into account, it is impossible to determine if partisan gerrymandering impairs "fair representation" under either a vote dilution or associational rights approach. The puzzle lies in partisan affiliation's

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[45] This quote is widely attributed to JOHN LYLY, EUPHUES: THE ANATOMY OF WIT (1579).

[46] *Cf.* CARL VON CLAUSEWITZ, ON WAR 731 (trans. and ed. Michael Howard and Peter Paret, 1993).

[47] For one analysis this fluidity in historical practice, see FRANK R. BAUMGARTNER AND BRYAN D. JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS 286 (2009) (describing how social and economic disruptions can result in shifts of standing commitments and subsequent realignment among both voters and parties). Underlying this theory of fluidity is an interest-based theory of politics that has a hoary tradition in American politics. *See, e.g.*, THE FEDERALIST NO. 10 (James Madison); E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT 18 (2009) (describing the role of interest in party politics).

[48] Some research has suggested that voters often treat partisan affiliation as a driver of preferences, rather than an expression of aggregated preferences. *See, e.g.*, Richard Johnston, *Party Identification: Unmoved Mover or Sum of Preferences*, 9 ANNU. REV. POL. SCI. 329, 347 (2006) (arguing that "Party identification…is a mover but not entirely unmoved", i.e., that party affiliation generally shapes ideology rather than the other way around). This conclusion indicates that partisan identity is highly "sticky," suggesting strong *P* values in the model described in Section II.B.1 *infra*. *But see* HOWARD G. LAVINE ET. AL, THE AMBIVALENT PARTISAN 19 (2012) (working from the popular rational choice framework, "people are adaptive political decision makers who make strategic use of their cognitive resources", and are more flexible than Johnston would suggest); Baumgartner and Jones, *supra* note 47, at 286 (describing how disruptions can result in realignment). However, the question for judicial intervention is, in a way, less about how voters behave, than if their behavior can comprise a basis for rights (or other-theorized) intervention by the Courts.

purpose. Party affiliation is ultimately instrumental – voters join parties in general, and select which parties to join in particular, in order to realize their first-order policy preferences:[49] lowering taxes; protecting unions; preventing racial discrimination; criminalizing abortion; and so forth. It is these granular preferences that give voters a primary impetus for political involvement, and in terms of elections these preferences cannot be usefully dissolved or explained further. Because of its instrumentality in serving these foundational preferences, party affiliation can be characterized as a "second-order" political trait.

When a party's platform ceases to serve a voter's interests (or again, more precisely, comes to serve a voter's interest more poorly than the alternative), a voter has the choice to reject the party and support its rival.[50] If party affiliation is only an instrumental mechanism for realizing a voter's various specific policy investments, then such affiliation should be dynamic, as voters and parties engage in constant exchange to maximize electorate preference satisfaction and party chances of success.[51] This principle is perhaps most famously captured in the median voter

[49] *See supra* note 7. *See also* Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 133 (2005) (arguing parties should be treated as loose associations designed to advance the various private actors' agendas). For a review of the history of the interest-coalition understanding of American politics, see JOHN GERRING, PARTY IDEOLOGIES IN AMERICA 1828-1996, 27-29 (1998). Some recent normative political theorists have argued that partisan identity is more than instrumental. *See, e.g.,* NANCY ROSENBLUM, ON THE SIDE OF THE ANGELS (2008); RUSSELL MUIRHEAD, THE PROMISE OF PARTY IN A POLARIZED AGE (2014); Lea Ypi, *Political commitment and the value of partisanship,* 110 AM. POL. SCI. REV. 601 (2016). These assert that partisanship has social and normative dimensions that an instrumental treatment of party identity sidelines. *See* Muirhead at x ("partisanship is note a dispassionate 'identification'…it is spirited, or prideful."); Ypi at 603 ("partisanship matters…because certain associative practices are essential to sustaining and nurturing [political commitment]…A society without political commitment is a society of perpetually disengaged or permanently disaffected citizens").

[50] This approach is of course dependent on the fact that the US is a first-past-the-post system, and thus the meaningful option available to voters when they dislike a party is to support the alternative (allowing American politics to generally be modelled on a one-dimensional space). *See* Campbell, *supra* note 7 at 164. *See generally* James A. Gardner, *Madison's Hope: Virtue, Self-Interest, and the Design of Electoral Systems*, 86 IOWA L. REV. 87, 95 (2000) (describing the nature and implications of first-past-the-post systems). Schuck, *supra* note 12, at 1359 argues that first-past-the-post voting undermines the "fair representation argument" offered against partisan gerrymandering, as first-past-the-post will result in distortive over-representation for victorious parties.

[51] *See, e.g.,* Michael Laver and Michel Schilperoord, *Spatial models of political competition with endogenous political parties*, 362 PHIL. TRANS. R. SOC. 1711, 1711 (2007) (characterizing the typical spatial model as presuming to have policy preferences and candidates as competing for elections by offering competing package preferences).

theorem, but the instrumentality of voter affiliation need not be conceived through any one specific theory.

If voters can switch parties to serve their ultimate political ends – including abandoning a party which is no longer capable, given a particular configuration of voters due to district line drawing, of being securing victories – then partisan gerrymandering should pose no threat. Rather, after any particular line-drawing, voters and parties in a given district will engage in the mutual dynamic of compromising to determine what coalition of voter preferences and candidate platforms will be mutually most amenable to the majority of the electorate. If this reactive dynamic occurs after any particular line drawing, and party allegiance is purely an instrument by which voters realize their interests, with regards to *partisanship*, district line drawing is not a threat. The reactions of voters will ensure that any particular district selects the candidate who is most amenable to the majority of the voters.

Thus, partisan gerrymandering is not prospectively problematic with regards to *partisan* affiliation (itself only of value to voters as a tool), but rather with regards to *first-order preference satisfaction of particular groups*. There is nothing preventing politicized line-drawing from targeting groups that have particular first-order preferences, and 'cracking' and 'packing' based on those preferences to dilute the votes of a particular block of voters. As described in detail *infra*, race can be understood as a particular important – and explicitly constitutionally protected – interest. If the theory of partisanship as an instrumental vehicle for realization of substantive voter preference is accepted, partisan gerrymandering is not problematic because of its *direct* harm to parties, but because of its *effective* harm to popular realization of political preference. If this effective harm necessitates that courts prohibit districting based on party affiliation is the

underlying – but never clearly expressed debate[52] – among the justices. It might be possible to adapt around partisan gerrymandering itself, but it is less clear that when party is a firm proxy for antagonistic groupings of preferences, manipulative line-drawing does not deeply harm realization of the electorate's will.

Even if partisan affiliation is wholly instrumental, there is value in parties as settled and reliable coordinating mechanisms, and changing their constituency and ideology imposes transaction costs. The parties, and the candidates who are their standard-bearers, must satisfy a vast array of internal constituencies, particularly in a two-party system. Through this, party identity obtains longitudinal significance as an ideological synthesis[53] and as a hard-fought yet delicate product of negotiation and compromise.[54] Rearranging the coalitions that make a party viable is not costless;[55] and these transaction costs reveal another mechanism by which partisan gerrymandering can harm democracy.

It is precisely partisan gerrymandering's ability to materially impair electoral preferences that the *Bandemer* formula aspires to capture. However, the frustrating vagueness of the *Bandemer* formulation reveals the difficulties in using the existing rights framework to manage partisan gerrymandering.[56] It is neither an immutable attribute like race, ethnicity, or gender, nor is it a

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[52] *See* Section III.B.3 *infra*.

[53] *See* note 47 *supra* (describing various theories that attach intrinsic normative value to partisan attachment).

[54] *See* Gilat Levy, *A model of political parties*, 115 J. ECON THEORY 250, 251 (2004) (parties are constructed by compromise between competing factions to discipline affiliated politicians).

[55] The presence of such costs is apparent in the debate over how voters process information. *See, e.g.*, Thomas M. Carsey and Geoffrey C. Layman, *Changing Sides or Changing Minds? Party Identification and Policy Preferences in the American Electorate*, 50 AM. J. POL. SCI. 464, 465 (2006). Voter ignorance would certainly complicate, and arguably exacerbate, these costs. *See* Christopher S. Elmendorf and David Schleicher, *Districting for a Low-Information Electorate*, 121 YALE L. J. 1846, 1850-1854 (2012).

[56] Using rights to protect a fluid aspect of political identity may simply be a mismatch. In the context of protecting against majoritarian abuse, rights tend to be absolute and thus rigid in their political impact, rather than fluidity of votes. *See* Daryl J. Levinson, *Rights and Votes*, 121 YALE L. J. 1286, 1324 (2012). While Levinson analyses some of the tensions facing the use of rights to challenge *racial* gerrymandering, see *id.* at 1345, he does not address partisan gerrymandering, which raises the additional problems. *See generally Bandemer*, 478 U.S. at 152 (O'Connor, concurring) ("political parties *are* the dominant groups" in the political process).

protected existential attribute like religious identity. Rather, it is an instrumental attribute deployed in the service of deeper political desires of participants in politics. There is thus an obtuseness to defending party identity as an independent right, because individuals' interest in it is solely a function of other goods it can advance.

More generally, the instrumentality and adaptiveness of party affiliation complicate any claim that partisan gerrymandering impairs fair representation. A voter who complains that he has a less powerful vote as a result of a partisan gerrymander does not directly claim that the representative process impairs his ability to realize first-order preferences, but rather claims that a central organizational mechanism by which he implements these first-order preferences is less effective. Voters have no right to be in a particular district, or be guaranteed the election of the candidate they favor.[57] The right, rather, is to generally fair representation as non-discrimination; in the context of districting, this means a voter with the asserted characteristic of the claimant must have a less meaningful vote as a function of being a member of the group. Thus, a voter who claims that his right to fair representation is infringed by partisan districting must ultimately demonstrate both that his ability to realize his first-order political preferences is illegitimately impaired, and that this impairment flows from some factor that obstructs effective partisan reorganization.

For partisan gerrymandering to be justiciable, courts must successfully identify when allocating voters on the basis of parties harms their right to effective representation by preventing voters from using parties to advance first-order preferences. The remainder of the Article explores the challenges and contexts of this endeavor, and demonstrates that controlling the impact of

[57] *See Shapiro*, 2016 WL 4445320, at 5 ("citizens have no constitutional right to reside in a district in which a majority of the population shares their political views and is likely to elect their preferred candidate."). This is a corollary of the fact that a voter cannot claim vote dilution by function of the fact of merely happening to be in a district where she cannot elect her preferred candidate. *See* Gerken, *supra* note 21 at 1686 (observing the same claim in the racial vote dilution context). *Cf. Bandemer*, 478 U.S. at 131-32 (merely because a districting reduces the likelihood a given group will be able to elect its representative does not comprise a cognizable harm; and lack of proportional representation does not demonstrate a districting to be unfair).

partisan gerrymandering on the electorate's realization of substantive political preference is far trickier than it might initially appear.

II. POLITICIZED DISTRICTING AND THE SATISFACTION OF ELECTORAL PREFERENCE

If partisan gerrymandering infringes voters' rights, yet the purpose of party affiliation is to facilitate the satisfaction of voter policy preferences, partisan gerrymandering ought only to be identified as a wrong where it impairs such satisfaction. This Section begins with a simplified thought experiment that models how the implementation of an extreme partisan gerrymander might benefit, rather than harm, realization of the electorate's preferences. This suggests that it cannot be politicized districting itself that is the actual evil at stake. The Section then proceeds to offer a more comprehensive model of how partisan gerrymandering can change voter preference.[58]

A. Partisan Rearrangement and a Thought Experiment in Creative Destruction

As this Section shows, partisan gerrymandering can benefit realization of the electorate's will.[59] If the actors in a polity adapt to redrawn district lines in a way that results in substantive voter preferences being satisfied within each district, then partisan gerrymandering may disrupt settled patterns of allegiance and conduct, thereby producing more preference-fulfilling governance. Partisan gerrymandering, in effect, might achieve "creative destruction"[60] of inertial political affiliations, resulting in dynamic rearrangement of party platforms, thus better matching constituent policy preferences. [61]

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[58] As discussed *passim*, this article relies on the spatial model, and debates around and updates to it, that have been prominent in American political science on voter and party behavior since the 1960s.

[59] For an argument that the *type* of gerrymander is relevant to the effect of gerrymandering, see Michael J. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J. L. P. P. 443 (2005). This article, however, rejects the distinction between offensive and defensive gerrymandering, because it distinguishes factors that would obstruct realization of political preference from *any* drawing of district lines.

[60] JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 83 (1942). Others have used the phrase to describe shocks that shift partisan allegiance. Baumgartner and Jones, *supra* note 47, at 288.

[61] Unlike the type of exogenous shocks or disruptions to party allegiance caused by socio-economic change and identified in *id.*at 286, the types of shock caused by a partisan gerrymandering would relate to the constituencies of the parties themselves. It would thus be closer to a sort of shock that would induce deliberation on standing partisan

Purely random (ie, non-political) redistricting could also beneficially disrupt existing and potentially stagnant political relationships. However, by placing particular pressure on representatives and parties to satisfy their constituents regardless of original political allegiance, districting based on partisan affiliation might achieve this effect particularly robustly. Because partisan gerrymandering deliberately targets existing political relationships, its disruptive effects can induce change that is distinctly *political*, pressuring political parties to respond to voters' desires in a remapped constituency.

The mechanism of such transformation is preference-switching by representatives, parties, and constituents. Presuming that each of these categories of actors has clear goals – representatives to be (re)-elected, parties to maintain as much power as possible (presumably by maximizing the number of representatives), and constituents to have their political interests served as accurately as possible – partisan gerrymandering could induce them to rearrange their allegiances. It can break apart existing coalitions of interest by forcing representatives to change their views (and, in some conditions, their partisan allegiances), parties to change their collective platforms, and constituents what bundles of preferences they wish to be realized. The precise character of any such reconfiguration will depend on the levels of commitment to both particular issues and partisan loyalty by each entity, but the general principle is that each wishes to ensure that it is able to realize its goals whatever the arrangement of voters.

A common useful principle for understanding such a realignment is the median voter theorem.[62] In a two-party majoritarian democracy which determines victory by the highest vote-

commitments described by Lavine, *supra* note 48, at 6-7 (drawing on empirical research to show that ambivalence towards partisan identity may produce fruitful political reflection)

[62] The classic statement of this theory is contained in Downs, *supra* note 7. *See also* Campbell et. al, *supra* note 7, at 162. For a critical review of the academic perceptions of the median voter theorem, see generally Randall G. Holcombe, *The median voter in public choice theory*, 61 PUB. CHOICE 115 (1989); for an experimental test that further reviews the literature and provides an experiment that shows both the explanatory value and some of the limits of the median voter model, see, e.g., Eric J. Brunner and Stephen L. Ross, *Is the median voter decisive? Evidence from*

getter, those seeking election will seek to adopt a platform that peels away the voter that will tip the party over the threshold of victorious plurality. The result is that, all else equal, parties should dynamically rearrange their platforms as the electorate's preferences change. Reality, of course, is more complicated – parties have long-run demographic allegiances and commitments that may inhibit seeking the ideal preference-satisfying platform for a given election, the charisma and appeal of individual representatives will vary election to election, and voters themselves have partisan loyalties that mean the 'efficiency' upon which the median voter theorem is premised will not be perfectly realized. Yet the prospective benefit of partisan gerrymandering is that it can upset some of these inertial political commitments.

A highly simplified instance of a model of partisan gerrymandering and voter preference can illustrate how partisan gerrymandering can break up inertial politics.[63] Imagine a state with three single-representative districts representing 99 total voters in the state, of whom 59 are Democrats ('D) and 40 are Republican ('R'). Posit that under districting arranged under 'natural', 'neutral', or 'fair' principles,[64] voting produced the fairly expected outcome of 2 Democratic seats and 1 Republican seat. Further – to simplify the issue of preferences – the parties have two issues at play, on which the parties initially diverge: Taxes (which can be either High or Low) and Gun rights (which can be either Pro or Anti). Each party has a position on these issues prior in the initial

referenda voting patterns, 94 J. Pub. Econ. 898 (2010); Kathleen Bawn et. al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 PERSP. ON. POL. 571, 576 (2012) (reviewing the theory of and assumptions underlying the median voter theorem.).

[63] The analysis in this Section makes a number of simplifying assumptions. However, by holding voter preferences constant and presuming that parties adapt by 'competing' for voters, it is possible to deploy fairly straightforward utility theory, see YOAV SHOHAM AND KEVIN LEYTON-BROWN, MULTIAGENT SYSTEMS 50-60 (2009) to add content and rigor to the intuition, expressed by. e.g., Kang *supra* note 58, that partisan gerrymandering may be beneficial. Note that in this analysis, voter preferences are held constant; securing the support of enough voters to secure political support, is the 'payoff' to parties from participating in the 'game'.

[64] These neutral criteria are seminally laid out in *Karcher v. Daggett*, 462 U.S. 725, 740. They include "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives."

setup – the Democratic party is Tax High (T_H) and Gun Anti (G_A) while Republican party is Tax Low (T_L) and Gun Pro (G_p). Each voter has a position on these issues, but must prioritize one or the other ordinally – that is, a single voter may be any combination of High Tax or Low Tax and Gun Anti or Gun Pro, but will vote based on a single decisive issue. This produces 4 possible preference voters: [T_H | G_A]; [T_H | G_p]; [T_L | G_a]; [T_L | G_p]. However, there are 8 possible voter preference arrangements, because a voter could weigh either issue more strongly. Thus, partisan affiliation and thus vote will be determined by the ordinally preferred issue.

The following chart offers a possible numerical breakdown of how issues preferences might match partisan affiliation to reach the 59 D / 40 R breakdown:

	Voter prefers T_H	Voter prefers T_L
Voter prefers G_p	29 (prioritizes Tax – votes 'D')	0 (prioritizes Tax – votes 'R')
	10 (prioritizes Gun – votes 'R')	20 (prioritizes Gun – votes 'R')
Voter prefers G_a	25 (prioritizes Tax – votes 'D')	10 (prioritizes Tax – votes 'R')
	5 (prioritizes Gun – votes 'D')	0 (prioritizes Gun – votes 'D')

Critically, giving the greatest number of voters what they want would produce a Tax-High, Gun-Pro policy; 69 out of 99 voters prefer Tax-High to Tax-Low, and 59 out of 99 prefer Gun-Pro to Gun-Anti. However, in the starting setup, *party platforms make it impossible for the majority of voters to be satisfied across both metrics, even as each party has a platform that satisfies a majority of its base*.[65]

[65] Such cross-cutting party allegiances can be explained by any number of phenomena, such as historical affiliations, accidents of past log-rolling between parties or constituent groups, or faded cultural associations. *See generally* Bawn et. al, *supra* note 62, at 573-575, 580 (offering both hypothetical and historical conceptions of how an ideology might serve to "unif[y] disparate policy demanders…into a national coalition" and enquiring how this might be applied to contemporary politics and a general model.).

Imagine the following allocation of voters in a pre-gerrymandered context (ie, districting that obeys purely 'neutral' principles):

District 1:

	T_H	T_L
G_p	11 ('D')	0 ('R')
	5 ('R')	10 ('R')
G_a	5 ('D')	2 ('R')
	0 ('D')	0 ('D')

16 'D', 17 'R' = 'R' district

District 2:

	T_H	T_L
G_p	14 ('D')	0 ('R')
	0 ('R')	5 ('R')
G_a	10 ('D')	3 ('R')
	0 ('D')	0 ('D')

24 'D', 8 'R' = 'D' district

District 3:

	T_H	T_L
G_p	4 ('D')	0 ('R')
	5 ('R')	5 ('R')
G_a	10 ('D')	5 ('R')
	5 ('D')	0 ('D')

19 'D', 15 'R' = 'D' district

If by some electoral fluke, Republicans are able to gain control of the legislature and aggressively redistrict to favor Republicans and harm Democrats, they might draw new districts as follows:

New District 1:

	T_H	T_L
G_p	8 (‘D’)	0 (‘R’)
	10 (‘R’)	2 (‘R’)
G_a	5 (‘D’)	5 (‘R’)
	3 (‘D’)	0 (‘D’)

16 ‘D’, 17 ‘R’ = ‘R’ district

New District 2:

	T_H	T_L
G_p	18 (‘D’)	0 (‘R’)
	0 (‘R’)	5 (‘R’)
G_a	10 (‘D’)	0 (‘R’)
	0 (‘D’)	0 (‘D’)

28 ‘D’, 5 ‘R’ = ‘D’ district

New District 3:

	T_H	T_L
G_p	3 (‘D’)	0 (‘R’)
	0 (‘R’)	13 (‘R’)
G_a	10 (‘D’)	5 (‘R’)
	2 (‘D’)	0 (‘D’)

15 'D', 18 'R' = 'R' district

As a result of this aggressive 'cracking' and 'packing' of democratic voters (for example, the new districting has a much higher efficiency gap[66]), the Republicans control 2 out of 3 districts, despite only counting for approximately 40% of the electorate.

On its face, this would appear to be a classically pathological partisan gerrymandering, discriminating against Democratic voters and diluting their votes. Yet, the Democratic party can seize back control of a seat by making a policy change: if the Democratic party (or, more precisely, its candidate in the relevant election) becomes Gun-Pro, New District 1 becomes Democratic, as 10 Republican voters who are [T_H | G_p] but whom prioritize Gun policy should flip to the Democratic party. Moreover, as described above, this actually results in a set of policy outcomes that is *better* in terms of satisfying overall constituent preference: the now-dominant Democratic party is both Tax High and Gun Pro, as are the majority of voters. Some voters are made worse off – voters who prioritize Gun Anti now have no satisfactory party, and some Democratic voters ([T_H | G_A]) now are forced to accept only being satisfied on a single issue. Yet the polity as a whole is arguably better off in terms of preference satisfaction, *precisely due to the disruptive adaptation caused by the partisan gerrymander*.

[66] The "efficiency gaps" for the districts are as follows: there are 99 statewide votes, of which 59 are D and 40 are R. Pre-gerrymandering, D has wasted (16 (lost in district 1) + 16 (surplus in district 2) + 4 (surplus in district 3)) = 36. R has wasted 15 (lost) + 8 (lost) + 1 (surplus)= 24. 36 - 24 = 12 difference in wasted votes. 12/99 = efficiency gap of 12.1% (in D's favor; this matches, as D has roughly 59% percent of voters but wins 67% (2 out of 3) of seats). Post-gerrymandering, the same calculations yield D wasted votes of 54, and R wasted votes of 9. 54 – 9 = 45 / 99 = 45.5% (in favor of R, who have won 2/3rds of seats with only 40% of the electorate's support). *See* Stephanopolous and McGhee, *supra* note 4, at 834, 852 (providing instructions for calculating efficiency gaps).

This model has an abstracting simplicity,[67] though these assumptions serve, in at least some respects, to defend a certain conception of human autonomy.[68] Yet it reveals how a partisan gerrymander, by disrupting existing allegiances to challenge settled political coalition, could produce *stronger* preference satisfaction across the polity. As described *infra*, where certain demographic trends adhere, this may produce pathological outcomes – but this will be a function of demography and political relationships, not merely of district line-drawing. The potential for beneficial reactions to partisan gerrymandering expresses a central component of the argument of those who reject the justiciability of challenges to the practice. A politically engaged, "civically

[67] It presumes a highly simplified model of voter preference (in reality, most voters care about a far greater number of issues, care about each issue on a spectrum rather than a binary, and likely have policy preferences bundled together into unified ideologies) and behavior (in reality, voters may take active steps to shape party platforms, or react badly to what they see as changes in party platforms as 'betrayals'; moreover parties are likely to value some 'loyalist' voters more highly and thus not want to upset them), presumes perfect political efficiency (a point in particular covered in Section III.B.2.a *infra*, regarding obstructions of partisan conduct; *see also* Bawn, *supra* note 62, at 578 (observing two poles on the question of if voters are, generally, ignorant or informed)), disregards the possible effects of representatives of differing levels of charisma or appeal, and ignores that party differentiation allows for agenda-setting benefits (and thus that stronger party differentiation may be beneficial – the loss of *any* party that is Gun Anti arguably harms voter autonomy). *See* Schuck, *supra* note 12, at 1370 (describe local factors that can inflect election results); SEYMOUR MARTIN LIPSET AND STEIN ROKKAN, CLEAVAGE STRUCTURES, PARTY SYSTEMS, AND VOTER ALIGNMENTS: AN INTRODUCTION 1-5 (1967) (describing the role of structured party differentiation to enable meaningful political conflict). Some of these features are accounted for in the complex model in Section II.B.1 *infra*. Moreover, realistically the adaptation would not consist of a single 'switch' but rather fierce competition between parties to adaptively shuffle between positions (in the light of other influences, including the need to ingratiate with central wedge groups; *see generally* Bawn, *supra* note 62, at 591 (citing JACOB HACKER AND PAUL PIERSON, WINNER-TAKE-ALL POLITICS 100-101 (2010) to observe that elections and thus party platforms are often dominated by wedge groups that achieve outsized status)) offer platforms most satisfying to guarantee optimal political outcomes. This reflects the fact that parties possess internal ideologies as institutions, which cannot be changed costlessly vis-à-vis the party as an entity. *See* note 47 *supra* for various perspectives on this position.

[68] *See, e.g.*, ERIC BEERBOHM, IN OUR NAME: THE ETHICS OF DEMOCRACY (2012), at 26 (defending a deontological account of individual participation in democracy); ROBERT A. DAHL, ON DEMOCRACY 147 (2000) (freedom is a central precondition for democracy). For a terse description of the relationship between rights-based legal protections and personal autonomy, see Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 622 (2007). While too vast a field to broach or argument to fully address, it seems as though virtually no one in law – either among judges or academics – would ultimately reject individual freedom and the ability to express choice as a central pillar of democratic practice. It would undermine, for example, the significance of the competition theory advanced by scholars as described in Section III.B.2.a *infra*; the moral value of those who attack gerrymandering on First Amendment grounds; and the moral value of fair representation as a general principle. *Cf., e.g.*, Gary King, *Representation through Legislative Redistricting: A Stochastic Model*, 33 AM. J. POL. SCI. 787, 798 (1989) (characterizing politics as "hardly deterministic", but presuming that voter response to redistrict is basically mechanical).

militant electorate"[69] will express its preferences robustly even as district lines are rearranged, if necessary by adapting preferences such that parties, in order to obtain the approval of a median voter, are induced to change their platforms. Indeed, this prospective adaptability of voters comprises one of the main challenges to successful partisan gerrymanders; even without intentional reactivity by political actors, natural demographic shifts and the thinness necessary to retain a disproportionate majority make securing a partisan gerrymander a logistical challenge.[70] Through their explicitly political character, partisan gerrymanders may catalyze parties' and voters' reaction to a shifting political landscape and modified voter preferences.

The possibility of a gerrymander improving preference satisfaction, moreover, exposes the challenge of identifying how politicized districting infringes on voter rights. Since rational party and voter adaptation in response to the gerrymander could in some scenarios *improve* realization of democratic preference, it seems as though Democratic voters cannot allege they have been harmed by the gerrymander in a manner that is cognizable as a violation of a right. The gerrymander has neither diluted their votes on the basis of party (a rational response to the gerrymander *improved* the political satisfaction of some Democratic voters) nor meaningfully impaired their ability to associate as a party (indeed, their party organization would play a key in coordinating any rational adaptation). If the relevant actors fail to adapt by adjusting the party platform, this seems to be a deeper substantive failure of political rationality – a type of failing for which judicial intervention to quash the gerrymander would neither be sensible nor helpful. Likewise, while the voters who absolutely prioritize G_A have been made worse off by the gerrymander, their inferior position is a function of real politics in response to the gerrymander,

[69] Bandemer, 478 U.S. at 144 (Burger, C.J., concurring) (quoting *Baker v. Carr*, 369 U.S. at 270 (Frankfurter, dissenting)).
[70] *See* Cain, *supra* note 22, at 156 (describing the demographic-logistical challenges of successfully sustaining a gerrymander over time).

rather than any infringement of their right to political participation.[71] Moreover, protecting the G_A voters through political intervention appears pathologically anti-democratic: their position is simply the one the polity rejects, and there is neither constitutional mandate nor political logic[72] that makes their unpopular political preference deserving of judicial protection.

Of course, not *every* arrangement of voters, or, given an arrangement of voters, outcome of a gerrymander, would actually benefit democratic preference.[73] But the point of this thought experiment is to show that it is not gerrymandering based on partisan identity that inflicts a harm upon the electorate (in terms of preference satisfaction) nor can voters, as a result of a partisan gerrymander, necessarily claim their rights have been infringed. Rather, the effect of gerrymanders based on parties need to identified at a more granular level that unpacks the relevant preferences that parties represent.

[71] The logical recourse for Anti-Gun voters is to advert to debate and popular discourse to support their view. *See generally Shapiro*, 2016 WL 4445320, at 17-18 (Bredar, D.J., dissenting) (partisan gerrymandering does not impair the ability to engage in political activism such as debate).

[72] *See* Ely, *supra* note 11, at 76-77. They are not a "discrete and insular" minority – they are just a group with a policy preference.

[73] Other arrangements of voter preference could, of course, result in a gerrymander that *does* disrupt realization of popular preference. An 'R' gerrymander with the following baseline polity –

	Voter prefers T_H	Voter prefers T_L
Voter prefers G_p	0 (prioritizes Tax – votes 'D')	0 (prioritizes Tax – votes 'R')
	0 (prioritizes Gun – votes 'R')	40 (prioritizes Gun – votes 'R')
Voter prefers G_a	0 (prioritizes Tax – votes 'D')	0 (prioritizes Tax – votes 'R')
	59 (prioritizes Gun – votes 'D')	0 (prioritizes Gun – votes 'D')

– would simply result in grossly inferior voter preference, as two sets of policies, low taxes and pro-gun, are advanced, despite the alternatives being preferred by the vast majority of the polity. This, however, is due to substantive politics, and is a clear (if highly simplified) example of the 'spoiler' of preference bundling. See Section III *infra*.

B. Voter Preference and Political Adaptation

The relationship between partisan gerrymandering, political adaptation, and preference satisfaction can be helpfully generalized. This enables a more comprehensive description of how actors might respond to politicized redrawing of district lines.

1. The complex model

Most voters care about a vast array of issues with different degrees of intensity,[74] and likely have an affiliation from legacy, history, or instinct for a particular party.[75] Thus the simple model used *supra* is primarily helpful as a thought experiment. A more[76] accurate model of voter preference might be as follows:[77]

$$S = P + \sum I_1 * V_1 + I_2 * V_2 \ + \ldots \ I_n * V_n$$

S stands for a party's 'score,' *P* represents the voter's partisan loyalty,[78] *I* represents the intensity of a preference, and *V* represents a preference vis-à-vis a given party's position on the relevant

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[74] This is the basis of the spatial model described in the notes to Section I.C *supra*.

[75] *See* note 47 *supra*.

[76] This model still does not fully accommodate complexities related to voting over time, and the vagaries of fortune. For one, it does not accommodate the various tactics and impulses that may figure into voter decision-making. See PAUL M. SNIDERMAN AND EDWARD H. STIGLITZ, THE REPUTATIONAL PREMIUM, A THEORY OF PARTY IDENTIFICATION AND POLICY REASONING 13-14 (2012) (reviewing the literature on how voter tendencies can inflect party and preference voting); *see also* Schuck, *supra* note 12, at 1370 ("A party's fortunes wax and wane over time. In a single election, its success will vary according to the office in question, the attractiveness of particular candidates, coattail effects, salient issues, voter turnout, and many other factors."). For a broader account of how representation goes beyond "policy congruence," see GARY C. JACOBSON AND JAMIE L. CARSON, THE POLITICS OF CONGRESSIONAL ELECTIONS 243 (2016). These factors likewise affect voter preference in a given election. Many of these effects can be understood as reflected in *P*, and subsequently that one variable may be treated as over-explanatory.

[77] As with much of the rest of the reasoning in this Article, this model is adapted from the spatial model – that voters make a decision regarding which party to support by aggregating preferences. The notation adopted here reflects the idea that each voter is selecting a party based ultimately on a utility function. *See* James D. Morrow, Game Theory for Political Scientists, at 23 (1994) (describing how utility functions can predict actions). For related, more mathematically sophisticated models of voter behavior as preference aggregation, but one that is more difficult to use to unpack the partisan gerrymandering jurisprudence, see Dan Kovenock and Brian Roberson, *Electoral Poaching and Party Identification*, 20 J. THEORETICAL POL. 275 (2008); Levy, *supra* note 54, at 255 (offering a model of voter behavior as preference aggregation).

[78] *See generally* Alan Gerber and Donald P. Green, *Rational Learning and Partisan Attitudes*, 42 AM. J. POL. SCI. 794, 797-98 (1998) (summarizing a view on how partisan identity is formed and updated); Sniderman and Stiglitz, *supra* note 76. However, as described *passim*, in order to maintain manageable simplicity in the model, this formula treats *P* as a variable of significant versatility: it includes long-term strategic thinking related to party success or an ideology, as well as 'sentiments' in political affiliation beyond tactical affiliation.

issue. The preference for a particular party can be calculated using the same equation but replacing each V_x with a value that incorporates the difference between a voter's 'ideal' position and the party's actual position. A voter, in effect, has a higher value for each issue vis-à-vis a particular party where the differential is smaller, and prefers the party with the higher aggregate score calculated by summing up the $V_x * I_x$ values. A 'swing' voter is one who has 'scores' for the parties that are similar, and thus will be highly sensitive to slight shifts in party or candidate platform or attributes that might inflect partisan loyalty.

A party's goal is to adopt a set of positions defined by the set $[V_{1,2\ldots n}]$ such that the majority of voters have a higher *S* for that party than for any available alternatives in as many districts as possible.[79] With perfect information and in the absence of a *P*, this would be trivial: a party would just offer positions that maximize scores for a majority of voters across a maximum possible number of districts. However, uncertainty regarding both binary voter preferences on any given policy (uncertainty regarding the best *V* positions) and weighting of voter preferences (uncertainty regarding *I* values) clouds this analysis. Moreover, *P* value creates an obstacle to change, as voters will usually require a certain threshold of greater preference satisfaction to defect from a party towards which they have loyalty; and existing voters may reduce their own value of *P* towards their current party if they see a party as betraying its principles by shifting values. As is described in more detail below, the weight of *P* is critical in determining the effects of a partisan gerrymander because it can induce current voters and current parties to maintain status quo allegiances.

[79] *P* thus contains an element that this article leaves to the side: institutional pressures upon party formation. While this article treats parties (and candidates) as ruthlessly victory-maximizing market actors, parties have internal ideologically driven agendas, which can be caused by structural factors. *See* Bawn, *supra* note 62, at 781.

This model aims to capture some of the complexity involved in reacting to a partisan gerrymander by both parties and voters.[80] The risks and trade-offs of such adaptation can take two broad forms. Firstly, any change will impose transaction costs in terms of *P*. For voters, this takes the form of having to abandon existing allegiances in order to switch to a party that may now offer better policy satisfaction. For parties, this involves potentially alienating existing voters (thus reducing their *P* values) in the process of changing positions to attract new voters; existing voters may identify this as a betrayal of any claim to ideological consistency held by the party.[81] Secondly, any change will likely involve compromises on other issues.[82] A voter who switches to a new party will likely have to take on some new, less desirable V_x that were provided by the old party, even if the new party offers a greater overall satisfaction; this comprises a challenge in the absence of perfect clarity regarding preference weighting. Likewise, parties that adjust policies to attract new voters need to balance the prospective alienation of existing voters who preferred the old position.

2. The effects of partisan gerrymandering

While even the complex model simplifies the relationship between parties and voters, it is capable of illustrating the prospective benefit of partisan gerrymandering. If it is presumed that a successful democracy maximizes substantive voter policy preferences, partisan gerrymandering

[80] For the simplicity of the model, this treatment collapses candidate platforms into party platforms. If the views of those such as Johnston, *supra* note 48 (voters largely align with parties) or Bawn, *supra* note 62, at 571 (parties form dominant coalitions and thus select and discipline candidates) are accepted, then this differential may be slight in any case. Moreover, if parties are only a weakly coordinating mechanism, it is unclear why partisan gerrymandering should matter in any case; candidates would simply obey the median voter theorem for a given district.

[81] *See generally* Benjamin I. Page and Calvin C. Jones, *Reciprocal Effects of Policy Preferences, Party Loyalties, and the Vote*, 73 AM. POL. SCI. REV. 1071, 1083 ("Surely, citizens are well advised to view the parties to some extent as governing teams, with records of past performance which bears upon future prospects."). In this regards betrayal of a previously advanced position would suggest a lack of consistency by a party. *Cf.* Johnston, *supra* note 48, at 331 (suggesting loyalty is a pre-formed driver, and thus that voters will adjust their views rather than shift partisan loyalty); *and* Kovenock and Roberson, *supra* note 77, at 276 (treating loyalty as a preference that can be built into understandings of voter preference).

[82] This model, by separating out *P*, differentiates from the model offered in *id.*, by suggesting that partisan loyalty is not merely another policy preference, but rather a special characteristic.

can facilitate this by re-allocating voters in a manner that challenges their existing solidified preference bundles (organized by parties). When voters are no longer able to elect their prior preferred candidates, they may be induced to re-order their preferences in order to retain political relevance. Likewise, candidates (or the parties who select and support them) who have been gerrymandered out of a seat may be induced to rearrange their platforms to appeal to the new set of constituents.

The rational response of both sets of harmed political actors is adaptation.[83] Rational voters would recognize that continued commitment to the existing party platform – and perhaps the existing party – will result in the voters' continued irrelevance, and their inability to shape policy outcomes. Even if the current party offers an optimal platform for some subset of current party voters, continued commitment to the existing party platform would result in electoral defeat. Voters should thus engage in re-bundling of the preferences,[84] and assessing which preferences they would be willing to sacrifice, and which they would wish to retain, in order to potentially support a victorious candidate through allegiances with voters from the victorious party (either by compromising their own harmed party's platform to attract marginal victorious voters, or by switching to the victorious party in exchange for the prospective opportunity to influence its platform). In effect, defeated voters should abandon their current partisan configuration, determine the compromises they are willing to make, and then behave in a rational if mercenary fashion. The party harmed by gerrymandering, meanwhile, would need to engage in a corollary process, of

[83] How frequently voters actually behave in such a manner varies. *See* Carsey and Layman, *supra* note 55, at 474 (observing that voters, facing a diverge from their party on an issue, will vary between switching party and switching issue); *cf.* Johnston, *supra* note 48 (suggesting partisanship is the primary mover).

[84] *See* Samuel DeCanio, *Democracy, the Market, and the Logic of Social Choice*, 58 AM. J. POL. SCI. 637, 643 (2014) (observing that, in reality, parties offer multi-faceted "bundles" of goods and there is imperfect expression of preference in voting, as voters can only cast a single ballot).

revising its platform to satisfy *more* voters.[85] This would involve changing the platform such that a different array of voters – reflecting the new composition of the post-gerrymandered constituency in each district – would be satisfied.

In an environment without transaction costs for these re-arrangements, each given constituency would simply re-adapt to select an optimized candidate, and each party would offer a candidate that sought the precise median voter in each given district. However, there are transaction costs to these transitions. In the complex formula, much of this transaction cost is expressed by the partisan preference value *P*, which can prevent voters from rationally switching parties and parties from ruthlessly adopting the most preference-satisfying platforms.[86] The corollary cost for parties involve the challenge of coordinating across a multi-district party as well. A change in platform would likely displease current party members satisfied with the party's current policies, and further potentially unsettle coherence of the party coalitions and ideology. However, such reform of platforms could strip away marginal voters from the victorious party, thereby returning the harmed party to political competitiveness (particularly since 'cracked' districts usually rely upon particularly thin margins).[87] Thus, a reasonable voter from a party harmed by a gerrymander would accept some harm to its internal platform preference satisfaction, if that were the price of the voter's preferred party regaining power – unless, of course, the other party's platform became more attractive, in which case the voter should, logically, switch party allegiance.

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[85] The reciprocal nature of voter and party adaptation is captured in Michael Laver and Michel Schilperoord, *supra* note 51. Voters want preferences satisfied (but they will only be satisfied if they select a winning candidate); candidates and parties want to win (but will only win if they can successfully poach voters).

[86] *See* Gerber and Green, *supra* note 78, at 795 (offering, among competing views of formation of party loyalty, one that treats it as "ballast" that "stabiliz[es] party competition amid shifting political currents.").

[87] *Bandemer*, 478 U.S. at 153 (O'Connor, J., concurring); Schuck, *supra* note 12, at 1341-43; Cain, *supra* note 22, at 156.

Such adaptation returns vibrant competition and equilibrium of preference satisfaction to gerrymandered districts, at the cost of the platform configuration, and perhaps ideological integrity, of parties.[88] As the first move of such an adjustment, political actors from the harmed parties must sacrifice the commitment to partisan identity *P* in order to shift towards a set of policy positions that can attract voters from the party that implemented the gerrymander. For voters, this damage to *P* may involve either a willingness to embrace the dominant, gerrymandering party (in exchange for the dominant party itself shifting its position to accommodate *some* preferences from the crossover voter), but at the cost of the voter surrendering previous partisan identity; or a willingness to accept changes to the party platform of the harmed party to try to strip away marginal voters from the gerrymandering party.[89] For parties, this may take the form of disrupting established party dogma (that is, a certain set of V_x positions and the coherent sense of partisan identity *P*) to attract crossover voters from the party that implemented the gerrymander.

This violence to settled partisan identity may seem to be the harm of partisan gerrymandering; but as the simple model above shows, by disrupting set and potentially inertial partisan allegiances, the result can be to *improve* overall preference satisfaction.[90] Partisan commitment *P* can keep voters attached to outmoded party platforms, and obstruct the attempt to maximize voter preference satisfaction. Partisan gerrymandering, by discouraging inertial

[88] One longitudinal effect this model does not address is the possibility that individual political actors might deem it desirable to accept short-term political losses in order to retain long-term control of an internal party agenda, or avoid specific compromises. *See generally* NICOLE MELLOW AND JEFFREY K. TULIS, LEGACIES OF LOSING IN AMERICAN POLITICS (University of Chicago Press, forthcoming 2017). *Cf.* Robert Post and Reva Siegal, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 390 (2007) (describing such a phenomenon in the context of political reaction to legal decisions).

[89] *See* Kovenock and Roberson, *supra* note 77, at 288-291 (describing a model of when parties will try to 'poach' opposing voters).

[90] *See id.* at 297 ("voters pay a price for partisan loyalty."). The "creative destruction" of partisan gerrymandering can induce voters to reconsider this price.

attachment to party identity, can induce parties and voters to reject partisan attachments in favor of remaining competitive by adjusting preferences and party platforms.

C. Rights and Justiciability in the Shadow of Political Adaptation

Does the process of adaptation in response to partisan gerrymandering itself suggest any justiciable constitutional wrong? Some partisan gerrymanders might arrange voters in a manner that is substantively resistant to circumvention through adaptation due to the preferences of voters, a type of pathology discussed in Section III *infra*. However, in the absence of such 'spoiler' conditions, the omission by political actors to react to redrawn district lines seems to be a substantive political decision (or failing), and thus, as described more extensively in Section IV, an odd choice for judicial protection.[91] If the conclusion is that voters and parties cannot manage their responses to changing political circumstances, the courts would effectively be intervening to protect mainstream actors from their own political incompetence.

The question then becomes if rational adaptation (whether adaptive, or deliberately non-adaptive) to partisan gerrymandering could comprise the basis for a justiciable constitutional wrong. This again requires an enquiry into the nature of party constitution and affiliation. If parties were purely coordination mechanisms that were 'refreshed' from scratch at every election, then districting, vis-à-vis such neutral and content-free coordination mechanism, would inflict no harm upon voters.[92] However, parties, and voter partisan commitments, are not entirely mercenary marketplaces – they also reflect organic institutional development and persistent ideological commitments shared by multiple citizens and various blocks. Partisan gerrymandering interferes with these qualities of parties, either by inducing external change, or by reducing the efficacy of

[91] *See* Schuck, *supra* note 12, at 1379 (observing that regulating partisan gerrymandering would comprise direct "regulation of politics"). *See also* Section IV *infra*.

[92] The dilution, in effect, would not cause the harm of vote dilution – reducing a party's political power. *See* Gerken, *supra* note 21.

parties that, even in response to changed constituencies, do not deviate from their 'naturally' evolved party programs.

Any reasonable treatment would deny such a generic judicial obligation to protect the 'natural' condition or evolution of party identity. Firstly, such an intervention would require entry into a substantive morass of the nature of party identity, and its longitudinal development. This is both technically beyond the ken of courts and an inappropriately substantive political question, as it requires a judicial view regarding the correct 'baseline' theory of the institutional evolution of parties.[93] Secondly, such an intervention would use the courts to determine attributes of politics appropriately left to the exercise of democratic autonomy.[94] The management and content of a party's platform is unequivocally the responsibility of party members themselves; in order to identify a general constitutional right infringed by modifications to this platform, the Court would need to conclude that the judiciary plays an appropriate role in shaping party platforms. This is not only perhaps judicially unmanageable, but prospectively undemocratic. Rather than protecting a party equally under the law or protecting a right to association, such judicial intervention in party formation would disrupt democratic autonomy.[95] While the next section enquires if *particular*

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[93] *Cf.* Einer Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?* 101 YALE L. J. 31, 48 (observing that critiques of interest group pluralism require a "baseline" of acceptable influence). Elhauge's article questions the concern with interest group pluralism expressed in, e.g., Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (that interest group capture of government functions poses a significant threat), and argues that any challenge to interest group pluralism faces a 'baselining' problem. One could observe that partisan gerrymandering is, at a high level of abstraction, a similar problem – the process of districting is 'captured' by the dominant party. Determining, however, the right baseline of districting – in effect determining how much political influence "is too much?"). *Vieth*, 541 U.S. at 297.

[94] This can be seen as the synthesis of two concepts. The first is that that political outcomes should be left to democratic process. *See* Ely, *supra* note 11, at 103 (observing that judicial intervention is justified only when *processes* fail, otherwise the substance of democratic politics should be left to democracy); s*ee also* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 14 (2000) (arguing that even determining the bounds of constitutionalism should be a matter of political debate). The second is the idea that parties are powerful, and, this article argues, adaptive players in political life. *See Bandemer*, 478 U.S. at 152. (O'Connor, J., concurring) (parties are dominant players in politics who can engage in self-care).

[95] Hints of this idea are emerge from the *Bandemer* concurrences: Chief Justice Burger's sense that the Constitution dictates "responsibility for correction of such flaws [as partisan gerrymandering lies] in the people," 478 U.S. at 144; and Justice O'Connor's suggestion that parties can "fend[] for themselves through the political process", *id.* at 153.

exogenous circumstances can impair partisan gerrymandering, it seems impossible to identify a *general* right to be protected from partisan gerrymandering, insofar as the practice is merely another factor in the continuous adaptation that political actors must undertake.

III. THE 'SPOILERS' OF PARTISAN GERRYMANDERING

Where political actors are inhibited from responding to a politicized redistricting by compromise and adaptation, partisan gerrymandering can inflict significant damage upon the effective realization of popular preferences. These circumstances provide the strongest (though still dubious) case for judicial intervention. This section unpacks the two such categories: the robustness of a comprehensive partisan identity, and substantive voter preference arrangements that naturally break voters into mutually hostile blocks.[96] The section then observes that the conflict over partisan gerrymandering within the Supreme Court (and in the literature) revolves around these 'spoiler' conditions, but the lack of a clear analytical framework has obscured the debate.

A. Excessive Partisanship and Bundled Preferences

Two types of conditions can result in partisan gerrymandering harming realization of the electorate's preferences: excessive partisan attachment; and strongly correlated bunching of preferences. These circumstances can divide determinative blocks of voters into inimical and

This article adds force to their arguments by arguing that the very nature of party formation in light of constituent autonomy supports this analysis.

[96] For a discussion of how the spoiler conditions have evolved, and how they intersect in complex ways (particularly in race-party interaction), see generally Bruce Cain and Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L. J. 867 (2016). For an analysis and review of the question (ultimately concluding in the negative) that partisan gerrymandering exacerbates polarization (which can be traced to either of the spoiler conditions discussed herein), see Nolan McCarty et. al., *Does Partisan Gerrymandering Cause Polarization?*, 53 AM. J. POL. SCI. 666, 678 (2009).

irreconcilable factions.[97] The modelling described above illustrates how each of these can render partisan gerrymandering harmful.

1. Strong partisan attachment

If *enough* voters have sufficiently strong attachments to party identity, effective responses to politicized districting will become prohibitive, and partisan gerrymandering can impair effective preference expression.[98] Indeed, the prospective benefits of partisan gerrymandering come from its ability to induce beneficial reorganization of party positions, such that both parties 'compete' more vigorously for marginal voters. But if the critical mass of prospective crossover voters has such strong partisan affiliation that it would require profoundly dramatic changes in the gerrymandered party's platform to get them to 'defect', then the gerrymandered party will be whipsawed. To tempt crossover voters, the gerrymandered party would have to change its platform so dramatically that it might disrupt continuity and coherence in party identity, thereby alienating its current constituency.[99]

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[97] Anxiety over faction has a long history in American political thought. *See generally* Madison, *supra* note 47. For descriptions of the various structural mechanisms by which Framers attempted to manage faction, *see* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 15-27 (1956); Gardner, *supra* note 50, at 152.

[98] As described *infra*, the most common complaint from academics – that partisan gerrymandering serves not to advantage one party, but to impair competition in a way that entrenches incumbents – can be understood as a form of partisan attachment. That is, particular incumbents are able to establish a stable base of voters who will, for loyalty-related reasons, not oust them. While there might be other mechanisms by which existing candidates entrench themselves (such as use of shadow primaries, elite selection mechanisms, and so forth), these are intrinsically unrelated to districting, and ought to be managed through separate political reforms or judicial intervention. If partisan gerrymandering is meaningful, it is because general voter approval is still essential to politicians' success, *not* because political elites have deprived the electorate of power. Thus insofar as partisan gerrymandering can itself benefit incumbents, it must be because there is some preference among the electorate of a district for their existing incumbent. This article categorizes this as a form of partisan loyalty. If incumbents are able to exploit such partisan loyalty to impair competition, this is a deficiency of substantive voter political competence, *not* a trait that can be attributed to district line shape.

[99] Some would argue that the very fact that partisan gerrymandering comprises an exogenous shock to partisan identity, and force its disruption, might be toxic in and of itself. *See, e.g.,* Ypi, *supra* note 49, at 605 (characterizing partisan commitments as an associative commitment like friendship; exogenous transformations like partisan gerrymandering might be seen as impairing the virtue of such associations); *cf.* Lavine et. al., *supra* note 48 (suggesting that putting partisan preferences under stress might induce beneficial self-reflection).

The complex model would identify this as *P* being so strong such that the gerrymandered party would be forced to adjust a prohibitive number of V_x preferences to achieve a superior *S* for a sufficient number of crossover voters, particularly if such changes would harm the *P* of its existing constituency and enable the opposing party to attract them through comparatively minor V_x changes. In effect, by forcing the harmed party to transform its constitutive ideology (and thus perhaps lose its original base), partisan gerrymandering places a party that has suffered a gerrymander in an untenable position. If *P* value of the voters from the beneficiary party who must be induced to crossover is strong enough, these first-mover costs will prevent (ex ante) or punish (ex post) efficient adjustment.

Indeed, if *P* is strong enough, no degree of V_x adjustment will tempt enough crossover voters, and the partisan gerrymander will simply prevent realization of majoritarian voter preference – the type of harm to individual rights and the democratic system that seems to be the classical concern of partisan gerrymandering. This can be demonstrated in a trivial manner by adding partisan loyalty to the Simple Model from Section II.A *supra*. If *P* is strong enough such that $[T_H \mid G_p]$ *R* voters will not abandon their *R* affiliation for the added preference satisfaction of going from Tax-Low to Tax-High, no adjustment to the *D* platform is available to correct the effects of the partisan gerrymander, and the effect of the partisan gerrymandering is merely to result in a minority achieving control over Tax policy.

2. Correlated preference bundling

Adaptation to gerrymandering will also be impaired where most voters' differing substantive preferences are highly correlated, and geography (and other limitations) allow such correlation to be exploited in districting.[100] If voters' preference bundles are such that a party can

[100] This possibility is known to the courts. *See Vieth*, 541 U.S. at 359 (Breyer, J., dissenting) ("in recent political memory, Democrats have often been concentrated in cities while Republicans have often been concentrated in suburbs

satisfy most issues for one large block of voters, or most issues for another, there will be few prospective crossover voters to which an adapting party can appeal by making marginal modifications to its platform. Likewise, voters who wish to defect will struggle to extract concessions from the rival party, because the rival party will have strong incentives to remain steadfast to its current constituents.

Returning to the simple model from Section II.A.1 *supra* allows for a simple demonstration. If all *D* voters are $[T_H \mid G_A]$ and all *R* voters are $[T_L \mid G_p]$, then the groups will naturally form antagonistic blocks, with parties presumably corresponding to each view, and perhaps serving as foundations for concretizing the blocks as distinct ideologies. The negotiation between parties and voters and rearrangement of platforms that partisan gerrymandering can inspire will not occur. In such a situation partisan gerrymandering results in unfair outcomes, as the preferences of the majority will not be recognized. The potential for 'creative destruction' that can redeem partisan gerrymandering is lost.

Voter preferences are unlikely, in reality, to fall into such cleanly antagonistic blocks,[101] but the greater the number of preferences that are bundled together, the more difficult it becomes for parties to make marginal adjustments to platforms to poach marginal voters. Any such bundled position that appeals to prospective crossover voters will displease existing party members; and in

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and sometimes rural areas"); *Whitford*, 2016 WL 6837229, at 11. Some have argued that such geographic clustering should be used to guide the districting jurisprudence. *See* Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379 (2012); *see also* Nicholas O. Stephanopoulos, *Spatial Diversity*, 125 Harv. L. Rev. 1903 (2012) (arguing that high diversity in districts may actually be problematic). Such geographic clustering, however, is parasitic upon preference bundling; what geographic clustering does is make it *easier* for a gerrymandering entity to exploit bundled preferences in districting, and thereby obstruct geographical adaptation.

[101] *See* DeCanio, *supra* note 84, at 643 (observing that the mismatch between the number of policies parties must accommodate and the fact that voters can only cast a single ballot will result in a degree of mistmatch).

order to convert prospective crossover voters, a party would have to change enough positions so as to completely alienate existing party members.[102]

As discussed more extensively in Section IV *infra*, preference bundling is a danger to a unified electorate and civic politics more generally, as a polity with such cleavages may lack civic unity and suffer the problems of faction. Moreover, it is likely to creating a feedback loop: strong, correlated preference differences will likely increase partisan loyalty, further dividing an electorate by partisan identity.

3. The historically weightiest spoiler: race in America

The character of spoiler conditions is further illuminated by comparison to a practice so destructive that it has generated its own tangled jurisprudence: racial districting. At its most disruptive, race can assume overriding weight, a V_x that for a determinative set of voters has an I_x value that dominates other considerations, thereby arranging voters into implacably opposed factions.

American history reveals that the such strong racial animus can strongly shape voters' political identities, resulting in strong and lasting *P* values. The Solid South was solid because race shaped Southern political dynamics, and the V_x of the racial wedge became intertwined with the *P* of the Democratic party.[103] As partisan positions evolved, the Republicans were able to realign as

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[102] Some would argue this occurs under particular circumstances. *See, e.g.*, Baumgartner, *supra* note 47 (describing a theory of realignment built around moments of deep realignment). One way of conceiving of this is more generally is damage to a party's "brand." *See generally* Sigge Winther Nielsen and Martin Vinaes Larsen, *Party brands and voting*, 33 ELEC. STUD. 153 (2014) (observing that partying branding influences voter behavior).

[103] The seminal account of this is contained is magisterially described IN V. O. KEY, SOUTHERN POLITICS IN STATE AND NATION (1949). Others have offered various updates of this account, particularly in light of the inversion of the Solid South from Democratic to Republican. *See, e.g.*, BYRON E. SHAFER AND RICHARD JOHNSTON, THE END OF SOUTHERN EXCEPTIONALISM: CLASS, RACE, AND PARTISAN CHANGE IN THE POSTWAR SOUTH 51-53 (2009) (outlining a theory of how black politics and in particular black enfranchisement through legal chance in the 1960s requires a revision of Key's account); M. V. HOOD III ET. AL, THE RATIONAL SOUTHERNER 64-67 (2012) (making a similar argument). For an account that focuses on how racial animus affected legal change, *see, e.g.*, Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 58-60 (2014).

the party of the South – but the momentousness of the shift merely reinforces that *P* will often be particularly intense where it can be traced to an overriding V_x based in an immutable and divisive feature.

Where an electorate's dominant preferences are so dictated by a single wedge issue, party identity will resist negotiation or compromise. In such circumstances, a competently executed partisan gerrymander will irrevocably harm members of the defeated party through classic discriminatory districting tactics.[104] Where such a wedge issue dominates and partisan identity subsequently assumes an at least temporary fixedness, the perspective of the liberal wing of the Court (discussed in Section III.B.i.2 *infra*) seems vindicated.[105]

Of course, partisan gerrymandering becomes a weapon in vicious wedge-group battle only where toxic political circumstances exist. District line-drawing that discriminates against a vulnerable group is parasitic upon the invidious firmness and ardency of the dominant block. Were their views not so firm and their political allegiances not so unitary, there would be opportunities for adaptation that would alleviate the partisan districting. This, in turn, supports, the view that drawing of districts itself is not the problem, but rather the substantive views of the electorate, and their predilection to be antagonistic, tribal, and inflexible.[106]

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[104] *Gomillion* remains the classic example of such an exercise in racial vote dilution; *see generally* Gerken, *supra* note 21. Under US federal law, of course, where such a gerrymander tracks race it will also effect *racial* vote dilution, prohibited under Section 2 of the Voting Rights Act, and would be unequivocally illegal. However, the current Court may be eroding the efficacy of such mechanisms. *Shelby County v. Holder*, 133 S.Ct. 2612 (2013), for example, eliminated the precoverage formula of Section 4 of the Voting Rights Act. *See* Cain and Zhang, *supra* note 96, at 884 (observing that partisan gerrymandering can impair the voting power of racial minorities, and that the ability of Section 2 of the VRA to prevent such racial effects is unclear); Hasen, *supra* note 2. For an argument that voter protection should shift to concern with partisan distortion of the voting process more generally, see Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L. J. 1363 (2015).

[105] The most extreme approach to this is Justice Souter's dissent in *Vieth* with regards to *any* group that would be the loser in such a wedge-group battle. *Vieth*, 541 U.S. at 347 (arguing that any 'vigorous hostility' by a major party against a 'different but politically coherent group' – including another major party – should be suspect).

[106] This sense may be reinforced by the fact that relatively oblique "exercise[s] in geometry" are only one of the tools used to deprive minority voters of the franchise, as part of a general attack on their political power. *See Shaw*, 509 U.S. at 639-40 (classifying racial gerrymanders as one such tool, along with others such as literacy tests and grandfather clauses); Levinson and Sachs, *supra* note 2, at 414 (observing the use of electoral entrenchment tools by

B. The Inchoate Struggle over Spoilers in the Supreme Court and the Literature

This analysis of 'spoiler' conditions reveals that any harm inflicted by politicized districting derives from underlying substantive political preferences that make typical adaptation ineffective. Thus, condemnation of partisan gerrymandering should point to the effects of spoiler conditions. This Section demonstrates that, while the courts and literature have not framed the analysis as such, spoiler conditions inevitably emerges as a central feature of the analysis.

1. The Court's treatment of spoilers

The arguments offered by the conservatives and liberals in the leading gerrymandering cases both take as an unspoken foundational question whether partisan identity has characteristics that allow for competitive adaptation in response to politicized districting. Each side implicitly treats partisan identity either as a fluid characteristic that cannot act as a definitive spoiler (the conservative view), or, through analogizing to race, as a firm attribute that can impair fair representation if used as the basis for redistricting, thus facilitating rights-based protection of voter party affiliation (the liberal view).

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the Democratic party in the post-Reconstruction South to minimize the power of black voters). *Cf.* Hasen, *supra* note 103, at 71-75 (arguing the Court should emphasize voter protection in general, instead of using abstruse analysis to determine if a given act of determination is driven by race or by party).

a. The conservative treatment of spoilers

The conservative[107] jurisprudence emphasizes the reciprocal abilities of voters to switch parties in light of a redistricting,[108] and of parties to fend for themselves in the political thicket.[109] These paired opportunities lead conservatives to conclude that partisan gerrymandering is unlikely to inflict constitutional harm.[110] If voters can switch parties when another party offers a platform that satisfies more of their policy preferences,[111] then a party disadvantaged by partisan gerrymandering can simply adjust its policies to appeal to marginal chunks of the electorate,[112] thereby defeating the thin majorities that a gerrymandering will tend to secure.[113] The threat from spoiler conditions, meanwhile, is mitigated by the asserted savviness of parties (which would

[107] While the politics of the Court have shifted since *Bandemer*, this article will refer to the anti-justiciability position as 'conservative' for all of the Supreme Court jurisprudence. Furthermore, Kennedy's *Vieth* concurrence will be discussed here, despite its ambiguous status.

[108] *Bandemer*, 478 at 156, 160 (O'Connor, J., concurring); *LULAC*, 548 U.S. at 420 (rejecting a particular test for violations of fairness in representation on the grounds that it hangs on assumptions upon shifting voter preference). *See also Whitford*, 2016 WL 6837229, at 75 (Griesbach, dissenting) (citing *Bandemer* and *Vieth* to support the point that a party victimized by a gerrymander may nonetheless convince voters who were identified by the gerrymandering party as members of that dominant matter to flip allegiances, thereby thwarting the intentions of the gerrymander; this logic is the functional linchpin of that provided in Sections II and III *infra*, as such conduct by both parties and voters is central to effective representation).

[109] "[M]embers of the Democratic and Republican Parties cannot claim they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group: these political parties *are* the dominant groups, and the Court has offered no reason to believe that they are incapable of fending for themselves through the political process." *Bandemer*, 478 U.S. at 152. (O'Connor, J., concurring); *see also Vieth*, 541 U.S. at 285-86 (boundary line drawing is a "root-and-branch matter of politics", making it impossible to identify when there is 'too much' politics in legislative matters regarding politics).

[110] The conservatives in particular seem concerned with the fact that the argument voter rights are impaired must be balanced against the fact that judicial nullification of a districting plan will result in the Court "fundamental political choice"[110] for the electorate. *Vieth*, 541 U.S. at 286-88. This idea draws on the point that districtings reflect *legislative* decisions based on democratic outcomes, and that for the Court to reject them is to effect rule from the bench; enforcement of a right to partisan identity, in the conservative view, is far from costless.

[111] This may be most plainly described *id.* at 287-288, using the example of candidate competence as a policy preference.

[112] *Id*. at 287; *Bandemer*, 478 U.S. at 160 (O'Connor, J., concurring) (on the importance of attracting independent voters to achieve electoral victory).

[113] *Id.* at 152-53 (characterizing political gerrymandering as a "self-limiting enterprise"). Indeed, the fundamental structural dispute in *Bandemer* may be if political gerrymandering is *always* self-limiting (in which case the question should never be justiciable) as opposed to self-limiting *only under certain conditions* (in which case the Courts will need to step in when those conditions don't apply). *Cf. id.* at 152 (O'Connor, J., concurring) always self-limiting) *with id.* at 126 (not always). Justice Breyer's dissent in *Vieth*, 541 U.S. at 355-360, offers one of the more reflective analyses of when such practice might be identified as self-limiting, or not. Interestingly, the *Vieth* plurality makes significantly less use of this fact, instead preferring to attack the idea that there is a right to proportional representation for attributes such as partisan affiliation. 541 U.S. at 289-90.

presumably manifest, *inter alia*, in their ability to effectively adapt to appeal to marginal voters) and pliability of voters (which would result in their receptiveness to appeals from the competing party).

Thus, underlying the conservative position is a set of implicit assertions regarding spoilers: that voters tend to have weak enough *P* values and partisan identities tend to be fluid enough such that political actors can readily respond to politicized districting; and that substantive preferences are arranged such that there is meaningful room for adjustment and political competition. Consequently, courts are ill-positioned to intervene, because the drawing of politicized district lines itself is not the cause of harm to representative capacity. That depends on substantive political characteristics which conservatives do not think courts can reliably police.[114] In short, voter partisan identity is too unstable a characteristic upon which to found a judicially enforceable right.

This supports a broader conservative confidence in the ability of political actors – to navigate the impact of politicized line drawing. Indeed, the conservative views of political competence, and their skepticism regarding the justiciability of political rights based in districting, are complementary. Because conservatives assume political competence will typically negate any prospective harm from partisan gerrymandering, and the judiciary is ill-positioned to ascertain when spoiler conditions do exist, courts cannot intervene to protect voter rights against partisan gerrymandering in an organized way.[115]

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[114] *See id.* at 286 (it is impossible to say when there is "too much" politics in a districting). *See also Bandemer*, 478 U.S. at 153 (O'Connor, J., concurring) (on the impossibility of eliminating politics from the districting). *LULAC* contains an interesting corollary to this, related to the intent rather than effect: If, as the conservatives in *Vieth* assert, partisanship is inevitable in districting and determining how much partisan intentionality is an unmanageable line-drawing exercise, then (even if one concedes prospective justiciability, as does Kennedy) even "bloodfeud" intentionality is not enough without some tangible negative impact, evidently missing in *LULAC* (at least at the moment of the election and without use of an exotic metric such as partisan symmetry). 548 U.S. at 456.

[115] This statement is probably a clearer restatement of the various claims from *Vieth* and *Bandemer* that it is impossible to know how much politics is too much.

b. The liberal treatment of spoilers

The liberal treatment of spoilers is generally (though not categorically)[116] structured around an analogy of party identity to race. This parallel tends to be embedded in liberal reasoning rather than explicitly stated[117] – it would be absurd to claim that party affiliations and platforms are as firmly set as racial identities. Yet liberals tend to posit a fixedness of partisan identity,[118] implying that voters cannot shift parties readily or easily, and that parties cannot make material adjustments to their platforms to remain competitive. Without the possibility of ready adaptation, politicized districting is a source of systemic and individual injustice, harming collective preferences and individual voting power.

The liberals do not clearly articulate the basis of partisan identity's similarity to race. Yet as described above, race can be the source of powerful partisan loyalty as well as a divisive wedge issue. If party identity necessarily has these traits, politicized districting will harm both the efficacy of representation and the rights of individual voters. Yet such intrinsic harm is only possible if partisanship is sufficiently firm such that adaptation cannot overcome districting, (the first spoiler condition); or if voter preferences and identities are arranged such that voters fall into necessarily oppositional blocks (the second spoiler condition). Yet the liberal implication that party identity

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[116] Breyer in particular avoids analogizing to race in his *Vieth* dissent, 541 U.S. at 360, but as a result his approach has a quality of generality similar to the *Bandemer* plurality test.

[117] The *Bandemer* plurality offers probably the most circumspect and legally cautious approach to this: "[T]hat the claim is submitted by a political group, rather than a racial group does not distinguish it in terms of justiciability." *Bandemer*, 478 U.S. at 125. *See also id.* at 130-31. The Powell dissent in *Bandemer* and the *Vieth* dissents tend to be more aggressive in analogizing to race. *Bandemer*, 478 U.S. at 164 (pointing to *Karcher v. Daggett* to suggest that any disfavoring of a 'weak' community group is a constitutional violation) (Powell, J., dissenting); *Vieth*, 541 U.S. at 320 (pointing to dicta in *Gaffney* to support the idea that racial and political discrimination are equivalently illicit), 337-38 (a political gerrymander is as objectionable as a racial gerrymander) (Stevens, J., dissenting); *Vieth*, 541 U.S. at 344 (observing that excessive presence of both race or partisanship can render a districting plan illicit) (Souter, J., dissenting). *See also LULAC*, 548 U.S. at 469-470 (Stevens, J., dissenting) (treating party affiliation as stable and analogizing to cases on racial gerrymandering to under discriminatory effect on Democrats).

[118] *See, e.g. Bandemer* 478 U.S. at 165-66; *Vieth*, 541 U.S. at 347 (discrimination by the dominant party against any "different but politically coherent group" should be suspect) (Souter dissent). *See also Whitford*, 2016 WL 6837229 at 40, referring to "cutting out for the longterm those of a particular political affiliation". These all presume that a districting that is illicit because it harms a voter on account of *partisan* affiliation has definitiveness in the affiliation.

possesses these characteristics is as much a substantive assumption as the conservative assertion regarding its adaptation and fluidity.

This analysis reveals that both the conservative and liberal positions on the justiciability of partisan gerrymandering hang on foundational assumptions. The justices are, in effect, divided on whether the Court can effectively assess and intervene when spoiler conditions adhere. The ardent conservatives suggest that the spoilers are not present with such consistent transparency so as to enable judicial intervention. The *Bandemer* plurality, Breyer, and, with great tentativeness, Kennedy, suggest that when use of partisan interest in districting is sufficiently egregious (that is, these conditions are present to a strong enough degree), the efficacy of representation will be compromised. The remaining liberal justices appear willing to presume the presence of these spoiler conditions whenever partisan self-interest dictates line-drawing.

The difficulty, however, is that the presence of these spoilers cannot be treated as anything other than substantive political realities, and resolving the justiciability debate can only be appropriately done through such a substantive political inquiry. In phrasing their analysis in the traditional terms of constitutional analysis – equal protection from vote dilution and rights to association, all occurring in the context of district line-drawing – the justices evade the substantive political nature of the partisan gerrymandering debate.

2. Spoiler conditions and the legal literature

Spoiler conditions also provide a helpful perspective on innovative approaches to election law. This section reviews how spoilers provide a framework that can organize and clarify the literature on partisan gerrymandering.

a. Competitive elections as political markets

The most comprehensive theory of American election law is the markets-and-lockups theory advanced by Samuel Issacharoff, Pamela Karlan, and Rick Pildes.[119] They emphasize that elections should prioritize robust political competition, a goal that can be obscured by a focus on a rigidly doctrinal framework.[120] In this view, partisan gerrymandering is not an intrinsic evil; rather the Court should evaluate the practice in the course of a broader policing of political accountability. The greatest hazard to representation is that those who currently hold power will entrench themselves through manipulating electoral structures and practices.[121]

The concern raised by these authors is the same at the heart of this Article. Indeed, they suggest – but do not fully develop – a theory sympathetic to the one in this Article: that partisan gerrymandering might benefit representation through creative destruction.[122] The authors focus on competition between candidates as the *sine qua non* of functional elections. If voters know their preferences and accordingly select representatives who will advance policies that serves those preferences, structures and mechanisms that impede open candidate competition have the same character as the 'spoiler' conditions identified above. Much as the spoiler conditions prevent effective adaptation in response to partisan gerrymandering, misuse of political structures allows

[119] A related structure-oriented approach is advanced by Gerken, *supra* note 19, at 530, which emphasizes the difficulty the Court suffers in trying to interpret wrongs that go to systemic electoral setups in individual rights terms. While Gerken does not focus on lack of competition as the specific indicator of electoral ills, her structural approach can be understood as a related attempt to use a high-level concept to bring order to the law. The spoiler understanding of partisan gerrymandering fits well with her theory, insofar as it demonstrates that politicized districting ultimately reflects substantive defects in politics rather than discrete infringement of individual rights.

[120] For the general articulation of this theory, see, *e.g.*, *see* Issacharoff and Pildes, *supra* note 17; for its specific application to partisan gerrymandering and how judicial intervention should focus on competition rather than narrow doctrinal queries, *see* Issacharoff and Karlan, *supra* note 10, at 570; Issacharoff, *supra* note 9.

[121] This implies, of course, that these authors would condemn certain clear statements the Court has made, such as the suggestion in *Gaffney*, 412 U.S. at 738, that there is no harm where a bipartisan agreement results in proportional partisan allocation of seats.

[122] Issacharoff and Karlan, *supra* note 10, at 543 ("to the extent that the Court's intervention [to stop partisan gerrymandering] is prompted by claims of excessive partisanship, it may actually encourage further reductions in political competition.").

representatives and elites to prevent elections from serving as an effective marketplace for voter choice.

Insofar as this Article intersects the politics-as-markets theory, it argues that partisan districting in isolation cannot be a basis for incumbent protection, insofar as adaptation should allow voters *as* well as parties to react to new constituencies. This is not to say that in practice partisan gerrymanders cannot be one of the tools in the toolkit of deviously entrenching elites, but because the lockup must exploit some other feature of the political ecosystem (or merely be the implementation of some deeper structural element that permits elites to deny access to rank-and-file choice), it cannot be first-order responsible. Those independent structural attributes are distinct from the effects of partisan gerrymandering (and thus conceptually parallel to spoiler conditions). Therefore, under a lockup theory it should be any true competition-impeding features of a political system that is the target, rather than partisan gerrymandering. Moreover, were partisan gerrymandering to be deemed justiciable, it would require a mechanism that explained how these ills exploited partisan gerrymandering. As discussed *infra*, the courts should be reticent to intercede in such substantive features particularly where party formation – part of the very battlefield of politics – is concerned.

b. The First Amendment and partisan gerrymandering

Arguments that associational rights solve the justiciability puzzle for partisan gerrymandering face a similar challenge.[123] The redrawing of district lines does not itself obstruct the ability of citizens to engage in the formation or coordination of political associations. If

[123] *See Shapiro*, 2016 WL 4445320, at 17-18 (Bredar, D.J., dissenting) (arguing that the partisan gerrymandering does not infringe the type of First Amendment associational rights that in manner germane to the type of conduct such rights are meant to protect, because partisan gerrymandering does not impair voters' ability to "affiliate with the party of their choice, to vote, to run for office if they wish, and to participate in vibrant political debate wherever they find themselves").

variations of preferences among voters were homogeneously distributed, then it could have no harmful associational effects, and the efficient adaptation process would simply produce new coalitions. The presence of spoiler conditions, however, could reduce the efficacy of associations after a politicized districting, because the gerrymander would artificial bunch voters so as to inhibit their 'natural' associations. Yet insofar as gerrymandering inflicts a unique harm to associations, it can be traced to the same substantive spoiler conditions for partisan gerrymandering generally: either strong partisan affiliations that make rejiggering associations costly, or bundling of preferences that entail voters cannot form coalitions that are as effective if they have been reallocated with politics in mind.

Yet the associational right is not a guarantee that a given arrangement of voters (that is to say, ones with strong partisan loyalty or a certain blocks of preferences) will have a protected level of political power.[124] In effect, it would insulate those who possessed certain fluid political characteristics from the need to engage in the adaptation process by which parties and voters fight for power and maintain political relevance. Such protection would make the associational right a constitutional guarantee that coalitions of voters do not need to react to shifting circumstances that are themselves political in origin. It would thus use the right to association to protect a given group defined only by its political identity from the need to engage in substantive politics. Such a protection might ultimately require defending a principle of proportional representation, a substantive political conclusion beyond the judicial mandate.[125] Again, as discussed *infra*, such judicial intervention in the very struggle that produces political coalitions and political identities

[124] *Cf.* Bandemer, 478 U.S. at 131-32 (rejecting the idea that the Court must protect certain levels of political power for groups).

[125] *Vieth*, 541 U.S. at 288; *see also* Schuck, *supra* note 12, at 1350; Persily, *supra* note 12 at 650 (proportional representation not necessarily the only just option in a first-past-the-post-system). *Cf. Vieth*, 541 U.S. at 337 (Stevens, J., dissenting) (generally agreeing, but adopting a softer view towards the idea that preserving proportional representation might be a valid objective).

is interference with the very process of political decision-making, and thus should be approached with great suspicion.

c. Quantitative metrics and justiciability

Another approach to partisan gerrymandering that has been in vogue of late focuses on solving the justiciability challenge by offering quantitative metrics. The "efficiency gap" metric advanced by Nick Stephanopolous has so far gained the most traction as a manageable standard, being favorably discussed by the majority opinion in *Whitford v. Gill*.[126] The efficiency gap updates[127] the partisan symmetry test that was advanced – but failed to convince a majority, including Justice Kennedy – in *LULAC*.[128]

The analysis of this Article, however, has demonstrated that these assays confuse a symptom of pernicious partisan gerrymandering with its necessary underlying cause. Partisan gerrymandering *can*, under certain conditions, cause political harm – but that political harm is necessarily due to substantive political realities, and it is the Court's decision to engage with these substantive political realities that must guide the justiciability analysis. The most notorious of those political realities, racial prejudice, enjoys constitutional mandates that, inter alia, attempt to prevent it from operating as a spoiler in the districting process. Numerical tests that focus on partisan identity may prove useful as indicia of other harm, but they can do no more than offer correlative evidence, and they shed little light unless it is clear what is being tested *for*.[129] Ultimately, this can be tracked back to the nature of partisan identity as ultimately instrumental, and the need for 'spoiler' conditions to make partisan gerrymandering actually harmful.

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[126] 2016 WL 6837229, at 50.
[127] Stephanopolous, *supra* note 4, at 855-57 (comparing the efficiency gap to partisan symmetry).
[128] 548 U.S. at 419-421 (describing the features and insufficiency of the partisan symmetry test advanced by *amici* Gary King); *but see id.* at 466-67 (summarizing the literature on partisan symmetry and describing it as "widely accepted by scholars providing a measure of partisan fairness in electoral systems).
[129] The analysis of this article, therefore, challenges the view presented by Hasen, *supra* note 4, that perhaps judicial intervention to prevent racial discrimination is effectively served by

IV. JUDICIAL INTERVENTION IN BROKEN POLITIES

If partisan gerrymandering is only a problem on account of underlying conditions, why have litigants, the liberal branch of the Court, and many academics persistently treated it as a malady that should be addressed as an intrinsic evil? Given that partisan gerrymandering *can* be exploited as such a tool for partisan advantage when such circumstances exist, but that under normal circumstances any harmful effects are neutralized by political adaptation, ought the courts to intervene? Why has identifying an independent constitutional wrong in the practice of partisan gerrymandering proven so seductive, if it can only be abused as a vehicle for exploiting deeper political factors? This section addresses these questions, focusing on the hazard of careless judicial bushwhacking through the political thicket. If the courts engage with partisan gerrymandering (whose pathologies are better identified as symptomatic, rather than causal, of electoral dysfunction) without sensitivity to underlying causal ills, invalidation of legislative districting could elicit backlash against excessive judicial intervention. The possibility of this is greatly exacerbated by the tendency of litigants and critics to evade discussion of the underlying pathologies that can make party-based districting problematic.

A. Fair Process, Substantive Politics and Judicial Intervention

The features courts unequivocally demand of a districting – that it respect one-person one-vote and face strict scrutiny in considerations of race – reflect either bedrock conditions of democratic fairness[130] or explicit constitutional instructions to restrict consideration of certain types of immutable characteristics.[131] This Article has explored how districting by partisan identity

[130] *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964) ("achieving fair and effective representation is concededly the basic aim of legislative apportionment").
[131] *Shaw*, 509 U.S. at 642 (prohibition against "redistricting legislative that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for the purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification.").

is conceptually and practically distinct, thanks to the capacity of political actors to adjust party identity. A question is whether consideration of party identity should none the less be prohibited by the courts. The most aggressive constitutional approach to districting (articulated in the Souter *Vieth* dissent) would simply prohibit attacks on *any* "politically coherent group whose members engaged in block voting" [132] through districting, in effect generalizing the equal protection principle currently applied to race.

However, even if one adopts the Souter approach and concludes districting should not be permitted to harm defined blocks of voters, there are reasons to treat judicial protection of party identity with cautious skepticism. Unlike other types of group commitments, party identity is an intermediary by which voters engage with politics, rather than an end of politics itself.[133] For courts to intervene in the process by which voters make instrumental decisions on how to advance their substantive preferences is both suspect as a democratic act, and potentially distortive of the unfolding of electorate-guided political outcomes.

This is not to say that courts cannot enter the political thicket in order to defend process. Indeed, this was precisely the basis on which the Court entered the thicket to protect one-person one-vote, which is a bedrock commitment of egalitarian democratic practice. However, this Article has shown that partisan gerrymandering is neither like a violation of one-person one-vote in principle (because voters can adapt their partisan identities to retain political relevance) or effect (because it can prove explicitly beneficial to expression of democratic will through creative destruction of existing coalitions).

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[132] 541 U.S. at 347.

[133] It is thus part of the process, and specifically part of the process by which voters establish their priorities and commitments in a first-past-the-post system. *See* Kang, *supra* note 49; *see generally supra* note 50.

The analysis of spoilers, of course, shows that adaptation will not always render partisan gerrymandering harmless in terms of voter preference satisfaction. Yet the spoilers themselves are the expression of substantive political conditions.[134] These conditions may justify separate types of judicial intervention, particularly if there is an independent failure in democratic process[135] or a vulnerable group's access to politics is harmed.[136] Yet to deem partisan gerrymandering illegal by default comprises subtle judicial intervention in a central process by which citizens coordinate their political activities. Judicial nullification of districting solely because districts are too partisan constrains the terms of citizen political engagement.[137]

If courts intervene to shape the substantive terms of political participation (as they would to protect party identities, whether related to partisan loyalty or preference bundling), they necessarily set a baseline[138] regarding general terms of how citizens organize politically. The resulting political coalitions are outputs of democratic autonomy that should lie beyond the ken of judicial review.[139] This point is elucidated the nature of the spoilers responsible for the pathologies

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[134] Some would argue that the current state of extreme polarization makes these conditions particularly exigent. *See generally* Muirhead, *supra* note 49, Rosenblum, *supra* note 49; *cf.* Schuck, *supra* note 12, at 1372 (arguing that by the mid-1980s partisan affiliation had declined, and could be expected to decline further, a claim evidently falsified by current levels of partisan fragmentation). Yet polarization is precisely the type of problem of autonomous politics that courts are ill-suited to manage, insofar as it requires the courts to decide optimal political arrangements for 'good' political attitudes. *See id.* at 1380.

[135] The idea such process failure underlies the competition theorists, Section III.B.2.a *supra*. *See also* Ely, *supra* note 11, at 101 (describing the Constitution as protecting processes rather than outcomes).

[136] This is most famously captured in *U.S. v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938); *see also* Ely, *supra* note 11, at 75-76.

[137] This challenges that the argument offered by Hasen, *supra* note 4 at 36, and that he imputes to Issacharoff, that the ballot-access-protecting measures that should be used to prevent racial and partisan discrimination against ballot access should be expanded to include gerrymandering, because district composition is inherently neutral, and only evil through the impact of other ills.

[138] *See* Elhauge, *supra* note 93; Levinson and Sachs, *supra* note 2, at 460; Charles, *supra* note 68, at 660; *cf.* Klarman, *supra* note 2, at 533-34 (observing the baseline argument of critics of judicial involvement, but arguing that the clearly illicit motive of partisan gerrymandering makes it susceptible to procedural solutions). If this baseline question were to be meaningfully phrased (which well might be a precondition to generating a coherent jurisprudence of partisan gerrymandering), it might be as follows: is there is a right to participate in a party whose ideological program has been formed free from 'exogenous' influences?

[139] *See* Ely, *supra* note 11, at 101 (the Constitution protects process, not ideologies). The factors that can make partisan gerrymandering pathological are part of the substantive outcomes of politics, not its process. *See generally* LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2005). Thus partisan

of partisan gerrymandering. Strong partisan affiliation ultimately reflects a choice on behalf of voters, whether political actors choose to prioritize maintaining their partisan identities (whether by refusing to contemplate negotiation to join the opposition party, or refusing to compromise on a party platform to tempt crossover voters). If autonomy is the core of democratic governance, this decision to avoid softening party identity in the face of disadvantageous conditions should be treated as a free choice, rather than the basis for judicial intervention. Likewise, insofar as preference bundling reflects the freely chosen preferences of voters, for the Courts to dictate that certain configurations of preference bundles should have a privileged status against the vagaries of circumstance is to intervene in the "root and branch"[140] conflict of democratic politics. To identify either partisan identity or preference bundling as a quality that must be protected to ensure fair representation is to make the category error of confusing neutral process (which can justify judicial intervention automatically since *Baker*) and substantive political preference (which requires an exceptional justification for the judicial hijacking of democratic will).[141]

As this Article has already conceded (and the very term spoiler denotes), partisan allegiance and preference bundling, as well as structural factors that independently impair adaptation,[142] can all mean that politicized redistricting can be an intermediary for impairing

gerrymandering does not need to be policed by the courts in order to ensure "the equal freedom and independence" of citizens that are central to democracy. Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 *Law & Phil.* 327, 328 (1990).

[140] *Vieth*, 541 U.S. at 285.

[141] While this Article suggests that partisan gerrymandering is not an ill on the terms suggested by reformers, its conclusions do not condemn the use of alternative districting mechanisms (so long as such alternatives are selected by democratic process). Thus *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S.Ct 2652 (2015) seems correctly decided, particularly given the independent mechanism arose from a ballot initiative. However, this Article would challenge certain vindications of such mechanisms, in particular that they *inherently* improve democratic process. Others have observed aspects of these problems with regards to redistricting commissions. *See generally* Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L. J. 1808, 1837 (2012) ("A truly bipartisan structure risks the prospect of stalemate and an incumbent gerrymander, but using independent members to break partisan deadlock can feed the perception of hidden bias."). *Cf.* Nicholas O. Stephanopoulos, *Arizona and Anti-Reform*, 2015 U. CHI. LEGAL F. 477 (2015).

[142] *See supra* Section III.B.2.a.

democratic efficacy. In each of these cases, however, there is a prior and independent condition that renders the districting process pathological by impairing the adaptation process. Particularly in light of the prospective benefits of partisan gerrymandering, courts should be leery of placing partisan identity in the category of rights that can be harmed by districting. Rather, courts should prefer to address the underlying substantive factors that are causally responsible for the political wrong. Indeed, the constitutional instruction to strictly scrutinize race in districting is just such an instruction, preventing it from acting as a wedge issue that can be used to harm minorities through districting.[143]

B. Justiciability and Testing for Substantive Political Harm

If courts deem some partisan gerrymanders illegal, it must not just be on the basis that they reflect "too much" politics[144] even over a prolonged period.[145] Rather, to avoid invading the domain of democratic choice, the Court must tie the nullification of a partisan gerrymander to the underlying substantive logic that makes the given districting pathological. As described above, one such possibility is that a partisan gerrymander is merely a proxy for harming another, first-order, and functionally immutable attribute, such that adaptation by the harmed group is impossible. It is critical to differentiate strong partisan attachment that can be attributed to such a wedge group characteristic from purely 'sentimental' attachment to a particular partisan identity, which is the domain of political choice and thus inappropriate for judicial intervention. Another is the possibility of "bundled preferences" amongst the electorate such that no meaningful adaptation can take place. A third possibility is that partisan gerrymandering might be a vehicle for anti-democratic practices distinct from a districting itself. In this case there would be other structural

[143] *See supra* Section III.A.3.
[144] *Vieth*, 541 U.S. at 286, 296.
[145] This makes the efficiency gap and partisan symmetry tests insufficient by themselves, as they must be tied to a deeper theory of legitimacy political process.

factors – such as elite domination of internal party dynamics – that make it possible to exploit spoiler conditions districting to impair fairness.[146]

Any such a test would need to look at both the districting itself as well as the underlying political circumstances, and thus have far more sophistication than the novel tests for justiciability suggested[147] or implemented.[148] Each of the three possibilities (harm to an immutable attribute; bundled preferences; and use as a tool of elite domination) identified above *might* be sufficient alone to prospectively make a politicized districting illicit, but intersections of the factors might serve to be mutually reinforcing. Courts would be required to engage in intensive fact-finding regarding underlying political conditions and then make an assessment regarding the impact of these political conditions upon the effect of a districting.[149] As this would need to occur on a case by case basis, each litigation would impose a tremendous burden on the courts, and test the limits of judicial competence.

The complexity of the test should generate further caution regarding the justiciability of partisan gerrymandering. Intervention in partisan gerrymandering not only requires intervention in a core process of democratic preference formation, but requires the court to make nuanced case-by-case judgments regarding local political conditions. That courts would have to so assess political conditions heightens risks that judging partisan gerrymandering will cross into

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[146] This must ultimately the foundation of the 'lockup' theory described by Issacharoff, Karlan, and Pildes described *passim*. *See* Section III.B.2.a.

[147] *Vieth*, 541 U.S. at 339 (Stevens, J., dissenting) (the *Shaw* test should be applied to enquire into if neutral principles were ignored); *id.* at 346 (Souter, J., dissenting) (apply a burden-shifting test derived from *McDonnell*); *Id.* at 365 (Breyer, J., dissenting) (identify unjustified entrenchment). The Stevens and Souter tests barrel through the possibility that partisan gerrymandering is a dependent harm; Breyer's test allows for more fluidity, but offers little more specificity than the *Bandemer* plurality's test.

[148] *Whitford*, 2016 WL 6837229, at 35 (offering a test based on "severe impediments to the effectiveness of the votes", yet failing to unpack upon what deeper features that impediment subsists).

[149] *See* Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L. J. 1457, 1489 (2005) (conceding that political gerrymandering "may be one of those contexts in which the judicial branch cannot develop effective safeguards for individual rights", though later arguing that it should be possible to adopt *some* principle).

paternalism. While the courts might try to use neutral criteria to judge when such specific political conditions are troubling, it is a difficult zone to create a clear and universal test. These all evoke basic concerns of the political question doctrine.

As partisan gerrymandering becomes a harmful practice only where it is founded in problematic features of the electorate's substantive political investments, it may be safer to leave its correction to the "aroused popular conscience"[150] of voters. Nullification of districting of partisan gerrymandering alone can only indict underlying structural injustices. It would be both more transparent and more efficacious for the Court to address such injustices directly, and thus avoid claims of surreptitious meddling in popular control of democratic outcomes.

C. Unintended Consequences of Judicial Intervention

The idealized assumptions upon which this Article operates, however, must face a challenge based in exigent political realities: partisan gerrymandering is used by parties to entrench themselves, often at a cost to traditionally disadvantaged groups.[151] In light of this, theorized arguments regarding the hypothetical capacity of voters and parties to adapt to politicized districting ought to be set aside; and any opportunity for the courts to intervene for the sake of justice ought to be taken.

The superficial appeal of this claim to practical necessity should not alleviate the fragility of the case for judicial intervention against partisan gerrymandering. The legacy of the Court's judicial intervention to prevent substantive ills – rather than merely protect fairness of and access to process – is a dubious one. If the adaptability of parties and partisan identity is conceded, one

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[150] *Bandemer*, 478 U.S. at 144 (Burger, dissenting) (quoting *Baker v. Carr*, 369 U.S. at 270 (Frankfurter, dissenting)).
[151] *See* Michael C. Li and Thomas P. Wolf, *Court should outlaw drawing of political maps based on parties*, NEWSDAY, Dec. 7, 2016, *available at* http://www.newsday.com/opinion/oped/court-should-outlaw-drawing-of-political-maps-based-on-parties-1.12718137 (two leading figures in the fight to make partisan gerrymandering justiciable argue for the convergence between race and party); Hasen, *supra* note 103, at 69 (observing that attacks on the Democratic party will also tend to be attacks on minority voters).

could characterize judicial interdiction of partisan gerrymandering as a type of public-law Lochnerism.[152] *Lochner*[153] (now "infamous and discredited")[154] deemed legislative action taken by elected representatives that structured private sector relations an illicit intrusion upon individual rights. This was seen as treating as enforcing a "prepolitical" baseline of wealth redistribution.[155] Likewise, striking down legislature-born districting plans on the grounds that they involve partisan gerrymanders might be identified as treating a given allocation of districts as likewise sacrosanct.

Yet if voters and parties can adapt to remain competitive, and explicit constitutional protections exist to protect the concededly vulnerable (racial minorities), then judicial intervention does no more than enforce an arbitrary baseline. Indeed, if anything the principles of *Lochner* cut more strongly against partisan gerrymandering, insofar as districting itself falls within the realm of public electoral contestation, thus presumably creating a reason for doubting the need for judicial review. More recently, scholars have begun to question judicial programs that impose social norms in the face of legislative action, even that those that appear more sympathetic to a progressive agenda. In particular, some have argued that decisions advancing racial rights, most notably *Brown v. Board of Education*, have actually had the effect of producing a popular political backlash. The modest gains generated by the Court-led action were undermined by long-simmering, and ultimately corrosive, effects of popular resentment. Scholars have suggested this is a broader pattern when the judiciary attempts to serve as the aggressive vanguard of social values.[156] The drawing of districts may not be the type of typical wedge issue that would have such backlash; moreover, some might argue it is precisely the type of representative self-dealing that

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[152] *See* Cass R. Sunstein, *Political Equality and Unintended Consequence*, 94 COLUM. L. REV. 1390, 1397 (1994). Sunstein compares *Lochner* to *Buckley*, insofar as that *Buckley* delimited government regulation of a type of good.
[153] *Lochner v. New York*, 198 U.S. 45 (1905).
[154] Sunstein, *supra* note 152, at 1397.
[155] *Id.*
[156] *See, e.g.*, Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST 81 (1994); Post and Siegal, *supra* note 88.

justifies judicial intervention.[157] Yet the structural argument of this article is that the harm from partisan gerrymandering must come from the substantive political commitments of an electorate. Thus, while it may not elicit first-order backlash, like these more facially invidious issues, it should perhaps be left as a democratic feature to be politically resolved.

Proponents of general judicial nullification of partisan gerrymandering might argue that the Court irrevocably entered the political thicket with *Baker v. Carr*, and having taken on the mantle of ensuring fair elections through judicial innovation, it should do so with consistency. Yet this ignores the basic structural observation that undergirds this Article: districting on account of partisan affiliation itself cannot impair individual voter political power, because of the capacity to adapt to new constituencies. The right protected in *Baker v. Carr* established such an individual right to equal power. Entry into the political thicket through one person one vote principle can be understood as both conceptually tidy and contained within a facial reading of the equal protection clause. To establish a right that is infringed by partisan gerrymandering requires extensive innovation regarding the relationship between equality and political participation, and only has bite with regards to underlying substantive politics.

More generally, judicial intervention against partisan gerrymandering comprises an attempt to dictate appropriate terms of political engagement (by defining the 'right' conditions of party identity) through elite technocratic instruction from the Court. Yet, unless justified by reference to some legal wrong linked to the substantive pathologies that makes partisan gerrymandering harmful, such intervention appears to be unalloyed judicial legislation. In nullifying politicized districting, the Court necessarily asserts that democracy suffers from substantive ills – yet rather than address these problems directly, it attacks a practice that should

[157] Klarman, *supra* note 2, at 533-34.

be in principle innocuous. This tempts a backlash against the very inefficacy of the judicial measures, or may simply result in churning of district lines by judicial fiat even as the underlying political maladies remain untouched. Indeed, if a polity truly has its conscience "seared"[158] such that it desires an apolitical districting mechanism, it has resources to ensure neutral bodies draw district lines. An electorate can either elect representatives who make creation of such a body a policy priority (and eject those who do not cooperate from office), or use plebiscite mechanisms to adopt such a body.[159] While more political costly or involved, such processes rely on democratic processes to set future democratic process.

A lesson may be drawn here from the impact of the judicial regulation of racial districting. Unlike partisanship, race has an incontrovertible legacy as a source of material oppression of the disadvantaged. Yet racial districting itself is not the ill – it is the fact that certain district shapes can be used to further the racial animus held by dominant blocks in a polity. Districting is regulated by the Court to ensure that it does not become an ostensibly useful mechanism for harming a group, and thereby serving as the vehicle for illicit preferences. Yet some have argued that the continued judicial policing of race in districting has actually served to marginalize minority voters and impaired democratic development.[160] In a similar fashion, this Article suggests that judicial intervention in partisan gerrymandering might have perverse impacts, concealing the true problems of representation and political fairness. It thus distracts both activists, political entity, and the judiciary from the substantive hazards in the political thicket that are worthy of attention.

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[158] *Bandemer*, 478 U.S. at 144 (Burger, C. J., concurring).
[159] *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S.Ct 2652 (2015).
[160] *See* Pildes, *supra* note 23, at 1571 (observing the perverse effects of the VRA Section 2 requirement in the context of *Shaw*); Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success*, 104 COLUM. L. REV. 1710, 1731 (suggesting that the continued judicial monitoring of racialized voting may be impairing emergence of a holistic political dynamic); Steven Hill, *How the Voting Right Act Hurts Democrats and Minorities*, THE ATLANTIC, June 17, 2013, *available at* http://www.theatlantic.com/politics/archive/2013/06/how-the-voting-rights-act-hurts-democrats-and-minorities/276893/. Of course, in light of *Shelby*, some of these questions may be tested in practice.

CONCLUSION

Anxiety regarding the procedures of representation inevitably brushes against concerns regarding the real outcomes of elections and policies derived from democratic will.[161] Judicial oversight of elections encounters this tension when protecting "fair representation" while refraining from legislating from the bench. This Article demonstrates that partisan gerrymandering alone does not comprise a procedural failure that deprives voters of representative efficacy.[162] Thus, judicial nullification of district lines purely on the grounds of partisan gerrymandering comprises judicial management of political outcomes. Moreover, because party identity is a venue of political contestation that constantly evolves in response to the electorate's preferences, judicial nullification of partisan gerrymandering more subtly intrudes upon voter control of the democratic process.

This Article has shown partisan gerrymandering can only serve as an intermediary for the expression of other problematic conditions in a democracy, usually related to the configuration of electoral preferences or control of party apparatus. It is these complaints that should be the source of investigation, and, if appropriate, judicial attention. To litigate partisan gerrymandering on its own terms is to quixotically seek to solve deep structural problems by attacking superficial symptoms. While the tangibility and crispness of partisan gerrymandering make it seductive as both the culprit of undesirable political outcomes and as a practice that can be readily condemned, this lure should be resisted.

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[161] *See generally* Ely, *supra* note 11, at 103-104 (differentiating between process and outcome).
[162] *See* Section II *supra*.