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## Gerrymandering and Conceit: The Supreme Court's Conflict with Itself

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# Gerrymandering and Conceit: The Supreme Court's Conflict with Itself

MCKAY CUNNINGHAM\*

*The Supreme Court has long held that extreme partisan gerrymandering violates equal protection, but has simultaneously dismissed gerrymandering disputes as nonjusticiable political questions. In particular, the Court has maintained that no manageable standard yet exists by which the Court could implement the promise of equal protection to partisan redistricting.*

*This Article analyzes the manageable standard requirement, revealing the Court's failure to consistently apply it. Why is "fairness" a manageable standard in one context but not another? How are standards that measure one's shocked conscious, or weigh the totality of the circumstances manageable? Importantly, when the Court has dismissed cases for lack of a manageable standard, it seemingly did so to preserve confidence in the judiciary.*

*Recast in this light, the manageable standard requirement serves as proxy for preserving judicial legitimacy. This Article argues that the Court should no longer hide behind the manageability barrier because partisan gerrymandering is an artificial obstacle to democratic governance. Court intervention to ensure democracy's proper functioning was (1) anticipated by the Framers, (2) memorialized in the Constitution's form and structure, and (3) exercised by the Court without loss of judicial legitimacy in analogous contexts. This Article posits that judicial intervention to unblock the avenues of political change is one of the Court's central responsibilities, that in similar contexts the Court has recognized as much, and that it should do so again.*

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\* Associate Professor, Concordia University School of Law. Gerrymandering is an intricate problem, and I am grateful to Professor Nicholas Stephanopoulos for his insight. I am also thankful for the significant editorial contributions provided by Professors Latonia Haney Keith and Ryan Stoa.

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## INTRODUCTION

In 2010, for the first time in over forty years, Wisconsin voters elected a Republican majority in both state houses, as well as a Republican governor.<sup>1</sup> Seeking to redraw voting districts in the wake of the 2010 census, Republican leadership hired a law firm and a political science professor who created a regression model that isolated “the baseline partisanship of a unit of geography.”<sup>2</sup> In conjunction with redistricting software, the regression model allowed lawmakers to explore potential districting decisions based on partisan result.<sup>3</sup>

[Y]ou would open up a plan that you’d been working on or label a new plan and assign it the Assembly district that you wanted to work with and then you could also pick a color that you wanted that Assembly district to be. It’s sort of like a color-by-number exercise . . . .<sup>4</sup>

In addition to data showing the number of people in a district, minority group populations, and voting-age populations, the software also allowed Republican legislators to customize redistricting maps with

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1. *Whitford v. Gill*, 218 F. Supp. 3d 837, 846 (W.D. Wis. 2016), *rev’d*, *Gill v. Whitford*, 584 U.S. \_\_\_\_ (2018).

2. *Id.* at 846–47.

3. *Id.* at 847–52.

4. *Id.* at 847–48.

ease.<sup>5</sup> Republican staff and legal counsel created customized demographic data that generated a composite partisan score reflecting the political makeup of discrete population units.<sup>6</sup> This composite partisan score enabled aggregation of those units into new districts that revealed the partisan makeup of the new districts.<sup>7</sup>

Republican staff members then drafted several statewide maps.<sup>8</sup> The drafters considered traditional districting criteria like compactness and communities of interest.<sup>9</sup> The drafters also used the composite partisan score to assess the level of partisan advantage in each potential map.<sup>10</sup> The drafters met with individual Republican incumbents to verify addresses and solicit redistricting preferences, asking, “are there areas you like, are there areas you don’t like, are there areas surrounding your district that you like[?]”<sup>11</sup>

Over the course of several months, a variety of statewide alternative maps emerged, identified by the degree of pro-Republican advantage, ranging from “[b]asic” to “[a]ssertive” to “[a]ggressive.”<sup>12</sup> The drafters then presented a selection of regional maps to Republican leadership, along with the partisan scores for each.<sup>13</sup> Combining the regional maps chosen by Republican leadership, the drafters created the “Final Map.”<sup>14</sup> In a separate document, labeled “Tale of the Tape,” the drafters compared the partisan outcome of the proposed final map with the State’s current map.<sup>15</sup> Under the State’s current map, 49 of 99 seats were 50 percent or better for Republicans.<sup>16</sup> Under the proposed final map, 59 were 50 percent or better for Republicans.<sup>17</sup>

Even so, the drafters again scrutinized the proposed final map for partisan performance, identifying and grouping districts into categories like “GOP seats strengthened a lot” and “GOP Donors to the Team,” the latter of which consisted of incumbents with numbers above 55 percent that donated “points” to weaker Republican districts.<sup>18</sup> Once finalized,

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5. *Id.* at 848.

6. *Id.*

7. *Id.*

8. *Id.* at 849–50.

9. *Id.* at 844, 863 (articulating the defendants’ argument as “Act 43’s districts were congruent, compact, and fairly equal in population”).

10. *Id.* at 848–49.

11. *Id.* at 849 n.36. One senator suggested how to redraw her district to unseat a Democrat: “If you need a way to take the Staskunas seat, put a little bit of my Senate seat into New Berlin.” *Id.*

12. *Id.* at 849–50.

13. *Id.* at 851.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 852.

each Republican legislator received data on his or her new district, along with a memorandum detailing census numbers and a comparison of election contests in the new district compared to the old.<sup>19</sup> The memorandum excluded data about compactness, continuity, and non-partisan communities of interest.<sup>20</sup>

When the drafters presented the finalized map at the Republican caucus, the drafters stated that “[t]he maps we pass will determine who’s here 10 years from now . . . .”<sup>21</sup> Both houses voted for the redistricting maps, the Governor signed it, and the redistricting maps were published as Wisconsin Act 43 on August 23, 2011.<sup>22</sup> In 2012, the Republican Party garnered 48.6 percent of the statewide vote for Assembly candidates but captured 60.6 percent of the Assembly seats.<sup>23</sup> In 2014, the Republican Party garnered 52 percent of the statewide vote for Assembly candidates and won 63.6 percent of the Assembly seats.<sup>24</sup> In 2016, the Republican Party garnered 52 percent of the statewide vote for Assembly candidates and won 64.6 percent of the Assembly seats.<sup>25</sup>

A three-judge federal court scrutinized these results and struck Wisconsin Act 43 as an unconstitutional gerrymander under both the First Amendment and the Equal Protection clause in November 2016.<sup>26</sup> After weeks of litigation, the court in *Whitford v. Gill* made a series of factual findings:

[T]he drafters sought to understand the partisan effects of the maps they were drawing. They designed a measure of partisanship and confirmed the accuracy of this measure with Professor Gaddie. They used this measure to evaluate regional and statewide maps that they drew. They labeled their maps by reference to their partisanship scores, they evaluated partisan outcomes of the maps, and they compared the partisanship scores and partisan outcomes of the various maps. When they completed a statewide map, they submitted it to Professor Gaddie to assess the fortitude of the partisan design in the wake of various electoral outcomes.<sup>27</sup>

Notably, the court also cited evidence that the drafters intended to entrench Republican control for at least a decade—until the next census.<sup>28</sup> Even if statewide support for Republicans fell below 48 percent,

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19. *Id.*

20. *Id.*

21. *Id.* at 853.

22. 2011 Wis. Sess. Laws 708.

23. *Whitford*, 218 F. Supp. 3d at 853.

24. *Id.*

25. *Wisconsin State Assembly Elections, 2016*, BALLOTPEDIA, [http://ballotpedia.org/Wisconsin\\_State\\_Assembly\\_elections,\\_2016](http://ballotpedia.org/Wisconsin_State_Assembly_elections,_2016) (last visited July 29, 2018).

26. *Whitford*, 218 F. Supp. 3d at 843, 884.

27. *Id.* at 895.

28. *Id.*

the court found that Act 43 assured Republicans a “comfortable majority.”<sup>29</sup>

The court’s decision in *Whitford* marks the first time a federal court has invalidated a redistricting plan as unconstitutional for partisan gerrymandering in over 30 years.<sup>30</sup> The Supreme Court has long held that extreme partisan gerrymandering violates equal protection, but it has simultaneously refused to act and instead labeled such claims non-justiciable political questions that invite judicial entanglement into a “political thicket.”<sup>31</sup> In particular, the Court has maintained that no judicially manageable standard yet exists by which the Court could implement the promise of equal protection to partisan redistricting.<sup>32</sup>

This Article examines the Court’s use of judicially manageable standards as a barrier to judicial action in partisan gerrymandering disputes. A review of the Court’s historical use of the manageable standard requirement reveals the Court’s unprincipled and discretionary implementation of it, and that the Court often reduces the manageability inquiry to a generalized cost-benefit analysis with judicial legitimacy on one end of the scale. As such, the manageable standard roadblock is properly seen as a deeper insecurity involving appropriateness of judicial review. It unearths Professor Bickel’s perennial query regarding the proper role of the Court:

The search must be for a function . . . which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if the courts do not assume it; which can be so exercised as to be acceptable in a society that generally shares Judge Hand’s satisfaction in a “sense of common venture”; which will be effective when needed; and whose discharge by the courts will not lower the quality of the other departments’ performance by denuding them of the dignity and burden of their own responsibility.<sup>33</sup>

This Article does not attempt to answer that question globally, but argues that in the context of partisan redistricting, judicial intervention meets this standard. Court intervention to keep legislators from ensuring re-election comports with the structure of the Constitution, itself predominantly dedicated to ensuring a representational democracy

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29. *Id.*

30. See generally *Davis v. Bandemer*, 478 U.S. 109 (1986) (agreeing that partisan gerrymandering was justiciable, but there was no majority agreement among the six justices regarding the applicable standard).

31. See *Vieth v. Jubelirer*, 541 U.S. 267, 310 (2004) (Kennedy, J., concurring).

32. *Id.* (Kennedy, J., concurring); see also Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 841–42 (2015) (“[G]errymandering remains a viable cause of action even after the decision—albeit without any real test for courts to apply.”).

33. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 24 (1962).

resistant to concentrated power in any one branch. Court intervention in partisan redistricting is also value neutral. In other words, a representation-reinforcing approach to judicial review avoids constitutionally enshrining the Court's personal value judgments and thereby avoids the criticism that non-elected, life-tenured judges override the value judgments made by elected representatives. Intervention to unblock the avenues of political change is one of the Court's central responsibilities. In similar contexts, the Court has recognized as much and it should do so again in partisan gerrymandering disputes.

Part I surveys the trend toward increased and entrenched partisan gerrymandering, as well as the resultant injuries visited on representational democracy. Part II reviews legislative unwillingness to self-correct and judicial abdication in partisan redistricting disputes through the political question doctrine. Part III analyzes the Court's use of judicially manageable standards, attempting to discern how the Court determines when a standard is manageable. Part IV argues that the manageable standard requirement is largely a question of judicial insecurity. Seen this way, the Court's refusal to engage in gerrymandering disputes cuts against recognized constitutional theory and the Court's own practice of intervening when the avenues of democratic representation have been obstructed by those in power. The Article concludes that the political question doctrine and the manageable standard requirement should not bar the Court from deciding the constitutionality of partisan gerrymandering claims.

#### I. NON-REPRESENTATIVE DEMOCRACY

"In the 2016 elections for the House of Representatives, the average electoral margin of victory was 37.1 percent."<sup>34</sup> The winning candidate, whether Democrat or Republican, typically won by around 70 percent of the vote to the challenging party's 30 percent of the vote.<sup>35</sup> Of 435 contests, a margin of 5 percent or less arose in only 17.<sup>36</sup> Of 435 contests, 33 were decided by a margin of 10 percent or less.<sup>37</sup> "In other words, more than 9 out of 10 House races were landslides where the campaign was a

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34. Brian Klass, *Gerrymandering Is the Biggest Obstacle to Genuine Democracy in the United States. So Why Is No One Protesting?*, WASH. POST (Feb. 10, 2017), <http://www.washingtonpost.com/news/democracy-post/wp/2017/02/10/gerrymandering-is-the-biggest-obstacle-to-genuine-democracy-in-the-united-states-so-why-is-no-one-protesting/>?

35. *Id.*

36. *Id.*; see also Nate Silver, *So Few Swing Districts, So Little Compromise*, N.Y. TIMES, Dec. 27, 2012, at A16 (estimating that of the 435 districts in the House of Representatives, there are only 35 "swing districts"—districts "in which the margin in the presidential race was within 5 percentage points of the national result").

37. Klass, *supra* note 34.

foregone conclusion before ballots were even cast.”<sup>38</sup> One commentator noted that such landslide elections, ensuring that those in power remain so, might be expected of autocratic nations that are democracies in name only.<sup>39</sup>

In the 2016 vote for House of Representatives, Republicans won 49.1 percent of the popular vote and the Democrats won 48 percent.<sup>40</sup> Republicans captured 241 seats, or 55.4 percent, to the Democrats 194 seats, or 44.6 percent.<sup>41</sup> Four years earlier, in 2012, Democrats garnered 1.4 million more votes than Republicans, but won only 201 seats, compared with Republicans capturing 234 seats.<sup>42</sup> In 2014, Democrats won 47 percent of the two-party vote but only 43 percent of the seats,<sup>43</sup> with the Pew Research Center observing that “there are only 14 truly competitive House elections this year.”<sup>44</sup> National polls show 10 to 15 percent approval of Congress, but only 8 of 393 incumbent House representatives seeking reelection were defeated by a member of the opposing party in 2016.<sup>45</sup>

At the state level, similar results emerged. In Pennsylvania in 2012, Democrats won 51 percent of the popular state House vote, but only captured 5 of 18 House seats, or 27.7 percent.<sup>46</sup> In the 2014 House elections in Maryland, 57 percent of the votes in House races went to Democrats, yet Democrats won 87.5 percent of the House seats.<sup>47</sup> Indiana, Kansas, Michigan, North Carolina, Ohio, Oklahoma, Virginia, Wisconsin, Wyoming and several other states have recently posted similar disparities, prompting one scholar to characterize these districts as “presumptively unconstitutional.”<sup>48</sup> To be sure, gerrymandering is not

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38. Klass, *supra* note 34.

39. Klass, *supra* note 34 (noting that the 37.1 percent margin of victory is “a figure you’d expect from North Korea, Russia or Zimbabwe—not the United States.”).

40. *United States House of Representatives Election, 2016*, BALLOTEDIA, [http://ballotpedia.org/United\\_States\\_House\\_of\\_Representatives\\_elections,\\_2016](http://ballotpedia.org/United_States_House_of_Representatives_elections,_2016) (last visited July 29, 2018).

41. *Id.*

42. Sam Wang, Opinion, *The Great Gerrymander of 2012*, N.Y. TIMES, Feb. 3, 2013, at SR1.

43. Rebecca Ballhaus, *Deep Loss by Democrats Obscures Party’s Numbers Problem*, WALL ST. J.: WASH. WIRE (Nov. 24, 2014, 9:28 AM), <http://blogs.wsj.com/washwire/2014/11/24/loss-by-democrats-obscures-partys-numbers-problem/>.

44. Drew DeSilver, *For Most Voters, Congressional Elections Offer Little Drama*, PEW RES. CTR. (Nov. 3, 2014), <http://www.pewresearch.org/fact-tank/2014/11/03/for-most-voters-congressional-elections-offer-little-drama/>.

45. *United States House of Representatives Election, supra* note 40.

46. *United States House of Representatives Elections in Pennsylvania, 2012*, BALLOTEDIA, [https://ballotpedia.org/United\\_States\\_House\\_of\\_Representatives\\_elections\\_in\\_Pennsylvania,\\_2012](https://ballotpedia.org/United_States_House_of_Representatives_elections_in_Pennsylvania,_2012) (last visited July 29, 2018).

47. *See United States House of Representatives Elections in Maryland, 2014*, BALLOTEDIA, [https://ballotpedia.org/United\\_States\\_House\\_of\\_Representatives\\_elections\\_in\\_Maryland,\\_2014](https://ballotpedia.org/United_States_House_of_Representatives_elections_in_Maryland,_2014) (last visited July 29, 2018).

48. Stephanopoulos & McGhee, *supra* note 32, at 837.



the sole cause of landslide elections that lack the possibility of competitiveness, but it is a significant influence.

Professor Stephanopoulos conducted a more direct study examining the effects of partisan districting on election outcomes.<sup>49</sup> The study included all states with at least eight congressional districts and all state house plans for all elections from 1972 to 2012.<sup>50</sup> Interestingly, the study revealed a relatively low rate of significant gerrymandering up until the 2012 election, when partisan gerrymandering spiked significantly.<sup>51</sup> The study's authors conclude that "today's most egregious plans dwarf those of their predecessors," and assert that "the problem of gerrymandering has never been worse in modern American history."<sup>52</sup>

Perhaps most telling, several polls show that Americans do not want legislators drawing electoral maps. In Virginia, for example, one study polled over 1,000 Virginians, with 74 percent supporting districting lines drawn by an independent board rather than state legislators.<sup>53</sup> Even constituents who benefited from gerrymandering rejected it. Of those identifying as Republicans, only 19 percent said they wanted lawmakers to define election districts.<sup>54</sup> The disapproval of partisan gerrymandering carried across age and racial groups.<sup>55</sup> If the electorate disfavors gerrymandering, why haven't elected officials responded by outlawing it? The question illustrates gerrymandering's central dilemma: The elected officials responsible for resisting it are those who most directly benefit from it.

Partisan gerrymandering benefits the legislators and parties drawing the district lines, but it carries a host of negative consequences for the electorate. Academic research into Congressional behavior yields at least one fixed finding: more than anything else, winning elections motivates politicians.<sup>56</sup> But if opposition is effectively neutralized, the negative consequences include less responsiveness, less accountability, less ideological diversity, less compromise, and less institutional

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49. Stephanopoulos & McGhee, *supra* note 32, at 835–37.

50. Stephanopoulos & McGhee, *supra* note 32, at 835–37.

51. Stephanopoulos & McGhee, *supra* note 32, at 867 (asserting that up until 2012 "neither party enjoyed a systematic advantage over its opponent.").

52. Stephanopoulos & McGhee, *supra* note 32, at 838.

53. *Citizens Don't Like Gerrymandering; Study Offers Alternative Redistricting Methods*, UVA TODAY (June 30, 2014), <https://news.virginia.edu/content/citizens-don-t-gerrymandering-study-offers-alternative-redistricting-methods>.

54. Benjamin M. Harris & Stephen J. Farnsworth, *With Overwhelming Support for Nonpartisan Redistricting, Virginians Are Studying Ways to Make That Happen*, VA. NEWSL. (June, 27, 2014), [https://ceps.coopercenter.org/sites/ceps/files/Virginia\\_News\\_Letter\\_2014\\_Vol.\\_90\\_No\\_4\\_o.pdf](https://ceps.coopercenter.org/sites/ceps/files/Virginia_News_Letter_2014_Vol._90_No_4_o.pdf).

55. *Id.*

56. Silver, *supra* note 36; Edward Rubin, *Rational States?*, 83 VA. L. REV. 1433, 1440 (1997).

legitimacy.<sup>57</sup> A legislator elected with a forty percent margin likely harbors little incentive to compromise and is constrained, if at all, to represent only party constituents.<sup>58</sup> Indeed, a strong disincentive to compromise stems from the sole electoral vulnerability—the primary.<sup>59</sup> If the general election is assured through partisan gerrymandering, the primary becomes a contest of radicals.<sup>60</sup> The most extreme candidate often secures the party nomination, prompting incumbents to eschew any semblance of compromise or moderation while in office.<sup>61</sup> This, in turn, incites gridlock and obstruction exemplified, *inter alia*, in the shutdown of government,<sup>62</sup> pandering filibusters,<sup>63</sup> and the downgrading of the United States’ debt rating.<sup>64</sup>

Gerrymandering also evokes voter apathy and disillusionment with the institutions of government. Voters respond and participate in close elections much more than in elections that appear predetermined.<sup>65</sup> Competitive races carry the secondary benefit of participation in other election matters on the same ballot, reflected most clearly in presidential election cycles.<sup>66</sup> Conversely, predetermined elections curvy heightened incredulity in policymakers and governing institutions.<sup>67</sup> The public’s faith in, and goodwill towards, governing institutions decreases with the

57. See DENNIS F. THOMPSON, *JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES* 39–42 (2002); JEREMY BUCHMAN, *DRAWING LINES IN QUICKSAND: COURTS, LEGISLATURES, & REDISTRICTING* 194–95 (2003).

58. See BUCHMAN, *supra* note 57, at 194 (noting the self-trenching tendencies gerrymandering has and that it “weakens incentives for legislators to satisfy constituents . . .”).

59. Klass, *supra* note 34 (“In fact, there is a strong disincentive to collaboration, because working across the aisle almost certainly means the risk of a primary challenge from the far right or far left of the party.”).

60. THOMPSON, *supra* note 57, at 41, 49; see also Tina Rosenberg, Opinion, *Increasing Voter Turnout for 2018 and Beyond*, N.Y. TIMES (June 13, 2017), <https://www.nytimes.com/2017/06/13/opinion/increasing-voter-turnout-2018.html> (“In primaries and local elections, turnout can dip into single digits. This has proved catastrophic for both major parties in our political system, often favoring extreme candidates and ensuring that most incumbents have no real contest.”).

61. Klass, *supra* note 34.

62. Jack M. Beerman, *The New Constitution of the United States: Do We Need One and How Would We Get One?*, 94 B.U. L. REV. 711, 712–13 (2014).

63. Mark A. Graber, *Belling the Partisan Cats: Preliminary Thoughts on Identifying and Mending a Dysfunctional Constitutional Order*, 94 B.U. L. REV. 611, 643 (2014) (“At present the filibuster more often serves as a means to prevent any legislation from passing.”).

64. See Nathan S. Catanese, Note, *Gerrymandered Gridlock: Addressing the Hazardous Impact of Partisan Redistricting*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 323, 324 (2014) (noting that the shift to less policy-making and more gridlock in Washington has been “costly to the United States”).

65. See Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 304–13 (2014); David S. Broder, *Voting’s Neglected Scandal*, WASH. POST, June 26, 2008, at A19.

66. Editorial, *The Worst Voter Turnout in 72 Years*, N.Y. TIMES, Nov. 12, 2014, at A26.

67. See *LULAC v. Perry*, 548 U.S. 399, 456 (2006) (stating that the harm in political gerrymandering is “an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good”) (citation omitted) (internal quotation marks omitted); THOMPSON, *supra* note 57, at 38–50.

public's diluted influence over them.<sup>68</sup> As such, gerrymandering has been called "the most insidious practice in American politics—a way . . . for our elected leaders to entrench themselves in 435 impregnable garrisons from which they can maintain political power while avoiding democratic realities."<sup>69</sup>

## II. LEGISLATIVE UNWILLINGNESS, JUDICIAL ABDICATION

Partisan gerrymandering's persistent drag on representational democracy is longstanding, and remediation remains elusive, despite clear detriments to core democratic functioning. Legislators, of course, have little incentive to temper self-interest in redistricting. No legal sanction counterbalances the temptation of ensured reelection and a manufactured party majority.<sup>70</sup> A long history memorializes legislators' inability to resist temptation.

Even before nationhood, colonists in rural Pennsylvania attempted to deny the city of Philadelphia additional representatives by refusing mergers and expansions of jurisdictional boundaries.<sup>71</sup> In 1732, the Governor of the Province of North Carolina tried to:

[D]ivide old Precincts established by Law, & to enact new Ones in Places, whereby his Arts he has endeavoured to prepossess People in a future election according to his desire, his Designs herein being . . . to endeavour by his means to get a Majority of his creatures in the Lower House . . .<sup>72</sup>

The First Congress of our new nation suffered allegations of gerrymandering at the hands of Patrick Henry, who reputedly attempted to manipulate voting districts to the detriment of James Madison.<sup>73</sup>

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68. See THOMPSON, *supra* note 57, at 38–50 (explaining the effect of partisan gerrymandering on the vitality of the political process, namely that it causes "[e]lectorate institutions [to] become congested" and lose legitimacy).

69. Robert Draper, *The League of Dangerous Mapmakers*, ATLANTIC (Oct. 2012), <https://www.theatlantic.com/magazine/archive/2012/10/the-league-of/309084/>.

70. While state legislators are loath to limit their power of redistricting, federal statutes arguably restrict partisan gerrymandering in some instances. See U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Choosing [sic] Senators."); Apportionment Act of 1842, ch. 47, § 2, 5 Stat. 491 (providing that Representatives must be elected from single-member districts composed of contiguous territory); see also *Vieth v. Jubelirer*, 541 U.S. 267, 276 (2004) ("The power bestowed on Congress to regulate elections, and in particular to restrain the practice of political gerrymandering, has not lain dormant.").

71. See ELMER C. GRIFFITH, *THE RISE AND DEVELOPMENT OF THE GERRYMANDER* 26–28 (Leon Stein ed., 1974).

72. THE COLONIAL RECORDS OF NORTH CAROLINA 380 (William L. Saunders ed., 1886); see also GRIFFITH, *supra* note 71, at 28 (noting that as early as 1732, the governor of North Carolina tried to gerrymander his state).

73. See 2 WILLIAM C. RIVES, *HISTORY OF THE LIFE AND TIMES OF JAMES MADISON* 655 n.1 (Boston, Little, Brown & Co., 1870); Letter from Thomas Jefferson to William Short, Feb. 9, 1789, *reprinted in* 5 THE WORKS OF THOMAS JEFFERSON 451 (Paul Leicester Ford ed., 1904).

It was not until 1812, however, that the eponymous Elbridge Gerry, the Massachusetts Governor, designed a district so grotesque and salamander-like as to coin the current locution “gerrymandering.”<sup>74</sup> As noted above, state legislators today continue to draw voting districts predominantly for partisan gain.<sup>75</sup> The current practice demonstrates an increase, rather than a stagnation or decrease in, the total number of gerrymandered districts, as well as the degree of gerrymandered entrenchment.<sup>76</sup>

With legislators unwilling to forbear, the possibility of reform has fallen to the judiciary. Court precedent as it now stands invites uncertainty. For the last thirty-one years, the Court has maintained that extreme partisan gerrymandering violates the Equal Protection Clause while simultaneously refusing to show when or how it violates the Equal Protection Clause.<sup>77</sup> Instead, a plurality of the Court insists the judiciary lacks the ability to show when partisan gerrymandering violates the Equal Protection Clause.<sup>78</sup> The Court’s reticence to articulate a legal standard interpreting open-ended constitutional guarantees like equal protection is not new.

That reticence prevented Court intervention into political districting in *Colgrove v. Green* in 1946.<sup>79</sup> Population shifts generated material disproportionalities based on outdated districts, handing rural voters a lopsided share of the vote.<sup>80</sup> The Court refused to intervene, maintaining that it was powerless to do so because the Constitution specifically entrusted Congress with ensuring a “Republican Form of Government”<sup>81</sup> and with ensuring fair elections: “[T]he Constitution . . . conferred upon Congress exclusive authority to secure fair representation.”<sup>82</sup> This judicial abstention from redistricting lasted sixteen years.

In 1962, the Warren Court reversed the effect of *Colgrove* without technically overruling it when it declared redistricting justiciable under the Fourteenth Amendment rather than the Guarantee Clause.<sup>83</sup> In *Baker v. Carr*, and in a series of subsequent decisions dealing with

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74. *Davis v. Bandemer*, 478 U.S. 109, 164 n.3 (1986) (Powell, J., concurring in part and dissenting in part).

75. *See supra* Part I.

76. *See* Stephanopoulos & McGhee, *supra* note 32, at 867–76.

77. *See Bandemer*, 478 U.S. at 119 (“Our past decisions also make clear. . . racial gerrymandering presents a justiciable equal protection claim.”).

78. *See Vieth v. Jubelirer*, 541 U.S. 267, 279–81 (2004).

79. *Colgrove v. Green*, 328 U.S. 549, 553–54 (1946) (“It is hostile to a democratic system to involve the judiciary in the politics of the people.”).

80. *Id.* at 551–55.

81. U.S. CONST. art. IV, § 4.

82. *Colgrove*, 328 U.S. at 554.

83. *Baker v. Carr*, 369 U.S. 186, 232–37 (1962).

disproportionate voting districts, the Court cemented its authority to adjudicate the constitutionality of a wide variety of districting disputes.<sup>84</sup> The Court held that the Equal Protection Clause demanded “no less than substantially equal state legislative representation for all citizens . . . .”<sup>85</sup> and extended its newly articulated standard of “one person, one vote” to Congressional districts,<sup>86</sup> popularly sanctioned malapportionment,<sup>87</sup> and local governments.<sup>88</sup>

The Court’s interjection into redistricting was not limited to malapportionment, but extended into minority vote dilution under the Voting Rights Act,<sup>89</sup> and then into constitutional racial gerrymandering.<sup>90</sup> In light of the Court’s active role in such redistricting cases, it was unsurprising when the Court agreed to hear a redistricting dispute based on partisan gerrymandering.

In *Davis v. Bandemer*, the Court again asserted its authority to decide redistricting cases.<sup>91</sup> It maintained that partisan gerrymandering was justiciable under the Equal Protection Clause and that extreme instances of partisan gerrymandering violated equal protection.<sup>92</sup> A majority, however, failed to agree on the standard by which alleged violations should be tested. Justice White’s plurality opinion sketched out an amorphous test that required discriminatory intent and a discriminatory impact that “consistently degrade[d] a . . . group of voters’ influence on the political process as a whole.”<sup>93</sup> This loose standard garnered quick criticism from commentators and courts alike,<sup>94</sup> resulting

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84. *Id.*

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

86. *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

87. *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736–37 (1964) (stating that it was irrelevant that voters approved malapportionment through an initiative).

88. *Hadley v. Junior Coll. Dist. of Metro. Kan. City*, 397 U.S. 50, 56–58 (1970) (applying the principle to a junior college district); *Avery v. Midland Cty.*, 390 U.S. 474, 485 (1968) (applying the principle to county commissioners).

89. *See White v. Regester*, 412 U.S. 755, 765–67 (1973) (invalidating districting scheme for unconstitutionally diluting minority votes).

90. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 657–58 (1993) (invalidating districting plan for improperly relying on race as predominant motive).

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

92. *Id.*

93. *Id.* at 132.

94. *See* SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 37–65 (3d ed. 2007) (identifying lower courts’ struggle with making sense of *Bandemer* and suggesting Justice White’s standard was ineffectual—“*Bandemer* served almost exclusively as an invitation to litigation without much prospect of redress. Only one case actually found an unconstitutional partisan gerrymander.”); *see also Vieth v. Jubelirer*, 541 U.S. 267, 279 (2004) (“The lower courts have lived with that assurance of a standard (or more precisely, lack of assurance that there is no standard), coupled with that inability to specify a standard, for the past 18 years.”).

in lower courts' near-universal refusal to invalidate redistricting maps based on partisan gerrymandering.<sup>95</sup>

Eighteen years later, the Court again took up partisan gerrymandering. In another deeply divided opinion, the plurality began by lamenting *Bandemer's* precedent: "Throughout its subsequent history, *Bandemer* has served almost exclusively as an invitation to litigation without much prospect of redress."<sup>96</sup> While the entire Court affirmed the Equal Protection Clause's prohibition of excessive partisan gerrymandering, a plurality maintained that such claims were non-justiciable. The claims were not justiciable, according to the plurality, because there are "no judicially discernible and manageable standards for adjudicating political gerrymandering claims."<sup>97</sup> The plurality revisited Justice White's standard from *Bandemer* and decried the standard's obscurity, which it claimed was demonstrated by confusion among lower courts.

The four dissenting justices in *Vieth* explained that partisan gerrymandering disputes were indeed justiciable, but could not agree on what the standard should be. The dissenters proposed three possible standards by which courts could determine constitutionality.<sup>98</sup> Justice Scalia, writing for the plurality, dedicated the bulk of the decision to

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95. See *Vieth*, 541 U.S. at 279–80; *White v. Alabama*, 867 F. Supp. 1571, 1576 (M.D. Ala. 1994); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1038 (D. Md. 1994); *Fund for Accurate & Informed Representation, Inc. v. Weprin*, 796 F. Supp. 662, 669 (N.D.N.Y. 1992); *Ill. Legislative Redistricting Comm'n v. LaPaille*, 782 F. Supp. 1272, 1276 (N.D. Ill. 1991); *Anne Arundel Cty. Republican Cent. Comm. v. Admin. Bd. of Election Laws*, 781 F. Supp. 394, 401 (D. Md. 1991); see also Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1365 (1987) (discussing why standards are difficult to apply to gerrymandering).

96. *Vieth*, 541 U.S. at 279 (quoting S. ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 886 (rev. 2d ed. 2002)).

97. *Vieth*, 541 U.S. at 281.

98. *Id.* at 317–68 (Stevens, J., dissenting). Justice Stevens advocated for a standard targeting those instances "when partisanship is the legislature's sole motivation—when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage." *Id.* at 318. Likewise, Justice Souter, joined by Justice Ginsburg, argued that a plaintiff must establish a prima facie case of partisan gerrymandering consisting of five elements. First, the plaintiff must be a member of a "cohesive political group . . . which would normally be a major party." *Id.* at 347 (Souter, J., dissenting). Second, the challenged map must have "paid little or no heed to . . . traditional districting principles . . . [such as] contiguity, compactness, respect for political subdivisions, and conformity with geographic features." *Id.* at 347–48. Third, there must be "specific correlations between . . . deviations from traditional districting principles and the distribution of the population of [the plaintiff's] group." *Id.* at 349. Fourth, an alternative map, complying with traditional districting principles must be feasible without diluting the voting strength of plaintiff's political group. *Id.* Fifth, claimants must show "the defendants acted intentionally to manipulate the shape of the district" to dilute the voting strength of the claimants' political group. *Id.* at 350. Finally, Justice Breyer proposed a continuum: The more entrenched the minority hold on power becomes, "the less evidence courts will need that the minority engaged in gerrymandering to achieve the desired result." *Id.* at 365 (Breyer, J., dissenting).

dismantling these alternative standards and admonishing his colleagues that “judicial action must be governed by *standard*, by *rule*,” before concluding that “no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged.”<sup>99</sup> Since no litigant or court ascertained a workable standard in the eighteen years separating *Bandemer* from *Vieth*, the plurality concluded that no such standard existed and that such claims were therefore and henceforth nonjusticiable.<sup>100</sup>

Straddling the gap between plurality and dissent, Justice Kennedy agreed with the plurality that a manageable standard had not emerged yet, but disagreed with the plurality’s conclusion that a manageable standard did not exist, stating: “I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.”<sup>101</sup> Divided in this way, *Vieth* presents a precedential purgatory. As a plurality opinion, it fails to overturn *Bandemer*’s premise of justiciability. But until the Court sanctions a judicially discernible and manageable standard, *Vieth* effectively insulates partisan gerrymandering from constitutional scrutiny, especially when considering the unlikely emergence of a “precise” standard.<sup>102</sup>

In one sense, the *Vieth* plurality has come full circle to *Colgrove v. Green*. The plurality in *Vieth* and the Court in *Colgrove* placed redistricting cases outside the judiciary’s reach by characterizing such disputes as nonjusticiable. But the *Vieth* plurality diverges from *Colgrove* in one critical aspect: Where the *Colgrove* Court held redistricting nonjusticiable as a matter of constitutional mandate,<sup>103</sup> the *Vieth* plurality maintained that redistricting for partisan purposes was nonjusticiable as a matter of judicial prudence.<sup>104</sup> Said differently, the Constitution provides that Congress has authority to ensure fair elections and a republican form of government, but it says nothing about the judiciary’s obligation to fashion judicially manageable standards.<sup>105</sup>

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99. *Id.* at 278, 281.

100. *Id.* at 306 (“Eighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application. We would therefore overrule that case, and decline to adjudicate these political gerrymandering claims.”).

101. *Id.* (Kennedy, J., concurring).

102. *See supra* note 98.

103. *Colgrove v. Green*, 328 U.S. 549, 553–54 (1946).

104. *Vieth*, 541 U.S. at 306.

105. *See* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 890–91 (5th ed. 2006) (characterizing the first Baker factor as “jurisdictional,” and distinguishing same from “[f]actors two and three of the Baker test, [which] seem to reflect a different idea [than the first].”); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 258–61 (2002) (indexing the prudential rationales as distinct from classical political question cases).

### III. GERRYMANDERING AS NONJUSTICIABLE

If it is true, as the Court has held for over three decades, that excessive partisan gerrymandering violates the Equal Protection Clause,<sup>106</sup> and if legislators refuse to self-correct, the Court's reluctance to address the problem due to its self-imposed asylum merits close scrutiny.<sup>107</sup> What is a judicially manageable standard? What test does the Court employ to determine whether a proposed standard is manageable? When and how has that test been used in other constitutional contexts?

#### A. GERRYMANDERING AS A POLITICAL QUESTION

It is worth remembering that the political question doctrine, of which the requirement for a judicially manageable standard is a subset, was a twin.<sup>108</sup> The birth of judicial review also witnessed the birth of the political question doctrine, a doctrine that requires judicial abstention in instances inappropriate for judicial review.<sup>109</sup> Even as Chief Justice Marshall secured enormous judicial power, he simultaneously tempered its exercise:

The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.<sup>110</sup>

From this foundation, the Court later constructed criteria from which to determine when coordinate branches of government retain sole authority to interpret and enforce particular constitutional provisions. Justice Brennan, in *Baker v. Carr*, articulated the most frequently cited statement of these criteria:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to

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106. See *Vieth*, 541 U.S. at 293 (reflecting a concession by the plurality that “excessive injection of politics [in districting] is *unlawful*. So it is, and so does our opinion assume.”).

107. See Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 *YALE L.J.* 597, 600 (1976) (maintaining that the artificial nature of the political question doctrine that excuses the judiciary from performing its core judicial function “cries for strict and skeptical scrutiny”).

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

109. See *Marbury v. Madison*, 5 U.S. 137, 170 (1803). Although the Court asserts its inability to decide issues that are deemed political questions, some commentators maintain that the political question doctrine does not exist as a justiciability doctrine, but rather serves as a proxy in determining whether Congress or the executive acted within their powers in political question cases. See Henkin, *supra* note 107, at 599; Gwynne Skinner, *Misunderstood, Misconstrued, and Now Clearly Dead: The “Political Question Doctrine” as a Justiciability Doctrine*, 29 *J.L. & POL.* 427, 427–28 (2014) (“[T]he Supreme Court has never applied the ‘political question doctrine’ as a true justiciability doctrine . . .”).

110. *Marbury*, 5 U.S. at 170 (ruling that the Court had the authority to review an act of Congress, and then declaring the portion of the Judiciary Act of 1789 giving the Court original jurisdiction over writs of mandamus unconstitutional under Article III of the Constitution).



a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>111</sup>

The potency of the political question doctrine lies in its finality. Once labeled a political question, the judiciary may not consider the underlying merits.<sup>112</sup> Discrete constitutional issues remain unanswered due to the Court's adherence to the political question doctrine.<sup>113</sup> Indeed, in several instances the Court seemingly identifies a constitutional violation, but nevertheless permits it, claiming an inability to redress the transgression.<sup>114</sup> The political question doctrine has excused the Court from considering whether a state's chartered government was a "republican form of government" under Art. IV, section 4,<sup>115</sup> whether proposed constitutional amendments expire if unratified for too long,<sup>116</sup> and whether an impeachment trial by Senate committee violates the constitution's provision allocating that power to "the Senate."<sup>117</sup>

Lower courts apply the political question doctrine more frequently and in contexts not yet considered by the Supreme Court. The constitutionality of executive action committing troops into potential combat largely remains unaddressed by the Supreme Court, but lower courts have relied on the political question doctrine to avoid disputes stemming from the war in Vietnam<sup>118</sup> and U.S. military involvement in

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111. *Baker*, 369 U.S. at 217.

112. See generally Barkow, *supra* note 105; Linda Champlin & Alan Schwarz, *Political Question Doctrine and the Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215 (1985); Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093 (2001); Jesse Choper, *The Political Question Doctrine, Suggested Criteria*, 54 DUKE L.J. 1457 (2005); Amy Endicott, *The Judicial Answer: Treatment of the Political Question Doctrine in Alien Tort Claims*, 28 BERKELEY J. INT'L L. 537 (2010).

113. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) (though refusing to address the merits of the case, conceding that "excessive injection of politics [in districting] is unlawful. So it is, and so does our opinion assume."). But see *Skinner*, *supra* note 109, at 428 (asserting that in nearly all political question cases, the Court essentially found that "the branch whose conduct was being challenged acted legally—in other words, within its constitutional or statutory powers.").

114. As noted above, the Court in *Colegrove v. Green*, 328 U.S. 549, 556 (1946), refused to correct malapportioned voting districts by characterizing reapportionment as a "political thicket" that courts must avoid and by finding that Congress had the sole authority to correct election impropriety under the Constitution. See *supra* Part II.

115. *Luther v. Borden*, 48 U.S. 1, 42 (1849).

116. *Coleman v. Miller*, 307 U.S. 433, 450 (1939).

117. *Nixon v. United States*, 506 U.S. 224, 229–31 (1993).

118. See *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309–12 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *Orlando v. Laird*, 443 F.2d 1039, 1043–44 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971).

Nicaragua<sup>119</sup> and El Salvador.<sup>120</sup> More recently, district courts have used the political question doctrine to avoid merits review of cases involving environmental harms.<sup>121</sup> In one suit against major automobile manufacturers, claimants sought redress for increased forest fires, disrupted water supply, and increased flood risk.<sup>122</sup> The district court dismissed the public nuisance suit citing no “manageable method of discerning the entities that are creating and contributing to the alleged nuisance.”<sup>123</sup> Branding critical issues like foreign environmental harms and military action as political questions reduces the likelihood of legal finality, while implicitly sanctioning the status quo.<sup>124</sup>

#### B. GERRYMANDERING AS A PRUDENTIAL POLITICAL QUESTION

Not all of the six criteria articulated in *Baker* share equal footing. Justice Scalia, in *Vieth*, maintained that “[t]hese tests are probably listed in descending order of both importance and certainty.”<sup>125</sup> Scholars have long divided the six criteria into two categories: classical and prudential.<sup>126</sup> Classical political questions are those in which the Constitution allocates decision-making authority to a coordinate branch.<sup>127</sup> They are rooted in a commitment to separation of powers and

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119. See *Ramirez de Arellano v. Weinberger*, 568 F. Supp. 1236, 1238–40 (D.D.C. 1983) (refusing to review a private citizen’s challenge to the U.S. Government’s use of private land in Honduras for military purposes), *aff’d on other grounds*, 724 F.2d 143 (D.C. Cir. 1983), *rev’d on reh’g*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *vacated and remanded*, 471 U.S. 1113 (1985), *aff’d on other grounds*, 788 F.2d 762 (D.C. Cir. 1986); *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 600 (D.D.C. 1983) (refusing to review claims arising out of U.S. government actions in Nicaragua), *aff’d*, 770 F.2d 202 (D.C. Cir. 1985).

120. See, e.g., *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff’d*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

121. See generally Philip Weinberg, “Political Questions”: *An Invasive Species Infecting the Courts*, 19 DUKE ENVTL. L. & POL’Y F. 155 (2009).

122. See generally *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

123. *Id.* at \*15.

124. Martin H. Redish, *Judicial Review and the “Political Question,”* 79 NW. U. L. REV. 1031, 1050 (1985) (“If the judiciary declines to resolve sensitive constitutional disputes, the nation is effectively left in a constitutional state of nature, in which the constitutional position that prevails is the one that is the politically or physically most powerful.”).

125. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004).

126. See Barkow, *supra* note 105, at 246 (discussing the classical and prudential versions of the political question doctrine); Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 79 (1961) (analyzing prudential considerations); Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1211–12 (2006) (assessing *Baker v. Carr*’s impact on prudential criteria); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7–9 (1959) (discussing what the political question doctrine should assess).

127. See Gerhardt, *supra* note 126, at 1211–13 (“*Luther v. Borden* is famous for recognizing the classical political question doctrine, which treats as nonjusticiable matters committed by the Constitution to other authorities’ final decision-making.”).

limited judicial review.<sup>128</sup> When Judge Nixon claimed that his impeachment trial by Senate Committee violated the Constitution, the Court declined a merits ruling by relying on Article I: “The Senate shall have the sole Power to try all Impeachments.”<sup>129</sup> The Constitution, according to the Court, allocated decision-making regarding impeachment processes to Congress alone.<sup>130</sup>

Prudential political questions, by contrast, “are [not] to be found in [the] Constitution.”<sup>131</sup> They derive from a sense of prudence and austerity, rather than from rule of law. The requirement of a judicially manageable standard is a prudential one.<sup>132</sup> Although the requirement for a manageable standard could arguably be characterized as a classical political question when combined with other criteria,<sup>133</sup> the plurality’s decision in *Vieth* that partisan gerrymandering is a political question rested solely on the lack of a manageable standard.<sup>134</sup> Notably, the *Vieth* plurality did not claim that the Constitution bestowed legislatures with final decision making authority over the redistricting process. To do so would have uprooted the Court’s malapportionment and racial districting precedents.

As a result, the Court’s paralysis on partisan gerrymandering does not stem from the assignment of decision-making authority over redistricting to a coordinate branch. Instead, the Court’s paralysis reflects a deep-seated insecurity regarding the appropriate exercise of the judicial function. The *Vieth* plurality said as much, stating that an unclear court-made standard was not worth “the partisan enmity it brings upon the courts.”<sup>135</sup> The plurality went on to suggest that the legislative branch is better suited to devise such a standard: “Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law

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128. See Barkow, *supra* note 105, at 246–49 (describing the “classical” political question doctrine as developed by Chief Justice Marshall).

129. *Nixon v. United States*, 506 U.S. 224, 229 (1993) (citing U.S. CONST. art. 1, § 3, cl. 6).

130. See *id.* (“The language and structure of this Clause are revealing. The first sentence is a grant of authority to the Senate, and the word ‘sole’ indicates that this authority is reposed in the Senate and nowhere else.”).

131. *Coleman v. Miller*, 307 U.S. 433, 453 (1939) (discussing both classical and prudential criteria in determining the Court should not decide questions regarding expiration of proposed constitutional amendments).

132. See Barkow, *supra* note 105, at 265 (“The Court in *Baker* therefore recognized not only the classical theory of the political question doctrine . . . but the prudential strand as well . . .”).

133. See Barkow, *supra* note 105, at 333 (noting that commentators occasionally disagree about whether a particular holding is “prudential” or “classical,” especially because political question holdings often rely on similar underlying justifications); see also *Nixon*, 506 U.S. at 228–29 (noting that “the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.”).

134. *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004); see also Joshua S. Stillman, Note, *The Costs of “Discernible and Manageable Standards” in Vieth and Beyond*, 84 N.Y.U. L. REV. 1292, 1299 (2009).

135. *Vieth*, 541 U.S. at 301.

pronounced by the courts must be principled, rational, and based upon reasoned distinctions.”<sup>136</sup> This statement, in a gerrymandering case, carries some irony. The legislative branch propagates gerrymandering. The problem is one of its own making. In 241 years, legislators have shown little willingness to address gerrymandering, and a great appetite to expand and entrench its influence,<sup>137</sup> making the Court’s exhortation that the legislature is better suited to address gerrymandering issues inapposite.

Notably, legal theory justifying the political question doctrine parallels the distinction between classical and prudential.<sup>138</sup> Classical political questions are bound by law; textual commitments of decision-making authority to a coordinate branch require judicial abstention.<sup>139</sup> As a result, justification for abstention derives from the text and structure of the Constitution itself.<sup>140</sup> The concentration of power in any one branch or official invites authoritarianism and undermines representative democracy.<sup>141</sup> The Court has historically parroted this basic tenet of American democracy in its landmark decisions, and the rationale supporting classical political questions surfaces in the most prominent political question cases.<sup>142</sup>

Justifications for prudential political questions are more practical.<sup>143</sup> They are necessarily distinct from the text of the Constitution and are grounded instead on “theories of normative policy.”<sup>144</sup> Judicial abdication based on prudence is justified by the following:

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136. *Id.* at 278.

137. *See supra* Part II.

138. *See supra* note 126.

139. *See supra* note 126.

140. Wechsler, *supra* note 126, at 7–8.

141. Although the separation of powers justification for the political doctrine appears unassailable at first blush, Professors Redish and Henkin, among others, have forwarded strong arguments for the abolition of the political question doctrine altogether, including classical political questions. Henkin, *supra* note 107, at 600; Redish, *supra* note 124, at 1031–33.

142. *See* Goldwater v. Carter, 444 U.S. 996, 1002 (1979); Nixon v. United States, 506 U.S. 224, 228–31 (1993); Gilligan v. Morgan, 413 U.S. 1, 6–8 (1973); Powell v. McCormack, 395 U.S. 486, 505 (1969); Baker v. Carr, 369 U.S. 186, 217 (1962); Colgrove v. Green, 328 U.S. 549, 553–54 (1946); Luther v. Borden, 48 U.S. 1, 42–43 (1849); *see also* Scott Birkey, Casenote, Gordon v. Texas and the Prudential Approach to Political Questions, 87 CALIF. L. REV. 1265, 1271 (2000) (“The constitutional rationale behind the political question doctrine emphasizes the separation of powers principle.”).

143. *See* Luis Fuentes-Rohwer, *Reconsidering the Law of Democracy: Of Political Questions, Prudence, and the Judicial Role*, 47 WM. & MARY L. REV. 1899, 1908–15 (2006) (“The prudential strand offers a flexible and shifting boundary, to be drawn by the courts in accordance to prevailing trends in public opinion.”); Skinner, *supra* note 109, at 427–28. Notably, some doubt remains regarding the prudential distinction. Justice Sotomayor, for example, listed the last three *Baker* criteria as prudential, whereas Professor Scharpf identified a separate category, “functional” political questions, which includes what others deem prudential. Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L. J. 517, 566 (1966).

144. Redish, *supra* note 124, at 1045.

(1) the inability of the judiciary to develop general principles and rules of construction of a particular constitutional provision; (2) the judiciary's lack of institutional capacity to review particular judgments of one or both of the political branches; and (3) the judicial humility that flows from the judiciary's inherently undemocratic nature . . . . [(4)] the fear that the judiciary's authority and legitimacy will be undermined by a blatant disregard of its decision by the political branches.<sup>145</sup>

Each justification listed above has received significant scholarly attention.<sup>146</sup> It is not the aim of this Article to recount what others already have done so well. Instead, a precise study of the political question doctrine as applied to partisan gerrymandering reveals that the Court's reticence to decide such disputes is unsupported by the underlying rationales that animate prudential political questions.

### C. GERRYMANDERING AS LACKING A JUDICIALLY MANAGEABLE STANDARD

It is worth repeating that the *Vieth* Court refused review based on one of six *Baker* criteria.<sup>147</sup> The Court did not hold that the Guarantee Clause or Article I, section four provided grounds to withhold review. As such, the underlying justification supporting classical political questions is inapplicable.<sup>148</sup> Instead, the Court solely relied on a lack of judicially discoverable and manageable standards. Standing alone, the manageable standard requirement is prudential.<sup>149</sup> It is not imposed by law, but by the Court itself.<sup>150</sup> It is more guideline than mandate, and consequently the Court can choose to disregard it without legal infraction.<sup>151</sup> But before analyzing when the Court chooses to adhere to the manageable standard requirement, the requirement must first be defined. What is a judicially manageable standard?

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145. Redish, *supra* note 124, at 1043–44 (synthesizing Professor Bickel's characterization of the most prominent rationales for the political question doctrine).

146. See, e.g., Barkow, *supra* note 105, at 244; Henkin, *supra* note 107, at 600; Redish, *supra* note 124, at 1034–35.

147. *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004); see also Stillman, *supra* note 134, at 1299 (“What makes *Vieth*'s use of the [prudential political question doctrine] unique, at least in the post-*Baker* [political question doctrine] era, is that it relied on the lack of judicially discernible and manageable standards as an independently sufficient rationale for rendering a [political question doctrine] holding, without any genuine argument that the issue was textually committed to a coordinate federal branch.”).

148. See Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist “Rebuttable Presumption” Analysis*, 80 N.C. L. REV. 1165, 1181 (2002) (identifying the “only *Baker* factor that did not necessarily implicate separation of powers—a lack of judicially discoverable and manageable standards’ . . . .”) (citing *Baker v. Carr*, 369 U.S. 189, 217 (1962)).

149. See Redish, *supra* note 124, at 1043 (“In my discussion, then, it is necessary to make clear that by ‘prudential’ I refer to all rationales for effective judicial abdication of review power, other than a basis in the text of the Constitution.”).

150. Redish, *supra* note 124, at 1043.

151. Redish, *supra* note 124, at 1043.

### 1. *Defining Manageability*

Within the context of gerrymandering, the *Vieth* Court rejected Justice White's proposed standard as well as the three standards proposed by the dissenters, illustrating examples of proposals that failed to constitute manageable standards.<sup>152</sup> But the Court did not define the term, nor did it address larger, structural questions. How are manageable standards defined? What is the test used by the Court to determine whether a proposed standard is manageable? How has the Court used that standard in other constitutional contexts, and what rationale supports it? Professor Fallon addressed many of these questions by aggregating and analyzing each time the Court meaningfully employed the manageable standard requirement.<sup>153</sup> His review revealed that "the Supreme Court has never attempted to define what it means by judicially manageable standards nor to specify what role courts should perform in developing them."<sup>154</sup>

Even so, the Court's repeated use of the manageable standard requirement has yielded insights. First, the Court has recognized a distinction between the Constitution's provisions and the tests fabricated by the Court that attempt to enforce them.<sup>155</sup> This distinction is most clearly seen when the Court creates standards from open-ended constitutional provisions like equal protection and due process.<sup>156</sup> Within the context of gerrymandering, for example, the Court unanimously agreed that egregious cases violate equal protection.<sup>157</sup> But that constitutional assurance, standing alone, does not necessitate justiciability: "The issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy."<sup>158</sup>

Second, the Court's practice of devising standards that enforce constitutional norms presents no obstacle.<sup>159</sup> The Equal Protection

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152. See *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (stating that *Bandemer's* majority was unable to "enunciate the judicially discernible and manageable standard that it thought existed" and "[e]ighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application"); see also *supra* note 98 (assessing the various Justices approaches to establishing workable standards).

153. Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1285–1296 (2006).

154. *Id.* at 1281.

155. *Id.*

156. See *id.* at 1281–82 ("[T]he need for judicially manageable standards that are distinct from an underlying constitutional norm arises when the norm itself fails the requirement of judicial manageability.").

157. *Vieth*, 541 U.S. at 293.

158. *Id.* at 292.

159. See Fallon, *supra* note 153, at 1281–84 ("[T]he bare language of the Equal Protection Clause is not a judicially manageable standard in political gerrymandering disputes. In another usage,

Clause, itself, is not a judicially manageable standard.<sup>160</sup> A judicially-designed standard is needed to implement equal protection's promise. Almost every Justice in *Vieth* strove to articulate a workable standard or demonstrate why a proposed standard was unworkable.<sup>161</sup> None attacked the underlying premise, that the judicial function includes authority to design workable standards in the first place.<sup>162</sup>

Third, the standard fabricated by the Court need not precisely reflect constitutional meaning.<sup>163</sup> The *Vieth* Court pursued a "workable" formulation, one that hewed to the spirit of equal protection's promise without having to replicate it exactly.<sup>164</sup> This, of course, implies that the Court tolerates, even expects, a gap between constitutional guarantees and the court-made standards devised to implement them. As Professor Fallon suggests, "[a]lthough close enough is good enough, too much disparity will not do."<sup>165</sup>

While valuable in many ways, these insights fail to unveil how the Court determines whether a given standard is manageable, or "close enough." The Equal Protection Clause says nothing, for example, about a compelling government interest required before government action targets certain groups.<sup>166</sup> It says nothing about redistricting based on race as a predominate factor,<sup>167</sup> or the necessity for clear guidance in determining voter intent when counting ballots.<sup>168</sup> Yet, in each instance, the Court used the relatively elastic Equal Protection Clause to fashion manageable standards that deviate in various degrees from the meaning of the Clause itself.<sup>169</sup> Of course, this practice is not limited to the Equal Protection Clause. A wide array of decisions contain meaningful gaps

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however, judicially manageable standards are not so much inputs as the *outputs* of constitutional adjudication. A judicially manageable standard is an output, rather than an input, in any case in which a court successfully devises a test that can thereafter be used to implement a constitutional provision that is not itself a judicially manageable standard.").

160. Fallon, *supra* note 153, at 1283.

161. *Vieth*, 541 U.S. at 292–368.

162. *See generally id.*

163. *See* Fallon, *supra* note 153, at 1281–84 ("[T]he Justices participating in *Vieth* all appeared to assume that a judicially manageable standard—if one could be devised—need not replicate the Constitution's meaning precisely.").

164. *Vieth*, 541 U.S. at 292–368.

165. Fallon, *supra* note 153, at 1284.

166. U.S. CONST. amend. XIV, § 2; *see also* *Washington v. Glucksberg*, 521 U.S. 702, 721 (1996); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Redish*, *supra* note 124, at 1046 (noting that "the Court has adopted shifting standards of scrutiny under the equal protection clause that find little or no basis in the vague terms of that provision.").

167. U.S. CONST. amend. XIV, § 2; *see also* *White v. Regester*, 412 U.S. 755, 765 (1973); *Miller v. Johnson*, 515 U.S. 900, 910 (1995).

168. U.S. CONST. amend. XIV, § 2; *see also* *Bush v. Gore*, 531 U.S. 98, 104–05 (2000).

169. *See* *Bush*, 531 U.S. at 104–05; *Glucksberg*, 521 U.S. at 721; *Miller*, 515 U.S. at 903–04; *Korematsu*, 323 U.S. at 216.

between constitutional text and court-made standards. Whether personal jurisdiction,<sup>170</sup> establishment of religion,<sup>171</sup> or obscenity,<sup>172</sup> the Court has historically confronted textual ambiguity with judicially designed standards that either over-enforce or under-enforce constitutional meaning.<sup>173</sup> These many instances demonstrate that no uniform standard guides the Court when it delineates manageable from unmanageable.<sup>174</sup> According to some scholars, the standard used by the Court to determine manageability is itself unmanageable: “[T]he Court makes its judgements about whether proposed standards count as judicially manageable under criteria that would themselves fail to qualify as judicially manageable. . . .”<sup>175</sup>

While it is tempting to conclude that the Court’s illusory process for determining manageability frustrates efforts to understand that requirement,<sup>176</sup> a partial remedy would be a baseline requirement that the standard be intelligible and practical. In other words, to be manageable, the standard must be, at minimum, understandable. As Justice Scalia puts it, unintelligibility is akin to “judging whether a particular line is longer than a particular rock is heavy.”<sup>177</sup> It then helps if the standard is practical in the sense that it will likely lead to fairly

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170. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112–14 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–73 (1985); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

171. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 678–79 (1984); see also *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (Straying further away from the text of the establishment clause, Justice O’Connor fabricated a new and improved “reasonable person” for purposes of the endorsement test, explaining that “[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of religion.”).

172. *Miller v. California*, 413 U.S. 15, 23–24 (1973) (adopting a three-pronged test for speech falling outside the parameters of the First Amendment’s protection of “free speech”).

173. See Fallon, *supra* note 153, at 1298–1306 (“[A] number of doctrinal tests underenforce constitutional norms (just as other tests produce overenforcement), often for reasons of judicial manageability . . .”).

174. *Baker v. Carr* provides an example relevant to redistricting. 369 U.S. 186 (1962). The *Baker* Court found a manageable standard existed for malapportionment disputes under the Fourteenth Amendment even though no manageable standard reputedly existed for malapportionment disputes under the Guarantee Clause. *Id.* at 209–10. The rationale for discovering a test under one provision but not the other has little bearing on the court-made standard itself. See Redish, *supra* note 124, at 1046 (identifying a range of court-made standards before suggesting that “one must suspect the disingenuousness of the ‘absence-of-standards’ rationale.”).

175. See, e.g., Fallon, *supra* note 153, at 1278.

176. Redish, *supra* note 124, at 1047 (“Ultimately, any constitutional provision can be supplied with working standards of interpretation.”).

177. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).



consistent results<sup>178</sup> as well as results that are actionable.<sup>179</sup> Judicial competence, the ability of the court to fully comprehend the facts of certain cases as well as the predictability of results stemming from judicial intervention, are implicit within this consideration.<sup>180</sup> Lower courts, for example, often avoid the merits of cases involving foreign affairs, citing lack of expertise.<sup>181</sup> Similarly, a standard that generates predictable and consistent results is more likely to be manageable. As Justice Scalia opined in *Vieth*, “Some criterion more solid and more demonstrably met than [fairness] that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, [and] to meaningfully constrain the discretion of the courts . . . .”<sup>182</sup>

While these baseline factors are helpful, they have not been consistently followed, and are not themselves determinative.<sup>183</sup> The *Vieth* Court, for example, rebuked Justice Powell’s purported “fairness” standard for gerrymandering disputes, even though fairness and justness play prominent parts in other constitutional standards.<sup>184</sup> Indeed,

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178. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–80 (1989) (stating that “reckonability” is a “needful characteristic”).

179. See Fallon, *supra* note 153, at 1291–92 (discussing courts’ lack of competence to make general factual or predictive judgments).

180. See, e.g., *United States v. Causby*, 328 U.S. 256, 274–75 (1946) (“It seems certain, however, that courts do not possess the techniques or the personnel to consider and act upon the complex combinations of factors entering into the problems.”) (Black, J., dissenting).

181. See, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307, 1310 (2d Cir. 1973) (avoiding the merits of dispute involving military action in Cambodia by claiming a nonjusticiable political question because the dispute raised “precisely the questions of fact involving military and diplomatic expertise not vested in the judiciary . . . .”); *DaCosta v. Laird*, 471 F.2d 1146, 1155 (2d Cir. 1973) (“Judges, deficient in military knowledge, lacking vital information upon which to assess the nature of battlefield decisions, and sitting thousands of miles from the field of action, cannot reasonably or appropriately determine whether a specific military operation constitutes an ‘escalation’ of the war or is merely a new tactical approach within a continuing strategic plan.”); *United States v. Sisson*, 294 F. Supp. 515, 517–18 (D. Mass. 1968) (avoiding merits review of claims regarding the legality of military tactics in Vietnam because a “domestic tribunal is incapable of eliciting the facts during a war, and because it is probably incapable of exercising a disinterested judgment which would command the confidence of sound judicial opinion”).

182. *Vieth v. Jubelirer*, 541 U.S. 267, 291 (2004). These practical considerations are balanced against the fact that a standard, by definition, entails more flexibility than a rule, which is a rigid and determinate formulation. The more flexible the standard, the more judgement and discretion required, carrying the concomitant risk of inconsistent results. See Fallon, *supra* note 153, at 1286 (assessing the inconsistency that stems from flexible standards).

183. See Fallon, *supra* note 153, at 1293 (claiming unanswerable questions regarding “how much analytical bite, or how much predictability or consistency of judicial decisionmaking” is required).

184. See, e.g., *Kansas v. Colorado*, 543 U.S. 86, 95–97 (2004) (explaining that “considerations of fairness” must be considered for equitable remedies); *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring) (asserting that “fairness and justice” indicate when a government taking of property has occurred); *Zafiro v. United States*, 506 U.S. 534, 538 (1993) (noting that the federal rules of civil procedure call for separate trials of codefendants when “justice requires”); *Quill Corp. v. North Dakota*, 504 U.S. 298, 307 (1992) (asserting that personal jurisdiction turns on “traditional notions of fair play and substantial justice” (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945))).

constitutional jurisprudence teems with standards that lack administrative facility and ready redress, including balancing tests,<sup>185</sup> state-of-mind probes,<sup>186</sup> and totality of the circumstances inquiries.<sup>187</sup> In the due process context, constitutionality has turned on whether one's conscience has been shocked.<sup>188</sup> These examples illustrate that any constitutional provision, regardless of opacity, can be outfitted with a court-made standard. As Professor Redish notes, "those standards often will not clearly flow from either the language or history of the provision, but that fact does not distinguish them from many judicial standards invoked every day."<sup>189</sup>

## 2. Manageability as Proxy for Judicial Legitimacy

Given the many instances in which court-made standards deviate from constitutional text, and in light of the varying degrees of deviation, the Court often employs a generalized cost-benefit analysis.<sup>190</sup> Is the cost of reduced judicial legitimacy outweighed by the benefit achieved through an unwieldy judicial standard? This cost-benefit overlay to manageability pervades *Vieth*. The dissenters did not argue that their proposed standards perfectly fit the constitutional guarantee; the dissenters argued that their proposed standards were better than the

185. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 785 (1985); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050, 1052 (1984); *United States v. Leon*, 468 U.S. 897, 926–28 (1984); *Hobby v. United States*, 468 U.S. 339, 350 (1984); *Mathews v. Lucas*, 427 U.S. 495, 516–17 (1976); *Branzburg v. Hayes*, 408 U.S. 665, 709–10 (1972) (Powell, J., concurring); *Matthews v. Eldridge*, 424 U.S. 319 (1976); *Konigsberg v. State Bar*, 366 U.S. 36, 61–68 (1961) (Black, J., dissenting); see also T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (providing a thorough review of balancing tests).

186. See, e.g., *Wilson v. Seiter*, 501 U.S. 294, 302 (1991) (explaining that "the offending conduct must be *wanton*"); *Graham v. Connor*, 490 U.S. 386, 387 (1989) (stating that "[t]he Eighth Amendment terms 'cruel' and 'punishments' clearly suggest some inquiry into subjective state of mind"); *id.* at 397 (explaining that *Johnson v. Glick*'s substantive due process standard puts the defendant's subjective motivation in issue); *Daniels v. Williams*, 474 U.S. 327, 328 (1986) (finding that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property"); see also Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 173 (2010) (citing difficulty pleading factually plausible claims where constitutionality turns on defendant officials' subjective state of mind).

187. See, e.g., Fallon, *supra* note 153, at 1288–89, 1288 n.57 (collecting numerous totality of circumstances cases).

188. See *Rochin v. California*, 342 U.S. 165, 172 (1952) (identifying the "shocks the conscience" standard). Some standards, although amorphous on their own, acquire greater certainty and predictability with frequent application. See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 884–91 (1996).

189. Redish, *supra* note 124, at 1047.

190. See *Vieth v. Jubelirer*, 541 U.S. 267, 300–01 (2004); *Nixon v. United States*, 506 U.S. 224, 236 (1993); see also Fallon, *supra* note 153, at 1278 ("In making this ultimate judgment, the Court, willy-nilly, conducts a startlingly open-ended inquiry in which, among other things, it weighs the costs and benefits of adjudicating pursuant to particular proposed standards.").

status quo.<sup>191</sup> Imperfect enforcement outweighs no enforcement at all. Justice Scalia's plurality, perhaps surprisingly, also reduced the manageability analysis to a generalized balancing of the perceived benefit attending the adoption of an imperfect standard against the perceived detriment of reduced judicial legitimacy:

Is the regular insertion of the judiciary into districting, with the delay and uncertainty that it brings to the political process and the partisan enmity it brings upon the courts, worth the benefit to be achieved—an accelerated (by some unknown degree) effectuation of the majority will? We think not.<sup>192</sup>

Perhaps Justice Scalia cribbed this balancing test—manageability balanced against the Court's reputation—from *Baker v. Carr* in which Justices Frankfurter and Harlan dissented from court intervention in malapportionment disputes.<sup>193</sup> “Those who consider that continuing national respect for the Court's authority depends in large measure upon its wise exercise of self-restraint and discipline in constitutional adjudication will view the decision with deep concern.”<sup>194</sup> Or, perhaps Justice Scalia's balancing test hailed from the Court's refusal to interpret impeachment processes, wherein the Court admonished that “opening the door of judicial review . . . would ‘expose the political life of the country to months, or perhaps years, of chaos.’”<sup>195</sup> In fact, Justice Scalia could have drawn inspiration for the balancing test from a well-spring of judicial precedent in which the Court declined review to foster institutional legitimacy.<sup>196</sup> As shown above, judicial restraint in the service of judicial legitimacy is a principal rationale for the political question doctrine itself. Viewed through this lens, the manageable standard roadblock reflects a deeper, historical insecurity involving appropriateness of judicial review.

#### IV. JUDICIAL LEGITIMACY AND REPRESENTATIONAL DEMOCRACY

Condensing the foregoing analysis is helpful. The Court has exercised, without serious question, its authority to devise standards that seek to implement constitutional norms. The Court has accepted a certain degree of deviation when court-made standards fail to capture constitutional norms perfectly. Such deviations cannot be “too great,”

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191. See *supra* note 98.

192. *Vieth*, 541 U.S. at 301.

193. *Baker v. Carr*, 369 U.S. 186, 330–40 (1962) (Harlan, J., dissenting); *id.* at 267–330 (Frankfurter, J., dissenting).

194. *Id.* at 340 (Harlan, J., dissenting).

195. *Nixon*, 506 U.S. at 236 (quoting *Nixon v. United States*, 938 F.2d 239, 246 (D.C. Cir. 1991)).

196. See J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 108–15 (1988) (characterizing the political question doctrine in terms of judicial restraint in the service of judicial legitimacy).

although no consistent test has emerged by which the Court determines whether a standard deviates too much, and is therefore unmanageable. At bottom, the standard must be intelligible. And, though not determinative, the standard's practical effects like predictability and ease of implementation have played a part in manageability decisions. Most importantly, the Court often enmeshes manageability with judicial review and related concerns of judicial legitimacy.<sup>197</sup>

This preoccupation with judicial legitimacy is as old as the Court itself.<sup>198</sup> Assuming that the Court's concern is valid, and that protecting its reputation justifies abdication in certain instances, this Article argues that gerrymandering is not one of them, and that the judiciary validly intervenes when it acts to ensure representational democracy's proper functioning. Correcting artificial obstructions that truncate or unduly dilute popular sovereignty is value-neutral and well within the judiciary's expertise. By contrast, judicial interjection that constitutionally enshrines one substantive value over another necessarily implicates the bias of a non-elected Court and has historically proved problematic.

#### A. CONSTITUTION AS FORM AND PROCESS

The form and structure of the Constitution support judicial review of disputes that challenge obstructions to representative democracy. Neophytes, upon first reading the Constitution, are often surprised that the document, particularly before amendment, resembles a sterile recitation of compartmental design: which branch and which official has authority to do which thing. The few substantive rights in the body of the document are enfolded into larger prescriptions that allocate political power and ensure constituent participation in government.<sup>199</sup> Prohibitions against bills of attainder, titles of nobility, and corruption of blood do little to burnish the constitution's reputation as the repository of individual liberties.<sup>200</sup> Said differently, the Constitution primarily separates powers and outlines processes for effective governance by the people.<sup>201</sup> Even the substantive rights clauses, like Ex Post Facto and Bills of Attainder, can be viewed as performing separation-of-powers functions.<sup>202</sup> The Constitution—and by extension, judicial

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197. *See supra* Part III.

198. *See* Barkow, *supra* note 105, at 253–56 (providing a brief history of the Court's use of the prudential factors, in part, to protect the judicial legitimacy).

199. *See* ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 517–18 (4th ed. 2013) (“The text of the Constitution, apart from the Bill of Rights, contains few provisions concerning individual liberties.”).

200. *Id.*

201. *See id.* at 218 (“[T]he framers thought that an enumeration of rights was unnecessary . . .”).

202. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 90 (1980).

review—principally focuses on structure and process in a representational government of separated powers.<sup>203</sup>

The amendments, while somewhat more concerned with individual liberties, are certainly not singularly so. Most of the amendments are either procedural in function or identify a substantive right that itself facilitates governmental processes.<sup>204</sup> The First Amendment, for example, guards against government overreach by protecting political discourse.<sup>205</sup> It serves a structural purpose as much as an individualized one.<sup>206</sup> The Fourth Amendment combines an individual privacy right with procedural protections by suppressing evidence seized from illegal searches.<sup>207</sup> “Amendments five through eight,” as Professor Ely notes, “tend to become relevant only during lawsuits, and we tend therefore to think of them as procedural . . . , calculated to enhance the fairness and efficiency of the litigation process.”<sup>208</sup> The amendments added after 1868 largely expand democratic participation through voting, whether based on race,<sup>209</sup> gender,<sup>210</sup> wealth,<sup>211</sup> location,<sup>212</sup> or age.<sup>213</sup>

By contrast, attempts to embed substantive rights in the Constitution’s text have a questionable record. The institutionalization of slavery in the body of the Constitution illustrates a substantive right remedied only at a horrific price.<sup>214</sup> Temperance, also enshrined as a substantive right, produced upheaval before constitutionally erased through the Twenty-First amendment.<sup>215</sup> Some argue the substantive right to possess guns fits the same pattern.<sup>216</sup> The Constitution is a poor vehicle for cementing popular value judgments, which tend to evolve

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203. *Id.* at 89. (“The theme that justice and happiness are best assured not by trying to define them for all time, but rather by attending to the governmental processes by which their dimensions would be specified over time, carried over into our critical constitutional documents.”).

204. See U.S. CONST. amends. I–XXVII.

205. See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443 (1996).

206. ELY, *supra* note 202, at 94.

207. ELY, *supra* note 202, at 96.

208. ELY, *supra* note 202, at 95.

209. U.S. CONST. amend. XV.

210. U.S. CONST. amend. XIX.

211. U.S. CONST. amend. XXIV.

212. U.S. CONST. amend. XXIII.

213. U.S. CONST. amend. XXVI.

214. See Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN. ST. L. REV. 413, 418–20 (2006) (arguing that although slavery was memorialized in the Constitution, the Declaration of Independence foreshadowed slavery’s “ultimate demise.”).

215. U.S. CONST. amend. XXI; see also Sidney J. Spaeth, *The Twenty-First Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CALIF. L. REV. 161, 176–80 (1991) (detailing the failure of prohibition).

216. ELY, *supra* note 202, at 94–95.

with society.<sup>217</sup> But governmental structure and prescribed processes designed to ensure participation in representational government properly embody the Constitution's highest and best function.

The Constitution's form and structure demonstrate the Framers' intent to protect fundamental concepts of freedom and liberty primarily through democratic processes. Requiring elections of Representatives every two years, and expressly naming the federal government as guardian against electoral manipulation, are textual proof of that commitment.<sup>218</sup> Significant debate at the Constitutional Convention in 1787 turned on insulating the essential processes of government from manipulation so that the House of Representatives, for example, actually reflected the electorate and were accountable to it.<sup>219</sup> The Framers were responding to the lack of representation afforded them as colonists, in conjunction with fresh memory of rotten boroughs that corrupted England's representative system.<sup>220</sup>

North Carolina delegate, John Steele, argued that the Constitution would not permit the creation of rotten boroughs, and that if redistricting plans that corrupted representation were passed that were "inconsistent with the Constitution, independent judges will not uphold them. . . ."<sup>221</sup> Delegate Steele was not alone in characterizing the Constitution's role as both creating and protecting the representational process. The only time George Washington addressed the Constitutional Convention on a substantive issue, he did so in an effort to increase the degree in which elected representatives reflected their constituents.<sup>222</sup> George Mason claimed that "[r]eps. should sympathize with their constituents; shd. think as they think, & feel as they feel."<sup>223</sup> John Adams wrote that the

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217. See ELY, *supra* note 202, at 88 (explaining that "the few attempts the various framers have made to freeze substantive values by designating them for special protection in the document have been ill-fated, normally resulting in repeal, either officially or by interpretive pretense.").

218. U.S. CONST. art. I, § 2; see also THE FEDERALIST NO. 37, at 181 (James Madison) (Gideon ed., 2001) ("The genius of republican liberty seems to demand on one side, not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people by a short duration of their appointments . . . .")

219. See Christopher St. John Yates, *A House of Our Own or A House We've Outgrown? An Argument for Increasing the Size of the House of Representatives*, 25 COLUM. J.L. & SOC. PROBS. 157, 175–76, 175 n.112 (1992) (discussing the history of the Convention).

220. See ROBERT B. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 16 (1965) (discussing England's monarchy and its impact on the United States' "idea of representative government").

221. *Wesberry v. Sanders*, 376 U.S. 1, 16 (1964) (quoting 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 71 (Jonathon Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES]).

222. Yates, *supra* note 219 at 175–76, 175 n.112.

223. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 134 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS].

representative assembly “should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them.”<sup>224</sup>

Perhaps James Madison was the most ardent defender of protecting democratic processes through unimpeded representation. In *The Federalist No. 52*, Madison wrote that “it is particularly essential that the [House of Representatives] should have an immediate dependence on, and an intimate sympathy with the people.”<sup>225</sup> Madison explicitly referred to state legislatures and the temptation “to mould their regulations as to favor the candidates they wished to succeed.”<sup>226</sup> Madison understood that elected officials would attempt to retain power by obstructing the democratic machinery that allows power to change hands:

[T]he State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices . . . . [T]he Legislatures of the States ought not to have the uncontrolled right of regulating the times places & manner of holding elections . . . . It was impossible to foresee all the abuses that might be made of the discretionary power.<sup>227</sup>

The Constitution’s concern, and therefore (arguably) the Court’s concern, turns on procedural protections ensuring unhindered participation in self-governance. The document’s form and structure memorialize this central focus of the Framers’ intent.

#### B. JUDICIAL INTERVENTION TO FACILITATE REPRESENTATIONAL DEMOCRACY

The Court has historically exercised judicial review to facilitate democratic participation and to remove artificial barriers that obstruct fair processes and insulate elected representatives from public accountability. The most famous footnote in constitutional jurisprudence identified instances that merit “more searching judicial inquiry.”<sup>228</sup> Footnote four in *Carolene Products* is deservedly famous for identifying “discrete and insular minorities” as worthy of heightened judicial scrutiny in the face of majoritarian discrimination.<sup>229</sup>

But to so limit the footnote’s interpretation is to overlook a critically important point. The footnote not only calls for court intervention but

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224. John Adams, *Thoughts on Government*, in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 403 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

225. THE FEDERALIST NO. 52, at 256 (James Madison) (Gideon ed., 2001).

226. 2 FARRAND’S RECORDS, *supra* note 223, at 241.

227. 4 ELLIOT’S DEBATES, *supra* note 221, at 401.

228. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

229. *See, e.g.*, Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 PENN ST. L. REV. 139, 157 (2012) (citing *Carolene Prod. Co.*’s footnote four as authority for governmental action dealing with morality).

also calls for exacting court scrutiny in order to ensure the proper working of democratic government.<sup>230</sup> Specifically, it requires “more exacting scrutiny” when “legislation restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.”<sup>231</sup> This language very nearly defines partisan gerrymandering, a legislative restriction that obstructs the political process by pre-determining election results.<sup>232</sup> Even the footnote’s protection of discrete and insular minorities is couched in terms of the court’s role in protecting the democratic process by highlighting prejudice “which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . .”<sup>233</sup>

This representation-reinforcing approach to judicial review suggests the propriety, even obligation, of judicial engagement in partisan redistricting. The Court has certainly engaged in other contexts aimed at facilitating representative and participatory functions of democratic governance. First Amendment free expression jurisprudence, for example, illustrates court intervention to facilitate democratic processes just as much as to protect individual rights. The amendment’s language focuses on limiting government authority: “Congress shall make no law . . . abridging the freedom speech, of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>234</sup> In the first instance, it ensures political speech, including open discussion meant to check government overreach.<sup>235</sup> Of course, non-political speech finds protection here, too, but the protection’s robust scope partly derives from ensuring effective democratic functioning.<sup>236</sup>

More germane to gerrymandering, the Court’s involvement in voting disputes confirms the appropriateness of judicial review to ensure proper functioning of democratic processes. In the aggregate, the Court’s voting decisions make clear that the Constitution protects the right to vote in both federal and state elections: “A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage

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230. *Carolene Prod. Co.*, 304 U.S. at 152 n.4.

231. *Id.*

232. See *Gerrymandering*, BLACK’S LAW DICTIONARY (8th ed. 2004) (defining gerrymandering as “[t]he practice of dividing a geographical area into electoral districts . . . to give one political party an unfair advantage by diluting the opposition’s voting strength”).

233. *Carolene Prod. Co.*, 304 U.S. at 152 n.4.

234. U.S. CONST. amend. I.

235. See Kagan, *supra* note 205, at 428–30 (arguing that First Amendment standards of review are designed to check for improper motive).

236. See ELY, *supra* note 202, at 93–94 (stating that although First Amendment protection is not limited to political speech, the concept of free speech is principally “intended to help make our governmental processes work . . .”).



has made this indelibly clear.”<sup>237</sup> The Court has intervened to assert constitutional protection for the right to vote,<sup>238</sup> to have votes counted<sup>239</sup> and not diluted by ballot box stuffing.<sup>240</sup> The Court has intervened to scrutinize restrictions on the right to vote, including poll taxes,<sup>241</sup> literacy tests,<sup>242</sup> property ownership,<sup>243</sup> and photographic identification.<sup>244</sup> The Court has interposed its judgement by requiring that states provide absentee ballots to those who are incarcerated and awaiting trial.<sup>245</sup> Even closer to partisan redistricting, the Court has intervened to invalidate racial gerrymandering<sup>246</sup> and white primaries.<sup>247</sup>

But the Court’s decisions in malapportionment redistricting represent the closest analogue to partisan gerrymandering.<sup>248</sup> The question of court intervention in malapportionment cases was not an easy one. Passionate disagreement over whether it was proper for the Court to intervene, prompted the Court in *Baker v. Carr* to request that the litigants re-argue the case,<sup>249</sup> with one Justice so conflicted that he recused himself due to illness.<sup>250</sup> The Court’s ultimate determination that it properly exercised judicial authority in reviewing malapportionment claims and that Tennessee’s malapportionment impermissibly diluted voting under the Equal Protection Clause had a wide and continuing impact.<sup>251</sup> Tennessee was not the only state forced to re-draw district lines; the controversial ruling affected nearly every state in the union.<sup>252</sup>

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237. *Reynolds v. Simms*, 377 U.S. 533, 554 (1964).

238. *Ex parte Yarbrough*, 110 U.S. 651, 665, 666–67 (1884).

239. *United States v. Mosley*, 238 U.S. 383, 387 (1915).

240. *United States v. Saylor*, 322 U.S. 385, 387 (1944); *Ex parte Siebold*, 100 U.S. 371, 388 (1879).

241. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665–66 (1966).

242. *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 50–51 (1959).

243. *Ball v. James*, 451 U.S. 355, 367 (1981); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969).

244. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189–90 (2008).

245. *O’Brien v. Skinner*, 414 U.S. 524, 530 (1974).

246. *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960).

247. *Terry v. Adams*, 345 U.S. 461, 45–68 (1953); *Smith v. Allwright*, 321 U.S. 649, 661–61 (1944); *Nixon v. Condon*, 286 U.S. 73, 89 (1932); *Nixon v. Herndon*, 273 U.S. 536, 540–41 (1927).

248. *See LULAC v. Perry*, 548 U.S. 399, 468 n.9 (2006) (Stevens, J., concurring in part and dissenting in part) (suggesting that the Court’s approach to one person-one vote claims could serve as a template for a gerrymandering test).

249. *Baker v. Carr*, 369 U.S. 186, 186 (1962).

250. *Id.* at 237; *see also* Carlo A. Pedrioli, *Instrumentalist and Holmesian Voices in the Rhetoric of Reapportionment: The Opinions of Justices Brennan and Frankfurter in Baker v. Carr*, 4 ALA. C.R. & C.L. L. REV. 1, 10–14 (2013) (detailing the Court’s internal debates leading up to the Court’s formal decision).

251. *See generally* Luis Fuentes-Rohwer, *Baker’s Promise, Equal Protection, and the Modern Redistricting Revolution: A Plea for Rationality*, 80 N.C. L. REV. 1353 (2002) (discussing state experimentation with the standard established in *Baker*).

252. *See generally id.*

Chief Justice Earl Warren characterized this case as the most significant of his tenure.<sup>253</sup> The Court partially explained the importance of its ruling in a later opinion: “The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”<sup>254</sup> In a series of cases following *Baker v. Carr*, the Court repeatedly emphasized the propriety of Court intervention to ensure proper democratic functioning. The Court stressed, for example, that “the right of suffrage is a fundamental matter in a free and democratic society,” and that “any infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”<sup>255</sup>

In another malapportionment case, the Court again couched its justification for intervention in terms of democratic government. “To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government . . .”<sup>256</sup> When admonished that state governments are better suited than the Court to address irregularities in voting district population, that judicial intervention diminishes legislative prerogative, and that a “political thicket” and a “mathematical quagmire” would surely attend judicial intervention, the Court gave a succinct response. “Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.”<sup>257</sup>

The logic and rationale bolstering judicial review in malapportionment disputes applies with equal force to partisan gerrymandering. Indeed, Court intervention in gerrymandering disputes is arguably more appropriate. Legislators intentionally dilute voting equality in gerrymandering disputes, whereas malapportionment arises innocently as people migrate from rural to urban districts. In both, the avenues normally available to effect change in democratic governance are constricted.

As noted above, the Court has not acted to clear these avenues but has abstained for three decades, citing a lack of a judicially manageable standard. The precedential purgatory imposed by *Vieth* remains the law of the land. Because Justice Kennedy, as the fifth vote, rejected the dissent’s three proposed standards as unworkable, but maintained the

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253. EARL WARREN, *THE MEMOIRS OF CHIEF JUSTICE EARL WARREN* 306 (1977).

254. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

255. *Id.* at 562.

256. *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964).

257. *Reynolds*, 377 U.S. at 566.

possibility that a workable standard would someday emerge, enormous efforts to contrive a suitable standard followed.<sup>258</sup>

C. JUDICIAL INTERVENTION TO FACILITATE REPRESENTATIONAL DEMOCRACY IN *WHITFORD V. GILL*

The claimants in *Whitford* proposed a new manageable standard dubbed the “efficiency gap,” which measures the difference between the parties’ wasted votes.<sup>259</sup> Votes cast for a losing candidate are deemed “wasted” as are votes in excess of what the winning candidate needed to prevail.<sup>260</sup> Gerrymandering generates substantial “inefficiencies” by packing favorable votes into a single district, and by cracking other districts results in large numbers of losing votes.<sup>261</sup> The efficiency gap combines the wasted votes from all districts, reducing the inefficiencies to a single percentage.<sup>262</sup> Importantly, this measurement also reveals entrenchment. States that have efficiency gaps of at least seven percent will yield substantially similar election results year over year, despite plausible shifts in voter preference.<sup>263</sup> The efficiency gap, as a result, identifies gerrymanders “that are both severe *and* entrenched.”<sup>264</sup>

The trial court in *Whitford* did not solely rely on the efficiency gap as the definitive standard, but used the measurement when applying a three-pronged test.<sup>265</sup> The court’s test analyzed whether redistricting: “(1) [was] intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds.”<sup>266</sup> The efficiency gap informed the second prong of the test by showing that Wisconsin’s map would have ensured Republican advantage through the lifetime of the map.<sup>267</sup> The ability to measure such entrenchment allowed the court to distinguish inherent from invidious discrimination, a distinction critical to Equal Protection analysis.<sup>268</sup>

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258. See Stillman, *supra* note 134, at 1318–21 (suggesting that Justice Kennedy’s concurrence is an invitation to propose new standards that “cannot help but invite more litigation”).

259. *Whitford v. Gill*, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016).

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 860–61. *But see* Stephanopoulos & McGhee, *supra* note 32, at 897–98 (defending an 8 percent gap as demarcating maps that are presumptively invalid).

264. Stephanopoulos & McGhee, *supra* note 32, at 836.

265. *Whitford*, 218 F. Supp. 3d at 884.

266. *Id.*

267. *Id.* at 898–910.

268. *Id.* at 909–10, 913–27.

The Supreme Court accepted review but ultimately remanded for lack of standing. If the Court abstains in future cases, partisan gerrymandering will likely intensify. Arguments favoring abstention characterize the efficiency gap as unmanageable.<sup>269</sup> The standard, it is argued, cannot perfectly account for shifting voter preferences, which potentially dilutes entrenchment.<sup>270</sup> If shifting voter preferences diffuse the gerrymander's effect, the redistricting occasions no harm. Another criticism of the efficiency gap derives from Justice Kennedy's concern of determining "how much partisan dominance is too much."<sup>271</sup> The efficiency gap attempts to address that concern by identifying the level of inefficiency that yields entrenchment.<sup>272</sup> But this standard is itself imprecise. The trial court found a seven percent gap presumptively violative; the authors of the efficiency gap model posit that an eight percent gap is presumptively violative.<sup>273</sup>

As noted above, however, the standard need not perfectly implement the constitution's meaning. Constitutional jurisprudence overflows with imprecise standards.<sup>274</sup> Again, malapportionment serves as the closest analogue. The malapportionment standard, one person, one vote, was lauded for its ease of administration, its manageability.<sup>275</sup> But a closer study reveals instances where strict adherence to the standard was impracticable.<sup>276</sup> As a result, the Court recalibrated the standard, holding redistricting presumptively unlawful when population deviations exceed ten percent.<sup>277</sup> Presumptive invalidity of ten percent in malapportionment cases is not dissimilar from presumptive invalidity of seven percent in gerrymandering cases. The efficiency gap does not perfectly reflect equal protection's promise, but it isn't required to do so.

#### CONCLUSION

*Whitford v. Gill* presented a missed opportunity to look more closely at the Court's past refusal to decide gerrymandering disputes. The political question doctrine and, more particularly, the prudential

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269. See Brief of Amici Curiae Wisconsin State Senate and Wisconsin State Assembly at 3, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161), 2017 WL 1506064, at \*3.

270. Stephanopoulos & McGhee, *supra* note 32, at 895–96.

271. Stephanopoulos & McGhee, *supra* note 32, at 897–98.

272. Stephanopoulos & McGhee, *supra* note 32, at 836–37.

273. Compare *Whitford v. Gill*, 218 F. Supp. 3d 837, 860–61 (2016), with Stephanopoulos & McGhee, *supra* note 32, at 897–98.

274. See *supra* Part III.

275. See, e.g., WILLIAM N. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION 50 (2000) (describing one person, one vote as having the "virtue of being easy to administer").

276. See *Reynolds v. Sims*, 377 U.S. 533, 578 (1964).

277. See *id.* ("Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations.") (citations omitted).

requirement that the Court abstain if it lacks a judicially manageable standard, has heretofore stopped the Court from identifying those gerrymanders that violate equal protection. But an analysis of the manageable standard requirement reveals the Court's failure to define what a manageable standard is. More disconcerting, the Court has applied the manageable standard requirement haphazardly, illustrated by scores of court-made standards that either over- or under-enforce the constitutional norm they purport to implement. Why is "fairness" a manageable standard in some contexts but not others? How are standards that measure one's shocked conscious, or weigh the totality of the circumstances judicially manageable?

While a review of the Court's application of the manageability requirement yields few insights, one common thread connects the Court's use of the manageability requirement to its insecurity in exercising judicial review, indicating that the Court often applies the manageability requirement when particularly insecure in exercising the judicial function. Recast in this light, the question of Court engagement in gerrymandering disputes turns on the propriety of Court intervention to address artificial obstacles that disrupt democratic functionality, a question squarely within the judicial role. The Constitution as a whole, in structure and form, demonstrates the document's principal aim of ensuring representational democracy through prescribed processes. The relatively few provisions in the Constitution that memorialize substantive rights are sporadic and enfolded into the broader constitutional design that details democratic processes.

The Court's jurisprudence also favors intervention. In analogous contexts, the Court has identified manageable standards in disputes involving artificial obstacles to proper democratic functioning. Whether impediments to voting, malapportionment, or racial gerrymandering, the Court consistently and appropriately intervenes to protect popular sovereignty and to ensure that those in power cannot insulate themselves by fabricating barriers to democratic processes.

Court intervention is warranted. The Framers contemplated the Court's role to include correcting artificial strictures on representational democracy, the Court has historically and successfully done so, and adequate judicial tools exist to measure and censure harmful partisan gerrymandering. One of the Court's central responsibilities is to protect democratic governance. The Court has recognized as much historically. It should do so again and directly address the constitutionality of partisan gerrymandering.