

CARDOZO LAW REVIEW  
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THE INSTITUTIONAL CASE FOR PARTISAN  
GERRYMANDERING CLAIMS

*G. Michael Parsons*<sup>†</sup>

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INTRODUCTION

For voters hoping the Supreme Court's 2017 Term brings relief

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<sup>†</sup> Gary Michael Parsons, Jr., J.D., Georgetown University Law Center, 2013; A.B., Davidson College, 2008.

from partisan gerrymandering, the end of the 2016 Term was inauspicious. In *Cooper v. Harris*, the majority assumed the legitimacy of “partisan advantage”<sup>1</sup> arguments while the dissent—including Justice Kennedy—warned about the “serious institutional and federalism implications” of judicial intervention in the redistricting process.<sup>2</sup> If past is prologue, this concern for institutional and structural interests does not bode well.<sup>3</sup>

No doubt redistricting law has “serious institutional and federalism implications,” but the tension is not between strong intervention and strong institutions. In discussing the deference owed state legislatures, “a vital constitutional principle must not be forgotten: Liberty requires accountability.”<sup>4</sup> Federalism ensures “state governments remain responsive to the local electorate’s preferences [and] state officials remain accountable to the people.”<sup>5</sup> The Constitution’s structural principles were designed not only to prevent arbitrary and tyrannical rule, but to protect individual liberties and provide institutional accountability as well.<sup>6</sup> The Court pays these principles no respect by standing silent when politicians insulate themselves from popular dissent and consolidate their grip on power through the violation of individual rights.

“Abdication of responsibility is not part of the constitutional design.”<sup>7</sup> By mistaking inaction for neutrality and avoidance for deference, the Court fails to fulfill its own role in the constitutional scheme and destabilizes the institutions it seeks to protect. As the Chief Justice of the Supreme Court of Michigan once observed, “the outrageous practice of gerrymandering . . . threatens not only the peace of the people, but *the permanency of our free institutions*.”<sup>8</sup> Partisan gerrymandering undermines responsive government and the civic faith required for our democratic institutions to endure.

If the Court wants to honor structural principles, respect state legislators, and maintain judicial integrity, it should foster clarity, certainty, and credibility by relying on its traditional tools of principled

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<sup>1</sup> *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017).

<sup>2</sup> *Id.* at 1490 (Alito, J., dissenting).

<sup>3</sup> *See Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring) (“A decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process. The Court is correct to refrain from directing this substantial intrusion into the Nation’s political life.”).

<sup>4</sup> *Dep’t of Transp. v. Ass’n of Am. R.R.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring).

<sup>5</sup> *New York v. United States*, 505 U.S. 144, 168 (1992).

<sup>6</sup> *See Bond v. United States*, 564 U.S. 211, 221–22 (2011); *Loving v. United States*, 517 U.S. 748, 758 (1996); *New York*, 505 U.S. at 168–69.

<sup>7</sup> *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

<sup>8</sup> *Giddings v. Blacker*, 93 Mich. 1, 11 (1892) (Morse, C.J., concurring) (emphasis added).

neutrality: clear rules and coherent doctrine.<sup>9</sup>

Clear rules would distinguish *general* partisan intent (which is the intent to win voters' political preferences and is legitimate even to an extreme degree) from *invidious* partisan intent (which is the intent to suppress voters because of their political preferences and is illegitimate regardless of degree). Even death-match rules recognize that an intent to harm outside the arena cannot be condoned if battle inside the arena is to have purpose. Meanwhile, the effects question in dilution cases is not *how much* suppression is too much suppression, but rather *whether* the opportunity of a targeted group to elect its preferred candidate was adversely impacted by the invidious state action or decision.

Coherent doctrine could also be just one term away. By affirming in *Gill v. Whitford*<sup>10</sup> and reversing in *Harris v. Cooper*,<sup>11</sup> the Court could end the “legal arbitrage” between racial and political redistricting law; harmonize the treatment of racial and political “advantage” arguments across equal-population, dilution, and sorting case law; and bring redistricting law into closer alignment with the Court’s broader equal-protection and First Amendment jurisprudence.

The Court may fear that judicial intervention will be too disruptive or that legislative compliance will be too difficult. These concerns are misplaced, overstated, and underestimate the institutional and structural consequences of the Court’s inaction or exit from the field. Instead, a precise and predictable jurisprudence provides what the Court, the Constitution, and the country all require: strong, accountable institutions, and a forceful defense of individual rights.

## I. BACKGROUND

In 1962, the Supreme Court held that redistricting laws can raise justiciable questions for federal courts to resolve.<sup>12</sup> Shortly thereafter, the Court clarified that such laws might violate the Constitution if they “designedly . . . would operate to minimize or cancel out the voting strength of racial *or political* elements of the voting population.”<sup>13</sup> More than fifty years later, the Court’s promise to protect the constitutional rights of voters from partisan gerrymandering remains unfulfilled.

The Supreme Court came close to renegeing on this promise and

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<sup>9</sup> See *Maryland v. Wilson*, 519 U.S. 408, 423 (1997) (Kennedy, J., dissenting) (“Adherence to neutral principles is the very premise of the rule of law . . .”); *Plaut v. Spendthrift Farm*, 514 U.S. 211, 239–40 (1995) (noting that “structural safeguard[s]” require “clear distinctions” because “[g]ood fences make good neighbors”).

<sup>10</sup> See *Gill v. Whitford*, No. 3:15-cv-421, 218 F. Supp. 3d 837 (W.D. Wis. Nov. 21, 2016), *stayed pending disposition*, 85 U.S.L.W. 3587 (U.S. argued Oct. 3, 2017) (No. 16-1161).

<sup>11</sup> See *Harris v. McCrory*, No. 1:13-cv-949, 2016 U.S. Dist. LEXIS 71853 (M.D.N.C. June 2, 2016), *docketed and pending sub. nom.*, *Harris v. Cooper*, (U.S. Aug. 5, 2016) (No. 16-166).

<sup>12</sup> See generally *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>13</sup> *Fortson v. Dorsey*, 379 U.S. 433 (1965) (emphasis added).

carving out an exception to its redistricting justiciability rules in *Vieth v. Jubelirer*.<sup>14</sup> There, four Justices attempted to reverse course and hold that political gerrymandering presented a nonjusticiable question.<sup>15</sup> On this issue, Justice Kennedy joined the dissenters to form a majority and noted that relief should be granted “if some limited and precise rationale were found to correct an established violation of the Constitution.”<sup>16</sup>

In the intervening years, concerned citizens of all stripes—lawyers, political scientists, mathematicians, activists—have searched for a suitable standard to convince Justice Kennedy on the merits and remedy this violation of rights. And as the 2017 Term begins, it looks like voters may have a shot. Gerrymandering cases are bubbling up from states controlled by Republicans and states controlled by Democrats. From Wisconsin to North Carolina, voters across the country and across the political spectrum are looking forward to October Term 2017 with anxious anticipation—believing perhaps this year the Court will fulfill its promise.

For these voters, the 2016 Term closed with a bucket of cold water. In *Cooper v. Harris*,<sup>17</sup> the Supreme Court held that legislatures could not district on the basis of race for a political purpose without running afoul of the Equal Protection Clause.<sup>18</sup> This aspect of the decision was positive but unsurprising.<sup>19</sup> More unexpected was the majority’s holding that plaintiffs in racial gerrymandering cases did not need to produce an alternative map to prove that race—not politics—drove the districting decision, so long as sufficient evidence showed that race provided the essential basis for sorting voters.<sup>20</sup>

The decision provoked a biting dissent from Justice Alito:

The alternative-map requirement . . . is a logical response to the difficult problem of distinguishing between race and political motivations when race and political party preference closely correlate. This is a problem with serious institutional and federalism implications . . . . When a federal court finds that race predominated in the redistricting process, it inserts itself into that process. That is appropriate—indeed, constitutionally required . . . . But if a court mistakes a political gerrymander for a racial gerrymander, it illegitimately invades a traditional domain of state authority,

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<sup>14</sup> 541 U.S. 267 (2004).

<sup>15</sup> *Id.* at 305–06 (plurality opinion).

<sup>16</sup> *Id.* at 306 (Kennedy, J., concurring).

<sup>17</sup> 137 S. Ct. 1455 (2017).

<sup>18</sup> *Id.* at 1464 n.1.

<sup>19</sup> See *Bush v. Vera*, 517 U.S. 952, 968–70 (1996) (plurality opinion); *Miller v. Johnson*, 515 U.S. 900, 914 (1995); See also G. Michael Parsons, *Is Bethune-Hill a Major Voting Rights Victory or the Next Northwest Austin?*, MODERN DEMOCRACY (Mar. 30, 2017), <https://moderndemocracyblog.com/2017/03/30/is-bethune-hill-a-major-voting-rights-victory-or-the-next-northwest-austin> (noting that “the determinative question in a sorting claim should be *the basis of the sort*, not the *goal of the sorter*”).

<sup>20</sup> See *Cooper*, 137 S. Ct. at 1478–81.

usurping the role of a State's elected representatives. This does violence to both the proper role of the Judiciary and the powers reserved to the States under the Constitution.<sup>21</sup>

The dissent also pointed to “a final, often-unstated danger” in such cases: “that the federal courts will be transformed into weapons of political warfare.”<sup>22</sup> Justice Kennedy joined the dissent without qualification.

The Supreme Court—and Justice Kennedy in particular—has long wrestled with the institutional implications of judicial involvement in partisan gerrymandering cases.<sup>23</sup> In these cases, Court action is portrayed as a zero-sum game, with structural principles set against gerrymandering claims as if each step towards vindication of such claims represents a step beyond the judiciary's proper sphere or a step into the states' core powers.

Like almost everything about the Court's approach to partisan gerrymandering, this premise is backwards. The concern that intervention will degrade the structural and institutional pillars of the Constitution is misplaced. The Court's hesitation—not its action—has blurred the lines of lawful behavior and drawn legislators out beyond clear constitutional boundaries. The Court's avoidance—not its resolve—has left redistricting doctrine in an awkward, inconsistent, and unpredictable corner of the law. And it is the Court's decades-long practice of stooping to accommodate low political expectations—rather than standing up for individual rights—that has undermined state governments and diminished institutional credibility.

The responsibility of the Court is to set out clear, coherent, and neutral standards that can be consistently and predictably applied. As Justice Kennedy once wrote, “Adherence to neutral principles is the very premise of the rule of law.”<sup>24</sup> When courts define and protect constitutional rights in a manner that is certain and precise, the judiciary fulfills a core role in the separation of powers. When state legislators are entrusted to follow plain constitutional rules and state institutions are accountable to their citizens, federalism thrives. In short, the question is not how the Court can take on partisan gerrymandering without undermining institutional integrity or structural principles, but rather how it can honor these core constitutional pillars if it does not.

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<sup>21</sup> *Id.* at 1489–90 (Alito, J., dissenting).

<sup>22</sup> *Id.*

<sup>23</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring), *Miller*, 515 U.S. at 915–16 (1995), *Davis v. Bandemer*, 478 U.S. 109, 144–46 (1986) (O'Connor, J., concurring).

<sup>24</sup> See *Maryland v. Wilson*, 519 U.S. 408, 423 (1997) (Kennedy, J., dissenting).

## II. CLARITY: AVOIDING DEGREES OF CONSTITUTIONALITY

The first requirement for redistricting law must be clarity. As Justice Kennedy recognized in *Vieth*, the “rationale” for intervention must be “limited and precise.”<sup>25</sup> “Separation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors.”<sup>26</sup> Without clear distinctions, legislators will test the boundaries of the Constitution, and litigants will test the boundaries of liability in response. Doctrinal ambiguity, not strong enforcement, is what risks “transform[ing] [federal courts] into weapons of political warfare.”<sup>27</sup>

To start, the Court should let go of the vague notion that the constitutionality of a gerrymander should turn on whether “politics as usual” has “go[ne] too far”<sup>28</sup> and, instead, sharpen the inquiry by distinguishing between the roles of intent and effect.

A. *Intent*

Examining “degrees” of intent would be a fool’s errand. As Justice Kennedy has warned, “courts must be cautious about adopting a standard that turns on whether the partisan interests in the redistricting process [are] excessive. Excessiveness is not easily determined.”<sup>29</sup> One party’s gerrymander may be “more egregious” and another’s may be “more subtle,” but “each is culpable.”<sup>30</sup>

The intent inquiry is the most institutionally sensitive and requires clear categorical rules for legislators and judges alike. To begin, the Court should distinguish between “political” intent and “partisan” intent.

## 1. Political Intent

Neutral, “political” intent has been long endorsed by the Court. In *Gaffney v. Cummings*,<sup>31</sup> the Court upheld the use of a “political fairness” principle,<sup>32</sup> in which the mapmakers sought “to allocate seats

<sup>25</sup> *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).

<sup>26</sup> *Plaut v. Spendthrift Farm*, 514 U.S. 211, 240 (1995).

<sup>27</sup> *Cooper v. Harris*, 137 S. Ct. 1455, 1490 (2017) (Alito, J., dissenting). *See also Plaut*, 514 U.S. at 240 (“[D]elphic alternative[s] . . . simply prolong[] doubt and multipl[y] confrontation [between the branches].”).

<sup>28</sup> *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting).

<sup>29</sup> *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring).

<sup>30</sup> *Id.*

<sup>31</sup> 412 U.S. 735 (1973).

<sup>32</sup> *Id.* at 738.

proportionately to major political parties”<sup>33</sup> based on voting results from the last three statewide elections.<sup>34</sup> In *Easley v. Cromartie (Cromartie II)*,<sup>35</sup> the Court upheld the use of a similar “partisan balance” principle which (despite the “partisan” moniker) sought to split the congressional delegation between six Democrats and six Republicans<sup>36</sup> in rough proportion to the statewide voting strength of the parties.<sup>37</sup>

These goals are undoubtedly “political” but also fulfill “the basic aim of legislative apportionment”: “the achieving of fair and effective representation.”<sup>38</sup> Lawmakers might aim to achieve “proportionality,”<sup>39</sup> “partisan symmetry,”<sup>40</sup> or any other consistent, neutral, and legitimate theory of political representation. If, for example, lawmakers *consistently* drew “competitive” districts, this too would be a political interest worthy of the judicial deference afforded in *Gaffney*. Even extreme deviations from “neutral”<sup>41</sup> districting criteria are constitutionally permissible to achieve such ends.

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<sup>33</sup> *Bush v. Vera*, 517 U.S. 952, 964–65 (1996) (citing *Gaffney*, 412 U.S. at 757–59).

<sup>34</sup> See *Gaffney*, 412 U.S. at 738.

<sup>35</sup> 532 U.S. 234 (2001).

<sup>36</sup> *Id.* at 246–47, 253.

<sup>37</sup> See Michael Parsons, *Clearing the Political Thicket: Why Political Gerrymandering for Partisan Advantage is Unconstitutional*, 24 WM. & MARY BILL RTS. J. 1107, 1142 n.276 (2016) [hereinafter Parsons, *Clearing the Political Thicket*].

<sup>38</sup> *Gaffney*, 412 U.S. at 748 (quoting *Reynolds v. Sims*, 377 U.S., 533, 565–66 (1964)).

<sup>39</sup> Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. (forthcoming 2018) (manuscript at 11), <https://ssrn.com/abstract=3011062> [hereinafter Levitt, *Intent is Enough*] (defining proportionality as “the extent to which a certain percentage of votes . . . translate[s] to a requisite percentage of seats”).

<sup>40</sup> *Id.* (manuscript at 12) (defining partisan symmetry as “the extent to which a certain percentage of votes that translates to a percentage of seats for one party would . . . translate to the same percentage of seats if achieved by the opposing party”).

<sup>41</sup> Neutral *criteria* (such as compactness, adherence to political subdivisions, and nesting) are important in redistricting because they further the neutral and legitimate *purposes* of a geographic system of representation (accountability, ease of political organization and election administration, etc.). See, e.g., *Karcher v. Daggett*, 462 U.S. 725, 756 (1983) (Stevens, J., concurring) (noting that “geographical compactness serves independent values; it facilitates political organization, electoral campaigning, and constituent representation”); *id.* at 758 (noting that political subdivision boundaries “tend to remain stable over time,” adherence to these boundaries make districts “administratively convenient and less likely to confuse the voters,” and “[r]esidents of political units such as townships, cities, and counties often develop a community of interest, particularly when the subdivision plays an important role in the provision of governmental services”); *id.* at 787 n.3 (Powell, J., dissenting) (noting that “[m]ost voters know what city or county they live in,” and adherence to subdivision boundaries “would lead to more informed voting” and would “lead to a representative who knows the needs of his district and is more responsive to them”); *Davis v. Bandemer*, 478 U.S. 109, 179 n.18 (1986) (Powell, J., concurring in part, dissenting in part) (noting that nesting “permit[s] voters readily to identify their voting districts and corresponding representatives” and “can be expected to foster voter participation”). See also *Bush v. Vera*, 517 U.S. 952, 974 (1996) (noting that confusing district lines “caus[e] a severe disruption of traditional forms of political activity” and can “creat[e] administrative headaches for local election officials”). To be sure, parties can manipulate neutral criteria to serve non-neutral purposes, whether legitimate (racial or political opportunity) or illegitimate (racial or political maximization). But while individualized criteria—such as race or political affiliation—can also be used to serve legitimate or illegitimate *purposes*, they inherently cannot provide a neutral *basis* for districting decisions under the Equal Protection Clause.

The fact that different theories of “fair and effective representation” can be equally valid disposes of the argument that partisan gerrymandering claims will necessarily result in some kind of proportional representation requirement<sup>42</sup> or that such claims require a “substantive definition of fairness” or an “agreed upon model of fair and effective representation.”<sup>43</sup> Justice Scalia was right to observe that the Constitution need not “take sides” in a dispute over which view of “fairness” or which theory of political representation a legislature should enact.<sup>44</sup> As *Gaffney* stated: “The reality is that districting inevitably has and is intended to have substantial political consequences.”<sup>45</sup>

But a political goal is not the same as a partisan goal. *Gaffney* explicitly distinguished legitimate political aims from unconstitutional partisan ones.<sup>46</sup> This distinction held clear through *Miller v. Johnson*,<sup>47</sup> *Bush v. Vera*,<sup>48</sup> and *Alabama Legislative Black Caucus v. Alabama*,<sup>49</sup> and was central to Justice Kennedy’s view in *Vieth* that an unlawful gerrymander “must rest on something more than [the application of] political classifications”—it must rest on the use of political classifications “in an invidious manner or in a way unrelated to any legitimate legislative objective.”<sup>50</sup> Only in *Cooper*’s recent dicta has the Court so carelessly conflated the political and partisan categories.<sup>51</sup> The Court has sanctioned the use of the “political affiliation” *criterion* in redistricting, not the *goal* of “partisan advantage, [or] what have you.”<sup>52</sup>

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<sup>42</sup> Charles Lane, *Do We Really Want the Supreme Court to Decide How Partisan is Too Partisan?*, THE WASHINGTON POST (June 21, 2017), [https://www.washingtonpost.com/amphtml/opinions/do-we-really-want-the-supreme-court-to-decide-how-partisan-is-too-partisan/2017/06/21/7b5fd7e0-569b-11e7-a204-ad706461fa4f\\_story.html](https://www.washingtonpost.com/amphtml/opinions/do-we-really-want-the-supreme-court-to-decide-how-partisan-is-too-partisan/2017/06/21/7b5fd7e0-569b-11e7-a204-ad706461fa4f_story.html).

<sup>43</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring).

<sup>44</sup> *Id.* at 288 n.9 (2004) (plurality opinion).

<sup>45</sup> *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973).

<sup>46</sup> *Id.* at 754.

<sup>47</sup> *See* 515 U.S. 900, 914 (1995) (“It is true that redistricting in most cases will implicate a political calculus in which various interests compete for recognition . . .”).

<sup>48</sup> *See* 517 U.S. 952, 964–65 (1996) (noting that states “may draw irregular district lines in order to allocate seats proportionately to major political parties”).

<sup>49</sup> *See* 135 S. Ct. 1257, 1270 (2015) (noting that “political affiliation” may “offset” racial considerations) (citing *Vera*, 517 U.S. at 968, for the political affiliation consideration).

<sup>50</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring).

<sup>51</sup> *See Cooper v. Harris*, 137 S. Ct. 1455, 1463–64 (2017) (reciting the predominance test and stating that plaintiffs must show “that the legislature ‘subordinated’ other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to ‘racial considerations’”). Justice Kagan cites *Miller* for this proposition, but *Miller* only discussed compactness, political subdivisions, and other neutral, geographic criteria—not “partisan advantage.” *See Miller*, 515 U.S. at 916 (stating that plaintiffs must show “that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations”).

<sup>52</sup> *Cooper*, 137 S. Ct. at 1464. In *Alabama*, the Court added “political affiliation” to the list of offsetting considerations, but this was accomplished with a citation to *Vera*—a decision that distinguished between political and partisan purposes. *See supra* notes 48–49.

## 2. Partisan Intent

More importantly, the Supreme Court must recognize that not all forms of “partisan intent” are constitutionally problematic. It is not a question of whether “partisanship” has gone “too far” or a question of “how partisan is too partisan?”<sup>53</sup> On the contrary, *general* partisan intent fulfills a core democratic function. The desire to defeat your political opponent is an animating and natural feature of democracy itself. Using hardball, partisan tactics and strategy *to appeal to voters* is an essential part of politics. There is no point at which such general partisan intent goes “too far” or becomes “excessive” as far as the Constitution is concerned. That is for the voters to decide.

There is a separate “limited and precise” category of partisan intent, however, that deserves no judicial succor: suppressive intent. “Suppressive intent” is an extremely narrow form of *invidious* partisan intent: the intent to burden, disfavor, or punish citizens because of their political preferences.<sup>54</sup> Once we identify and define this specific strain of intent, the question—and the stakes—become much clearer: How much suppressive intent deserves judicial deference? The answer is none.<sup>55</sup>

This distinction is not difficult to draw. The law is replete with examples of cabined and specific forms of intent carrying different consequences,<sup>56</sup> and it does not take a law degree to understand why the difference between general and invidious partisan intent matters.

In one of the final scenes of the film *Gladiator*,<sup>57</sup> Commodus (the Emperor) stands before a chained-up Maximus and challenges him to fight to the death. It is hard to imagine a more extreme adversarial realm than a death match. When beheading is considered legitimate behavior, there is little risk the rules are too intrusive. Commodus wants to kill Maximus and that intent is not only acceptable, but a vital part of the game.

And yet, Commodus still manages to offend us by violating the plain rules of the game: he stabs Maximus just before the combat begins, while Maximus is still in chains. The specific intent to harm Maximus *outside* of the arena is categorically distinguishable. An extreme battle to the death serves a purpose: it reveals a victor on the merits. Furtively stabbing your adversary before the battle undermines

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<sup>53</sup> See Lane, *supra* note 42.

<sup>54</sup> The terminology of “suppressive intent” is not meant to imply the existence of a “natural” or “unsuppressed” baseline, but rather simply intent to disfavor.

<sup>55</sup> See *City of New Orleans v. Dukes*, 427 U.S. 297, 303–04 (1976) (holding that “invidious discrimination . . . cannot stand consistently with the Fourteenth Amendment”).

<sup>56</sup> See, e.g., 21 AM. JUR. 2D *Criminal Law* § 117 (2017) (distinguishing between “general intent” and “specific intent” crimes).

<sup>57</sup> *GLADIATOR* (DreamWorks & Universal Pictures 2000).

that purpose. Such intent is illegitimate regardless of the degree of harm intended or achieved.

In *Cooper*, Justice Alito warns about the dangers of “invit[ing] the losers in the redistricting process to seek to obtain in court what they could not achieve in the political arena.”<sup>58</sup> But that is precisely the problem: partisan gerrymandering short-circuits the accountability usually provided by extreme battle in the “political arena.” As Justices Kennedy and Alito have pointed out in past cases, structural principles do more than prevent tyranny and protect liberty: they foster “effective and accountable” government by “allow[ing] the citizen to know who may be called to answer for making, or not making, th[e] delicate and necessary decisions essential to governance.”<sup>59</sup> In all the discussions about protecting state legislative prerogatives, “a vital constitutional principle must not be forgotten: Liberty requires accountability.”<sup>60</sup>

The judicial question is not whether “legislative majorities should be allowed to treat adversaries as adversaries.”<sup>61</sup> This conflation of concepts—general partisan intent and invidious suppressive intent—“rest[s] on an impoverished vocabulary of politics and partisanship.”<sup>62</sup> Rather, the question is whether an intent to suppress voters based on their political preferences (and insulate state legislators from accountability) deserves the same doctrinal treatment as an intent to win votes by appealing to—or changing—voters’ political preferences (the essence of accountability). It does not.<sup>63</sup>

Of course, not all cases will present the overwhelming direct evidence of suppressive intent available for today’s maps. Commodus sought to conceal his actions specifically because the rules were clear and he was trying to evade them. Luckily, powerful tools for detecting illicit intent have developed over the past decade. If an enacted map stands apart from hundreds or thousands<sup>64</sup> (or even billions)<sup>65</sup> of

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<sup>58</sup> *Cooper v. Harris*, 137 S. Ct. 1455, 1490 (2017) (Alito, J., dissenting).

<sup>59</sup> *Loving v. United States*, 517 U.S. 748, 758 (1996).

<sup>60</sup> *Dep’t of Transp. v. Ass’n of Am. R.R.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring).

<sup>61</sup> *Perez v. Abbott*, No. 5:11-cv-360, 2017 U.S. Dist. LEXIS 60237, at \*253 n.27 (W.D. Tex. Apr. 20, 2017) (Smith, J., dissenting).

<sup>62</sup> Levitt, *Intent is Enough*, *supra* note 39 (manuscript at 20).

<sup>63</sup> Recent works by Professors Justin Levitt and Michael Kang offer compelling explanations (and thorough precedent) for why invidious partisan intent/purpose deserve distinct treatment, and each offers an intent/purpose-focused claim to operationalize his legal analysis. See generally Levitt, *Intent is Enough*, *supra* note 39; Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. (forthcoming 2017) <https://ssrn.com/abstract=3019390>. In my view, a partisan sorting claim sufficiently fills this conceptual space. See *infra* text accompanying notes 120–134.

<sup>64</sup> See *Raleigh Wake Citizens Ass’n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 344–45 (4th Cir. 2016) (accepting Dr. Jowei Chen’s methodology for determining whether a partisan outcome was statistically possible without invidious partisan intent in a “Larios-style” quantitative partisan dilution case).

<sup>65</sup> See, e.g., Wendy K. Tam Cho & Yan Y. Liu, *Towards a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 ELECTION L. J. 351, 360

neutrally-generated maps as a statistically significant partisan anomaly, then the circumstantial evidence of invidious intent may be overwhelming. Whether the evidence is direct or circumstantial, however, the inquiry is one of type, not degree.

### B. *Effect*

In *League of United Latin American Citizens v. Perry (LULAC)*, Justice Kennedy contended that gerrymandering plaintiffs must “show a burden, as measured by a reliable standard, on [their] representational rights.”<sup>66</sup> Even in racial vote dilution cases under the Fourteenth Amendment there must be at least *some* identifiable effect on opportunity to elect.<sup>67</sup> The effect showing in partisan dilution cases is the same. The various measures of and tests for partisan effects developed to date provide evidence to inform the ultimate judicial inquiry: whether the opportunity of a targeted group to elect its preferred candidate was adversely impacted by invidious state action.

No “baseline” of “fair” representation is necessary once this effect is causally linked to invidious state action. For example, if a plaintiff can prove that a group lacks an ability-to-elect *because* it was targeted for suppression, a dilution claim should succeed. If the same group lacks an ability-to-elect *because* of the state’s geography or the statewide pursuit of a legitimate theory of representation, a dilution claim should fail. “Party members may not have any constitutional entitlement to electoral success”—or any specific degree of competitiveness, proportionality, or efficiency—“but they should have a constitutional expectation against the government actively trying to burden their representational interests based on their partisan affiliation and beliefs.”<sup>68</sup>

Several tests now offer reliable and effective measures of the impact of gerrymandering on voters’ electoral opportunities. *Whitford* relied upon the “efficiency gap” test to measure the impact of a map upon voters (and the durability of that impact), but it did not apply any strict threshold or hold the efficiency gap to be dispositive.<sup>69</sup> As tests and methods improve, courts may rely upon such evidence to satisfy the relevant legal standard.

Ever since Justice Kennedy observed that “[t]echnology is both a

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(2016) (using supercomputers to generate “more than a billion” comparison maps).

<sup>66</sup> 548 U.S. 399, 418 (2006).

<sup>67</sup> See *Perez v. Abbott*, No. 5:11-cv-360, 2017 U.S. Dist. LEXIS 66428, \*176 (W.D. Tex. May 2, 2017) (noting that “plaintiffs still must show some discriminatory effect” in making an intentional vote dilution claim under the Fourteenth Amendment).

<sup>68</sup> Kang, *supra* note 63 (manuscript at 22).

<sup>69</sup> See *Whitford v. Gill*, 218 F. Supp. 3d 837, 906 n.298 (W.D. Wis. 2016) (distinguishing between the “evidence of a constitutional violation” and the “violation itself”).

threat and a promise,”<sup>70</sup> the methods of measurement and detection have continued to advance as fast as the methods of identification and suppression. Because of the Court’s jurisprudence, however, voters have suffered ever-deeper and more enduring burdens from the evolution of technology without seeing any of its promise or relief. This is wholly avoidable. If a plaintiff can prove that the targeted group’s opportunity to elect was diminished because of invidious state action, the dilution inquiry should be over.

### III. CERTAINTY: BUILDING A COHERENT DOCTRINE WITH PREDICTABLE APPLICATION

The second requirement for redistricting law to protect structural and institutional interests must be certainty. When state actors violate clear rules, the application of the law by district judges must be predictable. Predictability insulates the administration of justice from accusations of partisanship. And, when state actors test the boundaries of rules, the surrounding doctrine should be coherent enough that its evolution and extension fosters certainty. Like adherence to precedent, coherence removes doubt that the development of the law serves partisan ends.

The Roberts Court continues to bring political law precedents into closer alignment with broader constitutional doctrines to enhance coherence and predictability. As Professor John McGinnis has observed, the Court’s campaign finance jurisprudence has moved closer and closer to traditional First Amendment principles.<sup>71</sup> McGinnis considers “[r]especting settled principles [to be] essential” given the nature of the questions involved<sup>72</sup>:

Political actors include the Justices themselves, who were all appointed in a political process and have distinct political affiliations. To depart from the Court’s long-established . . . principles in th[is] [political] context . . . would suggest that the Supreme Court is trying to skew political campaigns for ideological, and indeed partisan, reasons.<sup>73</sup>

This trend towards consistency extends (in part) to redistricting law, where racial gerrymandering law has drawn closer to traditional equal-protection principles<sup>74</sup> and the Court recently reminded us that

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<sup>70</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring).

<sup>71</sup> See generally John O. McGinnis, *Neutral Principles and Some Campaign Finance Problems*, 57 WM. & MARY L. REV. 841 (2016).

<sup>72</sup> *Id.* at 847.

<sup>73</sup> *Id.*

<sup>74</sup> See *Cooper v. Harris*, 137 S. Ct. 1455, 1479 (2017) (“[I]n no area of our equal protection law have we forced plaintiffs to submit one particular form of proof to prevail.”).

election remedies are governed by traditional equitable principles.<sup>75</sup> Whether or not one believes these general doctrines *should* be so insensitive to subject-matter, the Court continues to move in that direction.

The Court's unusual treatment of partisan gerrymandering strays from this approach to neutrality. The Court seems to believe its non-intervention allows it to "stay above the fray." It is wrong. The Court is "staying above the fray" the same way a police commissioner might try to "stay above the fray" by ignoring systemic complaints that his immediate reports have been firing line officers based on their political beliefs.<sup>76</sup> The commissioner is "in the fray" whether he acts on the information or not, and his inaction—however consistent—will not build institutional respect for his office. The Court's inaction fares no better.

Indeed, the Court's approach departs from established principles at every turn.<sup>77</sup> The Supreme Court recognizes that challenges to redistricting laws are justiciable<sup>78</sup> but continues to flirt with a special exception for political gerrymandering.<sup>79</sup> The Supreme Court jealously defends against government viewpoint discrimination<sup>80</sup> but urges respect when legislators enact laws with the overt goal of suppressing the rights and influence of voters based on their views.<sup>81</sup> The Supreme Court consistently holds that government classifications must have some rational basis<sup>82</sup> but demurs when asked whether "partisan advantage" constitutes a legitimate state interest allowing the government to sort citizens by political preference.<sup>83</sup> The Court recognizes that partisan gerrymanders can be identified as a defense in racial gerrymandering claims,<sup>84</sup> but questions whether partisan gerrymanders can be identified by plaintiffs for partisan gerrymandering claims.<sup>85</sup> And for decades, the Supreme Court has stated that partisan gerrymandering is contrary to basic constitutional principles<sup>86</sup> and that political gerrymandering violates individual rights in certain circumstances,<sup>87</sup> and yet the Court has failed to provide redress.

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<sup>75</sup> See generally *North Carolina v. Covington*, 137 S. Ct. 1624 (2017).

<sup>76</sup> Cf. *Elrod v. Burns* 427 U.S. 347, 371–73 (1976); *id.* at 374–75 (Stewart, J., concurring).

<sup>77</sup> See Kang, *supra* note 63 (manuscript at 17–35), for a particularly rigorous accounting.

<sup>78</sup> See generally *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>79</sup> See generally *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

<sup>80</sup> See *Matal v. Tam*, 137 S. Ct. 1744, 1765–66 (2017) (Kennedy, J., concurring).

<sup>81</sup> See *Cooper v. Harris*, 137 S. Ct. 1455, 1490 (Alito, J., dissenting).

<sup>82</sup> See *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

<sup>83</sup> See *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016) (avoiding answering whether partisan advantage is a legitimate state purpose by "assuming, without deciding, that partisanship is an illegitimate redistricting factor").

<sup>84</sup> See *Hunt v. Cromartie (Cromartie I)*, 526 U.S. 541, 551 (1999).

<sup>85</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 287 (2004).

<sup>86</sup> See *id.* at 292 (plurality opinion); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015).

<sup>87</sup> See *Cromartie I*, 526 U.S. at 551 n.7.

This “delphic alternative” to principled neutrality “simply prolongs doubt and multiplies confrontation” between the branches.<sup>88</sup> Nor could the Court contain the effects of this strange doctrinal vacuum with a formal justiciability exception. The conceptual space would remain, encouraging legislators and litigators alike to engage in legal arbitrage and undermining the institutional goals the Court is attempting to protect.

After the last census, for example, legislators sorted voters by race under the pretext of a constitutional purpose (preventing racial vote dilution) to achieve an arguably unconstitutional purpose (partisan vote dilution).<sup>89</sup> By doing so, legislators could pursue suppressive partisan goals and blame the federal courts and federal executive to boot. In response, some partisan litigants brought racial sorting claims to vindicate partisan dilution harms, using the legal remedy that did exist as a proxy for the legal remedy that did not.<sup>90</sup> Legislators then claimed in defense that they were discriminating against voters based on party for partisan purposes (unconstitutional under law that does not exist)<sup>91</sup> rather than discriminating against voters based on race for partisan purposes (unconstitutional under law that does exist).<sup>92</sup>

Legislators also pushed the boundaries of the one-person, one-vote (OPOV) doctrine by adjusting population levels between districts and degrading the influence of voters by party affiliation. The Court has attempted to avoid the inevitable “partisan advantage” question in these cases as well,<sup>93</sup> weakening the predictable application of OPOV principles. Notably, while the Court has reserved the question of whether partisan advantage can justify population deviations, lower courts have been unanimous in answering it: “partisan advantage” is not a legitimate justification for diverging from the equal-population principle.<sup>94</sup>

If the Supreme Court thinks it is bolstering institutional respect, building coherent doctrine, and creating a predictable set of rules by forcing federal courts to navigate this intersection of law and non-law, it

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<sup>88</sup> See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995).

<sup>89</sup> See Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U. L. REV. 573, 609 (2016).

<sup>90</sup> See, e.g., Robert Barnes & Laura Vozzella, *Supreme Court Will Weigh in on Whether VA. Districts Are Racially Gerrymandered*, THE WASHINGTON POST (June 6, 2016), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-will-weigh-in-on-whether-va-districts-are-racially-gerrymandered/2016/06/06/c0366e3c-2beb-11e6-9de3-6e6e7a14000c\\_story.html?utm\\_term=.913cd1468c08](https://www.washingtonpost.com/politics/courts_law/supreme-court-will-weigh-in-on-whether-va-districts-are-racially-gerrymandered/2016/06/06/c0366e3c-2beb-11e6-9de3-6e6e7a14000c_story.html?utm_term=.913cd1468c08).

<sup>91</sup> See *Cromartie I*, 526 U.S. at 551 n.7.

<sup>92</sup> See *Cooper v. Harris*, 137 S. Ct. 1455, 1464 n.1 (2017).

<sup>93</sup> See *Harris v. Ariz. Indep. Redistricting Comm’n*, 136 S. Ct. 1301, 1307 (2016).

<sup>94</sup> See *Raleigh Wake Citizens Ass’n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 345 (4th Cir. 2016); *Perez v. Abbott*, No. 5:11-cv-360, 2017 U.S. Dist. LEXIS 60237, at \*163 (W.D. Tex. Apr. 20, 2017); *City of Greensboro v. Guilford Cty. Bd. of Elections*, No. 1:15-cv-559, 2017 U.S. Dist. LEXIS 50253, at \*22 (M.D.N.C. Apr. 3, 2017).

is sorely mistaken. The Court’s doctrine has not prevented partisan actors from “transform[ing] [the federal courts] into weapons of political warfare.”<sup>95</sup> Partisan actors—both legislators and litigants—have done precisely that by exploiting the law’s inconsistent standards and ambiguities. Indeed, *litigants* have been the only ones honoring constitutional rights and principles in the process.<sup>96</sup>

Moreover, a non-justiciability holding would only ensure further institutional degradation, as Judge Niemeyer points out in *Benisek v. Lamone*:

[A] categorical rule that would abandon efforts at judicial review surely cannot be accepted lest it lead to unacceptable result. . . . A controlling party[] could theoretically create . . . districts by assigning to each district [a certain percentage of individual citizens by political affiliation], regardless of their geographical location. . . . Such a pointillistic map would, of course, be an absurd warping of the concept of representation, resulting in the very ‘tyranny of the majority’ feared by the Founders. Yet, such an extreme possibility would be open to the most politically ambitious were courts categorically to abandon all judicial review of political gerrymandering.<sup>97</sup>

The Court cannot abandon its post without undermining the Constitution’s fundamental purpose and design.

If the Supreme Court wants to restore certainty in this field, protect institutional and structural interests, and stem the tide of mandatory jurisdiction cases flowing onto its docket year after year, its interests would be better served by definitive intervention than middling avoidance. The Court’s traditional tools of principled neutrality in “political” cases—coherent doctrine and consistent application—point the way forward.

The very least the Court can do this term is recognize a partisan dilution claim and foreclose the ability of states to raise “partisan advantage” arguments (and defenses) in redistricting cases. This would begin to fill the doctrinal gap in redistricting jurisprudence and help bring certainty to legislators navigating the Court’s curious case law.

To craft a dilution claim, the Court’s next step is simple: affirm the judgment in *Gill v. Whitford*.<sup>98</sup> With respect to intent, the district court properly recognized that suppressive intent is invidious and distinguishable from general partisanship<sup>99</sup>—a distinction the dissent

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<sup>95</sup> *Cooper*, 137 S. Ct. at 1490 (Alito, J., dissenting).

<sup>96</sup> *See id.* at 1480 n.15 (“[W]hatever the possible motivations for bringing such suits . . . they serve to prevent legislatures from taking unconstitutional districting action . . .”).

<sup>97</sup> *Benisek v. Lamone*, No. 1:13-cv-3233, 2017 U.S. Dist. LEXIS 136208, at \*45–46 (D. Md. Aug. 24, 2017) (Niemeyer, J., dissenting).

<sup>98</sup> 137 S. Ct. 2268 (2017), No. 16-1161.

<sup>99</sup> *See Whitford v. Gill*, 218 F. Supp. 3d 837, 887 n.170 (W.D. Wis. 2016) (“The intent we require, therefore, is not simply an ‘intent to act for political purposes,’ [] but an intent to make

failed to grasp.<sup>100</sup> This not only harmonizes partisan dilution law with racial dilution law, it recognizes that suppressive intent is closer to unconstitutional viewpoint discrimination than any kind of routine “politics as usual” deserving judicial deference. Partisan dilution—like viewpoint discrimination—tilts the playing field, delegitimizing the results from the political arena.

With respect to effect, the harm in a partisan dilution case—like a racial dilution case—is found in the mapmaker’s discriminatory dilution of an identifiable group’s opportunity to elect.<sup>101</sup> An identity does not need to be immutable to be identifiable,<sup>102</sup> and the Court’s *Cromartie* doctrine already implicitly acknowledges that the political preferences of voters are identifiable.<sup>103</sup>

The Court need not crown a single evidentiary test or measure of effect. The district court did not hold the specific metrics of the “efficiency gap” dispositive,<sup>104</sup> and the plaintiffs do not claim as much.<sup>105</sup> The tools used to detect and measure dilutive effect will continue to improve with time and aid federal courts in their ability to determine whether plaintiffs have “show[n] a burden, as measured by a reliable standard, on [their] representational rights.”<sup>106</sup>

Nor need the Court bless a singular concept of “fairness.” The standard applied by the district court in *Gill* offers an opportunity for the State to give a legitimate explanation for dilution.<sup>107</sup> If the State can point to a legitimate justification—be it geography or democratic theory—then the plan may still survive. “Partisan advantage” is no such justification.

To foreclose states from making “partisan advantage” arguments in redistricting cases, the Court’s next step is equally simple: reverse the

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the political system systematically unresponsive to a particular segment of the voters based on their political preference.”).

<sup>100</sup> See *id.* at 933 (Griesbach, J., dissenting) (“I am unable to accept proof of intent to act for *political purposes* as a significant part of any test for whether a task constitutionally entrusted to the political branches of government is unconstitutional. If *political motivation* is improper, then the task of redistricting should be constitutionally assigned to some other body, a change in law we lack any authority to effect.”) (emphases added).

<sup>101</sup> See *id.* at 883.

<sup>102</sup> See Parsons, *Clearing the Political Thicket*, *supra* note 37, at 1160–61.

<sup>103</sup> See *id.* at 1155.

<sup>104</sup> See *Whitford*, 218 F. Supp. 3d at 906 n.298.

<sup>105</sup> See Motion to Affirm at 22, *Gill v. Whitford*, 137 S. Ct. 2268 (No. 16-1161), 2017 WL 1907756 (filed May 8, 2017) (“To be clear, Appellees do not ask the Court to endorse any *particular* measure of partisan asymmetry or any *particular* technique for demonstrating durability. The Panel did not do so, nor need the Court in order to affirm.”).

<sup>106</sup> *League of United Latin American Citizens v. Perry (LULAC)*, 548 U.S. 399, 418 (2006). Notably, the efficiency gap can be calculated (and the impact of a map measured) before elections are held under a new map. See Nicholas Stephanopoulos, *Flickers of the Future?* ELECTION LAW BLOG (Sept. 2, 2017), <https://electionlawblog.org/?p=94560>. Such tools can help plaintiffs identify suspect maps and help legislators avoid litigation in the first place.

<sup>107</sup> See *Whitford*, 218 F. Supp. 3d at 883.

district court's decision in *Harris v. Cooper*.<sup>108</sup> There, legislators adopted redistricting criteria that *expressly* required the use of "political data" for "partisan advantage,"<sup>109</sup> thereby raising a black-letter equal-protection question: whether partisan advantage is a legitimate state interest.

Holding that partisan advantage is not a legitimate state interest would reconcile several doctrinal demands and make redistricting law significantly more coherent and predictable.

First, "partisan advantage" cannot be considered a "legitimate" interest or even a "state" interest.<sup>110</sup> The Court has repeatedly held that the raw desire to disadvantage a group of persons (racial, political, or otherwise) is not "legitimate."<sup>111</sup> Moreover, the suppression of voters based on party preference is not an interest of the "state" *qua* state.<sup>112</sup> Recognizing this would align redistricting law with more general equal-protection principles.

Second, holding that "partisan advantage" does not constitute a legitimate state policy would harmonize the Court's sorting and dilution doctrine with its OPOV doctrine and bring the Supreme Court into line with the unanimous response of the lower federal courts to *Harris* that deviations from population equality cannot be justified by a desire for partisan gain.<sup>113</sup>

Third, the suggestion that "partisan advantage" constitutes a legitimate justification for state action is irreconcilable with the concept of rational basis review itself. It is hard to imagine a single law that could not be justified by a majority's desire to gain "partisan advantage" at the next election. Rejecting this justification is important to sustain the very concept of a *constitutional* democracy where majority power is

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<sup>108</sup> *Harris v. McCrory*, No. 1:13-cv-949, 2016 U.S. Dist. LEXIS 71853 (M.D.N.C. June 2, 2016), *docketed and pending sub. nom.*, *Harris v. Cooper*, No. 16-166 (U.S. Aug. 5, 2016).

<sup>109</sup> See Brief for OneVirginia2021: Virginians for Fair Redistricting as Amicus Curiae Supporting Appellants, *Harris v. McCrory sub. nom. Harris v. Cooper*, No. 16-166 (U.S. Aug. 5, 2016).

<sup>110</sup> See Parsons, *Clearing the Political Thicket*, *supra* note 37, at 1135–38.

<sup>111</sup> Compare *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (upholding the use of race to prevent discrimination), *abrogated by* *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612 (2013), and *Gaffney v. Cummings*, 412 U.S. 735, 752–53 (1973) (upholding the use of party to achieve "political[] fair[ness]"), with *Bartlett v. Strickland*, 556 U.S. 1, 20 (2009) (noting that federal antidiscrimination law "does not guarantee minority voters an electoral advantage"), and *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring) (observing that political classifications cannot be used "in an invidious manner or in a way unrelated to any legitimate legislative objective"). See generally *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that when legislation is "inexplicable by anything but animus toward the class it affects[,] it lacks a rational relationship to legitimate state interests").

<sup>112</sup> See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[W]hile sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts."); Parsons, *Clearing the Political Thicket*, *supra* note 37, at 1136 ("Simply put, the state, *qua* state, has no cognizable interest in which party wins a democratic election or which party ascends to power.").

<sup>113</sup> See *supra* note 94.

bounded by the rule of law.<sup>114</sup>

Finally, foreclosing partisan-advantage defenses would resolve one of redistricting law's thorniest issues: the "race versus party" problem. This problem stems from the difficulty of unwinding the motives and/or basis for state action in states with "conjoined polarization," or the "consistent alignment of race, party, and ideology."<sup>115</sup> Foreclosing this defense would render much of the doctrinal confusion moot. In *Cooper*, for example, a primary question was whether legislators drew a challenged district predominantly on the basis of race to achieve partisan advantage or whether they drew the district on the basis of party to achieve partisan advantage.<sup>116</sup> Holding that "partisan advantage" is not a legitimate justification either way would sweep away the most institutionally intrusive part of the judicial inquiry.<sup>117</sup>

If the Court wishes to go even further and foster even greater certainty, it could also use *Harris v. Cooper* to establish a broader rule. Considering "[r]acial and political gerrymandering claims share a common judicial genesis in *Fortson v. Dorsey*,"<sup>118</sup> the Court could use this term to recognize not one singular gerrymandering offense, but two: dilution and sorting.<sup>119</sup> By acknowledging that "political vote dilution and political sorting are two different gerrymandering offenses raising two separate constitutional concerns,"<sup>120</sup> the Court could quickly and easily establish an analytically robust and doctrinally consistent approach to the entire field.

To craft a sorting claim,<sup>121</sup> the Court would simply apply the

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<sup>114</sup> This provides a strong "universalistic" basis for judicial intervention. "Universalistic reasoning seeks to define [constitutional] clauses through the invocation of overarching general principles, usually derived from abstract philosophical ideas." See Edward B. Foley, *The Gerrymander and the Constitution: Two Avenues of Analysis and the Quest for a Durable Precedent*, 59 WM. & MARY L. REV. (forthcoming 2018) (manuscript at 4 n.19), <https://ssrn.com/abstract=2999738>. If the judicial blessing of "partisan advantage" would unwind the entire constitutional enterprise, it must be rejected wholly apart from any suggestion that the Constitution embraces a specific notion of democratic "fairness."

<sup>115</sup> Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. (forthcoming 2018), <https://ssrn.com/abstract=2912403> (citing Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867, 869 (2016)).

<sup>116</sup> See *Cooper*, 137 S. Ct. 1455, 1472–73 (2017).

<sup>117</sup> Holding partisan advantage to be illegitimate would have also improved comity by obviating the need for the Supreme Court to adopt federal court findings contrary to state court findings on the same question. See *id.* at 1466–68.

<sup>118</sup> Parsons, *Clearing the Political Thicket*, *supra* note 37, at 1123 (discussing *Fortson v. Dorsey*, 379 U.S. 433, 438–39 (1965)).

<sup>119</sup> *Id.* at 1148.

<sup>120</sup> *Id.*

<sup>121</sup> Some courts and commentators claim *Vieth* rejected a *Shaw*-like predominance test. See, e.g., *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-4884, 2011 WL 5868225, at \*2–3 (N.D. Ill. Nov. 22, 2011). This need not be so. First, the Supreme Court has never considered that political gerrymandering, like racial gerrymandering, may implicate two different constitutional concerns remedied by two fundamentally different (but co-existing) tests. See Parsons, *Clearing*

standard articulated in *Bethune-Hill v. Virginia State Board of Elections*<sup>122</sup> to the facts in *Harris v. Cooper*. If plaintiffs can show that the “essential basis”<sup>123</sup> upon which voters were sorted was political preference, then this should trigger an inquiry into the State’s justification.<sup>124</sup>

As Justice Kennedy noted in *Vieth*, “an apportionment’s *de facto* incorporation of partisan classifications” may show that the classification “is used in an impermissible fashion.”<sup>125</sup> Using race as the essential basis in redistricting triggers strict scrutiny.<sup>126</sup> Using party as the essential basis need not trigger strict scrutiny,<sup>127</sup> but the *de facto* classification must—at the very least<sup>128</sup>—survive rational basis review.<sup>129</sup> As Justice Kennedy so plainly puts it: “If a State passed an enactment that declared ‘All future apportionment shall be drawn so as most to burden Party X’s rights to fair and effective representation, though still in accord with one-person, one-vote principles,’ we would surely conclude the Constitution had been violated.”<sup>130</sup> When party preference is the “essential basis” driving a district’s boundaries and a “*de facto* political classification,” the question then becomes whether this “classification is unrelated to the aims of apportionment.”<sup>131</sup>

Adopting a partisan dilution claim and a partisan sorting claim would eliminate opportunities for legal arbitrage entirely. Where political classifications provide the essential basis for redistricting *or* the State intentionally frustrates certain voters’ ability to elect based on their political beliefs, the State should be required to show that it “purport[ed] fairly to allocate political power . . . and, within quite

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*the Political Thicket*, *supra* note 37, at 1149 n.303. Second, just as the Supreme Court has not considered an “intent-plus-effects”-style test under the First and Fourteenth Amendments together, it has not considered the viability of a hybrid “predominance”-style test. *See* Whitford v. Gill, 218 F. Supp. 3d 837, 883–84 (W.D. Wis. 2016). Finally, given that “[t]he Court has expressly asked litigants to rescue it from the status quo of its own making[,] . . . there is little institutional reason for the Court to avoid starting from a clean slate.” Levitt, *Intent is Enough*, *supra* note 39 (manuscript at 8).

<sup>122</sup> 137 S. Ct. 788 (2017).

<sup>123</sup> *Id.* at 792.

<sup>124</sup> Classification doctrine is not triggered by political or racial considerations alone; the doctrine is only triggered when party or race is the “dominant and controlling” consideration. *See* Miller v. Johnson, 515 U.S. 900, 913 (1995). Nor is the absence of demonstrable effect relevant in such cases; sorting is a process harm that is *assumed* based on the classification. *See, e.g., Cano v. Davis*, 211 F. Supp. 2d 1208, 1216 (C.D. Cal. 2002) (“The *Shaw* doctrine is unusual in that, unlike most constitutional doctrines, it requires no concrete injury. Rather, [the harm] results solely from the classification of voters . . .”).

<sup>125</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring).

<sup>126</sup> *Bethune-Hill*, 137 S. Ct. at 792.

<sup>127</sup> *See Vieth*, 541 U.S. at 293; *Shaw v. Reno*, 509 U.S. 630, 650 (1993).

<sup>128</sup> *See Parsons, Clearing the Political Thicket*, *supra* note 37, at 1153–54 n.330.

<sup>129</sup> *See New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Nor is this inconsistent with the notion that political sorting can offset a finding of racial sorting. *See Parsons, Clearing the Political Thicket*, *supra* note 37, at 1154–55 n.332.

<sup>130</sup> *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring).

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

tolerable limits, succeed[ed] in doing so.”<sup>132</sup> This follows *Gaffney* and the *Cromartie* doctrine by affording legislators due deference in the structuring of government without giving legislators carte blanche to suppress voters for invidious purposes.<sup>133</sup>

In short, adopting a partisan dilution claim and foreclosing partisan-advantage arguments (or adopting an additional partisan sorting claim) would go a long way towards making redistricting law more analytically consistent, more predictable, and less subject to partisan manipulation by legislators and litigants alike.<sup>134</sup>

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<sup>132</sup> *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973).

<sup>133</sup> One might question whether a federal court can smoke out “fake” proportionality, “fake” competition, or other pretextual nods to legitimate goals that are simply partisan-advantage plans in disguise. Notably, courts already engage in such discerning analyses. *See Perez v. Abbott*, No. 5:11-cv-360, 2017 U.S. Dist. LEXIS 66428, at \*119 n.73 (W.D. Tex. May 2, 2017) (noting that the mapmakers sought “to create an appearance that [they] were drawing new minority districts or were recognizing minority growth, when in fact they were not, and they knew they were not”).

<sup>134</sup> Adopting a separate sorting claim could render additional benefits in the long run by solving two of redistricting law’s other quandaries: the “incumbency protection” question and the “dummymander” question.

The “incumbency protection” question wrestles with the proper role of incumbency considerations in redistricting. Incumbents may draw lines to avoid contests with each other, *see Tennant v. Jefferson Cty. Comm’n*, 133 S. Ct. 3, 8 (2012); *Bush v. Vera*, 517 U.S. 952, 964–65 (1996), but the Court has also noted that “incumbency protection can take various forms, not all of them in the interests of the constituents,” *League of United Latin American Citizens v. Perry (LULAC)*, 548 U.S. 399, 441 (2006). Just as “political” and “partisan” purposes are distinguishable in districting, there is an obvious difference between a legitimate interest in “incumbency-pairing prevention” and an illegitimate interest in “incumbency advantage.” *See Parsons, Clearing the Political Thicket*, *supra* note 37, at 1144–47. Drawing a boundary between two incumbents’ residences “preserves the opportunity for voters in both districts to weigh the incumbents’ experience, legislative seniority, and community ties against the promises and platforms offered by the electoral challengers. This renders a neutral, public benefit to the voters in both districts.” *Id.* at 1146. Drawing a boundary “to fence out challengers or fence in supporters,” on the other hand, “usurps voters’ rightful role in choosing which candidate to elect and attempts to coronate a state-sanctioned winner.” *Id.* Various courts have recognized this distinction. *See Perez v. Abbott*, No. 5:11-cv-360, 2017 U.S. Dist. LEXIS 60237, at \*153–57 (W.D. Tex. Apr. 20, 2017); *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 542 (E.D. Va. 2015), *affirmed in part, vacated in part, and remanded by* 137 S. Ct. 788 (2017); *In re Legislative Districting of General Assembly*, 193 N.W.2d 784, 790 (Iowa 1972). Although a dilution claim may be limited in its ability to vindicate these wrongs, a sorting claim could do the trick.

The “dummymander” question, meanwhile, asks how courts should analyze gerrymanders that do not work as intended or backfire. Despite the presence of suppressive intent, the question is whether a claim can be maintained when no measurable dilutive burden results. As above, a sorting claim may succeed here even if a dilution claim fails because sorting is a *process harm* based on the state’s use of a government classification without adequate justification. A state’s predominant use of race for “racial suppression” or “racial maximization” could not be saved by ham-handed execution. The same should hold for a partisan sorting claim. The public outrage over the original “Gerry-mander,” for example, was not based on any specific degree of dilution. The outrage arose because the government used political preference as the “essential basis” in its decision-making without any legitimate state justification. Tying the sorting claim to the original “Gerry-mander” provides an additional particularistic basis for judicial intervention. *See Foley, supra* note 114 (manuscript at 4 n.19) (“Particularistic reasoning . . . seeks to specify the meaning of [constitutional] clauses by anchoring them in concrete instances of America’s national experience, with a preference for those experiences most deeply rooted in American history and thus mostly likely to be most deeply ingrained in America’s collective national character.”).

## IV. CREDIBILITY: SETTING EXPECTATIONS AND ENFORCING CONSTITUTIONAL RIGHTS

Clear rules, coherent doctrine, and predictable application are usually sufficient to protect the courts' institutional integrity and the states' legislative prerogatives. In redistricting law, however, two final concerns haunt the Court: the fear that judicial intervention will be too disruptive and the fear that legislative compliance will be too difficult.

The Supreme Court's concerns about disruption seem reasonable at first. The Court worries that finally accepting partisan gerrymandering claims will unleash a wave of litigation.<sup>135</sup> Upon further reflection, however, this concern is both misplaced and overstated.

Concerns about disruption are misplaced because violations of the Constitution cannot be weighed against the inconvenience of stopping them. In *Reynolds v. Sims*, the Court recognized the disruptive nature of the rule it was establishing: "the problem of state legislative malapportionment is one that is perceived to exist in a large number of the States."<sup>136</sup> Nonetheless, "the Court held that the widespread and long-practiced nature of the violation did not thereby sanction its continuation."<sup>137</sup> Despite articulating a new rule holding several states in violation, the Court recognized that "a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."<sup>138</sup>

The same holds true here. Suppressive line-drawing may be a common practice "perceived to exist in a large number of the States"<sup>139</sup> today, but that is no excuse for inaction. The Court's own failure to intervene has green-lighted the naked pursuit of partisan advantage, drawing legislators out beyond clear constitutional lines. It may be that legislators' "sense of decorum and restraint"<sup>140</sup> kept the practice somewhat in check in earlier decades, but the fact that a "practice is not new to American politics"<sup>141</sup> is not what is relevant: "It is the practice itself, not the magnitude of its occurrence, the constitutionality of which must be determined."<sup>142</sup>

Concerns about disruption also are overstated given the relevant timeline, timing, and evidentiary showing required. To start, one must

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<sup>135</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 286 (2004) (plurality opinion) ("[T]he fact that partisan districting is a lawful and common practice means that there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation . . ."); *id.* at 306 (Kennedy, J., concurring).

<sup>136</sup> 377 U.S. 533, 556 (1964).

<sup>137</sup> *Parsons Clearing the Political Thicket*, *supra* note 37, at 1167.

<sup>138</sup> *Reynolds*, 377 U.S. at 566.

<sup>139</sup> *Id.*

<sup>140</sup> *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring).

<sup>141</sup> *Elrod v. Burns*, 427 U.S. 347, 353 (1976).

<sup>142</sup> *Id.* at 354.

remember that “the timeline of the law” spans generations.<sup>143</sup> The question is not how many maps are challenged when the rule of law is announced, but how many maps are challenged *once the rule of law is settled*. On the day *Reynolds v. Sims* was announced, the Court decided *five* additional OPOV cases.<sup>144</sup> The Court would continue to refine its doctrine over the decades that followed, but it did not take long for overall compliance with the equal-population standard to become routine redistricting fare.<sup>145</sup>

Far from diminishing the Court’s credibility, the celebrated OPOV doctrine now stands undisputed—a rule so obvious one wonders why it took so long to arrive. So too will it be when this generation explains to their children that the government used to be able to discriminate between citizens based on how the government predicted they would vote, allowing the state to favor preordained candidates and to suppress the influence of those who disagreed with the state-sanctioned choices. Looking back over the sweep of history, the larger black-mark upon the Court’s record will be the decades in which the Court failed to rectify a widespread violation of rights, not a fleeting uptick in pending claims.

If the Supreme Court acts quickly and decisively, the timing of the current appeals also offers a unique opportunity to minimize the disruptiveness of any new rule. With the 2020 census just around the corner, *every map in the United States* must be redrawn. If the Court establishes a strong, clear set of rules this term, congressional, state, and local maps across the nation will be able to incorporate the Court’s guidance immediately, obviating much of the need for litigation.

Finally, the proposal above will not trigger a lawsuit every time any legislator harbors invidious intent. It is true that even legislators unarmed with political data and mapping software will have an instinctual sense of where their support lies and may be tempted to nudge boundaries in their favor.<sup>146</sup> As a practical matter, however, such a nudge will rarely give rise to a dilution claim because usually there will be insufficient proof that the decision was based on invidious intent or had any discernable impact on a targeted group’s opportunity to elect. Similarly, a sorting claim will usually fail in such instances because political preference will not be the “essential” basis upon which the district was drawn.

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<sup>143</sup> *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring) (“[B]y the timeline of the law 18 years is rather a short period.”).

<sup>144</sup> *WMCA v. Lomenzo*, 377 U.S. 633 (1964); *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *Roman v. Sincock*, 377 U.S. 695 (1964); *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713 (1964).

<sup>145</sup> *See, e.g.*, *Brown v. Thomson*, 462 U.S. 835 (1983) (adopting 10% burden-shifting rule); *Mahan v. Howell*, 410 U.S. 315 (1973) (population equality requirements less demanding for state legislative districts).

<sup>146</sup> *Davis v. Bandemer*, 478 U.S. 109, 128 (1986) (plurality opinion) (citing *Gaffney v. Cummings* 412 U.S. 735, 752–53 (1973)).

The Court need not bless suppressive intent as constitutionally legitimate to avoid spurring litigation every time it exists, and the Court need not decline to craft a claim simply because it will fail to rectify every wrong. A claim that causes legislators to exhibit restraint in word and deed still serves a vital purpose even if it does not remedy every transgression. If legislators must justify their decisions on neutral bases—and thus tend to use more normal legislative processes, tend to include or omit whole communities when designing districts rather than slicing neighborhoods apart, and tend to seek out ways to align their own interests with the public good—then the long-term salutary effects of the claim will be as important as the short-term legal ones.<sup>147</sup>

Nor need the Court find invidious intent legitimate for the doctrine to be “respectful” of state legislators. If this is respect, it is the backhanded kind. The notion that legislators can’t help themselves from suppressing voters’ rights insults the legislative branch and inverts the judiciary’s role. The Constitution does not stoop to our worst behavior, and the Court should not water down constitutional rights to match its low expectations of politicians. If the Constitution protects a right, state behavior must meet the demand. Trusting the legislative branch to be cooperative and capable in complying with the Constitution is a sign of true institutional respect.

The Supreme Court’s concerns about the difficulty of legislative compliance are similarly unwarranted. The Court fears that redistricting will become so complex that an inherently legislative process will shift to the courts.<sup>148</sup> But once expectations are settled, the clarity, coherence, and certainty of the rules should prompt a decrease in legislative excess, not an increase in judicial entanglement.

Closing legal loopholes and establishing clear categories of conduct would give legislators a comprehensible field map to stay *out* of court. And taking even some of the maneuvering for partisan advantage off the table could help legislators focus on legitimate questions about representation, like how to preserve “communities defined by actual shared interests.”<sup>149</sup> Legislatures could also decide to adopt internal processes to ensure maps are designed without partisan advantage in mind. In Iowa, for example, the legislature adopted such a process decades ago, and the political culture there occupies a healthier equilibrium today.<sup>150</sup> Legislators are not going to pack up their marbles and head home because someone clarifies the rules of the game; they

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<sup>147</sup> See Levitt, *Intent is Enough*, *supra* note 39 (manuscript at 53–55) (discussing salutary effects).

<sup>148</sup> See *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring) (warning that a partisan gerrymandering claim might “commit federal and state courts to unprecedented intervention in the American political process”).

<sup>149</sup> *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

<sup>150</sup> See DAVID DALEY, *RATF\*\*KED: THE TRUE STORY BEHIND THE SECRET PLAN TO STEAL AMERICA’S DEMOCRACY* 148–54 (2016).

will recognize the new rules and play on.

In the end, the true threat to our democratic institutions is the Supreme Court's own conspicuous silence. The Constitution's structural principles were designed to protect individual liberties, provide institutional accountability, and prevent arbitrary and tyrannical rule.<sup>151</sup> When politicians target citizens for their political beliefs, aim to suppress their influence, and attempt to insulate themselves from democratic accountability by violating voters' rights, the Court's non-intervention cannot be justified in the name of "federalism," "separation of powers," or any other "institutional" interest.

Indeed, the Court's myopic rationale for denying judicial relief does more than betray its own purposes; it arguably creates a far more ominous threat: widespread public doubt about the value of our political institutions and democracy itself.<sup>152</sup> Partisan gerrymandering "threatens . . . the permanency of our free institutions"<sup>153</sup> by eroding the civic faith required for such democratic institutions to endure.

#### CONCLUSION

This term, the Supreme Court faces an unparalleled opportunity to end the unconstitutional practice of partisan gerrymandering. The Court is right to recognize that partisan gerrymandering claims implicate vital institutional and structural interests, but wrong to think it can honor those interests through prolonged avoidance or nonjusticiability.

It is the vague and unobservable state of the law—and the resultant intermingling of judicial and legislative roles—that undermines these ends, not the existence of sharp and strong boundaries. Holding suppressive intent unconstitutional is consistent with every other fiber of constitutional doctrine. Holding that political classifications demand legitimate justification is a straightforward application of equal-protection doctrine. Despite its complex history, the partisan gerrymandering question remains simple: Can the Government burden

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<sup>151</sup> See, e.g., *Loving v. United States*, 517 U.S. 748, 758 (1996); *New York v. United States*, 505 U.S. 144, 168–69 (1992). See also Michael Parsons, Note, *The Future of Federalism: A Uniform Theory of Rights and Powers for the Necessary and Proper Clause*, 11 GEO. J.L. & PUB. POL'Y 177 (2013).

<sup>152</sup> In 1973, 42% of Americans had a "great deal" or "quite a lot" of confidence in Congress, while only 14% had "very little" or "none." In 2017, only 12% expressed confidence in Congress, whereas 47% had little to none. *Confidence in Institutions*, GALLUP, <http://www.gallup.com/poll/1597/confidence-institutions.aspx>. In a 2016 poll, 40% of Americans responded "I have lost faith in U.S. democracy," and 6% said "I have never had faith in U.S. democracy." Nathaniel Persily & Jon Cohen, *Americans Are Losing Faith in Democracy—And in Each Other*, THE WASHINGTON POST (Oct. 14, 2016), [https://www.washingtonpost.com/opinions/americans-are-losing-faith-in-democracy—and-in-each-other/2016/10/14/b35234ea-90c6-11e6-9c52-0b10449e33c4\\_story.html?utm\\_term=.9ea890ecac75](https://www.washingtonpost.com/opinions/americans-are-losing-faith-in-democracy—and-in-each-other/2016/10/14/b35234ea-90c6-11e6-9c52-0b10449e33c4_story.html?utm_term=.9ea890ecac75).

<sup>153</sup> *Giddings v. Blacker*, 93 Mich. 1, 11 (1892) (Morse, C.J., concurring).

or classify citizens based on their political beliefs in order to suppress disfavored voices and promote the election of state-favored candidates? To bless this behavior is to betray the constitutional enterprise.

The Court need not set out parameters on how much “partisanship” is “too much.” Voters can decide that for themselves. But for voters to decide, their voices must be heard. If the Court wants to honor structural principles, preserve institutional integrity, and respect state legislators, it should adopt clear and coherent partisan gerrymandering rules this term. With 2020 just around the corner, the time for action is now.