

Gobbledygook: Political Questions, Manageability, & Partisan Gerrymandering

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ABSTRACT: In finding that extreme partisan gerrymandering is a non-justiciable political question in Rucho v. Common Cause, the Supreme Court fixated upon the lack of judicially manageable standards to evaluate their constitutionality. The decision culminated in the Court's recent reinforcement of that manageability focus in partisan gerrymandering cases, with Chief Justice Roberts even calling efforts to numerically calculate the extremity of such gerrymandering "sociological gobbledygook."

Such belabored fears about manageability misread the questions in the political question doctrine. The doctrine requires the Justices to initially ask, as a normative matter, whether the judiciary should resolve the controversy in our constitutional system, and only then to consider practical manageability concerns. The Court has taken the reverse approach, failing to acknowledge the damage extreme partisan gerrymandering does to our representative democracy of separated powers.

The Court has also used an incoherent understanding of manageability that moves the goalposts for those that would measure and control partisan gerrymandering. In turn, the Court has first demanded more precise standards, then required more malleable ones. That impossibly exacting standard for standards is out of step with constitutional jurisprudence of similarly broad impact, such as Second and Fourth Amendment law, reapportionment cases, and racial gerrymandering.

The Rucho Court should have tackled the normative question directly, finding that extreme partisan gerrymandering is an existential threat to our tripartite government. It exacerbates legislative gridlock, forcing an overburdened judiciary to act as the primary agent of legal change. The Court

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should then have relaxed its demands for manageable standards. Manageability is a sliding scale; where an issue is normatively vital to democracy's future, the Justices should experiment with malleable standards. Adjudicating these cases with imperfect standards would have unleashed human capital to help repair the partisan rot in our democracy.

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I. INTRODUCTION

Although many Supreme Court Justices have signaled their interest in resolving extreme partisan gerrymandering claims over the past five decades,¹ this term the Court found such claims to be non-justiciable political questions.² The Court reached this conclusion in *Rucho v. Common Cause* despite the agreement of the Justices that extreme partisan gerrymandering

1. See *Gill v. Whitford*, 138 S. Ct. 1916, 1926–29 (2018) (summarizing the Court's prior opinions in *Gaffney v. Cummings*, 412 U.S. 735 (1973), *Davis v. Bandemer*, 478 U.S. 109 (1986), *Vieth v. Jubelirer*, 541 U.S. 267 (2004), and *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006)).

2. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (“We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.”).

is incompatible with basic democratic principles at the foundation of our system of government.³ In light of that agreement, why has the Court been so hesitant to adjudicate these cases?

The answer lies in the Justices' preoccupation with practical concerns about the manageability of standards available in extreme partisan gerrymandering cases. That component of the political question doctrine has led to nearly a half-century of waffling on partisan gerrymandering's justiciability, culminating in *Rucho*'s holding that the issue was a political question simply because there are no judicially manageable standards to measure partisan gerrymandering.⁴

In so holding, the Justices failed to assess a normative question—*should* the courts or coordinate branches resolve the issue under our Constitution?—separately from a practical question—*how* can judges resolve the issue with a manageable standard? Without squarely addressing the normative elephant in the room, recent decisions repeatedly questioned the existence of any manageable standard, deriding all of the proposals conjured by the plaintiffs as alternatively too vague and too numerically precise to comport with the Constitution.⁵ For example, in 2018 Chief Justice Roberts dismissed efforts to numerically calculate the extremity of partisan gerrymandering, such as the so-called “efficiency gap” that compares the “wasted votes” of the parties in recent elections,⁶ as “sociological gobbledygook.”⁷ Yet one year later in *Rucho*, Roberts derided several proposed standards as too vague to meet constitutional muster,⁸ even adding an exasperated call for more numerical precision from one proposed test.⁹

Manageability concerns, expressed in such assertive and contradictory language, misread the political question doctrine. The doctrine's roots are in clear constitutional statements that some issues should be resolved non-judicially; manageability only arose as a feature of it in the early twentieth century,¹⁰ and only then as a consideration within the doctrine, not a

3. *Id.* at 2505; *id.* at 2512 (Kagan, J., dissenting).

4. *Id.* at 2506–08 (majority opinion).

5. *See, e.g.*, Transcript of Oral Argument at 20, 23, 36–37, 40, 42–43, 50–54, *Gill*, 138 S. Ct. 1916 (No. 16-1161); Transcript of Oral Argument at 26–31, *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (No. 17-333); *see also Gill*, 138 S. Ct. at 1933.

6. *Gill*, 138 S. Ct. at 1924, 1933 (“Though they take no firm position on the matter, the plaintiffs have suggested that an efficiency gap in the range of 7% to 10% should trigger constitutional scrutiny.”); *see also* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 850–53 (2015).

7. Transcript of Oral Argument at 40, *Gill*, 138 S. Ct. 1916 (No. 16-1161).

8. *Rucho*, 139 S. Ct. at 2502–06.

9. *Id.* at 2505 (“Would twenty percent away from the median map be okay? Forty percent? Sixty percent?”).

10. *See, e.g.*, *Coleman v. Miller*, 307 U.S. 433, 454–55 (1939); *see also* Brief for Constitutional Law Professors as Amici Curiae in Support of Appellees at 8, *Gill*, 138 S. Ct. 1916 (No. 16-1161) [hereinafter Brief for Constitutional Law Professors].

sufficient condition on its own for sidestepping an issue. Many scholars have criticized the political question doctrine's malleability and its use to preclude judicial review of foreign policy decisions in coordinate branches,¹¹ emphasizing that the lack of judicially discoverable standards is a prudential concern not required by the constitution's text¹² that fails to justify judicial abstention from many foreign policy disputes.¹³ That critique applies with full force to manageability concerns in extreme partisan gerrymandering cases, where that practical worry is not a standalone justification to sidestep the issue.

Manageability is a sliding scale; where an issue is normatively vital to the country's future, the Court should experiment with malleable standards that can be refined later.¹⁴ The Court should begin its political question analysis in extreme partisan gerrymandering cases by asking whether it is normatively desirable for the third branch to resolve such claims under any standard.¹⁵ To answer that question, the Justices should recognize that extreme partisan gerrymandering is not just a problem in the political branches; it is an existential threat to a representative democracy of separated powers. The legislature's process for self-formulation now undermines its own ability to serve its citizens, leading to historically low levels of legislative output¹⁶ and

11. See, e.g., THOMAS M. FRANCK, *POLITICAL QUESTIONS JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 4–5, 8–9 (1992); Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1400–03 (1999); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 675–86 (2002); see also Harlan Grant Cohen, *A Politics-Reinforcing Political Question Doctrine*, 49 ARIZ. ST. L.J. 1, 6 (2017) (“Complaints about the political question doctrine after *Baker v. Carr* usually center on the way courts have used some of the *Baker* categories to insulate Executive or government policies from review.” (footnote omitted)).

12. McKay Cunningham, *Gerrymandering and Conceit: The Supreme Court's Conflict with Itself*, 69 HASTINGS L.J. 1509, 1526 (2018) (citing 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, 265 (2002)); see also Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 78 (1961); Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1211–12 (2006); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7–9 (1959).

13. Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 964 (2004).

14. Richard Hasen has raised a similar argument in favor of judicially unmanageable standards in some Equal Protection cases. See Richard L. Hasen, *The Benefits of “Judicially Unmanageable” Standards in Election Cases Under the Equal Protection Clause*, 80 N.C. L. REV. 1469, 1473–75 (2002).

15. “Our previous attempts at an answer have left few clear landmarks for addressing the question [of what judicially enforceable limits to partisan gerrymandering exist]. . . . Our efforts to sort through those considerations have generated conflicting views both of how to conceive of the injury arising from partisan gerrymandering and of the appropriate role for the Federal Judiciary in remedying that injury.” *Gill*, 138 S. Ct. at 1926.

16. See, e.g., Edward G. Carmines & Matthew Fowler, *The Temptation of Executive Authority: How Increased Polarization and the Decline in Legislative Capacity Have Contributed to the Expansion of Presidential Power*, 24 IND. J. GLOBAL LEGAL STUD. 369, 379 (2017) (noting that Congress has exhibited “a significant decline in productivity over time” and that “[t]he 113th Congress passed

increasing the pressure on the judiciary to act as the nation's primary agent of legal change without any congressional oversight.¹⁷ Partisan gridlock also undermines the judicial appointment process through which that branch is formed.¹⁸ Judicial refusal to address partisan gerrymandering might avoid the short-term appearance of politicization. But it licenses a rot in our society that can overwhelm our democracy, including the judicial branch, over time.

Once the Court has addressed that normative question, it should then turn to practical concerns over the manageability of standards that assess the extremity of partisan gerrymandering. Where, as here, the issue is normatively vital to the country's future, the Justices should be more willing to implement malleable standards that can be refined over time. The Court can announce such malleable standards while candidly acknowledging that litigants and judges should experiment with stricter standards, thereby unleashing experimentation and innovation.

Such candor would force the Court to stop moving the goalposts of manageability just beyond reach in each partisan gerrymandering case it hears.¹⁹ "Manageability" cannot mean opposing on logically inconsistent

fewer bills than any other in memory; in fact, this was the least productive Congress since the late 1800s, when polarization was equivalent to the level it is today" (citing Philip Bump, *The 113th Congress Is Historically Good at Not Passing Bills*, WASH. POST (July 9, 2014, 9:54 AM), <https://www.washingtonpost.com/news/the-fix/wp/2014/07/09/the-113th-congress-is-historically-good-at-not-passing-bills> [<https://perma.cc/4BLF-MQJ2>]); Daniel Stepanicich, Comment, *Presidential Inaction and the Constitutional Basis for Executive Nonenforcement Discretion*, 18 U. PA. J. CONST. L. 1507, 1546 n.273 (2016) ("The 112th and 113th Congresses have been the least productive in terms of legislative productivity in history." (citing Drew DeSilver, *In Late Spurt of Activity, Congress Avoids 'Least Productive' Title*, PEW RES. CTR. (Dec. 29, 2014), <https://www.pewresearch.org/fact-tank/2014/12/29/in-late-spurt-of-activity-congress-avoids-least-productive-title> [<https://perma.cc/6A43-N7AB>])); *Statistics and Historical Comparison*, GOVTRACK, <https://www.govtrack.us/congress/bills/statistics> [<https://perma.cc/WQF9-V4P5>].

17. Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1138 ("[I]f Congress cannot act, it cannot effectively check the executive—or the judiciary—when the other branch extends beyond its authority or impairs Congress's ability to fulfill its constitutional responsibilities. This represents the more critical problem of congressional gridlock. A Congress deprived of its legislative power is a branch unable to check."). A hyper-partisan, gridlocked Congress can also lead to an expansion of presidential powers. See Carmines & Fowler, *supra* note 16, at 379; see also Teter, *supra*, at 1136 ("[A] gridlocked Congress pushes the executive to engage in its own form of law making to make up for Congress's failure.").

18. "[T]he gridlock involving the judicial appointment process has produced a judicial vacancy rate that 'erod[es] the quality of justice' as courts cancel oral arguments, postpone cases for months, and take dramatically longer to dispose of matters." Teter, *supra* note 17, at 1142 (alteration in original) (footnote omitted) (first quoting William H. Rehnquist, *The 1997 Year-End Report of the Federal Judiciary*, THE THIRD BRANCH, Jan. 1998, at 2–3; then citing SARAH A. BINDER & FORREST MALTZMAN, *ADVICE & DISSENT: THE STRUGGLE TO SHAPE THE FEDERAL JUDICIARY* 128–30 (2009)).

19. Justice Roberts's discomfort with the efficiency gap may be genuine; the Court and commentators can always express good-faith disagreement with a particular social science measure. Indeed, they have regarding the efficiency gap. See Robin E. Best et al., *Considering the Prospects for Establishing a Packing Gerrymandering Standard*, 17 ELECTION L.J. 1, 6 (2018); Wendy

grounds to reject any proposed standard that plaintiffs propose. Since 1986's *Davis v. Bandemer*,²⁰ the Court has alternated between suggestions that proposed standards are either too indeterminate for judges to administer or too numerically precise to fit the Constitution's text.²¹

The Court's standardless search for manageable standards has disincentivized plaintiffs who might develop more precise measures of partisan gerrymandering. Human ingenuity has an unlimited capacity to refine standards, but only if the Court unleashes it.²² By suggesting that partisan gerrymandering standards will always be either too vague or too precise, the Court has undermined the very efforts that might have further refined those standards. The Court thus ensured that far more human capital was employed to enhance the technological and statistical methods that have made partisan gerrymanders so powerful. Had the Court adopted even a relatively fuzzy standard while explicitly suggesting that lower courts and plaintiffs should experiment with more precise quantification of gerrymanders in the future, it would have unleashed the power of human ingenuity to resolve the manageability concern.

The Court's manageability concerns are also out of step with its jurisprudence in other momentous constitutional areas, including Second and Fourth Amendment controversies and even other stands of redistricting cases concerning malapportionment and racial gerrymandering. Justices of varying ideologies have waded into those claims, which, much like partisan gerrymandering, broadly impact the daily lives of nearly all citizens and open new pathways for high-profile litigation with ill-defined parameters. If the Court is willing to intervene in those situations, it should be equally willing to

K. Tam Cho, *Measuring Partisan Fairness: How Well Does the Efficiency Gap Guard Against Sophisticated as Well as Simple-Minded Modes of Partisan Discrimination?*, 166 U. PA. L. REV. ONLINE 17, 20–23 (2017); John F. Nagle, *How Competitive Should a Fair Single Member Districting Plan Be?*, 16 ELECTION L.J. 196, 199–203 (2017); Nicholas A. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 STAN. L. REV. 1503, 1508 (2018); Jonathan Krasno et al., *Can Gerrymanders Be Measured? An Examination of Wisconsin's State Assembly 11* (May 28, 2016) (unpublished manuscript), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2783144 [<https://perma.cc/7TFY-JQFB>].

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

21. See *infra* Part II.

22. As Justice Kennedy said in *Vieth v. Jubelirer*:

Technology is both a threat and a promise. On the one hand, if courts refuse to entertain any claims of partisan gerrymandering, the temptation to use partisan favoritism in districting in an unconstitutional manner will grow. On the other hand, these new technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties. That would facilitate court efforts to identify and remedy the burdens, with judicial intervention limited by the derived standards.

Vieth v. Jubelirer, 541 U.S. 267, 312–13 (2004) (Kennedy, J., concurring).

intervene in partisan gerrymandering cases given the normative importance of the issue.

In Part II of this Article, I explain how the Court incorrectly prioritized manageability over normative concerns in the version of the political question doctrine it applied in extreme partisan gerrymandering jurisprudence.²³ The political question doctrine, properly understood, renders practical manageability a secondary concern to normative justiciability.²⁴ The Court should have applied a sliding scale of manageability depending upon the urgency of any justiciable issues in the case.²⁵ In Part III, I argue that manageability requirements should be less demanding. The Court's waffling between demanding more flexibility and more precision in proposed standards has precluded innovation, discouraging talented social scientists from refining those standards. It has likewise given political actors an unfettered opportunity to refine even more damaging gerrymandering techniques.²⁶ In Part IV, I demonstrate that the Court's requirements for an exacting standard to measure extreme partisan gerrymandering are an outlier, even among similarly momentous constitutional matters.²⁷ The Justices' reticence in partisan gerrymandering cases is conspicuously inconsistent with the willingness of Justices of all stripes to adopt flexible standards in Second and Fourth Amendment jurisprudence, and even in malapportionment and racial gerrymandering cases.²⁸ Finally, in Part V, I offer my own argument in favor of justiciability, given the threat such practices present to a representative democracy of separated powers.²⁹

II. THE POLITICAL QUESTION DOCTRINE, JUSTICIABILITY & MANAGEABILITY

In extreme partisan gerrymandering cases, the Court has misapplied the political question doctrine by emphasizing practical concerns over normative ones. Just as they were in the prior term, the Justices in *Rucho* were focused on the manageability of potential standards, often excluding the normative question of whether the issue has been constitutionally committed to the political branches.³⁰ Addressing that normative inquiry first should have led the Court to find extreme partisan gerrymandering justiciable.

23. See *infra* Part II.

24. See *infra* Sections II.A–B.

25. See *infra* Sections II.C–D.

26. See *infra* Part III.

27. See *infra* Part IV.

28. See *infra* Sections IV.B–D.

29. See *infra* Part V.

30. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491, 2494, 2496, 2498–99 (2019).

A. *MANAGEABILITY ON A FALSE PEDESTAL*

Manageability has arisen early in the Court's extreme partisan gerrymandering cases of the past two terms. At the oral arguments in *Gill v. Whitford*, Justice Breyer quickly suggested that "the hard issue in this case is are there standards manageable by a court[?]"³¹ Soon thereafter, Justice Kagan suggested that the plaintiffs' proposed standards were "pretty scientific,"³² while Justice Alito quickly disagreed that there was "not a manageable standard" to measure partisan gerrymandering.³³ In a preview of his *Rucho* opinion, Chief Justice Roberts later claimed that addressing partisan gerrymandering would force the Court "to decide in every case whether the Democrats win or the Republicans win," which the plaintiffs argued the Court could do "because [the efficiency gap] was greater than [seven] percent."³⁴ But for Roberts, "the intelligent man on the street is going to say [such a finding is] a bunch of baloney."³⁵ Moments later, Roberts went even further in deriding the plaintiffs' proposed social science measures of partisan gerrymandering, remarking that the plaintiffs wanted to "[take] these issues away from democracy and . . . [throw] them into the courts pursuant to, and it may be simply my educational background, but I can only describe as sociological gobbledygook."³⁶

When the Court issued its standing-focused decision in *Gill* months later, it again outlined its manageability concerns with the efficiency gap standard, but failed to address the important threat that the extreme political gerrymandering presented to our democratic government.³⁷ The Court extensively detailed the efficiency gap's operation alongside a suggestion that it would measure only "the effect that a gerrymander has on the fortunes of political parties," rather than "the effect that a gerrymander has on the votes

31. Transcript of Oral Argument at 11, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161).

32. *Id.* at 15. Justice Sotomayor added that "every single social science metric points in the same direction." *Id.* at 16.

33. *Id.* at 20.

34. *Id.* at 37.

35. *Id.* at 38.

36. *Id.* at 40. Justice Alito quickly piled on, noting the need for manageable standards and quizzically inquiring whether the efficiency gap was "the Rosetta stone" the Court had been searching for. *Id.* at 42-43. Justice Breyer suggested that the Court ask for additional briefing and reargument specifically to address the various standards proposed by the parties for administering partisan gerrymandering cases. Transcript of Oral Argument at 26-28, *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (No. 17-333). This would allow the Court to "have a blackboard and have everyone's theory on it" so it could weigh the merits of each standard and potentially find one that was satisfactorily manageable. *Id.* at 28. The Court did not directly take up Justice Breyer's suggestion; instead, it remanded both cases on standing grounds, only to readdress the issue the following term in *Rucho*.

37. See *Gill*, 138 S. Ct. at 1924 (beginning the recitation of the case's facts with the plaintiff's proposed standards for evaluating partisan gerrymanders).

of particular citizens.”³⁸ The Court’s complaint was two-fold: First, complex numerical tests are unsatisfying descriptions of a complex phenomenon like partisan gerrymandering;³⁹ and second, even if the efficiency gap accurately measured the partisan asymmetry in many elections, the parties themselves lack the kinds of individual rights needed to challenge such asymmetry.⁴⁰

In *Rucho v. Common Cause*, the Justices again fixated upon the manageability of standards when determining whether extreme partisan gerrymandering is a political question. The majority opinion almost immediately noted that the Court “has struggled without success over the past several decades to discern judicially manageable standards for deciding such claims.”⁴¹ The Court analyzed whether the facts presented a justiciable controversy by claiming that one discrete category of political question cases “are those that lack ‘judicially discoverable and manageable standards for resolving [them].’”⁴² The Court’s analysis of justiciability in *Rucho* then centered upon the need for manageable standards, and it rejected every proposal that the plaintiffs, dissent, and lower court could muster.⁴³ It ultimately found extreme partisan gerrymandering non-justiciable because it found no “limited and precise standards that are clear, manageable, and politically neutral.”⁴⁴

The Justices’ manageability focus arose from their misguided approach to the political question doctrine in partisan gerrymandering cases. Those decisions addressed manageability concerns primarily, using practical concerns to justify inaction.⁴⁵ The political question doctrine itself suggests that the Court should proceed in the opposite order.

38. *Id.* at 1933.

39. *Id.*

40. *Id.*

41. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019).

42. *Id.* at 2494 (alteration in original) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). As I argue below, however, the Court’s prior descriptions of the political question doctrine have not suggested that a case is non-justiciable *solely* because there are no manageable standards to resolve them. *See infra* Section II.B; *see also* Brief for Constitutional Law Professors, *supra* note 10, at 9 (“[E]ven where the Court has held an issue nonjusticiable as a political question, the Court has relied primarily upon commitment of that issue to the political branches.” (citing *Nixon v. United States*, 506 U.S. 224, 229–36 (1993); *Gilligan v. Morgan*, 413 U.S. 1, 11 (1973))).

43. *See Rucho*, 139 S. Ct. at 2491, 2501–07.

44. *Id.* at 2500, 2508.

45. *Davis v. Bandemer*, 478 U.S. 109, 165 (1986) (Powell, J., concurring) (“Because it is difficult to develop and apply standards that will identify the unconstitutional gerrymander, courts may seek to avoid their responsibility to enforce the Equal Protection Clause by finding that a claim of gerrymandering is nonjusticiable. . . . [S]uch a course is mistaken, and that the allegations in this case raise a justiciable issue. Moreover, I am convinced that appropriate judicial standards can and should be developed.” (footnote omitted)).

B. THE QUESTIONS IN THE POLITICAL QUESTION DOCTRINE

In *Marbury v. Madison*, the Court recognized “that where there is a legal right, there is also a legal remedy,” yet noted that some actions of the executive branch are constitutionally “submitted to the executive” and therefore “only politically examinable.”⁴⁶ Scholars view this decision as the origin of the political question doctrine.⁴⁷ “Subsequent cases held that certain questions were nonjusticiable political questions because they were committed unreviewably to the discretion of the political branches by the text of the Constitution, its structure, or historical practice.”⁴⁸

Judicial manageability, though not part of the political question doctrine at first, arose as a feature of it in the early twentieth century. For example, in the 1939 decision *Coleman v. Miller*, the Court found that time limits on state ratification of constitutional amendments were a non-justiciable political question.⁴⁹ There, the Court emphasized that easy criteria for judges to evaluate the question were elusive but rested its decision largely on the fact that the issue was committed to Congressional discretion.⁵⁰ Thus, the Court’s focus remained on clear textual commitments of an issue to political branches. The lack of judicially manageable standards was a consideration within the doctrine but not a sufficient condition on its own to decline ruling on the issue.

In *Baker v. Carr*, a 1962 challenge to Tennessee’s malapportioned election districts, the Court again summarized the features of the political question doctrine with an emphasis, first, on textual commitment of questions to a coordinate branch.⁵¹ In finding that controversy justiciable,⁵² the Court first quoted its formulation in *Coleman* that when determining whether an issue presents a political question, “the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.”⁵³ The Court later described six features “[p]rominent on the surface of” a political question:

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

46. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 166, 170 (1803).

47. See Brief for Constitutional Law Professors, *supra* note 10, at 5–6 (summarizing the emergence of the political question doctrine).

48. *Id.* at 6.

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

50. Brief for Constitutional Law Professors, *supra* note 10, at 8 (citing *Coleman*, 307 U.S. at 454–56).

51. *Davis v. Bandemer*, 478 U.S. 109, 121 (1986) (discussing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

52. *Baker*, 369 U.S. at 198.

53. *Id.* at 210 (quoting *Coleman*, 307 U.S. at 454–55).

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.⁵⁴

The *Baker* Court's description emphasizes that the practical manageability "feature" of political questions is of somewhat less importance; more critical is whether an issue has been assigned to a coordinate branch by the Constitution itself. Manageability is neither a necessary nor sufficient condition for application of the political question doctrine.

Many scholars have suggested that the strands of the political doctrine are either classical or prudential,⁵⁵ with manageability falling into the latter category, and clear textual commitment to another branch falling into the former.⁵⁶ Most of the Court's applications of the political question doctrine reflect the emphasis on classical strands of the doctrine over prudential ones. Thus, where the Court has ruled an issue a non-justiciable political question post-*Baker*, it has first determined whether the issue is textually committed to another branch before considering manageability.⁵⁷ For instance, in holding that National Guard training was a non-justiciable political question in *Gilligan v. Morgan*, the Court emphasized that the issue was textually committed to the political branches by Article I, Section 8 of the Constitution.⁵⁸ According to the Court, "[i]t would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process."⁵⁹

The Court likewise held that an issue was a non-justiciable political question based upon a textual commitment to a coordinate branch in *Nixon v. United States*.⁶⁰ The Court ruled that the procedure by which the Senate conducted impeachment trials was a political question primarily because,

54. *Id.* at 217.

55. Barkow, *supra* note 12, at 246, 256; Bickel, *supra* note 12, at 79; Cunningham, *supra* note 12, at 1525 (collecting authorities); Gerhardt, *supra* note 12, at 1211–12; Wechsler, *supra* note 12, at 7–9.

56. Cunningham, *supra* note 12, at 1526 ("The requirement of a judicially manageable standard is a prudential one.").

57. Brief for Constitutional Law Professors, *supra* note 10, at 9 ("[E]ven where the Court has held an issue nonjusticiable as a political question, the Court has relied primarily upon commitment of that issue to the political branches." (citing *Nixon v. United States*, 506 U.S. 224, 229–36 (1993); *Gilligan v. Morgan*, 413 U.S. 1, 11 (1973) (summarizing the emergence of the political question doctrine))).

58. *Gilligan*, 413 U.S. at 6–11 (discussing U.S. CONST. art. I, § 8).

59. *Id.* at 10.

60. *Nixon*, 506 U.S. at 229–36.

under Article I, Section 3, “[t]he Senate shall have the sole Power to try all Impeachments.”⁶¹ Chief Justice Rehnquist acknowledged that this normative concern was primary, though it might be informed by practical manageability considerations.⁶² Thus, certain discretionary decisions left to coordinate branches cannot, by their nature, be judicially managed. Where the Constitution’s text contains discretionary standards that seem to lack precision, the founders likely meant to delegate the issue to another branch.⁶³

The Court again suggested that manageability was a lesser concern in *Zivotofsky v. Clinton*.⁶⁴ The *Zivotofsky* Court began its analysis by highlighting that political question jurisprudence has distilled the doctrine to just the first two criteria listed in *Baker*, eschewing the remaining four.⁶⁵ However, the Court also noted the primacy of the normative, textual commitment inquiry. According to the Court, as long as the parties’ arguments “sound in familiar principles of constitutional interpretation,” the case likely “does not ‘turn on [whether there are] standards that defy judicial application.’”⁶⁶

C. THE QUESTIONS IN EXTREME PARTISAN GERRYMANDERING CLAIMS

Until recently, cases considering challenges to extreme partisan gerrymandering have also reflected the secondary importance of manageability within the political question doctrine. The Court’s plurality

61. *Id.* at 229 (quoting U.S. CONST. art. I, § 3, cl. 6).

62. *Id.* at 228–29 (“[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.”).

63. *Id.* at 230 (“[T]he use of the word ‘try’ in the first sentence of the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review of the Senate’s actions . . .”).

64. *Zivotofsky v. Clinton*, 566 U.S. 189, 189 (2012).

65. *Id.* at 195. Commentators have also noted an evolution in the political question doctrine towards an emphasis on only the first two common characteristics of political questions. “[T]he Court has not invoked the more obviously flexible criteria articulated in *Baker v. Carr*—the last four of the six on its list—in any recent case, to the point where it seems fair to say that the only real components of the doctrine are the first two: a textually demonstrable commitment to the political branches and the lack of judicially manageable standards.” 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, 1213 (2002); see also Brief for Constitutional Law Professors, *supra* note 10, at 8 (“Some decisions mentioning judicial manageability, for example, treat it as the only factor to be considered in political question analysis in addition to commitment to the political branches.” (citing *Zivotofsky*, 566 U.S. at 195)). Jesse Choper has suggested a set of four criteria to determine the existence of a political question, including whether “there is a textual commitment to a coordinate political department,” whether “judicial review is thought to be unnecessary for the effective preservation of our constitutional scheme,” whether “[the Court] cannot formulate principled, coherent tests as a result of ‘a lack of judicially discoverable and manageable standards,’” and whether the plaintiffs complain of “constitutional injuries that are general and widely shared.” Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1462–63 (2005) (footnote omitted) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

66. *Zivotofsky*, 566 U.S. at 201 (quoting *Baker*, 369 U.S. at 211).

opinion in 1986's *Davis v. Bandemer*, for instance, noted that "[t]he mere fact" that neither party presented "a likely arithmetic presumption" to readily resolve political gerrymandering cases "does not compel a conclusion that the claims presented here are nonjusticiable."⁶⁷ Instead, the Court could wait for such constitutional standards to evolve in future cases.⁶⁸

In recent partisan gerrymandering jurisprudence, however, the Court has almost entirely focused upon the practical manageability feature of the political question doctrine. The plurality opinion in 2004's *Veith v. Jubelirer* summarized the political question doctrine by quoting the same passage from *Baker* and quickly noting that "[t]hese tests are probably listed in descending order of both importance and certainty."⁶⁹ But immediately after suggesting that practical manageability was a secondary concern, the opinion claimed that only manageability issues were raised in the case, emphasizing the historical roots of that "feature" of the political question doctrine.⁷⁰ The opinion then decried the lack of guidance provided to lower courts in the years since *Bandemer*, suggesting that the Court should revisit whether any practically manageable standards exist.⁷¹ Notably absent was any discussion of a possible textual commitment of the issue to the political branches. The plurality then suggested that because "no judicially discernible and manageable standards for adjudicating political gerrymandering claims . . . emerged" following *Bandemer*, "political gerrymandering claims are nonjusticiable."⁷²

When the Court briefly addressed partisan gerrymandering claims again in 2006's *League of United Latin American Citizens v. Perry*,⁷³ the plurality again reflected this subtle but important shift emphasizing manageability as the primary concern. The plurality began its analysis by "examin[ing] whether appellants' claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution."⁷⁴ As mere background for an inquiry into the manageability of the proposed tests, the Court quickly summarized the Constitutional text that addresses whether gerrymandering ought to be a political question as a normative matter.⁷⁵ The plurality then focused its analysis on the practical manageability of the plaintiffs' proposed test, noting that it was "not a reliable measure of

67. *Davis v. Bandemer*, 478 U.S. 109, 123 (1986).

68. *Id.*

69. *Veith v. Jubelirer*, 541 U.S. 267, 277–78 (2004) (quoting *Baker*, 369 U.S. at 217).

70. *Id.* at 278 ("The second [manageability feature] is at issue here, and there is no doubt of its validity.").

71. *Id.* at 279–81.

72. *Id.* at 281.

73. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

74. *Id.* at 414.

75. *Id.* at 414–16.

unconstitutional partisanship.”⁷⁶ The plurality thus rejected the plaintiffs’ partisan gerrymandering claim because they did not articulate “a reliable standard for identifying unconstitutional political gerrymanders.”⁷⁷

The subtle shift toward an emphasis on the manageability concern as primary had tremendous doctrinal importance that was reflected in the *Rucho* decision. It allowed the *Rucho* Court to sidestep consideration of the classical strands of the political question doctrine, instead alluding to prudential concerns like manageability as the primary, and perhaps sole, consideration in the political question doctrine. Right from the start, the *Rucho* Court focused on the inability of courts to employ sufficiently manageable standards to decide extreme partisan gerrymandering cases.⁷⁸ It repeated the assertions in *Vieth* and *LULAC* that cases lacking judicially manageable standards are a discrete category of non-justiciable political questions.⁷⁹ The Court’s justiciability analysis then centered upon the need for manageable standards, without even noting the order in which the “features” of the political question doctrine were presented in *Baker*.⁸⁰ Ultimately, because of “the absence of a constitutional directive or legal standard[] to guide us in” resolving such cases, the Court held that extreme partisan gerrymandering claims are non-justiciable political questions.⁸¹

D. RESTORING ORDER TO THE POLITICAL QUESTION DOCTRINE

The Court’s holding in *Rucho* was the culmination of a trend that wrongly elevated manageability above the more normative question of commitment to a coordinate branch. That procedure reverses the traditional order of operations for analyzing political questions. It makes the political question doctrine—the very standard through which the Justices require precise standards in partisan gerrymandering cases—imprecise and difficult to administer,⁸² largely because there is no clear standard by which to determine

76. *Id.* at 416–20.

77. *Id.* at 423.

78. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019).

79. *Id.* at 2494, 2498.

80. *Id.* at 2496–98.

81. *Id.* at 2508.

82. Brief for Constitutional Law Professors, *supra* note 10, at 20 (“[A] free-standing notion of judicial manageability is itself vague and unmanageable in any consistent way. The Court has a variety of tools for dealing with difficult and complex issues, such as making narrow rulings that address only a small aspect of such issues or broader rulings that leave open to future consideration more particularized determinations. But there are no rules or standards by which to determine when these tools are unavailable and an issue is unmanageable.”). Justice White complained of a similar misconstruction of the political question doctrine in Justice O’Connor’s dissent in *Davis v. Bandemer*.

Justice O’Connor’s analysis is flawed because it focuses on the perceived need for judicial review and on the potential practical problems with allowing such review. Validation of the consideration of such amorphous and wide-ranging factors in

the workability of proposed judicial standards.⁸³ Instead, the Court should have considered that normative issue first, and only then considered manageability, informed by the normative importance of the question and the necessity of the Court's intervention to answer it.

The political question doctrine rightly emphasizes textual commitment above manageability. Whether a question has been committed to another branch is a fundamentally normative question. It asks whether courts *should* resolve the controversy in our tripartite system.⁸⁴ Even where the Constitution's text does not clearly state that another branch should act to resolve a specific issue, the Court has to confront whether it is a good idea for the judiciary to answer that question rather than leaving it to a political process that may never resolve it.

The manageability feature of the political question doctrine is, in contrast, practical or prudential.⁸⁵ "[T]he manageable standard requirement . . . is not imposed by law, but by the Court itself. It is more guideline than mandate, and consequently the Court can choose to disregard it without legal infraction."⁸⁶ The manageability strand of the political question doctrine seeks standards that courts can reliably and consistently invoke to resolve the issue in subsequent cases. That concern asks not whether the judiciary *should* resolve an issue, but rather whether it *can* in light of appropriately precise tools that are available.

Considered at these higher levels of abstraction, the traditional analytical progression of the political question doctrine properly places normative concerns above practical, prudential ones. Proceeding in that order allows the initial normative inquiry to inform the manageability inquiry.

assessing justiciability would alter substantially the analysis the Court enunciated in *Baker v. Carr*, and we decline Justice O'Connor's implicit invitation to rethink that approach.

Davis v. Bandemer, 478 U.S. 109, 126–27 (1986).

83. "[T]he 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." Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1281 (2006). "[T]he Court makes its judgments about whether proposed standards count as judicially manageable under criteria that would themselves fail to qualify as judicially manageable . . ." *Id.* at 1278. This proposition was quoted in Cunningham, *supra* note 12, at 1531.

84. Tushnet, *supra* note 65, at 1206 ("According to [Louis] Henkin, most of the political question cases involved decisions by the Court (1) that the Constitution gave the political branches discretion to decide what to do and the political branches had not abused their discretion, or (2) that the Constitution placed no limits on the discretion of the political branches to decide what to do." (citing Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976))). Furthermore, "the Court applies ordinary processes of interpretation to the clauses that a litigant claims commit the question to the political branches in deciding whether a question is a political question." *Id.* at 1209.

85. "The requirement of a judicially manageable standard is a prudential one." Cunningham, *supra* note 12, at 1526.

86. *Id.* at 1528 (footnote omitted).

Justiciability does not turn on manageability. It should not be secondary to it. This is not to say that the manageability concern is invalid. Justice Scalia rightly noted in *Vieth* that “law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.”⁸⁷ But it should be a secondary inquiry the Court performs *after* answering the normative question, not an alternative route to avoid the case’s merits.

Furthermore, the practical manageability concern ought to be secondary because it should be informed by the primary normative concern. Manageability can operate on a sliding scale depending upon the type of question at issue. The normative aspects of the political question doctrine balance the importance of the issue against the risks that judicial resolution of it will undermine the separation of powers and improperly enmesh the judiciary in the inner workings of a coordinate branch. How that question is answered helps define how much risk the Court can take by employing fuzzier standards to measure the constitutional violation. The more normatively important the issue, the more willing the Justices ought to be to implement fuzzier, less-manageable standards because the nation desperately needs an answer.⁸⁸

As an illustration of this sliding scale of manageability, consider three hypothetical cases. In case one, the Court finds that there is a clear textual commitment of an issue to a coordinate branch; the issue might then immediately be considered political, and the political question doctrine invoked irrespective of the existence of manageable standards for courts to resolve it. In case two, the Court finds that there is a reasonably strong norm of commitment to a political actor, one which traditionally has kept the judiciary out of the fray. For such issues, the Court might then proceed to the practical inquiry and ask whether there are any manageable standards to resolve the issue, with a relatively high bar for those standards. Given the likelihood that the issue should be resolved by political actors, the Court should only get involved if it can do so using clear analytical frameworks that will not generate public controversy or accusations of judicial bias. In case three, the Court finds that judicial resolution of the issue is important to the preservation of our democracy and has not been allocated plainly to the political branches. In that case, the Court should again consider the practical inquiry, but with more lenient expectations for the manageability of proposed standards. Put another way, the Court’s standard for standards should be

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

88. McKay Cunningham has presented a similar argument in suggesting that manageability itself is simply the Court’s effort to balance the importance of the issue against the damage intervention may do to the Court’s reputation. “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. Is the cost of reduced judicial legitimacy outweighed by the benefit achieved through an unwieldy judicial standard?” Cunningham, *supra* note 12, at 1533 (footnote omitted).

explicitly lower; even a slightly malleable standard could be implemented and refined over time given the dire need for judicial resolution of the question.

Richard Hasen has raised a similar argument in favor of judicially unmanageable standards in some Equal Protection cases.⁸⁹ According to Hasen, when there is significant “novelty or controversy surrounding the holding,” the Court should utilize a fuzzier standard.⁹⁰ Doing so “leaves room for future Court majorities to deviate from or modify rulings in light of new thinking about the meaning of democracy or the structure of representative government,” all while “allow[ing] for greater experimentation and variation in the lower courts.”⁹¹ Announcing any standard, even a vague one, allows the Justices to unleash the ingenuity of lower courts and future plaintiffs on the problem without staking themselves to a particular bright line.⁹²

I agree with Hasen that the Court should be more open to less determinate standards, but I would take that reasoning one step further. The Court’s willingness to experiment with fuzzy standards should depend upon the normative importance of judicial resolution of the question for our democracy, irrespective of the novelty or public controversy surrounding it. Just as Hasen suggests, in those cases the Court can announce fuzzy standards while hoping that lower courts will engage in greater experimentation with more concretized (or perhaps even mathematical) ones later. The Court should be clear about its goals; though the announced standard may be opaque, the Court should forthrightly state that it wants litigants and judges to experiment with stricter standards in future cases. The Court can state what

89. See Hasen, *supra* note 14, at 1489.

90. *Id.*

91. *Id.* at 1472.

92. *Id.* at 1503. As Hasen puts it:

Unmanageability in the pursuit of political equality is no vice. Indeed, unmanageable judicial standards have much to commend them in certain circumstances. If we think about the overused metaphor of the Court making its way through the political thicket, we might imagine a few ways that the Court could reach its destination. We begin with the Court stuck in a deep forest. Manageable standards are the equivalent of the leader using all of her resources to clear the path in a particular direction. That strategy is appropriate if one has a very good sense of where one wants to go, but dangerous if one does not.

When unsure of the correct direction, the leader’s best strategy might be to stay in a single location and send a few scouts out along different paths. Each scout then reports to the leader with updated information on the paths available. The leader, after receiving this information, can then make a more informed decision on the ultimate path to be taken. If the Court, as is likely, will remain in the political thicket, unmanageability may be one of the best tools available for finding the right paths.

Id.

those future standards ought to achieve, thereby unleashing experimentation and innovation on the specific tests that can meet those articulated goals.⁹³

Surprisingly, the plurality opinion in *Vieth* itself acknowledged the possible sliding scale of practical manageability before ignoring it later. As the *Vieth* plurality acknowledged,

courts might be justified in accepting a modest degree of unmanageability to enforce a constitutional command which (like the Fourteenth Amendment obligation to refrain from racial discrimination) is clear; whereas they are not justified in inferring a judicially enforceable constitutional obligation . . . which is both dubious and severely unmanageable.⁹⁴

The plurality thus suggested a sliding scale of manageability, informed by the clear normative need for judicial intervention. Such a scale would allow courts to adjudicate extreme partisan gerrymandering cases because, as I argue below, the practice undermines the function of both the legislative and judicial branches, presenting an existential threat to tripartite democracy.⁹⁵

III. A SHIFTING STANDARD FOR STANDARDS

Today's partisan gerrymandering techniques are remarkably precise. What was once a crude effort to roughly capture partisan advantage⁹⁶ has become a multi-million-dollar enterprise undertaken by experts in computing, mathematics, and social science that can tilt the scales in favor of one party with unprecedented precision.⁹⁷ Data analytics allows mapmakers

93. See *infra* Part V. Admittedly, announcing fuzzy standards in controversial cases may undermine the public's confidence in the Court's ruling, especially given the initial public resistance that such a ruling might face. But the risk of lowered public confidence in the Court as an institution may be justified in the name of resolving an issue that threatens to undermine vital democratic norms, as I argue below in Part V.

94. *Vieth v. Jubelirer*, 541 U.S. 267, 286 (2004).

95. See *infra* Part V.

96. "Old-time efforts, based on little more than guesses, sometimes led to so-called dummy-manders—gerrymanders that went spectacularly wrong." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2512–13 (2019) (Kagan, J., dissenting).

97. The literature on the precision with which partisan gerrymanders is executed is vast and begins even at the turn of the century. See, e.g., *Vieth*, 541 U.S. at 345–46 (Souter, J., dissenting) (citing Micah Altman & Michael McDonald, *The Promise and Perils of Computers in Redistricting*, 5 DUKE J. CONST. L. & PUB. POL'Y 69, 72–77 (2010)) (describing a typology of computer use in redistricting); Bruce E. Cain et al., *A Reasonable Bias Approach to Gerrymandering: Using Automated Plan Generation to Evaluate Redistricting Proposals*, 59 WM. & MARY L. REV. 1521, 1526 (2018); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 624 (2002); Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 736 (1998); Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2553–54 (1997). The effects of such technology have been well summarized in the popular press. "Today, political mapmaking is a multimillion-dollar enterprise, with dozens of high-profile paid consultants, armies of lawyers, terabytes worth of voting data, advanced software, and even a supercomputer or two." Vann R. Newkirk II, *How Redistricting Became a Technological*

and software engineers to examine voting preferences with granularity well below the precinct level, accounting for behavior of individual blocks or even households.⁹⁸ This has led to ever-more enduring,⁹⁹ and potentially damaging, partisan gerrymanders.¹⁰⁰ “The severity of today’s gerrymandering is . . . unprecedented in modern times.”¹⁰¹

But just as the capabilities of technically savvy political operatives who implement partisan gerrymanders appear limitless, human ingenuity to design and refine standards that measure extreme partisan gerrymandering is likewise inexhaustible. The same technologies used to generate maps that widely favor one party can be used to generate maps that do not consider partisan advantage.¹⁰² Justice Kennedy recognized this possibility decades ago

Arms Race, ATLANTIC (Oct. 28, 2017), <https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888> [<https://perma.cc/W85G-MA5N>]. “It’s intensified by technology, it’s intensified by data and better handling of big data sets. We have GIS, or geographic information systems, we have maps that are manipulable down to the house level, and we have very rich voter-data files.” Mark Walsh, *Data Scientists Help Courts Grapple with Increasingly Divisive Maps*, A.B.A. J. (Apr. 1, 2018, 12:30 AM), http://www.abajournal.com/magazine/article/gerrymandering_goes_high_tech [<https://perma.cc/CG5V-W29R>] (quoting Moon Duchin, Associate Professor of Mathematics, Tufts University).

98. Newkirk, *supra* note 97 (“Normally, precincts are the lowest level at which aggregated official political data is available. That makes sense, since precincts as designated and created by towns and counties are the primary unit of elections administration. But, with the rise of big data and big datasets, mapmakers have been able to scry—with remarkable accuracy—both the political leanings and voting likelihood of blocks and households, which then allow them much more fine-tuning of district lines.”); *see also Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting) (“Mapmakers now have access to more granular data about party preference and voting behavior than ever before. County-level voting data has given way to precinct-level or city-block-level data; and increasingly, mapmakers avail themselves of data sets providing wide-ranging information about even individual voters. Just as important, advancements in computing technology have enabled mapmakers to put that information to use with unprecedented efficiency and precision.” (citations omitted)).

99. Though party affiliations can be changed at any time, such affiliations are relatively sticky. *See generally* DUANE F. ALWIN ET AL., *POLITICAL ATTITUDES OVER THE LIFE SPAN: THE BENNINGTON WOMEN AFTER FIFTY YEARS* (1991) (analyzing empirically the general continuity of party affiliations and attitudes of a cohort of women studied over a 50-year span).

100. Newkirk, *supra* note 97 (“[T]echnology has gotten a lot more sophisticated, and it’s enabled map drawers to draw much more durable gerrymanders than they have in the past. That’s because state mapmakers now know a lot more about voters. That’s just an extension of the big data revolution that you also see in marketing and other politics.” (quoting Michael Li, Senior Counsel, Brennan Center for Justice)).

101. Stephanopoulos & McGhee, *supra* note 6, at 836 (noting an “alarming rise in the efficiency gap in the 2012 election. At the congressional level, the average plan had an absolute gap of 0.94 seats in the 1970s and 1980s, 1.09 seats in the 1990s and 2000s, and 1.58 seats in 2012. At the state house level, the average plan had an absolute gap of 4.76 percent in the 1970s and 1980s, 5.10 percent in the 1990s and 2000s, and 6.07 percent in 2012”).

102. For example, researchers have proposed various plans to automate the redistricting process, eliminating the risks (and temptations) of partisan gerrymanders. *See, e.g.*, Cain et al., *supra* note 97, at 1526 (“Automated map generation technologies will continue to improve and become more accessible in the future. We provide an example of how they could be used with the Parallel Evolutionary Algorithm for Redistricting (PEAR), the most advanced

in *Vieth*.¹⁰³ In a concurring opinion, Justice Kennedy expressed optimism that the Court could nudge the development of manageable standards to measure partisan gerrymandering:

Technology is both a threat and a promise. On the one hand, if courts refuse to entertain any claims of partisan gerrymandering, the temptation to use partisan favoritism in districting in an unconstitutional manner will grow. On the other hand, these new technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties. That would facilitate court efforts to identify and remedy the burdens, with judicial intervention limited by the derived standards.¹⁰⁴

But the Court's manageability rhetoric has precluded the development of better standards in extreme partisan gerrymandering cases. Instead, the Court has issued a series of openly contradictory criteria for a potential standard to measure extreme partisan gerrymandering. At first, the Court demanded more precision. When plaintiffs produced mathematical formulas to measure the extremity of partisan gerrymandering, the Court found them too untethered from the Constitutional text to garner widespread public approval. But when plaintiffs returned again with more malleable standards, the court turned those aside as too vague. By alternatively finding proposed standards too vague and too precise, the Court has stunted the very ingenuity needed to develop manageable standards that might end partisan gerrymandering.

Start with *Veith*. Despite Justice Kennedy's optimism, the majority expressed dissatisfaction with the indeterminacy of a variety of proposed tests to measure the extremity of a partisan gerrymander. First, the Court took issue with the test proposed 18 years earlier in *Davis v. Bandemer*, based upon whether a political group was "denied its chance to effectively influence the political process."¹⁰⁵ The *Vieth* Court suggested that the *Bandemer* test's "indeterminacy" created a "legacy . . . of puzzlement and consternation" in the lower courts.¹⁰⁶ Second, the Court found that the plaintiff's proposed test in *Vieth* itself—a showing not just of partisan effects, but also "that . . . mapmakers acted with a *predominant intent* to achieve partisan advantage" because "other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage"—would "cast[] [judges] forth

automated redistricting algorithm to date. PEAR is able to utilize more than a hundred thousand processor cores on the Blue Waters supercomputer, the fastest research supercomputer in the world." (footnote omitted)).

103. *Vieth v. Jubelirer*, 541 U.S. 267, 312–13 (2004) (Kennedy, J., concurring).

104. *Id.*

105. *Davis v. Bandemer*, 478 U.S. 109, 132–33 (1986).

106. *Vieth*, 541 U.S. at 282–83.

upon a sea of imponderables, and ask[] them to make determinations that not even elections experts can agree upon.”¹⁰⁷

In an effort to respond to the indeterminacy the *Veith* Court found so unsettling, the plaintiffs in *Gill* relied in part upon the efficiency gap to provide concrete numbers for the extremity of partisan gerrymandering. The efficiency gap

is calculated by subtracting the statewide sum of one party’s wasted votes from the statewide sum of the other party’s wasted votes and dividing the result by the statewide sum of all votes cast, where ‘wasted votes’ are defined as all votes cast for a losing candidate and all votes cast for a winning candidate beyond the 50% plus one that ensures victory.¹⁰⁸

The creators of the efficiency gap have suggested presuming unconstitutionality where a districting plan leads to efficiency gaps of “*two seats* for congressional plans and *8 percent* for state house plans,” subject to additional sensitivity testing.¹⁰⁹

Though *Vieth* asked plaintiffs to propose more determinate standards, the very numerical precision of the efficiency gap doomed it in *Gill*. As Chief Justice Roberts claimed, “the intelligent man on the street” would find such a mathematical formula insufficiently tethered to the Constitution’s text, a theme to which other Justices quickly ascribed.¹¹⁰ From *Vieth* to *Gill*, the Court asked the designers of a standard to measure extreme partisan gerrymandering to thread a needle between indeterminacy and precision. A test that allows too much judicial interpretation is too indeterminate for lower courts to administer reliably; on the other hand, a numerically precise test is too mentally taxing and divorced from the Constitution’s text for the well-informed public to support.

The pendulum swung back to precision in *Rucho*. Seemingly ignoring the critique of numerical formulas, it made just a year earlier in *Gill*, the *Rucho* Court found the plaintiffs’ more malleable standards too vague. The Court first critiqued the plaintiffs’ three-part Equal Protection standard—which examined the predominant purpose of the mapmaker, then the likelihood that partisan effects would be enduring, and finally whether the mapmaker could provide “a legitimate state interest or other neutral explanation” for its

107. *Id.* at 284, 290 (quoting Brief for Appellants at 19, *Vieth*, 541 U.S. 267 (No. 02-1580)).

108. *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018); see also Stephanopoulos & McGhee, *supra* note 6, at 851 (discussing the concepts of wasted votes and the efficiency gap). “Though they take no firm position on the matter, the plaintiffs have suggested that an efficiency gap in the range of 7% to 10% should trigger constitutional scrutiny.” *Gill*, 138 S. Ct. at 1933.

109. Stephanopoulos & McGhee, *supra* note 6, at 837. As the creators note, such mathematical thresholds of presumptive unconstitutionality, which the defendants can overcome at trial, are not foreign to judges or to election law; courts apply “a population deviation threshold [of] []10 percent[]” to one person-one vote claims. *Id.*

110. Transcript of Oral Argument at 37, 42-43, 50-54, *Gill*, 138 S. Ct. 1916 (No. 16-1161).

map.¹¹¹ According to the Court, the first step of that analysis wrongly suggested that partisan intent was always impermissible.¹¹² The second step was too vague, requiring courts to make impossible predictions about the durability of a gerrymander.¹¹³ And the third step was too broad, seeming to overlap with the first.¹¹⁴ The Court was similarly critical of the plaintiffs' three-part First Amendment standard—which required proof of the mapmakers' intent to burden the opposing party, “an actual burden on political speech or associational rights[,] and a causal link between the . . . intent and [the effects].”¹¹⁵ According to the Court, that test also misleadingly suggested that any partisan intent in mapmaking is too much.¹¹⁶ Furthermore, the proof of an actual burden upon First Amendment rights was “not a serious standard for separating constitutional from unconstitutional partisan gerrymandering;” it was a vague suggestion of how much gerrymandering is too much.¹¹⁷

Perhaps most revealing was the *Rucho* majority's critique of the dissent's proposed standard, which would examine how far a map deviates from the “median” map that could be created using the State's own districting criteria.¹¹⁸ The majority first suggested that the variation amongst State's traditional districting criteria was too wide to allow a precise measure of the extremity of gerrymandering.¹¹⁹ It was also exasperated by determining how far mapmakers could deviate from the “median” map without running afoul of the Constitution: “Would twenty percent away from the median map be okay? Forty percent? Sixty percent?”¹²⁰ But that critique is double-speak. After first suggesting that the standard is too vague in defining traditional districting criteria, it decries the minority's inability to provide a numerically precise measurement of unconstitutional gerrymandering.

That vagueness critique of the *Rucho* minority's standard is irreconcilable with Justice Roberts's distaste for the numerical precision of the efficiency gap. In *Gill*, the Court suggested that numerically precise tests like the efficiency gap are not the kind of “manageable” standards the political question doctrine requires. Yet in *Rucho*, the Court lambasted the proposed standards as far too vague to meet constitutional muster, even complaining about the lack of a numerical test for the extremity of partisan

111. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019) (citing *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 868 (M.D.N.C. 2018)).

112. *Id.* at 2502–03.

113. *Id.* at 2503–04.

114. *Id.* at 2504.

115. *Id.* at 2504–05.

116. *Id.* at 2504.

117. *Id.*

118. *Id.* at 2505.

119. *Id.* at 2501.

120. *Id.* at 2505.

gerrymandering. Such alternating critiques effectively reject all proposed standards, whether vague or precise. They create “a cloud of defeatism [that] hangs over the cause of action for partisan gerrymandering,”¹²¹ instituting a one-sided arms race that favors those designing ever-more precise and damaging gerrymanders and disfavors those who would devise similarly precise measures of the extremity of gerrymandering. Technology and data science march forward, yet only one gerrymandering combatant has an incentive to harness those new capabilities.¹²²

If the Court applied a consistent standard to measure the manageability of standards, it might have opened the door to human ingenuity, allowing it to resolve the very manageability concern that the Court claims plaintiffs have failed to sufficiently address. Given the vital importance of the issue to the future of our nation, the Court should have accepted something less than perfection in standards.¹²³ Furthermore, it should have suggested that litigants and judges experiment with stricter standards in the cases that will arise below, incentivizing those opposed to extreme partisan gerrymandering to unleash their capabilities against one of the most destructive forces in our democracy.¹²⁴

IV. MANAGEABLY MALLEABLE STANDARDS IN CONSTITUTIONAL LAW

Overruling another branch’s districting decision would have momentous repercussions across the political landscape and should not be taken lightly.

121. Stephanopoulos & McGhee, *supra* note 6, at 849 (“[N]ot a single claimant was able to convince a court to strike down a district plan on gerrymandering grounds during the eighteen years between *Bandemer* and *Vieth*. In the decade since *Vieth*, plaintiffs’ record has been equally dismal: failure after failure with nary a single success. Faced with such relentlessly negative precedent, aggrieved parties in the post-*LULAC* era may have *included* gerrymandering claims in their complaints, reasoning that they could do no harm, but then chosen not to *pursue* these claims with much enthusiasm.” (footnotes omitted)).

122. “Until recently, there would have been no reason for us to write this Article. Just about every potential partisan gerrymandering standard already had been proposed to—and rejected by—the Court.” *Id.* at 839.

123. As I discussed above, Richard Hasen has suggested a sliding scale for the manageability of constitutional standards in Equal Protection cases, though he focuses on the controversial nature of the question presented, rather than its importance to our democracy. *See supra* Section II.D.

124. Justice Stevens’s view in *Vieth* is particularly informative on this point:

Quite obviously, however, several standards for identifying impermissible partisan influence are available to judges who have the will to enforce them. We could hold that every district boundary must have a neutral justification; we could apply Justice Powell’s three-factor approach in *Bandemer*; we could apply the predominant motivation standard fashioned by the Court in its racial gerrymandering cases; or we could endorse either of the approaches advocated today by Justice SOUTER and Justice BREYER. What is clear is that it is not the unavailability of judicially manageable standards that drives today’s decision. It is, instead, a failure of judicial will to condemn even the most blatant violations of a state legislature’s fundamental duty to govern impartially.

Vieth v. Jubelirer, 541 U.S. 267, 341 (2004) (Stevens, J., dissenting).

Such a decision could shape the way every citizen interacts with their elected representatives, altering the constituencies that political actors address during their campaigns and represent once seated. Decisions that apply malleable standards to adjudicate partisan gerrymandering claims would also assert a new basis for judicial review of the construction of a coordinate branch.¹²⁵ Given the stakes, some reticence to employ a malleable standard that would invite howls of prejudice from losing parties is understandable.

But are the concerns over partisan gerrymandering so distinct from those raised in other areas of constitutional law where the Court willingly employs malleable standards? In this Part, I argue that, although drawing lines in constitutional cases is always difficult, the Court has deployed standards far less definite than those proposed in partisan gerrymandering cases in other fields of law with equally high stakes. The “Court has not shied away from addressing questions, much less foreclosed all future consideration of those questions, simply because they are ‘not susceptible to the mechanical application of bright and clear lines.’”¹²⁶ The Court’s position on the manageability of standards in partisan gerrymandering cases is out of step with its jurisprudence in other constitutional areas, and even in other redistricting cases that address racial disparities in voting power. Given the threat that partisan gerrymandering poses to our representative democracy,¹²⁷ it ought to show similar willingness to intervene in that area.

125. As Chief Justice Roberts noted during the *Gill* oral argument, intervention in a single case would invite litigation in each election cycle to evaluate the fairness of the processes used across the country to determine our representatives, in essence forcing the Court “to decide in every [election] whether the Democrats win or the Republicans win.” Transcript of Oral Argument at 37, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161). Roberts also noted that the Court could not easily sidestep these challenges, which would fall under its mandatory jurisdiction:

[I]f the claim is allowed to proceed, there will naturally be a lot of these claims raised around the country. Politics is a very important driving force and those claims will be raised. And every one of them will come here for a decision on the merits. These cases are not within our discretionary jurisdiction. They’re the mandatory jurisdiction. . . . So it’s going to be a problem here across the board.

Id. However, the *Rucho* dissent noted that plaintiffs asked the Court to intervene only in the most extreme cases. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2523 (2019) (Kagan, J., dissenting). As Justice Kagan explained,

the combined inquiry used in these cases set the bar high, so that courts could intervene in the worst partisan gerrymanders, but no others. Or to say the same thing, so that courts could intervene in the kind of extreme gerrymanders that nearly every Justice for decades has thought to violate the Constitution.

Id. at 2522.

126. Brief for Constitutional Law Professors, *supra* note 10, at 13 (quoting *United States v. Lopez*, 514 U.S. 549, 579 (1995) (Kennedy, J., concurring)).

127. See *infra* Part V.

A. *DEFINING THE STAKES*

Partisan gerrymandering cases appear uniquely momentous for two primary reasons. First, they have far-reaching effects that intersect with the everyday lives of nearly all citizens. Judicial intervention would alter citizens' election of representatives to the political branches, and at the same time change the way politicians campaign and representatives interact with constituents. Second, intervention would place the Court squarely in the center of a highly public controversy that it has long sidestepped. Intervention opens a rhetorical door on a submarine, inviting contentious, high-profile litigation that cannot be readily stopped.

Momentous though it might be, judicial intervention in partisan gerrymandering cases—even on the basis of relatively malleable standards in need of further refinement over time—would not be unique in constitutional law. I suggest several examples where Justices of varying ideologies have waded into controversies that both (1) impact the daily lives of nearly all citizens and (2) open new pathways for high-profile, controversial litigation.

As a first example, consider the Court's recent jurisprudence establishing an individual right to bear arms under the Second Amendment. These decisions have defined the constitutional limits for legislative regulation of an individual right; though some regulation is constitutionally permissible, outright bans on the possession of handguns are not.¹²⁸ The Court has been willing to strike down legislation that is an unconstitutional encroachment on Second Amendment rights in decisions that have profound effects on the daily lives of nearly all citizens. These rulings both preserve the ability of millions of gun owners to responsibly possess and use firearms and incense gun control and safety advocates, increasing the visibility of gun control and regulation as a national political issue. And in practical terms, judicial protection of the individual right to bear arms from many forms of legislative regulation can be directly traced to both tragic and heroic events that grab headlines and control the nation's current-events narrative.

The Court's Second Amendment jurisprudence also generates extremely high-profile, controversial litigation that garners a spotlight in everyday political conversation. It puts the Court in the center of a controversy it long averted, which it could have continued to sidestep quietly. And the Court's rulings include a highly malleable standard for defining the contours of the right to bear arms, as discussed below.¹²⁹ Yet the imprecision of that standard did not sway the Justices from intervention in this area as effectively as it has in partisan gerrymandering cases.

My next example concerns the Court's jurisprudence defining citizens' Fourth Amendment rights against unreasonable searches and seizures.¹³⁰

128. *District of Columbia v. Heller*, 554 U.S. 570, 626–36 (2008).

129. *See infra* Section IV.B.

130. U.S. CONST. amend. IV.

Though traditionally viewed through the lens of criminal procedure, Fourth Amendment rights concern more than just criminals and those who prosecute them.¹³¹ The Fourth Amendment protects the broader public against governmental invasions upon their privacy and tranquility. All citizens—not just criminals—are potentially subject to covert investigation by government agents, with the Court’s enforcement of the Fourth Amendment as the only potential bulwark against malfeasance.

Rulings in this area have cascading repercussions for the way executive officials intervene in citizens’ everyday lives and the scope of judicial oversight into that intervention through the warrant requirement. These issues have been at the forefront of our nation’s political discourse from the founding era, when public repulsion at writs of assistance played an important role in the revolution and, later, the drafting of the Fourth Amendment itself.¹³² The issue still resonates today, from widespread public concern at the NSA’s telephony metadata collection program¹³³ to recent litigation and consternation over warrantless collection of location information derived from citizens’ cell phone records.¹³⁴

Fourth Amendment jurisprudence has also opened new pathways for high-profile, controversial litigation on the basis of highly malleable constitutional standards. As detailed further below,¹³⁵ the Court’s early definitions of a “search” emphasized property rights, limiting the scope of search and seizure jurisprudence for much of American history.¹³⁶ Not until its 1967 decision in *Katz v. United States* did the Court formally transition to a “reasonable expectation of privacy” test that would vastly expand citizens’ privacy rights, all by employing an extremely malleable, and oft-critiqued, constitutional standard.¹³⁷ The Court adopted this test when the limited

131. Supreme Court “cases have historically recognized that the warrant requirement is ‘an important working part of our machinery of government,’ not merely ‘an inconvenience to be somehow “weighed” against the claims of police efficiency.’” *Riley v. California*, 573 U.S. 373, 401 (2014) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971)).

132. William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 404–09 (1995) (noting John Adams’ view that the arguments in the Boston writ-of-assistance case “fired the first shot of the Revolution”).

133. See, e.g., Glenn Greenwald, *Major Opinion Shifts, in the US and Congress, on NSA Surveillance and Privacy*, GUARDIAN (July 29, 2013, 7:33 AM), <http://www.theguardian.com/commentisfree/2013/jul/29/poll-nsa-surveillance-privacy-pew> [<https://perma.cc/8PHN-HVJM>].

134. *Carpenter v. United States*, 138 S. Ct. 2206, 2221 (2018); see also Michael Gentithes, *The End of Miller’s Time: How Sensitivity Can Categorize Third-Party Data After Carpenter*, 53 GA. L. REV. 1039, 1057–58 (2019).

135. See *infra* Section IV.C.

136. *United States v. Jones*, 565 U.S. 400, 405 (2012). Cases such as *Olmstead v. United States* exemplified this trend, holding that taps attached to telephone wires in public streets did not run afoul of the Fourth Amendment simply because none of the material things mentioned in the amendment—a citizen’s person, house, papers or effects—were intruded upon by the government’s action. *Olmstead v. United States*, 277 U.S. 438, 463–64 (1928).

137. *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring).

trespassory view of search and seizure law provided unsatisfyingly little protection for citizens' privacy. In doing so, the Court opened pathways to interminable, ongoing litigation to define a search and cabin the meaning of Fourth Amendment rights. The Court could have sidestepped that litigation by maintaining a property-based definition of a search yet chose to intervene to preclude a coordinate branch of government from undermining the Justices' sense of basic fairness and decency for all citizens.

My next example is even more striking. The Court has willingly intervened in two other types of cases involving the redistricting process itself. First, in a series of cases beginning in the 1960s,¹³⁸ the Court addressed the refusal of several states to reapportion their legislative districts in a way that would allow equal voting power for all citizens.¹³⁹ The impact of these cases on the way the legislative branch operates is hard to overstate.¹⁴⁰ They changed how large swaths of the country exercised political power and the relationship millions of citizens had with their representatives. Chief Justice Earl Warren even remarked that if these cases had been decided in the early 1950s, "'*Brown v. Board of Education* would have been unnecessary' because of the" impacts on legislative preferences in southern states.¹⁴¹ And though those decisions now enjoy nearly universal approval,¹⁴² they had to withstand contemporary criticism from those who considered the one-person, one-vote standard a stunningly concrete measure of constitutionality that is nowhere

138. See, e.g., *Voinovich v. Quilter*, 507 U.S. 146, 149 (1993); *Brown v. Thomson*, 462 U.S. 835, 838 (1983); *Connor v. Finch*, 431 U.S. 407, 409 (1977); *Chapman v. Meier*, 420 U.S. 1, 3 (1975); *Gaffney v. Cummings*, 412 U.S. 735, 735-36 (1973); *Reynolds v. Sims*, 377 U.S. 533, 536-37 (1964); *Baker v. Carr*, 369 U.S. 186, 187-88 (1962).

139. Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 544 (2004) (discussing the failure of states to redraw district boundaries, leading to legislatures "controlled by lawmakers from rural hamlets in decline whose reactionary politics stymied the interests of voters in the burgeoning cities and suburbs"); Douglass Calidas, Note, *Hindsight is 20/20: Revisiting the Reapportionment Cases to Gain Perspective on Partisan Gerrymanders*, 57 DUKE L.J. 1413, 1425 (2008) (citing Samuel Issacharoff and Pamela Karlan's article, *supra*, on gerrymandering).

140. "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." Cunningham, *supra* note 12, at 1540.

141. Calidas, *supra* note 139, at 1429-30 (quoting JOHN HART ELY, ON CONSTITUTIONAL GROUND 4 (1996)).

142. *Id.* at 1424 ("Over time, however, public opinion and judges of all political stripes have come to universally hail these decisions as courageous steps taken by the Court to restore the health and functioning of a democratic electoral system that suffered from serious structural flaws."); Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103, 1104 (2002) ("If *Baker v. Carr* was ever controversial, it is no longer so. The decision has not only enjoyed near-universal acceptance, it is also recognized as one of the Court's finest moments." (footnotes omitted)); Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1645 (1993) ("[D]ecades after the Court's initial forays into the 'political thicket,' the commands of one-person, one-vote reign supreme" (footnote omitted)).

to be found in the text.¹⁴³ Yet the Court willingly entered the “political thicket”¹⁴⁴ of malapportionment claims despite the high public impact and repeated high-profile litigation that followed.

Another example comes from the 1990s, when the Court again intervened in controversial, highly publicized redistricting litigation to establish an Equal Protection claim for racial gerrymandering. Though the court had previously considered constitutional challenges to racial gerrymanders, it had avoided substantial rulings that invoked Equal Protection.¹⁴⁵ But beginning with its 1993 decision in *Shaw v. Reno*, the Court held that “a new, ‘analytically distinct’ cause of action [existed] under the Equal Protection Clause” where states drew districts that were either so irregularly shaped that they “could not [rationally] be understood as anything” but racial classifications,¹⁴⁶ or where race served as “the predominant factor motivating the legislature’s [redistricting] decision.”¹⁴⁷ In the aftermath of those opinions, courts saw “a significant rise in challenges to various apportionment plans” in widely-publicized litigation from which the Court had previously steered clear.¹⁴⁸

Although jurisprudence in the areas I’ve discussed presents similarly high stakes to partisan gerrymandering cases, the Court has not hesitated to deploy malleable judicial standards to resolve them. The following subsections trace the evolution of those flexible standards.

B. IMPRECISION IN SECOND AMENDMENT RIGHTS

Starting with its decision in *District of Columbia v. Heller*, the Court held that citizens have an individual right to bear arms but did so without specifically defining the contours of that right.¹⁴⁹ The Court was willing to

143. *Reynolds*, 377 U.S. at 590–92 (Harlan, J., dissenting); *Baker*, 369 U.S. at 268–70 (Frankfurter, J., dissenting); 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) (providing a summary of the Court’s deliberative process in crafting the *Baker v. Carr* decision); Nathaniel Persily, *Suing the Government in Hopes of Controlling It: The Evolving Justifications for Judicial Involvement in Politics*, 5 U. PA. J. CONST. L. 607, 608–09 (2003) (describing the history of the Court’s involvement in political subject matter).

144. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

145. “Prior to its blockbuster opinions in *Shaw v. Reno*, and *Miller v. Johnson*, the Supreme Court had considered constitutional challenges to racial gerrymanders on three separate occasions, striking down only one redistricting plan on the grounds that it violated the Fifteenth Amendment.” Jocelyn F. Benson, *A Shared Existence: The Current Compatibility of the Equal Protection Clause and Section 5 of the Voting Rights Act*, 88 NEB. L. REV. 124, 137 (2009) (footnotes omitted).

146. *Id.* at 142 (quoting *Shaw v. Reno*, 509 U.S. 630, 652 (1993)).

147. *Bush v. Vera*, 517 U.S. 952, 959 (1996) (emphasis omitted) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)); see *Shaw*, 509 U.S. at 645.

148. Benson, *supra* note 145, at 142.

149. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

wade into a new constitutional controversy it found important and justiciable, even without clearly established standards to administer future cases.¹⁵⁰

In *Heller*, the Court offered a detailed historical analysis of the Second Amendment's terms and the roots of the "individual right to bear arms."¹⁵¹ However, the Court claimed that it would "not undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment."¹⁵² Instead, the Court offered several patently ambiguous standards for delineating the limits of the individual right it had just announced, with little in the way of clear definitions or manageable bright lines.¹⁵³ According to the Court, some regulation of the right to bear arms is constitutionally permissible, such as "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings."¹⁵⁴ Additionally, the Constitution permits laws "prohibiting the carrying of 'dangerous and unusual weapons,'" because the right only protects carrying weapons "in common use at the time."¹⁵⁵

Turning first to the carrying of firearms in "sensitive places," neither *Heller* itself nor subsequent decisions of the Court has further defined this ambiguous phrase. Lower courts have thus struggled to define that standard and determine which regulations of the right to bear arms might be constitutionally permissible, reasoning by analogy from the Court's examples of schools and government buildings. For instance, in *Bonidy v. USPS*, the Tenth Circuit held that a postal service parking lot was not a sensitive place.¹⁵⁶ It reasoned that, while some government buildings like the White House might be sensitive, "without more concrete evidence of particular vulnerability, any presumption of lawfulness for a firearms regulation cannot control."¹⁵⁷ In contrast, other courts have found that dams and related

150. See Brief for Constitutional Law Professors, *supra* note 10, at 12 (citing *Heller*, 554 U.S. at 626) (noting the Court's willingness to "adjudicate[] [Second Amendment] challenges where admittedly there was no comprehensive background theory" for doing so).

151. *Heller*, 554 U.S. at 576–626.

152. *Id.* at 626.

153. *Id.* at 626–27.

154. *Id.* at 626.

155. *Id.* at 627 (first quoting 4 WILLIAM BLACKSTONE 148–49 (1769); then quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). The Court in *Heller* also acknowledged that it had not yet elucidated the level of scrutiny that should apply to this right. *Id.* at 634–35. Though not precisely akin to the application of a malleable standard, the Court thus did accept a level of uncertainty in the name of adjudicating the controversy, rather than passing on it until all details are clear. And lower courts have disagreed over how to define the applicable level of scrutiny. Compare *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) (applying intermediate scrutiny), with *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89–101 (2d Cir. 2012) (employing a comprehensive two-step rubric to determine, first, whether the second amendment is burdened or the "in common use" exception or the "dangerous and unusual" exception applies, then second, what is the level of scrutiny), and *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015) (same).

156. See *Bonidy*, 790 F.3d at 1125–26.

157. *Id.* at 1137 (Tymkovich, J., concurring).

structures are sensitive places where it is “reasonable . . . to limit the carrying of loaded firearms,”¹⁵⁸ or that state universities are sensitive places, given the presence of students and the need to ensure their security.¹⁵⁹

The Court has also failed to flesh out its understanding of “dangerous and unusual weapons” that are not “in common use at the time,” leaving lower courts to fill the breach.¹⁶⁰ Those efforts are far from unified. For instance, the Fifth Circuit has found that machine guns are dangerous and unusual, arguing that they are weapons of war and of “quasi-suspect character,” as the Supreme Court previously held in *Staples v. United States*.¹⁶¹ The Fifth Circuit added that the “in common use” test is an objective, statistical inquiry,¹⁶² noting that some circuits examine the absolute total numbers of weapons,¹⁶³ while other circuits look to proportions and percentages of a particular weapon compared to all firearms in use.¹⁶⁴ The Ninth Circuit has also found that machine guns are dangerous because they are likely to cause serious bodily harm, given their effectiveness in World War I, and unusual because they have been unlawful since the 1980s.¹⁶⁵

The *Heller* Court set out markers for what it believed would be the limitations of the right to carry firearms but did so with standards that it hoped would become more concrete over time. The Court did not let the malleability of that standard preclude deciding that the constitutionality of a D.C. firearms statute was a justiciable question. The Court itself acknowledged the limitations of its opinion:

[S]ince this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than *Reynolds v. United States*, 98 U.S. 145 (1879), our first in-depth Free Exercise Clause case, left that area in a state of utter certainty. And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.¹⁶⁶

158. *GeorgiaCarry.org, Inc. v. U.S. Army Corps of Eng’rs*, 212 F. Supp. 3d 1348, 1371 (N.D. Ga. 2016).

159. *See DiGiacinto v. Rector & Visitors of George Mason Univ.*, 704 S.E.2d 365, 369–70 (Va. 2011) (citing *Heller*, 554 U.S. at 626) (finding that George Mason University is a sensitive place based on *Heller*’s recognition of schools as sensitive places, despite *Heller*’s failure to fully define a “sensitive place”).

160. *Heller*, 554 U.S. at 627 (quoting *Miller*, 307 U.S. at 179).

161. *Hollis v. Lynch*, 827 F.3d 436, 448–49 (5th Cir. 2016) (quoting *Staples v. United States*, 511 U.S. 600, 612 (1994)).

162. *Id.* at 449 (quoting *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 256 (2d Cir. 2015)).

163. *See N.Y. State Rifle*, 804 F.3d at 255.

164. *See Kolbe v. Hogan*, 813 F.3d 160, 174 (4th Cir. 2016). The Fifth Circuit thus ultimately found that a machine gun would fail either the Second Circuit or Fourth Circuit test. *Hollis*, 827 F.3d at 449.

165. *United States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012).

166. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

The expectation that newly announced standards will be fleshed out over time is nothing new. That very process in our common-law tradition allows legal doctrine to work itself pure.¹⁶⁷ Justiciability, the *Heller* Court reasoned, should not solely be based upon whether achieving doctrinal clarity may take years or even decades. Such refinement is a key component of our common-law system.

C. THE FOURTH AMENDMENT AND MALLEABLE STANDARDS

The Fourth Amendment provides citizens with the right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”¹⁶⁸ Though the Supreme Court has struggled to define that right, it has not shied from applying malleable standards on a case-by-case basis. The Court’s early definitions of a “search” emphasized the Amendment’s relationship to common-law trespass, creating a clear, manageable bright line based upon property rights.¹⁶⁹ But the Court’s focus slowly transformed throughout the twentieth century into its present-day emphasis on “people, not places.”¹⁷⁰ During that shift, the Court willingly adopted one of the most malleable standards in constitutional law, the reasonable expectation of privacy test.¹⁷¹

In his dissent in *Olmstead v. United States*, Justice Brandeis highlighted that “every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.”¹⁷² Brandeis’s views were partially formalized nearly 40 years later in *Katz v. United States*, a case concerning an eavesdropping device attached to a public telephone booth.¹⁷³ In a concurrence that the Court has since applied to innumerable cases, Justice Harlan suggested that government conduct amounts to a search triggering the Fourth Amendment’s protections when it intrudes upon a citizen’s “constitutionally protected reasonable

167. See RONALD DWORKIN, *LAW’S EMPIRE* 400 (1986) (describing this idea behind the common law tradition).

168. U.S. CONST. amend IV.

169. *United States v. Jones*, 565 U.S. 400, 405 (2012). Cases such as *Olmstead v. United States* exemplified this trend, holding that taps attached to telephone wires in public streets did not run afoul of the Fourth Amendment simply because none of the material things mentioned in the amendment—a citizen’s person, house, papers or effects—were intruded upon by the government’s action. *Olmstead v. United States*, 277 U.S. 438, 463–64 (1928).

170. *Katz v. United States*, 389 U.S. 347, 351 (1967).

171. See *id.* at 350–51; see also Michael Gentithes, *Tranquility & Mosaics in the Fourth Amendment: How Our Collective Interest in Constitutional Tranquility Renders Data Dragnets Like the NSA’s Telephony Metadata Program a Search*, 82 TENN. L. REV. 937, 941–44 (2015) (summarizing the history of the third-party doctrine).

172. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting); see also Scott E. Sundby, “Everyman”’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751, 1755–56 (1994) (emphasizing the importance of the founding principles of the Fourth Amendment that Brandeis elucidated in his dissent).

173. *Katz*, 389 U.S. at 348.

expectation of privacy.”¹⁷⁴ Harlan argued that in order for a citizen to demonstrate that government conduct has intruded upon such a reasonable expectation of privacy, she must in turn meet “a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”¹⁷⁵

Though the reasonable expectation of privacy test is now the touchstone of search and seizure cases, it is far from concrete and easy to administer. It cannot be read literally as an empirical measure of all citizens’ understandings of how technology functions, and thus what information the government can reasonably, warrantlessly obtain at any given moment.¹⁷⁶ Any snapshot of citizens’ understandings and expectations may be subject to undue influence from the government itself, which could massively publicize its intent to regularly invade spheres of life previously considered private.¹⁷⁷ And society’s

174. *Id.* at 360 (Harlan, J., concurring).

175. *Id.* at 361. Others have argued that modern employment of the test has eliminated the subjective prong, rendering the test wholly objective. *See* Orin S. Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113, 113–14 (2015).

176. *See* *Carpenter v. United States*, 138 S. Ct. 2206, 2245 (2018) (Thomas, J., dissenting) (discussing the circularity of a test that asks a descriptive question about society’s expectations to answer a question that will actually shape those very expectations); *see also* *United States v. Jones*, 565 U.S. 400, 427 (2012) (Alito, J., concurring) (“Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes.”); Rachel Levinson-Waldman, *Hiding in Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance in Public*, 66 EMORY L.J. 527, 550 (2017) (“[T]echnology itself—its ubiquity and its convenience—can dynamically change [society’s] expectations. As people become more reliant on their devices, the technology may seem less intrusive, making the apparent privacy risks recede as well. A test premised on the reasonable expectation of privacy must become more objective to account for that shift.” (footnote omitted)); Matthew Tokson, *Knowledge and Fourth Amendment Privacy*, 111 NW. U. L. REV. 139, 164–81 (2016) (discussing the “fundamental conceptual and practical problems inherent in the assessment of Fourth Amendment societal knowledge”); *id.* at 188 (“Societal knowledge is a complex, multilayered concept that does not lend itself to easy application in criminal cases. Knowledge typically spreads unevenly through the population, and attributing median societal knowledge to criminal defendants raises questions of fundamental fairness. Judges are societal elites who are systematically likely to overestimate the extent of societal knowledge. . . . Further, even if societal knowledge could be measured perfectly, anchoring the Fourth Amendment’s scope to it will lead to a gradual erosion of Fourth Amendment protection. As an increasingly intelligent and educated population gains awareness and understanding of new technologies and threats to privacy, expectations of privacy and the sphere of Fourth Amendment protection will naturally shrink.” (footnotes omitted)).

177. “[T]he government could condition the populace into expecting less privacy. For example, as Professor Anthony Amsterdam has observed, the government could diminish expectations of privacy by announcing on television each night that we could all be subject to electronic surveillance.” Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1524 (2010) (citing Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974)); *see also* STEPHEN J. SCHULHOFER, MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY 121 (2012) (“Existing expectations are shaped by the police practices that the law allows. If we decide what the law allows by looking to existing expectations, we end up chasing ourselves in a circle. Inescapably, decisions interpreting

understanding of what is reasonable changes as citizens decide whether the capabilities of a new technology are worth the tradeoff in how that technology reduces our privacy, giving the Court a moving target.¹⁷⁸

Instead, the reasonable expectation of privacy test merely checks new government search techniques based upon the Justices' rough impressions of what privacy protections are important enough to maintain for the foreseeable future.¹⁷⁹ The Court adopted this test when the limits of the trespassory view of search and seizure law proved unsatisfying, even though that bright line was easier to administer. Judicial estimations based on the reasonable expectation of privacy test are helpfully flexible, but almost hopelessly difficult for lower courts to predict and implement. Yet this test has remained the center of Fourth Amendment doctrine for more than half a century, despite its unmanageability.

Constitutional standards have also evolved away from what first appeared to be bright-line rules regarding one of the exceptions to the reasonable expectation of privacy test, the third-party doctrine. In the 1970s, the Court created an exception to the definition of a search when citizens disclose information to third-party service providers. In a series of holdings, the Court established that such disclosed information is subject to warrantless collection, while undisclosed information retains full Fourth Amendment protection.¹⁸⁰ But the Court has since nibbled at the edges of that bright line,

the Fourth Amendment determine what kind of privacy we are *entitled* to expect.”); Levinson-Waldman, *supra* note 176, at 552 (“*Katz’s* approach can also put the government in an enviable position: when a technology is first introduced, it is new, it is experimental, it is clumsy, and it is often rolled out secretly or in a limited trial, raising little communal ire. By the time the technology is in place and publicly revealed, and society has begun to grasp its true implications, it is too late; only an out-of-touch Luddite could be said not to understand, and implicitly consent to, all its potential uses. For the government, it is heads, we win; tails, you lose.”); Jed Rubinfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 106 (2008) (“The threat of circularity—or more accurately of a kind of prospective self-validation—is easy to see. Suppose the President announces that all telephone conversations will henceforth be monitored. Arguably, no one thereafter can reasonably expect privacy in his phone calls, and the announced eavesdropping will have constitutionalized itself. The same problem will afflict legislative and judicial pronouncements about police searches or seizures.”).

178. “New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable.” *United States v. Jones*, 565 U.S. 400, 427 (2012) (Alito, J., concurring).

179. The Justices are also cognizant of the need to look to the forward march of investigative capabilities given evolving technologies. “[T]he rule the Court adopts ‘must take account of more sophisticated systems that are already in use or in development.’” *Carpenter*, 138 S. Ct. at 2218 (quoting *Kyllo v. United States*, 533 U.S. 27, 36 (2001)).

180. *United States v. Miller*, 425 U.S. 435, 443 (1976) (“[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”);

establishing exceptions for sensitive data types such as the results of a diagnostic medical examination,¹⁸¹ the contents of a hotel room,¹⁸² or the words spoken in a telephone conversation.¹⁸³ In its most recent third-party-doctrine case, the Court suggested that there may be categorical exceptions for “unique” and “qualitatively different” information, while providing lower courts with little guidance as to which informational categories are so exceptional.¹⁸⁴

Fourth Amendment jurisprudence’s malleability holds lessons for the Court’s application of the political question doctrine to partisan gerrymandering. Even when bright-line, easily manageable standards readily appear, implementation can prove harder than anticipated, and malleability may become necessary as the Court adapts doctrine to new problems in society. The Court should be less fearful of standards that are not perfectly concrete at the outset. Such flexibility may even prove desirable over time.

D. MALAPPORTIONMENT AND RACIAL GERRYMANDERING

Both the Court’s malapportionment cases in the 1960’s and its foray into racial gerrymandering in the 1990’s show its willingness to intervene in redistricting cases, even when the standards for doing so are ill-defined. First, consider the Court’s early consideration of malapportioned voting districts in the states. *Baker* established that the judiciary could resolve those controversies but did not specify a precise standard by which to adjudicate those claims. The *Baker* decision itself merely held that the appellant’s alleged Equal Protection violation was “a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision,” then remanded

see also *Smith v. Maryland*, 442 U.S. 735, 743 (1979) (holding that phone numbers citizens disclose to service providers by dialing them are subject to the third-party doctrine).

181. *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001); Transcript of Oral Argument at 23, *Carpenter*, 138 S. Ct. 2206 (No. 16-402).

182. *United States v. Davis*, 785 F.3d 498, 527 (11th Cir. 2015) (Rosenbaum, J., concurring) (quoting *Hoffa v. United States*, 385 U.S. 293, 301 (1966); then citing *Minnesota v. Carter*, 525 U.S. 83, 95–96 (1998) (Scalia, J., concurring); and then citing *Minnesota v. Olson*, 495 U.S. 91, 96–97 (1990)), *cert. denied*, 136 S. Ct. 479 (2015). Similarly, Fourth Amendment protections extend to a suspect’s rental apartment “even though his landlord has the right to conduct unannounced inspections at any time.” *O’Connor v. Ortega*, 480 U.S. 709, 730 (1987) (Scalia, J., concurring); *see also* *United States v. Warshak*, 631 F.3d 266, 287 (6th Cir. 2010).

183. The contents of a phone conversation had after dialing phone numbers is protected, even though it is conveyed to a third party. Transcript of Oral Argument at 50–51, *Carpenter*, 138 S. Ct. 2206 (No. 16-402) (“People disclose the content of telephone calls to third parties. But we said the government can’t intrude without a warrant in that situation.”).

184. *Carpenter*, 138 S. Ct. at 2216–17 (“[W]hile the third-party doctrine applies to telephone numbers and bank records, it is not clear whether its logic extends to the qualitatively different category of cell-site records.”); *see also id.* at 2220 (“Given the unique nature of cell phone location information, the fact that the Government obtained the information from a third party does not overcome Carpenter’s claim to Fourth Amendment protection.”). I have attempted to provide an analytical basis for such categorical distinctions based upon informational sensitivity in *Gentiles*, *supra* note 134.

to the district court for those proceedings without explaining how it ought to evaluate the claim.¹⁸⁵ It was not until two years later that the Court began to broadly define the constitutional line that states could not cross, establishing the famous one person, one vote standard to avoid diluting the votes of some citizens at the expense of others.¹⁸⁶ Even that standard was at first highly malleable and imprecise, failing to specify just how far from an exact equality of voters per district a state can constitutionally stray.¹⁸⁷ The Court would slowly establish a rough mathematical threshold over the decade that followed,¹⁸⁸ striking legislative plans where the difference between the largest and smallest districts was greater than ten percent while holding that deviations under that threshold are presumptively permissible unless the plaintiffs provide other evidence of discrimination.¹⁸⁹

In the 1990s, the Court again intervened in redistricting cases, this time creating a new cause of action in response to so-called racial gerrymanders.¹⁹⁰ In 1993's *Shaw v. Reno*, the Court recognized that:

[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

185. *Baker v. Carr*, 369 U.S. 186, 237 (1962).

186. *See* *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (“Readers surely could have fairly taken [Madison’s writing in Federalist No. 57] to mean, ‘one person, one vote.’”); *see also* *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“[I]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted.”); *id.* at 563 (“Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.”).

187. *Cunningham*, *supra* note 12, at 1543 (“The malapportionment standard, one person, one vote, was lauded for its ease of administration, its manageability. But a closer study reveals instances where strict adherence to the standard was impracticable. As a result, the Court recalibrated the standard, holding redistricting presumptively unlawful when population deviations exceed ten percent.” (footnotes omitted)).

188. *White v. Regester*, 412 U.S. 755, 777 (1973) (Brennan, J., dissenting) (“[O]ne can reasonably surmise that a line has been drawn at 10%—deviations in excess of that amount are apparently acceptable only on a showing of justification by the State; deviations less than that amount require no justification whatsoever.”).

189. *See, e.g.,* *Voinovich v. Quilter*, 507 U.S. 146, 161–62 (1993); *Brown v. Thomson*, 462 U.S. 835, 842, 847 (1983); *Connor v. Finch*, 431 U.S. 407, 418–21 (1977); *Chapman v. Meier*, 420 U.S. 1, 17, 22 (1975).

190. *Benson*, *supra* note 145, at 142 (“*Shaw* was nevertheless groundbreaking because it created a new, ‘analytically distinct’ cause of action under the Equal Protection Clause. After *Shaw*, any plaintiff living in a gerrymandered district could allege that an apportionment plan, though facially neutral, violated the Equal Protection Clause where it rationally could not be understood as anything other than an effort to separate voters into different districts on the basis of race without sufficient justification.” (footnote omitted)).

districts on the basis of race, and that the separation lacks sufficient justification.¹⁹¹

As was the case in the malapportionment cases, the Court's entry into the "political thicket"¹⁹² of redistricting litigation to adjudicate racial gerrymanders lacked an explanation of how lower courts might recognize or adjudicate the new cause of action. The Court simply held that the plaintiffs stated an Equal Protection claim sufficient to survive a motion to dismiss and remanded for the district court to apply strict scrutiny to the challenged redistricting plan.¹⁹³ *Shaw* also lacked clear guidance as to what would qualify as a racial gerrymander. The Court's best efforts to describe the claim—"redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles" "such as compactness, contiguity, and respect for political subdivisions"¹⁹⁴—left future litigants guessing as to what might qualify as a racial gerrymander.

Just two years later, the Court returned to the issue in *Miller v. Johnson* in an effort to clarify the standard for a racial gerrymander, beyond inexplicably strange shapes in newly established districts. The Court held that a cause of action arose regardless of the district's shape where evidence demonstrated that race was the "predominant" factor behind the state's redistricting decisions.¹⁹⁵ Although states can consider racial demographics in redistricting, they must not allow race to predominate redistricting decisions to comply with Equal Protection.¹⁹⁶

That new standard, though helpful, raised its own plethora of questions about the indeterminacy of the predominant factor test.¹⁹⁷ The Court again attempted to refine the standard for identifying racial gerrymanders the next year in *Bush v. Vera*, where it held that states cannot "subordinate traditional districting criteria to the use of race for its own sake or as a proxy" without violating Equal Protection.¹⁹⁸ The Court added that race can be the predominant factor in redistricting decisions even when employed as a proxy

191. *Shaw v. Reno*, 509 U.S. 630, 649 (1993).

192. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

193. *See Shaw*, 509 U.S. at 658.

194. *Id.* at 642, 647.

195. *Miller v. Johnson*, 515 U.S. 900, 920 (1995).

196. *Id.* at 915-16, 920.

197. *See, e.g.*, Richard Briffault, *Race and Representation After Miller v. Johnson*, 1995 U. CHI. LEGAL F. 23, 46 ("*Johnson* does raise a host of new questions. To what extent may a legislature intentionally use race in districting in order to comply with the requirements of the Voting Rights Act? What does 'predominant' racial motivation mean? In the many political settings in which race is intertwined with partisanship, ideology, and other electoral factors, how can racial motivation be distinguished from otherwise constitutional legislative efforts to use districting plans to benefit particular parties or candidates, regardless of race?").

198. *Bush v. Vera*, 517 U.S. 952, 993 (1996) (O'Connor, J., concurring).

for political affiliation, triggering strict scrutiny review.¹⁹⁹ Yet distinctions that serve purely political motivations but coincidentally have racial effects remained permissible.²⁰⁰

Both malapportionment and racial gerrymandering cases established constitutional causes of action with ill-defined contours, allowing later cases to refine the standards for evaluating those claims. These cases, which concern the same redistricting process that is the subject of extreme partisan gerrymandering litigation, thus serve as another example of the Court overcoming its fear of malleable standards when establishing new constitutional causes of actions in controversial cases.

V. PARTISAN GERRYMANDERING AND THE SEPARATION OF POWERS

In this Part, I present my own views in favor of the justiciability of extreme partisan gerrymandering cases, focusing on how the practice undermines not just the function of the legislative branch, but the function of the judiciary itself. Concerns that intervention would undermine the separation of powers are misguided; intervention, instead, is needed precisely because it would ensure the vitality of distinct branches.

As I suggested earlier,²⁰¹ when applying the political question doctrine to partisan gerrymandering, the Court should first determine the normative question of whether the issue is committed to a coordinate branch of government, allowing the results of that inquiry to inform the strictness of its standard for manageable standards. With that as the starting point, the Court would have good reason for hesitation. Article I, Section 4 of the Constitution provides that, “[t]he 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 Places of chusing [sic] Senators.”²⁰² The Constitution’s text thus grants authority to the legislative branch to settle districting matters, without expressly creating any residual judicial power to override the legislature’s choices in the area.

But the inquiry is not at an end. Of course, such congressional power is implicitly limited by other constitutional provisions and the Court’s power to ensure that congressional actions do not otherwise undermine the Constitution’s text. Furthermore, as noted above,²⁰³ at a higher level of abstraction, the normative commitment question asks whether courts *should* resolve the controversy in a representative democracy of separated powers. The fundamental question is whether the Courts will be undermining that

199. *Id.* at 961–65.

200. Benson, *supra* note 145, at 149.

201. *See supra* Section II.D.

202. U.S. CONST. art. I, § 4, cl. 1.

203. *See supra* Section II.C.

political system by intervening in partisan gerrymandering cases, with the text of the Constitution as a guide to the likelihood that intervention may disturb the intricate balances in our political order.

Despite the language of the Elections Clause, intervention in cases of extreme partisan gerrymandering will preserve, not undermine, the separation of powers. Political branches that formulate themselves in a way that respects the Equal Protection and free speech rights of all citizens are fundamental to a properly functioning democracy, and to a properly functioning judiciary within that democracy. As McKay Cunningham has argued, “[t]he form and structure of the Constitution,” which includes a principal focus on the structure and process of a representational government of separated powers, “support judicial review of disputes that challenge obstructions to representative democracy.”²⁰⁴ Thus, “[c]ourt intervention to keep legislators from ensuring re-election comports with the structure of the Constitution, itself predominantly dedicated to ensuring a representational democracy resistant to concentrated power in any one branch.”²⁰⁵ Given the extremity of partisan gerrymandering in today’s political arena, judicial intervention will likely buttress, rather than undermine, a government of separated powers.²⁰⁶

The legislative branch’s current process for self-formulation undermines its own ability to serve its citizens. Political actors have gone so far in packing and cracking voting districts as to stagnate the legislative branch entirely with hyper-partisanship. As Justice Kagan noted, there is “a ‘cascade of negative results’ from excessive partisan gerrymandering: indifference to swing voters and their views; extreme political positioning designed to placate the party’s base and fend off primary challenges; the devaluing of negotiation and compromise; and the impossibility of reaching pragmatic, bipartisan solutions to the nation’s problems.”²⁰⁷ Legislators in gerrymandered districts are more ideologically uniform, and show less willingness to compromise their ideals lest they be punished by ideologically purer candidates in a primary contest.²⁰⁸

The role of hyper-partisanship in declining levels of legislative productivity is well documented at the federal level. “Partisan rancor and

204. Cunningham, *supra* note 12, at 1535.

205. *Id.* at 1513–14.

206. As Justice Kagan put it during the *Benisek* oral arguments, “however much [gerrymandering] you think is too much, this case is too much.” Transcript of Oral Argument at 39, *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (No. 17–333).

207. *Gill v. Whitford*, 138 S. Ct. 1916, 1940 (2018) (Kagan, J., concurring) (quoting Brief for Bipartisan Group of Current & Former Members of Congress as Amici Curiae in Support of Appellees at 4, *Gill*, 138 S. Ct. 1916 (No. 16-1161)); *see also* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) (acknowledging that extreme partisan gerrymandering is “incompatible with democratic principles” (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015))).

208. *See* Cunningham, *supra* note 12, at 1515–16 (“To be sure, gerrymandering is not the sole cause of landslide elections that lack the possibility of competitiveness, but it is a significant influence.”).

divided government have often inhibited the ability of Congress to pass meaningful legislation.”²⁰⁹ Recent Congresses have been amongst the least productive in history in terms of legislative output.²¹⁰ “Congress cannot fulfill its functional responsibility to legislate because of the stalemate that exists.”²¹¹

The evidence at the State level is more mixed, though there is at least some suggestion that states subject to extreme partisan gerrymanders have unproductive legislatures. Consider the North Carolina legislature, which commentators consider one of the most gerrymandered jurisdictions in America.²¹² Since 2001, the number of bills that have become law in North Carolina has steadily declined, with recent years competing to be the least productive on record.²¹³ There is, however, little evidence of a decline in legislative productivity in Wisconsin and Maryland, the states at issue in *Gill* and *Benesik*, respectively.²¹⁴

Even if gerrymandered legislatures are productive, they seem likely to generate laws that are discordant with the broader public’s will. Legislators elected by a minority of the popular vote will naturally tend to elevate that minority’s views, generating legislation that serves their constituents’ interests even if they do not align with the interests of most voters. Such counter-majoritarian difficulties are typically reserved for the judicial, not the legislative branch.²¹⁵ Furthermore, legislators in gerrymandered districts are less responsive to constituents, less accountable, less ideologically diverse, and less prone to compromise when their sole election threat is in the primary, rather than the general, election.²¹⁶

209. Michael A. Livermore et al., *Computationally Assisted Regulatory Participation*, 93 NOTRE DAME L. REV. 977, 987 (2018).

210. See Stepanicich, *supra* note 16, at 1546.

211. Teter, *supra* note 17, at 1136.

212. See Christopher Ingraham, *America’s Most Gerrymandered Congressional Districts*, WASH. POST (May 15, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/05/15/americas-most-gerrymandered-congressional-districts> [<https://perma.cc/D45T-WXQR>] (“Three of the 10 most-gerrymandered districts are in North Carolina . . . and North Carolina [is] essentially tied for the honor of the most-gerrymandered state.”); see also Kaz Weida, *The Top 10 Most Gerrymandered States in America*, RANTT MEDIA (May 25, 2017), <https://rantt.com/the-top-10-most-gerrymandered-states-in-america> [<https://perma.cc/4D53-VH92>] (ranking North Carolina as the most gerrymandered state).

213. Mark Barrett, *NC Legislature Has Passed Fewer Bills So Far in ‘17*, ASHEVILLE CITIZEN TIMES, <https://www.citizen-times.com/story/news/politics/elections/2017/06/17/nc-legislature-has-passed-fewer-bills-so-far-2017/401831001> [<https://perma.cc/T8UE-Y2AC>] (last updated June 18, 2019, 9:31 PM).

214. See Len Lazarick, *Final Tally in Record Year: 890 Bills Passed, 142 Already Law*, MARYLAND REPORTER, <http://marylandreporter.com/2018/04/10/final-tally-in-record-year-890-bills-passed-142-already-law> [<https://perma.cc/J5FR-VE93>]; WISCONSIN STATE LEGISLATURE, <https://legis.wisconsin.gov> [<https://perma.cc/MFP9-YFZK>] (compiling statistics on rates of bill introduction and passage).

215. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

216. Cunningham, *supra* note 12, at 1516–17.

Partisan gridlock undermines the values served by the separation of powers. “Preserving liberty, promoting efficiency, and increasing accountability: a gridlocked Congress frustrates all three of the purposes of the separation of powers doctrine.”²¹⁷ Many commentators have argued that a gridlocked Congress leads to the expansion of presidential powers.²¹⁸ And importantly, it can also limit Congress’s ability to check other branches, including the judiciary, which takes on a lawmaking role in its absence.²¹⁹

As Professor Michael J. Teter has illustrated, this is far from an idle concern.²²⁰ Legislative hyper-polarization, created in part by extreme partisan gerrymandering, is an existential threat to the judiciary. Citizens are forced to rely upon the judiciary as the primary agent of legal change; judges, in turn, are tempted to be more activist when they are confident that legislators are incapable of addressing emerging problems in society. “[J]udicial interpretations of a statute become even more final—even if a majority in Congress disagrees with it.”²²¹ Courts take on a greater policy-making role in the face of gridlocked legislatures and can interpret and even override what little legislative product is produced without pushback from that branch.²²²

217. Teter, *supra* note 17, at 1142.

218. See Carmines & Fowler, *supra* note 16, at 379 (“The 113th Congress passed fewer bills than any other in memory; in fact, this was the least productive Congress since the late 1800s, when polarization was equivalent to the level it is today.” (citing Philip Bump, *The 113th Congress Is Historically Good at Not Passing Bills*, WASH. POST (July 9, 2014, 9:54 AM), <https://www.washingtonpost.com/news/the-fix/wp/2014/07/09/the-113th-congress-is-historically-good-at-not-passing-bills> [<https://perma.cc/4BLF-MQJ2>])); see also Teter, *supra* note 17, at 1136 (“[A] gridlocked Congress pushes the executive to engage in its own form of law making to make up for Congress’s failure.”).

219. Teter, *supra* note 17, at 1138.

[I]f Congress cannot act, it cannot effectively check the executive—or the judiciary—when the other branch extends beyond its authority or impairs Congress’s ability to fulfill its constitutional responsibilities. This represents the more critical problem of congressional gridlock. A Congress deprived of its legislative power is a branch unable to check.

Id.

220. See *id.* at 1097 (naming Teter’s main argument).

221. *Id.* at 1146. Teter also notes that “the problem is exacerbated by the way the federal judiciary approaches its interpretative task. The judiciary imagines a ‘dialogue’ with the legislative branch over the proper meaning of statutes, but because of gridlock, one party to this supposed conversation is suffering from laryngitis.” *Id.* (footnote omitted).

222. *Id.* at 1159.

A gridlocked system transfers policy-making responsibility from Congress to the courts. Moreover, stalemate further weakens Congress by largely depriving the legislative branch of its ability to check the judiciary through overrides. Just as the president is emboldened by the knowledge that no institutional conflict will arise even in the face of extraordinary executive actions, so too must the judges of today’s federal judiciary recognize that only rarely can Congress act to undo a statutory decision. Thus, gridlock threatens Congress’s domain over its primary functions: enacting legislation and ensuring faithful judicial interpretation of those statutes.

Id.

Justice Roberts expressed concern that adjudicating extreme partisan gerrymandering might gridlock the Court because appeals to districting challenges are part of the Court's mandatory jurisdiction.²²³ That critique misunderstands the effect of abstaining from partisan gerrymandering. In nearly every other area of jurisprudence, the Court faces far more litigation aimed at filling the policy-making void left by a gridlocked legislature, simply because its refusal to adjudicate partisan gerrymandering contributes directly to that legislative gridlock. And as the *Rucho* dissent highlighted, plaintiffs in recent cases have asked the Court to intervene only in the most extreme cases of partisan gerrymandering, and have proposed high bars to success that would allow courts to "intervene in the worst partisan gerrymanders, but no others."²²⁴ Furthermore, the Court could always adopt a policy of summarily affirming the majority of redistricting challenges, saving its substantive intervention for only a limited number of cases. The concern that adjudicating these cases will open the floodgates of litigation is almost precisely backwards.

Congressional gridlock produced by a flawed process for the legislature's self-formulation also threatens the process by which the judiciary is formed. "[T]he gridlock involving the judicial appointment process has produced a judicial vacancy rate that 'erod[es] the quality of justice' as courts cancel oral arguments, postpone cases for months, and take dramatically longer to dispose of matters."²²⁵ At the federal level, legislative gridlock hamstring the judiciary's ability to serve even its core competencies.

The Court's hesitation to intervene is of course understandable. Partisan gerrymandering plaintiffs ask the Court to overrule actions that our democratically elected officials take in drawing election districts. The question presented concerns a coordinate branch's very formation, rather than merely its work product. Chief Justice Roberts reflected those concerns when he remarked that intervention in partisan gerrymandering cases will lead individuals to think that "the Supreme Court preferred [one party over another]," potentially a "very serious harm to the status and integrity of the decisions of this Court in the eyes of the country."²²⁶

But extreme partisan gerrymandering is the very source of innumerable cases that do even more damage to the Court's status and integrity. Because legislatures are stagnant, litigants often ask courts to make fine-grained policy choices better left in the hands of legislators. Refusing to address partisan gerrymandering might avoid the short-term appearance of politicization. But over time, it will preserve a stagnated legislative branch that forces judges to

223. Transcript of Oral Argument at 37, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161).

224. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2522 (2019) (Kagan, J., dissenting). "Or to say the same thing, so that courts could intervene in the kind of extreme gerrymanders that nearly every Justice for decades has thought to violate the Constitution." *Id.*

225. Teter, *supra* note 17, at 1142 (alteration in original) (footnote omitted).

226. Transcript of Oral Argument at 37-38, *Gill*, 138 S. Ct. 1916 (No. 16-1161).

act more and more like legislators. This broad threat to the separation of powers actually justifies intervention.

Making broad pronouncements when the legislature has exceeded its constitutional authority is an appropriate role for the courts to fill. If the Court issues just such a ruling in partisan gerrymandering cases, it can return to that role in the vast majority of its work and avoid matters ripe for legislative and regulatory responses.

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Admittedly, there are risks for intervention in this area. Foremost is the possibility that intervention will undercut public respect for the judiciary as an apolitical arbiter of our nation's legal disputes. Accusations of political bias are sure to surround any decisions the Justices reach in partisan gerrymandering cases, which will necessarily favor one political party over another. This risk is far from negligible; judges seem likely, consciously or subconsciously, to resolve extreme partisan gerrymandering cases in ways that tilt toward their own political preferences.

Courts should accept that risk for several reasons. First, the fear of a politicized judicial branch has, in large part, already been realized in today's society.²²⁷ Judicial intervention in partisan gerrymandering cases might only further entrench the appearance of judicial politicization by ensuring that the judicial branch becomes even more active in issues that are the focus of our national political conversation. But that outcome is already the status quo, not a dramatic turn for the worse.

Even if the judiciary were to become more political, at least it would be less stagnant than coordinate branches, in part due to partisan gerrymandering itself. As noted earlier,²²⁸ our political branches are already stagnated. Courts across the country are already overburdened with cases that ask judges to resolve policy disputes that would more appropriately be handled by elected legislators. And yet the courts continue to function, even if they are fulfilling a role never imagined by the framers. The politicization

227. As an example, consider the recent confirmation process for Justice Kavanaugh, which innumerable commentators have argued marked a new high (or low) point in the politicization of the Court. *See, e.g.,* Dan Balz, *The Kavanaugh Nomination Is Another Big Step in the Politicization of the Supreme Court*, WASH. POST (Sept. 22, 2018, 10:51 AM), https://www.washingtonpost.com/politics/the-kavanaugh-nomination-is-another-big-step-in-the-politicization-of-the-supreme-court/2018/09/22/1a13b5c4-be78-11e8-b7d2-0773aa1e33da_story.html [<https://perma.cc/7Y5D-BP7F>]; *How America's Supreme Court Became So Politicised*, ECONOMIST (Sept. 15, 2018), <https://www.economist.com/briefing/2018/09/15/how-americas-supreme-court-became-so-politicised> [<https://perma.cc/YP9H-QVKE>]; *see also* Molly Ball & Tessa Berenson, *Brett Kavanaugh's Confirmation Fight Exposes Major Problems With the Nation's Most Powerful Court*, TIME (Sept. 27, 2018), <https://time.com/5407920/supreme-court-problems> [<https://perma.cc/U4FY-68UV>].

228. *See supra* Part IV.

of the judiciary, even at the highest levels, is already underway; little more damage can be done by wading into partisan gerrymandering cases.

Furthermore, the risk of politically motivated judgments is not unique to partisan gerrymandering cases. It arises whenever courts enforce constitutional limitations on the actions of other branches. The judiciary's hierarchical structure exists in part to control for that risk, allowing the Supreme Court to resolve inconsistent and improper rulings by lower courts. The same is possible in partisan gerrymandering cases, where the Supreme Court's oversight can at least temper the politically-motivated actions of lower courts. And while the Court itself may not be perfectly non-partisan, the Justices at least have a broader perspective on the overall national perception of the judiciary and a motivation to maintain that branch's integrity.²²⁹

Furthermore, there is reason to be optimistic that once courts begin to intervene in partisan gerrymandering cases, the standards for reviewing cases in lower courts will evolve in more precise, and politically neutral, ways. The Court has suppressed human ingenuity from full application to measuring and controlling for partisan gerrymandering.²³⁰ Once unleashed, that capability will help refine the tools by which lower courts measure and respond to extreme partisan gerrymandering, likely with less room to maneuver toward politically motivated results. Rather than insisting that those standards be fully developed at the outset, the Court should encourage their evolution by opening the door to partisan gerrymandering cases with instructions for litigants and lower courts to continue refining their standards for reviewing such cases.

Though the risks of politically motivated judging when partisan gerrymandering cases are resolved are overstated, they are real. But even if those risks are realized, they can do little additional harm beyond the havoc that extreme partisan gerrymandering already wreaks upon our representative democracy. The stagnant tendencies of the hyper-polarized political branches are already in place. They might concretize further if the judicial intervention is politically motivated, but such further polarization will only speed the degradation of our system that partisan gerrymandering has already begun. The experiment in adjudicating extreme partisan gerrymandering might fail, but its failure would come in an effort to save the nation's broader experiment with representative democracy. And that experiment is in dire need of judicial assistance in the present political climate.

229. For example, Chief Justice Roberts has long sought to preserve the Court's integrity and its non-partisan appearance. See, e.g., Adam Liptak, *John Roberts, Leader of Supreme Court's Conservative Majority, Fights Perception That It Is Partisan*, N.Y. TIMES (Dec. 23, 2018), <https://www.nytimes.com/2018/12/23/us/politics/chief-justice-john-roberts-supreme-court.html> [<https://perma.cc/TE3T-HP66>].

230. See *supra* Part III.

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Another risk of intervention in extreme partisan gerrymandering cases is the unpredictable direction of judicial decisions in this area. The acceptance of social science standards in controversial cases could have cascading, undesirable effects in other areas of law. Malleable social science standards for measuring the extremity of a partisan gerrymander provide greater discretion for judges, and the ways in which judges might use that discretion are highly variable. Furthermore, once the door to employing social science standards in the name of preserving a healthy representative democracy is opened, judges might be tempted to employ similar logic in other areas of law. Their use of rough understandings of social science standards could become justification for activism and entanglement in a wide, and perhaps unpredictable, variety of issues.

This risk seems frightening because it threatens to force the judiciary to answer questions it is not equipped to answer using techniques it does not fully grasp. But that is exactly what the judiciary has already been forced to do in the face of increasing polarization in the political branches, caused in no small part by extreme partisan gerrymandering. Courts have already become the primary locus of policy debates in the face of a dysfunctional legislature. They are already feeling pressure to rely upon tools traditional employed by the legislature, including social science, in the many cases concerning public policy that find their way on the docket. Using that tool to resolve partisan gerrymandering cases might actually *reduce* the pressure to use it again. Reduced partisan gerrymandering, and reduced legislative polarization and gridlock, will make public policy debates less likely to emerge in the courts, and reduce the prevalence of arguments based upon social science to resolve them.

VI. CONCLUSION

Extreme partisan gerrymandering is too dangerous to our nation's future to be dismissed as impractical to adjudicate. Yet the Supreme Court's application of the political question doctrine in extreme partisan gerrymandering cases takes just that approach. By emphasizing practical, prudential concerns with the manageability of standards to measure partisan gerrymandering, the Court distracts attention from the broader normative question of whether the Court should resolve these disputes. The Court's language regarding manageability also confusingly demands a standard that is neither too precise nor too malleable, lowering the incentives for future designers of such standards to continue innovating and experimenting.

Properly ordered analysis of the political question doctrine would establish the importance of resolving extreme partisan gerrymandering to preserve the future of our nation's democracy. Courts could set out the parameters through which future litigants can create more refined standards

to evaluate the issue. That approach would be far from unprecedented given the Court's approach in other constitutional controversies of similar novelty and public profile. Manageability is a red herring that should not stop the Court from beginning to heal the country's partisan wounds.