Who's Afraid of the Hated Political Gerrymander?

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The political gerrymander has few friends among scholars and commentators. Even a majority on the Supreme Court agreed that the practice violates constitutional and democratic norms. And yet, this is one of the few issues that the U.S. Supreme Court refuses to regulate. The justices mask their refusal to regulate this area on a professed inability to divine judicially-manageable standards. In turn, scholars offer new standards for the justices to consider. This is not only a mistake but also misguided. The history of the political question doctrine makes clear that the discovery of manageable standards has never controlled the Court's prior decisions to venture into the field of politics. Further, existing doctrine makes clear that the question of whether politics play an excessive role in redistricting could be easily handled by the Court.

Thus the question at the heart of this Article: how to explain the judicial refusal to decide political gerrymandering questions in a world where the Court intervenes just about everywhere else? This Article concludes that the Court, and particularly Justice Kennedy, is worried about an assumed flood of litigation that would follow judicial intervention in this area. But this is not a new worry. This is the very concern that drove critics of the reapportionment revolution, a time when the Court happily created a standard out of thin air and declared unconstitutional all state legislatures at once. Rather than standards, Justice Kennedy needs a dose of history.

INTRODUCTION

Few issues in American politics elicit the reactions borne by the mere mention of the political gerrymander. This is where modern critics of the political process and our present partisan polarization focus on the rigging of redistricting lines by self-interested party operatives hell-bent on securing political victories into the foreseeable future. To be sure, the empirics are fuzzy—that is, whether the hated gerrymander is guilty of all the things ascribed to it.[2] But it is also true that few commentators defend the practice as a positive political good.[3] This might be the one place in our politics where consensus is reached.

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[2] *See, e.g.*, Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 312 (2011) (arguing that "the evidence that gerrymandering is a major cause of the decline in competitive elections is not powerful").

[3] For such defenses, see generally THOMAS L. BRUNELL, REDISTRICTING AND REPRESENTATION: WHY COMPETITIVE ELECTIONS ARE BAD FOR AMERICA 2 (2008) (arguing that "districts should not be drawn to maximize competitiveness, the approach commonly announced to be best, but instead

Ironically, this is also one of the few issues that the U.S. Supreme Court refuses to regulate.[4] This is remarkable. Generations ago, Alexander Bickel counseled for the Court's use of the "passive virtues" as a way to protect its legitimacy from too much involvement in questions best left alone.[5] But that is not the world we live in. Rather, we live in a world where the Court stands willing and ready to intervene in most aspects of our lives, from campaign finance[6] to health care[7] and the right to marry.[8] Judicial supremacy is the order of our day.[9] And yet, the Court is unwilling to intervene in the one sphere where consensus abounds and public opinion is clearly and unequivocally on its side. Without question, this is one of the great legal puzzles of our generation. How to explain it?

The Court's stated reason for its refusal to regulate this question is a professed lack of judicially manageable standards.[10] This inability to find such a standard renders this issue a political question, which the Court happily delegates to the political branches alone.[11] Curiously, the political question doctrine is one of the "passive virtues" catalogued by Bickel.[12] But the Court's answer is a red-herring; the history of the political question doctrine, as Part I argues, makes clear that the discovery of judicially manageable standards has never controlled the Court's prior decisions to venture into the field of politics. The doctrine has long been domesticated.[13] This is especially true in the gerrymandering context, a sub-species of the redistricting question at the heart of the reapportionment revolution and the logical resting place for the equality and fairness concerns that gave rise to judicial intervention in this area.

Thus, as Part II explains, it is not enough to simply point to a lack of standards, nor will an answer to this puzzle be unlocked by providing new standards for the Court to consider. The case law already provides a standard for the Court to regulate the hated political gerrymander, and Part III discusses it in detail. What is required, as the reapportionment revolution shows, is the requisite judicial will.

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should be drawn in such a way that they are 'packed' with as many like-minded partisans in each district as possible"); Justin Buchler, *Competition, Representation and Redistricting: The Case Against Competitive Congressional Districts*, 17 J. THEORETICAL POL. 431, 432 (2005) (arguing that "competition is not necessarily a goal that should be pursued in the redistricting process").

[4] *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 550–52 (1946) (refusing to force Illinois to redistrict after the 1940 census, stating that it was "beyond its competence to grant.").

[5] *See* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42 (1961).

[6] *See* Citizens United v. FEC, 558 U.S. 310, 319 (2010).

[7] *See* Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012).

[8] *See* United States v. Windsor, 133 S. Ct. 2675, 2682 (2013).

[9] *See* Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CALIF. L. REV. 621, 622 (2012).

[10] *See infra* notes 107–20 and accompanying text.

[11] *See infra* notes 107–20 and accompanying text.

[12] *See* Bickel, *supra* note 5, at 42.

[13] Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1205 (2002).

This is an argument in four parts. Part I tells a brief history of the fall of political questions. The case at the center of this story is *Baker v. Carr*.[14] This story is important for what it teaches us about judicial intervention and the role played by manageable standards.[15] This Part argues that it is all-or-nothing: once the Court entered the field of politics, it could not draw a principled distinction between redistricting cases writ-large and gerrymandering cases. Part II examines the gerrymandering cases with some care, both racial and political. This Part questions why the Court decides racial gerrymandering questions with such ease yet avoids political gerrymandering and argues that the Court's reasons fall short.

Part III situates the political gerrymandering cases where they belong: alongside the racial gerrymandering cases and within *Baker* and its progeny. *Baker* sets a very flexible and forgiving barrier: the state must behave reasonably.[16] As applied to the gerrymandering question, this means that while the use of politics is a legitimate state interest, the state may not use it excessively. In the language of doctrine, political considerations—*i.e.*, partisanship—may not predominate. This is a standard that the Court enforced, with great success, in both the minority vote dilution cases and the more recent *Shaw* cases.[17] And to the criticism that this standard would embroil the Courts in these questions, the obvious answer is that these were the very grounds upon which *Baker* was fought.[18] Justice Frankfurter lost this battle long ago.

By way of a conclusion, Part IV explores some of the lessons of the Court's refusal to examine political gerrymandering questions. Two lessons stand out. The first lesson underscores the importance of asking the right questions. To ask for a judicially manageable standard for political gerrymandering questions misapprehends the history of redistricting regulation and the Court's role in domesticating this area of the law. But worse, to ask this question is to exacerbate the problem, to legitimize an erroneous view of history and doctrine.

The second lesson questions the view of the Court as a cautious institution. In other words, and to return to a question asked at the onset, how to explain the judicial refusal to decide political gerrymandering questions in a world where the Court intervenes just about everywhere else? This is the most interesting question raised by the political gerrymandering impasse. What differentiates political gerrymandering questions from most other questions that the Court routinely decides? Part IV posits that the Court, and particularly Justice Kennedy, is worried about an assumed flood of litigation that would follow judicial intervention in this

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[14] Baker v. Carr, 369 U.S. 186, 226 (1962).

[15] *See id.*

[16] *See id.*

[17] *See infra* notes 74–89 and accompanying text.

[18] Baker v. Carr, 369 U.S. 186, 268 (1962) ("Even assuming the indispensable intellectual disinterestedness on the part of judges in such matters, they do not have accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgments.") (Frankfurter, J., dissenting).

area. But this is not a new worry. This is the very concern that drove critics of the reapportionment revolution, a time when the Court happily created a standard out of thin air and declared unconstitutional all state legislatures at once. This means that a search for standards is ultimately futile; rather, what Justice Kennedy needs is a dose of history.

I. THE FALL OF POLITICAL QUESTIONS: A BRIEF HISTORY

For many years, the Supreme Court refused to entertain redistricting questions. In the notorious case of *Giles v. Harris*, for example, the Court examined the wave of voter suppression laws throughout the South that began in Mississippi in 1890.[19] This was the same wave that provided for the mass disenfranchisement of the African-American community that had joined the voting rolls post-Reconstruction.[20]

The disenfranchisement was staggering and quite blatant.[21] In Louisiana, for example, the number of black registered voters declined from 130,334 in 1897 to 5,320 in 1900 to 730 in 1910, or less than 0.5% of all eligible black men.[22] The same was true throughout the South.[23] It strains credulity to suggest that these measures, which included cumulative poll taxes, literacy tests, grandfather clauses, good character clauses, and lengthy residency requirements, did not violate the U.S. Constitution, specifically the Fifteenth Amendment.[24]

The Supreme Court wanted no part of this fight. In the words of Justice Holmes:

> The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States.[25]

This is an arresting passage to modern ears, so accustomed to a very muscular and aggressive Court. But this was not a fight the justices thought they could win.

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[19] *See* Giles v. Harris, 189 U.S. 475, 483 (1903).
[20] *See id.*
[21] *See id.*
[22] United States v. Louisiana, 225 F. Supp. 353, 374 (E.D. La. 1963).
[23] *See id.* at 363.
[24] *See id.*
[25] *Giles*, 189 U.S. at 488.

This became a familiar refrain. In the 1946 case of *Colegrove v. Green*, the Court similarly refused to force the state of Illinois to redistrict after the 1940 census.[26] The malapportionment was severe; the biggest district had 914,000 people, while the smallest had 112,116.[27] The Court argued that this was a non-justiciable political question.[28] This was not a question about discriminatory exclusion from rights enjoyed by others; instead, it was "an appeal to the federal courts to reconstruct the electoral process of Illinois in order that it may be adequately represented in the councils of the Nation."[29] This was the case that gave us the famous line, "Courts ought not to enter this political thicket."[30] And like Justice Holmes before him, Justice Frankfurter pointed reformers to the political process for a remedy: "The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress."[31]

Notably, Justice Black's dissent in *Colegrove* foreshadowed the reapportionment revolution of the next generation.[32] His argument was disarmingly simple: if the state could not pick out voters and deny them the right to vote, nor could it give some citizens more votes than others, it stood to reason that the state could not weigh votes differently.[33] All votes must be weighed equally.[34] For constitutional support, he looked to Article I, Section 2. He argued that "state legislatures must make real efforts to bring about approximately equal representation of citizens in Congress."[35]

Then everything changed in 1962. The case was *Baker v. Carr*.[36] To be sure, the Court had ventured into the field and decided matters of politics before—the White Primary cases come to mind,[37] and *Guinn v. United States*,[38] a grandfather clause case decided in 1915, and *Gomillion v. Lightfoot*,[39] the infamous Tuskegee gerrymander—but these cases were about racial discrimination, a context in which, for reasons left unexplained,[40] the Court felt freer to intervene. Moreover, the

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[26] Colegrove v. Green, 328 U.S. 549, 550–52 (1946).
[27] *Id.* at 566 (Black, J., dissenting).
[28] *See id.* at 556 (majority opinion).
[29] *Id.* at 552.
[30] *Id.* at 556.
[31] *Id.*
[32] *See id.* at 569 (Black, J., dissenting).
[33] *See id.* at 574.
[34] *See id.* at 568.
[35] *Id.* at 572.
[36] Baker v. Carr, 369 U.S. 186 (1962) (deciding that redistricting issues present justiciable questions).
[37] *See* Terry v. Adams, 345 U.S. 461, 478 (1953); Smith v. Allwright, 321 U.S. 649, 650–51 (1944).
[38] *See* Guinn v. United States, 238 U.S. 347, 354 (1915).
[39] *See* Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960).
[40] *See, e.g.*, *Baker*, 369 U.S. at 300 ("This is not a case in which a State has, through a device however oblique and sophisticated, denied Negroes or Jews or redheaded persons a vote, or given them only a third or a sixth of a vote."). A cynic would include *Giles* as a case about racial discrimination as well. And that is the point of the Article.

Court's intervention in those cases was surgical, which allowed the Court to maintain its façade that it was not making political decisions but upholding the Constitution's command to racial equality.

Baker changed that. The facts in *Baker* were familiar: a severe malapportionment borne of a refusal from state legislatures to redistrict in the face of mass migrations.[41] Tennessee had last redistricted decades before, so that by the 1960 census, the number of people within each district could not be explained in any rational way.[42] The plan, and the number of voters within each district, just happened. Scholars have described this situation as a "silent gerrymander,"[43] or what Alexander Bickel called an "orgy of inactivity,"[44] for good reason. Lines were not redrawn because incumbent politicians had no incentive to redraw them.

The first question facing the Court in *Baker* was the justiciability issue: were political questions, as then understood, non-justiciable? This question led the Court to state the factors it found "on the surface of any case held to involve a political question."[45] The Court enumerated six factors:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[46]

The Court disposed of most factors summarily.[47] The biggest hurdle was the second factor: whether judicially manageable standards exist to govern these cases.[48] It bears reminding that this factor poses the big hurdle in the political gerrymandering arena. At the time of *Baker*, Justices Frankfurter and Harlan criticized the majority on the ground that the Constitution did not provide discoverable and judicially manageable standards for deciding these questions.[49] This was the Court's answer:

> Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and

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[41] *Id.* at 253–57.
[42] *Id.* at 258.
[43] Leroy C. Hardy, *Considering the Gerrymander*, 4 PEPP. L. REV. 243, 249–52 (1977).
[44] Alexander M. Bickel, *The Durability of* Colegrove v. Green, 72 YALE L. J. 39, 44 (1962).
[45] *Baker*, 369 U.S. at 217.
[46] *Id.*
[47] *Id.* at 217–25.
[48] *Id.* at 223–26.
[49] *See id.* at 267 (Frankfurter, J., joined by Harlan, J., dissenting). '

> familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.[50]

The Court was pointing to rationality as the proper judicial standard.[51] The issue in *Baker*—and this is made clear by the oral argument and the positions taken by Justices Clark and Stewart—was the fact that the districts could not be explained in any rational way. The overall plan was a "crazy quilt," lacking rationality. *Baker* was an easy case.

What would the Court do with the next case, once state legislatures were prodded into action? The Court gave us an answer two years later in *Reynolds v. Sims*.[52] This was the "one person, one vote" standard.[53] The argument was simple. First, the Court explained that "each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies."[54] In the American system, this is largely achieved by choosing representatives. To the Court, this meant that "[f]ull and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of members of his state legislature."[55]

This was a brazen opinion. As Justice Harlan argued in dissent, "people are not ciphers and . . . legislators can represent their electors only by speaking for their interests—economic, social, political—many of which do reflect the place where the electors live."[56] No matter. *Reynolds v. Sims* led to the constitutionalization of majority rule, which the Court happily defended. But the arguments offered by the Court were woefully unconvincing. Consider here the traditional worry that the Court would be declaring unconstitutional almost all state legislatures across the nation. The Court did not worry in 1964 as it did years before, because "a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."[57] A flurry of clichés and unsupported statements followed. For example: "To the extent that a citizen's right to vote is debased, he is that much less a citizen."[58] Also: "Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies."[59] And here was the Court's glib answer to the

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[50] *Id.* at 226 (majority opinion).
[51] *Cf.* Luis Fuentes-Rohwer, Baker's *Promise, Equal Protection, and the Modern Redistricting Revolution: A Plea for Rationality*, 80 N.C. L. REV. 1353 (2002) (arguing that "lower courts were given the proper room after *Baker* to decide redistricting questions in accordance with their particular views about rationality and arbitrariness").
[52] Reynolds v. Sims, 377 U.S. 533 (1964).
[53] *Id.* at 558.
[54] *Id.* at 565.
[55] *Id.*
[56] *Id.* at 623–24 (Harlan, J., dissenting).
[57] *Id.* at 566 (majority opinion).
[58] *Id.* at 567.
[59] *Id.*

argument that states could choose to follow the example of the US Senate, which was grossly malapportioned in reference to population figures: "[T]he federal analogy was inapposite and irrelevant to state legislative districting schemes."[60] The Court did not explain this conclusion in any convincing way.

Making sense of *Reynolds* helps us understand where we are today. The plaintiffs in the case argued that their right to vote had been unconstitutionally diluted because they were unable to exercise, through their elected representatives, a fair share of the state's legislative power. The Court accorded them expansive constitutional protection, and a constitutional standard was born—one person, one vote. *Reynolds* was a case about the weighing of votes across districts and how much vote dilution the Constitution would tolerate.

Notably, the Court was aware in *Reynolds* that other considerations played a role during the redistricting process, including compactness, contiguity, and a "desire to maintain the integrity of various political subdivisions."[61] The Court noted that to disregard these and all other considerations to the ultimate goal of population equality "may be little more than an open invitation to partisan gerrymandering."[62] And yet, the Court concluded that "*substantial* equality of population" must be the overriding goal of all redistricting plans.[63]

The malapportionment cases are direct progenitors of the political gerrymandering cases. The question in the malapportionment cases was, how much vote dilution does the Constitution allow? According to the *Reynolds* Court, not very much. But this conclusion only got the justices half-way to their desired destination. They must still face the question of a judicially manageable standards. This was not a hard thing to do. As Justice Harlan argued in his dissent in *Reynolds*, the Court created a new standard out of thin air:

> Stripped of aphorisms, the Court's argument boils down to the assertion that appellees' right to vote has been invidiously "debased" or "diluted" by systems of apportionment which entitle them to vote for fewer legislators than other voters, an assertion which is tied to the Equal Protection Clause only by the constitutionally frail tautology that "equal" means "equal."[64]

The Court discovered a judicially manageable standard only because it wished to discover one;[65] nothing from the Constitution helped the Court get there.

The following decade, the Court sought to regulate the redistricting area through the equipopulation principle.[66] The overarching issue was to secure fair and

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[60] *Id.* at 573.
[61] *Id.* at 578.
[62] *Id.* at 579.
[63] *Id.* (emphasis added).
[64] *Id.* at 590 (Harlan, J., dissenting).
[65] For a discussion on this point, see Guy-Uriel E. Charles and Luis Fuentes-Rohwer. *Reynolds* Revisited, *in* ELECTION LAW STORIES 21, 49-52 (Joshua A. Douglas and Eugene D. Mazo eds., 2016).

effective representation. The Court tried to accomplish that laudable goal through population equality, but that proved to be a difficult quest. The year after *Reynolds*, the Court faced the next logical question and the obvious implication of the one person, one vote revolution: the extent to which multimember districts might "operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[67] Taken to its logical conclusion, *Reynolds* appeared to demand single-member districts across the board. But the Court was unwilling to take this step.[68] In the meantime, redistricters grew savvy and accomplished their racial and political goals all the same. Nothing changed as the Court might have wished and expected.

Throughout the 1970s, the Court wrestled with the gerrymandering question, but not overtly.[69] In 1971, Justice Douglas called attention to the issue by observing that the gerrymandering question was "the other half of *Reynolds v. Sims*."[70] The cases were mirror images of one another. *Baker* offers a clearer comparison; the case examined questions of representation and political losses while setting a very high bar for litigants to meet. Through either *Baker* or *Reynolds* we get directly to the gerrymandering cases, which the next Part discusses in more detail.

II. WHAT IS SO DIFFERENT ABOUT GERRYMANDERING QUESTIONS?

The gerrymandering question has loomed large in the history of voting regulations. To date, the Court has been unwilling to examine gerrymandering questions in the same way that it has treated redistricting questions generally. This is puzzling in many ways, not the least of which is the fact that they raise essentially the same question: how much dilution, racial and/or political, does the Constitution permit?

A. Racial Gerrymandering, from Gomillion *to* Shaw.

In 1957, the Alabama legislature enacted Local Act No. 140, which redrew the boundaries of the city of Tuskegee.[71] Black citizens of Tuskegee brought suit challenging the constitutionality of the Act.[72] These plaintiffs had been residents of the city before the redistricting but were fenced out after the new lines were drawn.[73] The new map, according to the Court in *Gomillion v. Lightfoot*, "alters

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[66] *See, e.g.*, Wells v. Rockefeller, 394 U.S. 542, 544 (1969); Fortson v. Dorsey, 379 U.S. 433, 439 (1965).
[67] *Fortson*, 379 U.S. at 439.
[68] *See id.*
[69] *See, e.g.*, Whitcomb v. Chavis, 403 U.S. 124 (1971); White v. Regester, 412 U.S. 755 (1973).
[70] *Whitcomb*, 403 U.S. at 176 (Douglas, J., dissenting in part and concurring in the result in part).
[71] Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960)
[72] *Id.*
[73] *Id.* at 341.

the shape of Tuskegee from a square to an uncouth twenty-eight-sided figure."[74] If the allegations were proven at trial, the Court explained that they would amount to a deprivation of the right to vote under the Fifteenth Amendment.[75] To Justice Frankfurter, that would set this case apart from the political question world of *Colegrove* and place it within a constitutional realm that the Court was willing and able to adjudicate.

To be sure, the Alabama legislature made it too easy on the Court. The facts were extreme. But less than forty years after *Gomillion*, the Court showed that facts need not always offer easy answers in order for the justices to choose to intervene in these disputes. The case was *Shaw v. Reno*.[76] *Shaw* arose after the 1990 redistricting, when the state of North Carolina attempted to fulfill its political responsibilities while complying with the state and federal constitutions, as well as federal law.[77]

Here is the case in a nutshell: Democrats in the state drafted as friendly a congressional redistricting plan as they could, which they then submitted to the Attorney General for preclearance as demanded by Section 5 of the Voting Rights Act.[78] This plan had only one majority black district.[79] Since the state had no black elected officials in its congressional delegation, the plan did not violate Section 5 of the Voting Rights Act and thus should have been cleared by the Attorney General.[80] But the Attorney General refused to preclear the plan because the state could have easily created a second majority black district.[81] To do so, however, would have had obvious political costs for the Democrats.[82] So they created a second black district in order to comply with the federal request, but did so creatively.[83] Requirements for compactness and the preservation of communities of interest were not always observed.[84] Since these were neither constitutional nor federal requirements, the Attorney General approved the new plan.[85]

The U. S. Supreme Court did not agree.[86] A mere look at the map raised the collective eyebrows of the conservative justices. One of the Districts—Twelve—was hardly contiguous, compact in name only, and did not preserve communities of interest very well.[87] The problem for the Court was that the plan violated no law,

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[74] *Id.* at 340.
[75] *Id.* at 346.
[76] Shaw v. Reno, 509 U.S. 630 (1993).
[77] *See id.* at 633.
[78] *Id.* at 633–36
[79] *Id.* at 633.
[80] *Id.* at 635–36.
[81] *Id.*
[82] *See id.*
[83] *See id.* at 636.
[84] *See id.*
[85] *See id.*
[86] *Id.* at 649.
[87] *See id.* at 635–36.

state or federal, nor did it violate standing constitutional doctrine as then in existence.[88] No matter. According to the Court,

> a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, *rationally cannot be understood* as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.[89]

This was the genesis of the "expressive harms" doctrine.[90] Two years later, in *Miller v. Johnson*, the Court transformed this doctrine into a "predominant factor" inquiry.[91] This was a new doctrinal development.[92]

The Court in *Shaw* wished to align the case with longstanding doctrine, but the Court knew better. In a key passage, the Court conceded that the case recognized a new and "analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification."[93] This was not the law as it then stood. Furthermore, the case also fails miserably on its reading of the facts. Can a reasonable person look at the map in question and *only* conclude that this was an effort to separate voters on the basis of race? And what exactly is wrong with the justifications for the choices made by political actors in North Carolina? What makes these choices "insufficient?"

In hindsight, it is clear that the *Shaw* doctrine was an overreaction to the creative ways in which political actors went about their business. Political actors used race as part of their redistricting duties; of course they did. But it strains credulity to argue, as the conservative justices did, that the use of race predominated in the process. More important for purposes of this Article, and what I take to be the real lesson of *Shaw*, is how easily the Court moved past the "judicially manageable standard" requirement.[94] What looked like a classic political question ceased to be one as soon as the conservative justices decided otherwise. Notably, yet unsurprisingly, the apparent lack of a judicially manageable standard did not pose any kind of barrier for justices willing to get to the heart of the case.

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[88] *Id.* at 650.
[89] *Id.* at 649 (emphasis added).
[90] *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506–07 (1993).
[91] *See* Miller v. Johnson, 515 U.S. 900, 901 (1995).
[92] *See* Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action after the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1583 (2002) ("That had not previously been the law.").
[93] 509 U.S. 630, 652 (1993).
[94] *See Shaw*, 509 U.S. at 647–49.

B. Political Gerrymandering: The Final Step.

The political gerrymandering doctrine did not evolve the way that the racial gerrymandering doctrine did. It is hard to make sense of this divergence. Once the Court crossed the political question threshold in *Baker*, there is very little principled distinction between what it did in *Reynolds* and what it refuses to do in the political gerrymandering area. This is because, as Robert Dixon noted long ago, all redistricting is essentially gerrymandering.[95] The Court recognized this point in *Gaffney v. Cummings*, when it wrote that "[t]he very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. Politics and political considerations are inseparable from districting and apportionment."[96] More damningly, the Court continued:

> District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.[97]

How then to distinguish between the *Baker*/*Reynolds* line of cases, and their logical extension, to the regulation of political gerrymandering questions? Not easily.

In the year after *Reynolds*, the justices recognized as much. In *Fortson v. Dorsey*, the Court wrote that "[i]t might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[98] But this was not the time, nor the case, to so decide. The Court was likely worried about what its role in the political process might be. The Court made this worry explicit in *Gaffney*:

> That the Court was not deterred by the hazards of the political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so.[99]

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[95] *See* ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 462 (1968).
[96] Gaffney v. Cummings, 412 U.S. 735, 753 (1973).
[97] *Id.*
[98] Fortson v. Dorsey, 379 U.S. 433, 439 (1965).
[99] *Gaffney*, 412 U.S. at 749–50.

This concern led the justices to sanction the Connecticut bipartisan gerrymander in *Gaffney*.[100] For guidance, the Court noted that so long as racial or political groups are not "fenced out" or their voting strength "invidiously minimized" (whatever that means), it would not act.[101]

And then came *Davis v. Bandemer*, which finally made explicit what the doctrine up to that point had implied.[102] Writing for a plurality of the Court, Justice White situated political gerrymandering questions as a subspecies of the *Baker/Reynolds* line of cases, properly understood as a question of representation.[103] This was something the Court had adjudicated many times before, and the Court explicitly "decline[d] to hold that [representation] claims are never justiciable."[104] But the question remained: would the Court locate a judicially manageable standard?

Bandemer understandably looked to general constitutional principles. This meant that challengers to redistricting plans must "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."[105] The intent requirement would not be hard to prove: so long as the redistricting was conducted by a legislature, "it should not be very difficult to prove that the likely political consequences of the reapportionment were intended."[106]

The discriminatory effect requirement has proven far more elusive to establish. The *Bandemer* Court offered the following: "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[107] The discrimination could be established at either the district or state level.[108] Both inquiries ask the same question: "whether a particular group has been unconstitutionally denied its chance to effectively influence the political process,"[109] or whether "the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively."[110] The inquiries, however, diverge on their evidentiary demands.[111]

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[100] *Id.* at 754 ("Even more plainly, judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so.").
[101] *See id.*
[102] *See* Davis v. Bandemer, 478 U.S. 109 (1986).
[103] *See id.* at 123–24.
[104] *Id.* at 124.
[105] *Id.* at 127.
[106] *Id.* at 129.
[107] *Id.* at 132.
[108] *See id.* at 133.
[109] *Id.* at 132–33.
[110] *Id.* at 133.
[111] *See id.*

At the district level, a challenger must focus "on the opportunity of members of the group to participate in party deliberations in the slating and nomination of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns and to secure the attention of the winning candidate."[112] Statewide, evidence must focus on "the voters' direct or indirect influence on the elections of the state legislature as a whole."[113] In either situation, the evidence must be about "continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process."[114]

As you read the above two paragraphs, it is easy to appreciate why *Bandemer* had so little bite. The language is so broad that it borders on useless. What is "effective influence," for example, or "substantial disadvantage?" Further, with *Baker*/*Reynolds* in place, which essentially force states to redistrict after every census, a "continued frustration of majority will"[115] standard is almost impossible to meet. In the Court's defense, the question of fair representation is a very hard question. Once *Baker* focused on vote dilution at the individual level, so that *Reynolds* and strict population equality could easily follow, how does the Court allow politics to play a role yet strike down redistricting plans that use politics excessively? This is not an impossible inquiry, however; this is *Miller v. Johnson*, which asks the justices to discern when redistricting plans use race excessively.[116] If the Court can do the latter, there is no reason it cannot do the former.

Eighteen years later, the Court revisited *Bandemer*. The case was *Vieth v. Jubelirer*,[117] which examined the Pennsylvania redistricting plan after the 2000 census.[118] The Court in *Vieth* could not coalesce and issue a majority opinion.[119] Four justices concluded that no judicially manageable standards could be discerned,[120] and four other justices provided myriad standards.[121] And in the middle of this dispute was Justice Kennedy, unable to find a standard to decide this case but unwilling to abdicate the field quite yet: "[t]hat no such standard has emerged in this case should not be taken to prove that none will emerge in the future."[122] He explained:

> Our willingness to enter the political thicket of the apportionment process with respect to one-person, one-vote claims makes it particularly difficult to justify a

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[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] Miller v. Johnson, 515 U.S. 900, 906 (1995).
[117] Vieth v. Jubelirer, 541 U.S. 267 (2004) (plurality opinion).
[118] *Id.* at 272–73.
[119] *See id.* at 270.
[120] *Id.* at 304.
[121] *Id.* at 319 (Stevens, J., dissenting); *id.* at 346 (Souter, J., dissenting); *id.* at 356 (Breyer, J. dissenting).
[122] *Id.* at 311 (Kennedy, J., concurring).

> categorical refusal to entertain claims against this other type of gerrymandering. The plurality's conclusion that absent an "easily administrable standard," the appellants' claim must be nonjusticiable contrasts starkly with the more patient approach of *Baker v. Carr*, not to mention the controlling precedent on the question of justiciability of *Davis v. Bandemer*, the case the plurality would overrule.[123]

Whatever one thinks of Justice Kennedy in general, it is hard to disagree with him here. This was my argument before: this is *Baker*/*Reynolds* redux, so how to justify complete judicial abdication?

It is easy, even fun, to get bogged down in the many underlying debates going on in the case. But this is ultimately a futile exercise. On the one hand, Scalia and the three justices who join his plurality are hopeless: nothing satisfies them. The predominant intent test, for example, will not work in the political gerrymandering area even if it is the same test used in the racial gerrymandering cases because applying it to a racial gerrymandering "is easier and less disruptive."[124] But that cannot possibly be true. This is nothing but an "*ipse dixit* distinction."[125] The plaintiffs also proposed an effects test modeled after Section 2 of the Voting Rights Act, but that will not work since, even if judicially manageable, it is not "judicially discernible in the sense of being relevant to some constitutional violation."[126] And so it goes.

On the other hand, the dissenting four will take any standard that satisfies Justice Kennedy. For example, Justice Breyer proposes an "unjustified entrenchment" test;[127] Justice Souter posits a burden-shifting framework akin to *McDonnell Douglas*;[128] and Justice Stevens looks to the analogous racial gerrymandering cases, which ask whether one criterion predominates during the redistricting process in a way offensive to the Constitution.[129] But the very fact that the dissenters could not agree on a single standard leads Justice Scalia to conclude

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[123] *Id.* at 310 (citations omitted).
[124] *Id.* at 285 (plurality opinion).
[125] *Id.* at 324 (Stevens, J., dissenting).
[126] *Id.* at 288 (plurality opinion).
[127] *Id.* at 360–61 (Breyer, J., dissenting).
[128] *Id.* at 346 (Souter, J., dissenting); *see also* Ortiz v. Hershey, 580 Fed. App'x. 352 (6th Cir. 2014) (discussing a burden-shifting analysis in finding discrimination under Title VII in the employment context).
[129] The same dynamic takes place in *League of United Latin American Citizens v. Perry (LULAC)*, 548 U.S. 399 (2006). Justice Stevens writes that the partisan symmetry standard "is widely accepted by scholars as providing a measure of partisan fairness in electoral systems." *Id.* at 466 (Stevens, J., concurring in part and dissenting in part). Justice Souter similarly states that "[i]nterest in exploring this notion is evident. Perhaps further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review." *Id.* at 483–84 (Souter, J., concurring in part and dissenting in part) (citations omitted). But Justice Kennedy needs more: "Without altogether discounting its utility in redistricting planning and litigation, I would conclude asymmetry alone is not a reliable measure of unconstitutional partisanship." *Id.* at 420 (majority opinion).

that no one standard exists.[130] His arguments against each one, however, are not terribly persuasive.

III. POLITICAL GERRYMANDERING QUESTIONS AND THE CONSTITUTION

In *Vieth*, Justice Kennedy proved unwilling to adopt a standard from the myriad options available to him. Early in his concurring opinion, however, he offers his general view on the question:

> A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective.[131]

This is a burden that the plaintiffs in *Vieth* failed to meet. More specifically, the plaintiffs alleged a burden by a political classification on their representational rights. But they failed to show that this classification was unrelated to the aims of redistricting. In the end, the best they could show was that the legislature used politics during redistricting. This is not a constitutional violation.

Justice Kennedy is clearly on the right track. He agrees that the use of race in redistricting is a legitimate state interest, yet he also agrees that the excessive use of race violates the plaintiffs' representational rights.[132] What he needs—and what he is asking litigants to provide—is a dividing line between the legitimate use of politics and cases when the use of politics predominates the redistricting process. He needs a way to differentiate the mere use of politics from its invidious, excessive use. This is clearly a tall order.

It is also true, however, that the Court has done this before. This is *Baker v. Carr*. In *Baker*, the Court saw the population numbers in question and demanded a reason from the state in support of the existing plan.[133] The state did not have a legitimate reason other than inaction, but that answer only satisfied Justices Frankfurter and Harlan. The majority of the Court demanded more.

This is also what the Court does, even more directly, in *Shaw*[134] and its progeny. *Shaw* is important because its connection to the political gerrymandering cases is unmistakable. The search for a constitutional standard is almost the same: while race is a legitimate consideration for redistricters to use, racial factors cannot

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[130] *See Vieth*, 541 U.S. at 292 (plurality opinion) (observing that "the mere fact that these four dissenters come up with three different standards—all of them different from the two proposed in *Bandemer* and the one proposed here by the appellants—goes a long way to establish that there is no constitutionally discernible standard").

[131] *Id.* at 307 (Kennedy, J., concurring).

[132] *See id.*

[133] *See* Baker v. Carr, 369 U.S. 186, 235–37 (1962).

[134] Shaw v. Reno, 509 U.S. 630 (1993).

overwhelm the process. In *Shaw*, the Court took one look at the map and surmise that racial factors had played an excessive role. In the next case, *Miller v. Johnson*,[135] the Court used language that brought both inquiries closer together:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can "defeat a claim that a district has been gerrymandered on racial lines."[136]

Plaintiffs in racial gerrymandering cases must show that race predominated in the redistricting process. This is precisely the inquiry in the political gerrymandering context. If the Court can "'smoke out' illegitimate uses of race,"[137] there is nothing about the redistricting context that suggests the Court cannot similarly "smoke out" the excessive use of politics.

The minority vote dilution cases provide further support. In *Whitcomb v. Chavis*, the Court stated that a districting plan may "unconstitutionally operate to dilute or cancel the voting strength of racial or political elements."[138] The Court subsequently explained the plaintiff's burden in *White v. Regester* as follows:

> [T]o produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.[139]

Whitcomb and *Regester* are notable for how unmanageable their demands appear to be—so much so, in fact, that the Fifth Circuit attempted in *Zimmer v. McKeithen* to set out a list of factors it gleaned from these cases.[140] But far more important for purposes of this Article is how the Court understood that these cases were part and parcel of the nascent reapportionment revolution. Unsurprisingly, the Court hardly considered the question of manageable standards in these cases. This was not a relevant question.

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[135] Miller v. Johnson, 515 U.S. 900 (1995).
[136] *Id.* at 916 (citing *Shaw*, 509 U.S. at 647).
[137] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).
[138] Whitcomb v. Chavis, 403 U.S. 124, 144 (1971).
[139] White v. Regester, 412 U.S. 755, 766 (1973).
[140] Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973), *aff'd on other grounds sub nom.* E. Carroll Par. Sch. Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam).

To be clear, the point of these cases is not that federal courts have already established a standard to govern political gerrymandering claims or that the standards in these cases provide the requisite guidance. Rather, the point is that federal courts have managed large swaths of election law without the guidance of a clear and manageable standard. The constitutional command against the excessive use of race or politics has been enough.

The *Vieth* plurality disagreed.[141] Justice Scalia took up every argument raised by both the plaintiffs and the dissenters and dismissed them summarily.[142] Justice Scalia was at times philosopher, political scientist, and constitutional theorist. The one thing he was not willing to be was a judge as we have come to understand the term. He agreed that severe partisan gerrymanders were incompatible with democratic principles,[143] and he also agreed that "an excessive injection of politics is unlawful."[144] For him, the issue was not whether excessive use of partisan identification violates the Constitution, "but whether it is for the courts to say when a violation has occurred, and to design a remedy."[145]

And *that*, in a nutshell, is the point. The Court claims that it does not regulate political gerrymanders because it lacks manageable standards with which to do so. But that is misleading. The Court does not regulate political gerrymanders because it lacks the will to do so. Offering the justices more standards will not alter that fact. The question in this context is not about judicial standards but why the Court refuses to regulate the last frontier of our democracy while at the same time choosing to intervene in most important questions of our day. The next Part explores this great puzzle.

IV. THE PASSIVE VIRTUES IN AN ERA OF JUDICIAL SUPREMACY

All nine justices in *Vieth* agreed that the excessive use of partisanship in redistricting raises grave constitutional concerns.[146] Justice Kennedy, the Court's resident super-median,[147] expresses his own concerns as follows: "The ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government, and in the citizenry itself. Here, one has the sense that legislative restraint was abandoned."[148] A professed lack of standards, however, refrains the Court from intervening. In the meantime,

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[141] Vieth v. Jubelirer, 541 U.S. 267, 281 (2004) (plurality opinion).
[142] *See id.* at 283–91.
[143] *See id.* at 292.
[144] *Id.* at 293.
[145] *Id.* at 292.
[146] *See id.* at 292 (plurality opinion), 313–14 (Kennedy, J., concurring), 332–34 (Stevens, J., dissenting), 343 (Souter, J., dissenting), 361–62 (Breyer, J., dissenting).
[147] *See* Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 39–40 (2008).
[148] *Vieth*, 541 U.S. at 316.

the Court has curbed political excesses through indirect means, such as Section 2 of the Voting Rights Act.[149]

Vieth makes for great reading, and its many opinions and rejoinders are the stuff of challenging law school hypotheticals. The case fits oddly in our modern constitutional world, where the Court decides any and all important questions of policy. This is not to say that the modern Court is a restrained Court, by any means. It is not. Think about this: how could a justice decide *Bush v. Gore* yet feign powerlessness in the face of serious constitutional concerns?[150] To focus on a lack of manageable standards is not the answer. In fact, this focus obfuscates the issue. But maybe that is the point.

In the wake of *Vieth*, scholars and commentators set out on a search for new and improved (and judicially manageable) standards.[151] No standard that satisfies a majority of the Court has yet to emerge. But this is a red herring. It is the clear lesson of the reapportionment revolution that judicial intervention never hinged on the discovery of standards. This area has long been domesticated. Once the Court shifted its gaze to equality concerns in *Baker*, questions of democracy easily came within the purview of constitutional law. Standards in this area, as the *Baker* Court counseled, are "well developed and familiar."[152] And a new field of study was born.

Instead, the Court wishes to take us back to a world where the political question doctrine had bite. This was a world where the Court could not be sure of its authority and whether its edict would be enforced. Alexander Bickel coined the phrase "passive virtues" to signal the Court's need to sidestep questions as needed.[153] The political question doctrine was one of various prudential tools that provided the justices much needed flexibility.[154] To the Court, the existence of judicially manageable standards was one of the factors that formed the political question doctrine.[155] For Bickel, however, the factors took on a decidedly different gloss:

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[149] *See, e.g.*, League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 441–42 (2006); *see also* Guy-Uriel E. Charles, *Race, Redistricting, and Representation*, 68 OHIO ST. L.J. 1185, 1210 (2007) ("LULAC is best understood as a case that uses race to limit politics.").

[150] *Compare* Bush v. Gore, 531 U.S. 98 (2000), *with Vieth*, 541 U.S. at 305–06.

[151] *See, e.g.*, Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After* LULAC v. Perry, 6 ELECTION L.J. 2 (2007); Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015).

[152] Baker v. Carr, 369 U.S. 186, 226 (1962).

[153] *See* Bickel, *supra* note 4, at 42.

[154] *Id.* at 45–46.

[155] The factors according to the Court in *Baker* are as follows:

> [A] textually demonstrable constitutional commitment of the issue to 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

> [T]he court's sense of lack of capacity, compounded in unequal parts of the strangeness of the issue and the suspicion that it will have to yield more often and more substantially to expediency than to principle; the sheer momentousness of it, which unbalances judgment and prevents one from subsuming the normal calculations of probabilities; the anxiety not so much that the judicial judgment will be ignored, as that perhaps it should be, but won't; finally and in sum ("in a mature democracy"), the inner vulnerability of an institution which is electorally irresponsible and has no earth to draw strength from.[156]

These are unlike the factors catalogued by the Court in *Baker*. In fact, to read Bickel's factors today is to think about a Court we would not recognize. Bickel's conception is of a Court driven by anxiety and self-doubt. As the modern Court stands ready to bring to an end to the Second Reconstruction, can anyone seriously believe that anxiety and self-doubt form part of the Court's self-identity any longer?

Thus the question: how to explain the Court's posture in the political gerrymandering context as compared with the constitutional law world writ large? The Court professes a lack of judicially manageable standards, but that is almost dishonest. This search for standards offers a façade of decorum, of a search for law. It even sounds legal, doctrinal, right. But political questions have never been about that. What the quest for standards does for the Court is mask larger questions about the Court and its agenda. More importantly, the debate is carried out on the terms set by the Court. In so doing, the conservative justices turn an institutional question into a legal question. They then look for answers that they know will never be found. This is dishonest.

And so we get to the bottom of the puzzle. What is the worry that drives the justices, on prudential grounds, to remove the Court from considering political gerrymandering questions? One obvious answer is that the justices are worried about "a flood of litigation."[157] This is Justice Kennedy's worry. He began his concurring opinion in *Vieth* as follows:

> A decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to *unprecedented intervention* in the American political process. The Court is correct to refrain from directing this *substantial intrusion* into the Nation's political life.[158]

> need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217.

[156] Bickel, *supra* note 4, at 75.

[157] Vieth v. Jubelirer, 541 U.S. 267, 326 n.14 (2004) (Stevens, J., dissenting).

[158] *Id.* at 306 (Kennedy, J., concurring) (emphasis added).

Justice Kennedy was likely alarmed, and I take him at his word. Unlike Justice Scalia, who was alarmed yet ready to remove the Court from this area,[159] Justice Kennedy was alarmed, yet willing to think the question further.[160] But Justice Kennedy was also wrong on the facts. His history was flawed. Even the extreme way he states his point—an order from the Court requiring the correction of *all* district lines—would not be an unprecedented intervention by the Court. This was *Baker*.[161] This was *Reynolds*.[162] This was *Lucas v. Forty-Fourth General Assembly of Colorado*.[163]

Consider in this vein Justice Stewart's critique. Justice Stewart cast one of the deciding votes in *Baker* because he was willing to allow the Court to intervene in redistricting but only under extreme circumstances.[164] In subsequent cases, he expressed his dismay at the Court's newfound boldness, which enforced an equipopulation standard with uncharacteristic—even irrational—rigidity. He wrote in *Lucas*: "The Court's draconian pronouncement, which makes unconstitutional the legislatures of most of the 50 States, finds no support in the words of the Constitution, in any prior decision of this Court, or in the 175-year political history of our Federal Union."[165] Stewart's critique makes clear that whatever judicial intervention in political gerrymandering questions might be, it would not be unprecedented.

This is not a new debate. This is a return to the old debate between Justice Frankfurter and the Court. Justice Frankfurter famously argued that the Court "ought not enter this political thicket."[166] The criticism then, as now, is that judicial intervention would embroil the courts in questions of politics. The obvious answer is that this was the very ground upon which *Baker* was fought, and Justice Frankfurter lost this battle long ago. More crucially, the Court's prestige and respect grew as a result of this intervention.[167]

For the future, the question is not whether scholars and commentators can divine standards that will persuade the Court. The only question is, what will it take to assuage Justice Kennedy's alarms about what he takes to be a "substantial

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[159] This is a charitable reading of his position, at best.
[160] *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).
[161] Baker v. Carr, 369 U.S. 186, 226–29 (1962).
[162] Reynolds v. Sims, 377 U.S. 533, 562–64 (1964).
[163] Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713, 734–36, 739 (1964).
[164] *See Baker*, 369 U.S. at 265–66 (Stewart, J., concurring).
[165] *Lucas*, 377 U.S. at 746 (Stewart, J., dissenting).
[166] Colegrove v. Green, 328 U.S. 549, 556 (1946).
[167] Louis L. Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 991 (1967) ("At least some of us who shook our heads over *Baker v. Carr* are prepared to admit that it has not been futile, that it has not impaired, indeed that is has enhanced, the prestige of the Court."); Pamela S. Karlan, *Equal Protection:* Bush v. Gore *and the Making of a Precedent*, *in* THE UNFINISHED ELECTION OF 2000, at 159, 194 (Jack N. Rakove ed., 2001) (explaining that "because one-person, one-vote has been . . . a stunning popular and jurisprudential success" the Court has based subsequent activist decisions on similar grounds).

intrusion" into politics? He is obviously concerned with the extreme ways to which politicians go to rig district lines in their favor. This is the clear lesson of *LULAC*. How toxic must our political environment become for Justice Kennedy to finally bring the Court to a place where it has long been?

CONCLUSION

The political gerrymander has few friends in the world. And yet, the Supreme Court appears ready to remove itself from considering the constitutionality of this hated political practice. This is an odd position to take in a world where the Court decides most questions of public policy. This is not a timid Court, worried about its stature in the world and how its opinions might be received by the relevant publics. But in the political gerrymandering context, conservatives on the Court profess a lack of judicially manageable standards as a reason for declaring these questions nonjusticiable. This is one of the most interesting puzzles in modern constitutional law. What explains this apparent incongruity?

This Essay argues that the Court's initial foray into the field of politics, in *Baker v. Carr*, leads inexorably to the political gerrymandering cases. To be sure, the worry for the justices, and particularly Justice Kennedy, is that the Court will embroil itself in political contests. The worry is akin to calls for too much justice. But this is not a new worry. It dates back to the moment when the Court first entered this field, in *Baker*, and particularly its implementation of the equipopulation standard, in *Reynolds v. Sims*. Critics of judicial intervention already fought this battle and lost. Rather than standards, then, what Justice Kennedy really needs is a dose of history.