

GOT THEORY?

DANIEL R. ORTIZ[†]

INTRODUCTION

In the forty years since the Supreme Court entered the “political thicket”¹ it has done much work. To mention just a few of its efforts, in enforcing the Constitution the Court has required decennial redistricting of all state legislatures and multimember congressional delegations under the rule of one person, one vote;² it has laid down many rules for how Congress and state legislatures can regulate campaign spending;³ it has defined how politics has to take account—and cannot take account—of race;⁴ and it has determined what kinds of elec-

[†] John Allan Love Professor of Law, University of Virginia School of Law. I wish to thank Andrew Boldt and Jesse Green for aid in research and the members of the class of 1957 of the University of Virginia School of Law whose Class of 1957 Summer Research Grant helped support this project. The discussion of the issues surrounding partisan gerrymandering relies in part on an amicus brief I wrote for The Reform Institute in *Vieth v. Jubelirer*, the partisan gerrymandering case from Pennsylvania decided by the Supreme Court at 124 S. Ct. 1769 (2004). Tom Mann, Norm Ornstein, and Trevor Potter helped me develop much of this particular discussion.

¹ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

² See *Reynolds v. Sims*, 377 U.S. 533, 562-68 (1964) (state legislative districts); *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) (congressional districts).

³ See, e.g., *McConnell v. FEC*, 540 U.S. 93, 124 S. Ct. 619, 643-719 (2003) (upholding constitutionality of most portions of the Bipartisan Campaign Reform Act of 2002); *FEC v. Beaumont*, 539 U.S. 146, 161-63 (2003) (finding provisions and regulations of the Federal Election Campaign Act of 1971 barring direct corporate campaign contributions to nonprofit advocacy corporation to be consistent with First Amendment); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 668-69 (1990) (upholding a Michigan statute prohibiting corporations from using corporate treasury funds for independent expenditures in support of or in opposition to candidates in elections for state office); *Buckley v. Valeo*, 424 U.S. 1, 143-44 (1976) (per curiam) (upholding in part, and finding unconstitutional in part, the Federal Election Campaign Act of 1971).

⁴ See, e.g., *Easley v. Cromartie*, 532 U.S. 234, 237 (2001) (holding that district court’s finding that race, rather than politics, was the predominant factor in North Carolina legislature’s congressional redistricting plan was clearly erroneous); *Shaw v. Reno*, 509 U.S. 630, 639-52 (1993) (finding that an allegation that North Carolina’s redistricting legislation was designed to segregate races for voting purposes was sufficient to state a claim under the Equal Protection Clause); *Rogers v. Lodge*, 458 U.S. 613, 627-28 (1982) (holding a Georgia county’s system of at-large elections unconstitutional); *White v. Regester*, 412 U.S. 755, 767-70 (1973) (finding that a Texas House of

toral structures are and are not permissible.⁵ In interpreting several statutes, particularly the Voting Rights Act of 1965, it has also unsettled many traditional electoral arrangements.⁶ Nearly all of this work has been difficult and contentious. In few other areas have the Court's decisions so directly and personally interested members of the political branches of government while resting so weakly on the widely recognized and traditionally authoritative guides to constitutional construction (e.g., constitutional text and intent).

Beginning explicitly with *Baker v. Carr*, one argument, the "got theory" argument, has had great play in these cases⁷. The "got theory" argument maintains that the Court must defer to the political branches in these political cases to avoid freezing one particular theory of politics into the structure of governance.⁸ No matter how certain the Court is that a particular theory of equality, representation, or political behavior is right, the argument goes, it should nonetheless refrain from striking down conflicting arrangements, because doing so would displace the state's own choice among competing and acceptable political theories. So stated, the "got theory" argument has much to recommend it. It cautions judicial humility, recognizes diversity of judgment on matters concerning local conditions and traditions, and allows for experimentation by different parts of government. In short, the argument goes, often one size does not fit all.

The "got theory" argument made its greatest play in the reapportionment cases.⁹ I discuss in Part I how the argument framed the issues in those cases. In general, how well did it work? Did it emphasize certain values and concerns and ignore others? Did it have an

Representatives reapportionment plan was not invidiously discriminatory, but that the disestablishment of two multimember districts in the plan was justified because of the history of discrimination against minorities in those districts.).

⁵ See, e.g., *Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000) (holding unconstitutional the imposition of blanket primary against political party's wishes); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (holding poll tax unconstitutional).

⁶ See, e.g., *Thornburg v. Gingles*, 478 U.S. 30 (1986) (construing Voting Rights Act of 1965 with respect to use of multimember districts in North Carolina legislative apportionment); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (applying Voting Rights Act of 1965 to state election laws and regulations).

⁷ 369 U.S. 186, 224-29 (1962).

⁸ See, e.g., *infra* notes 38-43 and accompanying text (discussing Justice Frankfurter's application of a "got theory" argument in *Colegrove v. Green*, 328 U.S. 549 (1946) (Frankfurter, J., plurality opinion)).

⁹ See, e.g., *Baker*, 369 U.S. at 266 (1962) (Frankfurter, J., dissenting); *id.* at 330 (Harlan, J., dissenting); *Colegrove*, 328 U.S. 549 (Frankfurter, J., plurality opinion).

identifiable substantive agenda? And, in the end, did it fulfill or betray its rhetorical appeal? In Part II, I look at this argument in a more contemporary setting: the partisan gerrymandering cases. After laying out the surprisingly complex issues these cases pose, I explore how the “got theory” argument addresses and spins them. I conclude by reflecting that, although the “got theory” argument could play a helpful role in deciding these and perhaps other cases, in practice it has not. Instead of deepening consideration of the political concerns underlying the cases, the argument has been used to foreclose such consideration. It has operated more as a conversation stopper than as the conversation starter its rhetoric suggests.

I. ENTERING THE “POLITICAL THICKET”

A. *Initial Hesitation*: *Colegrove v. Green*

*Colegrove v. Green*¹⁰ foreshadowed the deepest arguments in the reapportionment cases. Three voters sued to have declared unconstitutional an Illinois congressional districting scheme in which some districts contained many more people than others. The largest district, in fact, contained 914,000 people—over eight times the 112,116 in the smallest district.¹¹ These three voters from larger districts claimed that the scheme violated equal protection because they had proportionately less representation in the House of Representatives. The Supreme Court did not even consider the claim. Both Justice Frankfurter, writing for a plurality of three Justices, and Justice Rutledge, writing for himself, voted to dismiss the case for want of equity.¹² The voters’ first recourse, Justice Frankfurter thought, should be to the Illinois state legislature. If people were unhappy, they should simply vote in a state legislature that would give them relief: “The remedy for unfairness in districting is to secure State legislatures that will apportion properly”¹³ And, if that should fail, those from larger districts should “invoke the ample powers of Congress”¹⁴ to fix things. Because Justice Frankfurter believed that the Constitution “conferred upon Congress *exclusive* authority to secure fair representation by the

¹⁰ 328 U.S. 549 (1946).

¹¹ *Id.* at 566 (Black, J., dissenting).

¹² *Id.* at 551 (Frankfurter, J., plurality opinion); *id.* at 565 (Rutledge, J., concurring).

¹³ *Id.* at 556 (Frankfurter, J., plurality opinion).

¹⁴ *Id.*

States in the popular House and left to that House determination whether States have fulfilled their responsibility,"¹⁵ he thought it deprived the courts of all power to act. The Constitution, by vesting Congress with such authority, thus simply foreclosed the possibility of judicial remedy.

More fundamentally, Justice Frankfurter believed that the case involved a choice among theories of representation that state legislatures should be able to make. As he put it:

The basis for the suit is . . . a wrong suffered by Illinois as a polity. In effect this is an appeal to the federal courts to reconstruct the electoral process of Illinois in order that it may be adequately represented in the councils of the Nation. Because the Illinois legislature has failed to revise its Congressional Representative districts in order to reflect great changes, during more than a generation, in the distribution of its population, we are asked to do this, as it were, for Illinois.¹⁶

In his view, the case concerned no injury to individuals,¹⁷ but a claim that the state's political leaders were wasting Illinois' representational capital in national politics.¹⁸ It asserted, in other words, an injury that ran to the state, not one that ran directly to some citizens while favoring others. The case thus represented a kind of political "derivative action" where the principals (voters) were suing the managing agents (state politicians) for malfeasance to the polity as a whole. Any individual injury came only through a citizen's stake in the impaired polity.

Framed in this way, the case posed no question about how individuals should be represented in the House, but at most asked whether the state's choice of representational policy, which created some districts with many more people than others, wasted the state's national influence. And as to that question, Justice Frankfurter thought, the state's political leaders were likely in a better position than the federal courts to make a decision.¹⁹ To carry the "derivative action" analogy one step further, the courts were as ill-suited to review these kinds of political decisions as they are to review ordinary busi-

¹⁵ *Id.* at 554 (emphasis added).

¹⁶ *Id.* at 552 (citations omitted).

¹⁷ *See id.* ("The basis for the suit is not a private wrong . . .").

¹⁸ *See id.* ("In effect, this is an appeal to the federal courts to reconstruct the electoral process of Illinois in order that it may be adequately represented in the councils of the Nation.").

¹⁹ *Cf. id.* at 553 ("Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof.").

ness decisions. Consequently, courts should follow a type of “political judgment” rule, which just like its counterpart, the business judgment rule, would insulate first-order decision makers from judicial second-guessing.²⁰

Judicial deference, moreover, was particularly appropriate when the courts, as Justice Frankfurter assumed, had no power to draw single-member districts.²¹ At most, he thought, a court could declare an existing single-member districting scheme unconstitutional, which would mean that all of Illinois’ congressional candidates would have to run in one statewide at-large district.²² It is at this point that Justice Frankfurter grapples directly with the value of different theories of representation. Even if the courts were to intervene and declare that the state could not follow a particular view of what theory of representation best suited Illinois, the courts’ only remedy would be to impose at-large House elections on the state—a practice that, he noted, itself rested on a largely discredited theory of representation.²³ Because of his view of the courts’ limited remedial powers, then, Justice Frankfurter believed that striking a plan resting on a bad theory of representation might result in a plan resting on an even worse one.

Questions, of course, dog every step of Justice Frankfurter’s reasoning. Just to start, exactly where does the Constitution say Congress

²⁰ See, e.g., *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (defining the business judgment rule as the “presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company”), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); see generally Douglas M. Branson, *The Rule that Isn’t a Rule—The Business Judgment Rule*, 36 VAL. U. L. REV. 631 (2002) (discussing and criticizing the business judgment rule); Kenneth B. Davis, Jr., *Once More, The Business Judgment Rule*, 2000 WIS. L. REV. 573 (analyzing justifications for the business judgment rule).

²¹ See *Colegrove*, 328 U.S. at 553 (“Of course no court can affirmatively remap the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system.”).

²² *Id.*

²³ See *id.* (“The upshot of judicial action may defeat the vital political principle which led Congress, more than a hundred years ago, to require districting.”). As Chancellor James Kent wrote:

[E]lection of members of Congress by districts . . . [is] recommended by the wisdom and justice of giving, as far as possible, to the local subdivisions of the people of each state, a due influence in the choice of representatives, so as not to leave the aggregate minority of the people in a state, though approaching perhaps to a majority, to be wholly overpowered by the combined action of the numerical majority, without any voice whatever in the national councils.

1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *230-31 (1873), *quoted in Colegrove*, 328 U.S. at 553.

shall have *exclusive* remedial authority?²⁴ If the text and original intent of the Constitution do not make Congress's remedial power exclusive, should the Court do so, especially when Congress has long failed in this area and individual congressmen's incumbency interests weigh against congressional action? As Justice Frankfurter himself methodically documented,²⁵ so many states were severely malapportioned that the principle of unseating a state's congressional delegation on this ground would have led to the unseating of many representatives, which would have made it hard for many in Congress to vote for it. And relying on state legislatures for a remedy was similarly unpromising. As Justice Black noted in dissent, the case rested in part on the allegation that corresponding malapportionment of the Illinois state legislature foreclosed any relief from that source.²⁶ Furthermore, was equity really insufficiently flexible at the time to permit courts to draw single-member districts? And even if it was, was there any real risk that a state legislature faced with at-large congressional districts would not back down and draw equipopulous single-member districts?

Beyond remedy, the questions remain just as pressing. Why, for example, was the voters' injury derivative, not personal? The plaintiffs were complaining, after all, that the scheme violated a personal right to equal representation.²⁷ Did they not have such a right? Or was it one that the state could subordinate in the interest of best representing the state qua state? Should the Constitution, which originally intended the House of Representatives to represent the people rather than the states as polities,²⁸ allow the state to make such a choice? Jus-

²⁴ See U.S. CONST. art. I, § 4, cl. 1 & § 5, cl. 1 (establishing, in part, 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," and that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members").

²⁵ See *Colegrove*, 328 U.S. at 557-59 app. I (charting the disparities in apportionment between the largest and smallest district in each state).

²⁶ See *id.* at 567 (Black, J., dissenting) ("[T]he issues of state and congressional apportionment are thus so interdependent that it is to the interest of state legislators to perpetuate the inequitable apportionment of both state and congressional election districts.").

²⁷ See *id.* at 567 ("Appellants claim that since they live in the heavily populated districts their vote is much less effective than the vote of the those living in [the smallest districts] . . .").

²⁸ Indeed, the Framers intended that the House of Representatives be fixed in such a way as to preclude state government control over the House:

[B]eing fixed by the State constitutions, [the House of Representatives] is not alterable by the State governments, and it cannot be feared that the people of the States will alter this part of their constitutions in such a manner as to

tice Frankfurter is simply silent on all of these questions. Still, if one grants his initial assumptions (1) that the injury is derivative, not personal, and (2) that drawing a single statewide at-large district was the only available judicial remedy, his approach has something to recommend it. The legislature is probably in a better position than a court to decide what is best for the state as a polity and, if the at-large district stuck, the court would be imposing a poor theory of representation on the state.²⁹ Furthermore, the individual voters' claims would not bear on any injury to the state itself. From this perspective their claim to equal proportional representation in Congress would represent a claim for special, not equal, treatment relative to other citizens because it would partially appropriate to some citizens an opportunity that properly belongs to the polity as a whole. It would be as if a shareholder demanded private use of a corporate asset.

Justice Frankfurter implicitly adopts here an early form of the "got theory" argument, recognizing that a malapportionment claim *would* impose a particular theory of representation on the state—the theory that representation is a right that runs to individuals rather than to the polity as a whole. His use of the argument, of course, is disappointing: he nowhere defends his major, controversial assumptions. But in other ways his use of it makes good sense. He identifies a particular competing theory of representation that recognizing malapportionment claims would displace, finds value in that theory, and thus rejects the invitation to displace it. In fact, he does this twice—once in refusing to conceptualize malapportionment as involving an individual right and once in rejecting what he sees as the only available judicial remedy as being worse than the harm itself. The "got theory" argument allows him to identify and weigh the theories on both sides and so serves to deepen and broaden the analysis. It does not simply defer to state autonomy.

B. *Jumping into the Thicket: Baker v. Carr*

In *Baker v. Carr*,³⁰ the Supreme Court opened the courthouse door to exactly those claims that *Colegrove* foreclosed. The Tennessee Con-

abridge the rights secured to them by the federal Constitution. THE FEDERALIST NO. 52, at 337 (James Madison (or Alexander Hamilton)) (Robert Scigliano ed., 2000).

²⁹ See *supra* note 23 and accompanying text (explaining that Congress and courts agree that at-large districts are a poor alternative for representation).

³⁰ 369 U.S. 186 (1962).

stitution required that state representatives “be apportioned among the several counties or districts, according to the number of qualified voters in each,”³¹ and that state senators be apportioned “according to the number of qualified electors.”³² Despite this express constitutional command, the Tennessee General Assembly had not passed a reapportionment bill since 1901.³³ Since then, the population of Tennessee had grown substantially and shifted across the state. In 1901, the state’s population was 2,020,616 of whom 487,380 were eligible to vote; in 1960, its population was 3,567,089 of whom 2,092,891 were eligible to vote—an increase of more than 325% in the number of eligible voters and more than 75% in the state’s total population.³⁴ And, as the Court noted, “[t]he relative standings of the counties in terms of qualified voters ha[d] changed significantly.”³⁵ By 1961, Tennessee’s most populous state senate district contained 5.2 times as many people as the least populous district.³⁶ The disparity in Tennessee’s House of Representatives was even greater. There the largest district was roughly eighteen times the size of the smallest.³⁷

Voters from the state’s larger districts sued to have the scheme declared unconstitutional, and a majority of the Court, although it did not reach the merits, found the case justiciable.³⁸ In heated dissents, however, Justices Frankfurter and Harlan argued strongly that the Court should not have heard the case.³⁹ At bottom, they believed, the case concerned a conflict between two competing theories of political

³¹ TENN. CONST. art. II, § 5 (prior to 1966 amendment).

³² *Id.* § 6.

³³ Tennessee’s current apportionment scheme is set forth in TENN. CODE ANN. § 3-1-102 to -103 (Michie 1994 & 2001 Supp.). Except for a few minor revisions, *see, e.g.*, 1957 Tenn. Pub. Acts ch. 220 (increasing Shelby County’s number of representatives from seven and one-half to eight), Tennessee had not significantly modified the 1901 reapportionment, 1901 Tenn. Pub. Acts ch.122, at the time of *Baker v. Carr*. *See Baker*, 369 U.S. at 187 & n.1, app. at 237-41 (discussing the history of reapportionment bills in Tennessee and reprinting several of the most significant historical changes in Tennessee’s apportionment statute).

³⁴ *Baker*, 369 U.S. at 192.

³⁵ *Id.*

³⁶ *Id.* at 274-75 (Frankfurter, J., dissenting). Justice Frankfurter points out that this statistic is based on the number of voting-age persons in the districts. Consequently, Justice Frankfurter points out, the statistic may be inaccurate because it does not account for other (i.e., non-age) voting eligibility restrictions, such as citizenship and residency requirements. *See id.* at 274 n.7.

³⁷ *Id.*

³⁸ *Id.* at 237 (majority opinion).

³⁹ *Id.* at 266-330 (Frankfurter, J., dissenting); *id.* at 330-40 (Harlan, J., dissenting).

representation, both of which were permissible.⁴⁰ As Justice Frankfurter put it:

What is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union.

. . . What Tennessee illustrates is an old and still widespread method of representation—representation by local geographical division, only in part respective of population—in preference to others, others, forsooth, more appealing. Appellants contest this choice and seek to make this Court the arbiter of the disagreement. They would make the Equal Protection Clause the charter of adjudication, asserting that the equality which it guarantees comports, if not the assurance of equal weight to every voter’s vote, at least the basic conception that representation ought to be proportionate to population, a standard by reference to which the reasonableness of apportionment plans may be judged.⁴¹

He then noted that in deciding such an apportionment claim, the Court would have to inquire “into the theoretic base of representation in an acceptably republican state”:⁴²

For a court could not determine the equal-protection issue without in fact first determining the Republican-Form issue, simply because what is reasonable for equal-protection purposes will depend upon what frame of government, basically, is allowed. To divorce “equal protection” from “Republican Form” is to talk about half a question.

The notion that representation proportioned to the geographic spread of population is so universally accepted as a necessary element of equality between man and man that it must be taken to be the standard of a political equality preserved by the Fourteenth Amendment—that it is, in appellants’ words “the basic principle of representative government”—is, to put it bluntly, not true. . . . Unless judges, the judges of this

⁴⁰ *Cf. id.* at 333 (Harlan, J., dissenting) (“[W]hat lies at the core of this controversy is a difference of opinion as to the function of representative government.”). Generally accepted bases of representation include representation proportioned by population and fixed representation by geographical unit. Yet there have been many variations on both of these basic theories, including provisions for minimum and maximum representations per district, and rules changing the aggregation of counties into districts (regardless of population). Variations may arise from the desire to support regional politics, limit the influence of metropolitan areas, or other political concerns. *See generally id.* at 300-24 (Frankfurter, J., dissenting) (presenting various theories of representation and their histories).

⁴¹ *Id.* at 300 (Frankfurter, J., dissenting).

⁴² *Id.* at 301.

Court, are to make their private views of political wisdom the measure of the Constitution—views which in all honesty cannot but give the appearance, if not reflect the reality, of involvement with the business of partisan politics so inescapably a part of apportionment controversies—the Fourteenth Amendment, itself a historical product, provides no guide for judicial oversight of the representation problem.⁴³

To Frankfurter, several different bases of representation were possible. “Apportionment, by its character,” he wrote:

[I]s a subject of extraordinary complexity, involving—even after the fundamental theoretical issues concerning what is to be represented in a representative legislature have been fought out or compromised—considerations of geography, demography, electoral convenience, economic and social cohesions or divergencies among particular local groups, communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, respect for proven incumbents of long experience and senior status, mathematical mechanics, censuses compiling relative data, and a host of others.⁴⁴

Presumably, to his mind, any of these concerns could legitimately override equipopulousness.

Justice Harlan extended this “got theory” argument in two ways. First, he defended against the obvious embarrassment that the Tennessee legislature had failed to redistrict in over sixty years.⁴⁵ In other words, even if Justice Frankfurter’s alternative theories of representation were permissible in the abstract, one might well question whether the Tennessee plan actually embodied any of them. Was it not simply a product of inertia or perhaps of no public policy at all? Justice Harlan argued, however, that the legislature’s long failure to redistrict might itself reflect a deep judgment about the proper nature of representation. Assuming that the 1901 apportionment was originally valid, which was actually contested in the case,⁴⁶ Justice Harlan thought either that the plan might by accident have come to reflect some desirable theory of representation, which the legislature’s inaction endorsed, or that, even if the plan did not reflect a theory, the

⁴³ *Id.* at 301-02 (quotation marks and citation omitted).

⁴⁴ *Id.* at 323.

⁴⁵ *See id.* at 336 (Harlan, J., dissenting) (suggesting that it is within legislative discretion to defer reapportionment).

⁴⁶ *See id.* at 192 (majority opinion) (“[T]he complaint alleges that the 1901 statute, even as of the time of its passage, ‘made no apportionment of Representatives and Senators in accordance with the constitutional formula . . . , but instead arbitrarily and capriciously apportioned representatives in the Senate and House without reference . . . to any logical or reasonable formula whatever.’” (omissions in original)).

legislature might legitimately have valued stability over whatever interests the original 1901 plan served. The courts, he wrote, are:

[A]sked to say that the passage of time has rendered the 1901 apportionment obsolete to the point where its continuance becomes vulnerable under the Fourteenth Amendment. But is not this matter one that involves a classic legislative judgment? Surely it lies within the province of a state legislature to conclude that an existing allocation of senators and representatives constitutes a desirable balance of geographical and demographical representation, or that in the interest of stability of government it would be best to defer for some further time the redistribution of seats in the state legislature.⁴⁷

Justice Harlan argued, in other words, that a principled theory of representation could not only lead a legislature to draw districts of very different sizes, but could also lead it to refuse to redistrict at all for over 60 years—even in the face of an express state constitutional command to the contrary. His argument magically transformed seeming inertia into a robust and sound exercise of judgment over representational theories.

Second, Justice Harlan defended against the argument that the legislature's inaction had a simple and clear explanation: Tennessee legislators' interest in continued incumbency. With no redistricting, those incumbents would retain the districts that had last elected them and likely maintain their existing support among known constituents. Interestingly, Justice Harlan did not argue that incumbent self-interest was not the actual reason why the legislature had failed to act. He just declared that even if that were the reason, it would be irrelevant. The conclusion that the Court should not intervene, he thought:

[C]an hardly be escaped by suggesting that capricious state action might be found were it to appear that a majority of the Tennessee legislators, in refusing to consider reapportionment, had been actuated by self-interest in perpetuating their own political offices or by other unworthy or improper motives. Since *Fletcher v. Peck* was decided many years ago, it has repeatedly been pointed out that it is not the business of the federal courts to inquire into the personal motives of legislators.⁴⁸

⁴⁷ *Id.* at 336 (Harlan, J., dissenting).

⁴⁸ *Id.* at 337 (citing *Fletcher v. Peck*, 10 U.S. 87 (1810)). He would have applied something like reduced scrutiny to the plan and declared that the federal courts simply had no role “once it appears . . . that the state action complained of *could have* rested on some rational basis.” *Baker*, 369 U.S. at 338 (Harlan, J., dissenting) (emphasis added).

C. *The Problems with Early “Got Theory” Arguments
and Justice Stewart’s “Third Way”*

On their surface, Justices Frankfurter and Harlan’s arguments have much appeal. By refusing to impose one particular and contestable vision of representation on the structure of politics, they would allow states to experiment with different models and determine which models best fit local cultures, traditions, and conditions. Stated this way, the argument appears dynamic and progressive. Since the goodness of different theories of representation changes over time, leaving the choice between theories open avoids freezing-in a particular, and perhaps only temporary, consensus as to the proper structure of government. In this view, Justices Frankfurter and Harlan are not desperately defending the status quo, but struggling to preserve the people’s ability to debate one of the most fundamental issues of democratic governance and to refashion politics. They, not the majority, are the champions of change and progress.

There are, however, some obvious difficulties with their use of the “got theory” argument. For one thing, they fail to analyze any of the competing theories they hold out as possibilities.⁴⁹ Are all of them acceptable alternatives to equipopulousness? How much constitutional weight, for example, should possibilities such as “the lobby and the city machine” and “respect for proven incumbents” be given?⁵⁰ Should somewhat weightier-sounding concerns like “electoral convenience” and “considerations of geography”⁵¹ completely or only partially trump equipopulousness? Failing to consider the legitimacy of a competing theory can lead to much difficulty. Under this approach, for example, many long-discredited political practices would be unobjectionable. Many parts of the country, for example, long employed property qualifications⁵² and defended them as a way of ensuring that the electorate was informed, engaged, and independent.⁵³ Only those who held property, the argument ran, had enough stake in the community to be trusted to do what was truly best for all and to be free from economic dependence on, and thus coercion from, others,

⁴⁹ See *supra* note 40 (identifying competing bases of representation).

⁵⁰ *Baker*, 369 U.S. at 323 (Frankfurter, J., dissenting).

⁵¹ *Id.*

⁵² See ALEXANDER KEYSAR, *THE RIGHT TO VOTE* app. tbls.A.1-A.3, A.9, A.11, & A.13 (2000) (documenting property qualifications in state suffrage requirements over time).

⁵³ See *id.* at 5, 9 (describing the arguments for property qualifications in the colonial era and after the American Revolution).

which would prevent the exercise of independent judgment.⁵⁴ Nowadays, however, a court would view property qualifications with great suspicion. The problem is not that no theory could support them, but rather that we now think it would be a bad theory.⁵⁵ Contemporary conceptions of democracy wholly discredit property qualifications and the like.

In addition to failing to evaluate alternatives, Justices Frankfurter and Harlan's "got theory" argument fails even to inquire whether an alternative actually supports the disputed plan. If only because the legislature had not redistricted in over sixty years, one might suspect that Tennessee's malapportionment reflected something other than merely a theory of representation different from the plaintiffs' theory. Indeed, one might suspect any number of legislative motives that would reflect anything but laudable theories of representation. For instance, one might suspect that the legislature's failure to redistrict reflected a desire to disenfranchise voters, or perhaps that the failure was a result of gross self-interest on the part of incumbent legislators. And while Justice Harlan ingeniously portrays the Tennessee legislature's inaction as a careful balancing aimed at political stability, he proves too much with this argument. Without requiring any evidence that the legislature deliberately chose not to act, Justice Harlan's argument would protect plans reflecting no legitimate reasons at all. The mere possibility that concern for stability could explain the districting scheme would foreclose any claim of inertial malapportionment.

Consider how this type of "got theory" argument would have addressed two other now notorious electoral practices: poll taxes and literacy tests. For much of our history, many argued that both practices promoted republican aims. Poll taxes, it was claimed, ensured that all who voted would care about public affairs. If voting came at a

⁵⁴ *Id.* at 5.

⁵⁵ *Cf.* Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) (invalidating poll tax on similar grounds, and stating that "[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax"); see generally KEYSSAR, *supra* note 52, at 269-73 (discussing the gradual elimination of economic voting qualifications through statute and constitutional decisions); J.L. Hill, *The Five Faces of Freedom in American Political and Constitutional Thought*, 45 B.C. L. REV. 499, 512-16 (2004) (placing the invalidation of property qualifications and poll taxes in the context of "growing egalitarianism in American politics"); Ronnie L. Podolefsky, *The Illusion of Suffrage: Female Voting Rights and the Women's Poll Tax Repeal Movement After the Nineteenth Amendment*, 7 COLUM. J. GENDER & L. 185, 235-37 (1998) (placing the poll tax debate in the context of the civil rights and gender equality movements, arguing that poll taxes were discriminatory).

cost, only those who cared would vote and electoral outcomes would reflect sound judgment.⁵⁶ Literacy tests, it was argued, serve a similar civic function. In theory, they ensured that all who voted could read and had enough basic understanding of American government to cast an informed and independent ballot.⁵⁷ Despite these lofty purposes, however, there was much evidence that many jurisdictions adopted and continued to employ these devices for illegitimate reasons: most notably, to frustrate voting by African Americans⁵⁸ and, in some cases, poor whites.⁵⁹ Justices Frankfurter and Harlan's approach, however, would have ignored the actual discriminatory reasons for the devices' continued use in favor of a hypothetical rationale that mattered not at all to those who used them. In their view, the mere possibility of a civic rationale, no matter how tarnished by history, would overcome strong evidence of invidious motivation.⁶⁰

⁵⁶ See *Harper*, 383 U.S. at 674 (Black, J., dissenting) ("State poll tax legislation can 'reasonably,' 'rationally' and without an 'invidious' or evil purpose to injure anyone be found to rest on [the need for revenue collection and the] belief that voters who pay a poll tax will be interested in furthering the State's welfare when they vote."); *id.* at 677 (noting "the long-standing beliefs that making the payment of a tax a prerequisite to voting is an effective way of collecting revenue and that people who pay their taxes are likely to have a far greater interest in their government"); *id.* at 684-85 (Harlan, J., dissenting) ("[I]t is certainly a rational argument that payment of some minimal poll tax promotes civic responsibility, weeding out those who do not care enough about public affairs to pay . . . for the exercise of the franchise."); A.F. THOMAS, *THE VIRGINIA CONSTITUTION AND ITS POSSIBILITIES* 12 (1901).

⁵⁷ As the Supreme Court noted in upholding literacy tests:

[I]n our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. It was said last century in Massachusetts that a literacy test was designed to insure an independent and intelligent exercise of the right to suffrage.

Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 52 (1959) (quotation marks and citations omitted); see also SAMUEL JONES, *TREATISE ON THE RIGHT OF SUFFRAGE* 132-33 (Boston, Otis, Broaders & Co. 1842) (arguing that a basic education is necessary to enable people to exercise their right to vote in a manner that is beneficial to the public).

⁵⁸ See J.N. BRENAMAN, *A HISTORY OF VIRGINIA CONVENTIONS* 89-90 (1902) (discussing Virginia's use of literacy tests and poll taxes in its 1901-1902 constitutional convention to disenfranchise African American voters); KEYSSAR, *supra* note 52, at 111-13 (describing efforts in the late nineteenth century to disenfranchise African American voters).

⁵⁹ FREDERIC D. OGDEN, *THE POLL TAX IN THE SOUTH* 1-31 (1958) (arguing that the "disenfranchising movement" reflected a combination of factors, including the desire to contain the populist movement by disenfranchising poor whites).

⁶⁰ *Cf. Baker v. Carr*, 369 U.S. 186, 335-36 (1962) (Harlan, J., dissenting) (explaining that the issue at stake in *Baker* is not racial or religious discrimination and therefore is not covered by the Equal Protection Clause).

To his credit, Justice Stewart, who was very sympathetic to Justices Frankfurter and Harlan's position, recognized its problems. In *Lucas v. Forty-Fourth General Assembly of Colorado*,⁶¹ the Court struck down a Colorado state reapportionment scheme favored by a majority of voters in every county over a competing plan that much more closely drew districts of equal population.⁶² Justice Stewart, in dissent, would have upheld the plan despite its population variance. His test looked in Justices Frankfurter and Harlan's direction but sought to avoid their difficulties. His test had two critical parts:

First, [the Equal Protection Clause] demands that, in the light of the State's own characteristics and needs, the plan must be a rational one. Secondly, it demands that the plan must be such as not to permit the systematic frustration of the will of a majority of the electorate of the State. I think it is apparent that any plan of legislative apportionment which could be shown to reflect no policy, but simply arbitrary and capricious action or inaction, and that any plan which could be shown systematically to prevent ultimate effective majority rule, would be invalid under accepted Equal Protection Clause standards. But, beyond this, I think there is nothing in the Federal Constitution to prevent a State from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of its people.⁶³

Unlike his two colleagues, Justice Stewart would have at least checked to ensure that some minimally rational theory actually supported the state's plan and that the plan did not systematically frustrate majorities. Each part of his test would have done some important work. The first would have looked through the hypothetical justifications Justices Frankfurter and Harlan would have accepted, while the second would have ensured that the state paid *some* attention to equipopulousness. A plan departing too sharply from this value would necessarily frustrate the will of some numerical majority.⁶⁴

Justice Stewart's approach, of course, has its own problems. Most notably, it is difficult, if not impossible, for a court to administer.⁶⁵ By requiring courts to analyze whether districting plans are rational in

⁶¹ 377 U.S. 713 (1964).

⁶² *Id.* at 730-35.

⁶³ *Id.* at 753-54 (Stewart, J., dissenting) (footnote omitted).

⁶⁴ *Cf. Lucas*, 377 U.S. at 754 (Stewart, J., dissenting) ("[I]t is apparent that any plan of legislative apportionment which could be shown to reflect no policy, but simply arbitrary and capricious action or inaction, and that any plan which could be shown systematically to prevent ultimate effective majority rule, would be invalid under accepted Equal Protection Clause standards." (footnote omitted)).

⁶⁵ See RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW* 56-59 (2003) (discussing Justice Stewart's judicially unmanageable standard).

light of the state's own characteristics and needs, the plan invites embarrassing and difficult judicial inquiry. A court would have to sit in judgment of the merits of asserted state policies, make sure that the plan actually reflected them, and then weigh those policies against the competing demands of one person, one vote. None of those tasks is well-suited to judicial inquiry.⁶⁶ Whatever the faults of Justices Frankfurter and Harlan's approach—giving the states a free pass—it would have certainly avoided these difficulties and embarrassments.⁶⁷

The Court's divisions in these early apportionment cases reveal three possible approaches. First, the Court, as Justices Frankfurter and Harlan's "got theory" argument advocated, could simply assume that the state is acting—or not acting—for a valid reason no matter what evidence to the contrary there may be. Such an approach is clearly administrable because it requires a court to do nothing.⁶⁸ Even a redistricting plan reflecting only incumbent legislators' desires to be reelected will satisfy it. Second, the Court, as Justice Stewart's version of the "got theory" argument recommended, could check to make sure that some valid theory supported the plan and require that some attention be paid to one particular theory—equipopulousness. But while such an approach gives states and localities some choice among different theories of representation, judges are not well equipped or situated to apply it. Third, as a majority of the Court eventually held in *Reynolds v. Sims*, the Court could impose some version of the one person, one vote standard.⁶⁹ This standard is easily administered by courts, but vindicates one theory of representation—equipopulousness—at the expense of all others. Only individuals count in this theory of representation.

The Court did not ultimately choose one person, one vote merely because it was the only administrable approach. It was not. Justices Frankfurter and Harlan's approach was even easier to apply. Nor did

⁶⁶ See Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 190 (1968) (noting the difficulties inherent in courts making political decisions, in part because of "the practical impossibility of constructing a completely coherent system of constitutional law at any given time").

⁶⁷ Indeed, Justice Frankfurter's approach in *Colegrove* was attractive, in large part, because it allowed judicial humility and deference. See, e.g., *supra* text accompanying notes 21-23.

⁶⁸ For instance, under Justice Frankfurter's "got theory" approach, the Court simply refused to allow voters' claims in *Colegrove*.

⁶⁹ 377 U.S. 533, 568 (1964) (holding that state legislative districts must be divided equally by population).

the Court choose it because it represented the only legitimate theory of representation. Justices Frankfurter and Harlan were right about that.⁷⁰ Rather, the Court chose it because it felt that *some* valid theory of representation should underlie apportionment, and one person, one vote was the only administrable approach that would ensure that.⁷¹ “Got theory” approaches, which would allow plans to embody other theories of representation, would either, like Justices Frankfurter and Harlan’s approach, also allow plans to embody no legitimate theory at all or, like Justice Stewart’s, be unadministrable in practice. No approach other than imposing some particular theory could, practically speaking, ensure that a districting plan did indeed rest on *some* legitimate theory. Despite its rhetorical progressiveness, the “got theory” argument, as invoked by Justices Frankfurter and Harlan, amounts to a cry to protect the status quo. It fails on its promise to encourage states to choose a political theory. By simply hypothesizing legitimate purposes that could underlie redistricting, it forecloses discussion about the very issues it claims are so important.

II. PARTISAN GERRYMANDERING: THE NEXT GENERATION

Partisan gerrymandering poses many of the same issues posed by redistricting plans. And the central question remains the same: should the courts enter the “political thicket?” Are judicially manageable standards available to discipline the practice? To what extent does regulating partisan gerrymandering impose a particular and contestable theory of politics on the political process? And are other permissible theories of politics compatible with this practice? Unsurprisingly, the “got theory” argument has made several appearances in gerrymandering cases. To understand its significance and how it operates in this area, first we must understand what the partisan gerrymandering battle is all about. Although it of course concerns one major political party intentionally drawing districts to advantage itself at the expense of the other, the battle concerns much more than that. On the federal level, where I will exclusively discuss gerrymandering, it raises issues about the purpose and function of the House of Representatives, the value of political competition, and how voters should

⁷⁰ See *supra* note 40 and accompanying text (discussing competing theories of representation and Justices Frankfurter and Harlan’s view that many different theories of representation are permissible).

⁷¹ *Reynolds*, 377 U.S. at 568-69 (dismissing the other proposed plans as “little more than crazy quilts, completely lacking in rationality” and deviating too egregiously from population based divisions).

be represented. In this Part, I will lay out my own—perhaps tendentious—views on these issues. Whether one agrees with my particular positions on these issues, however, is unimportant to the overall argument. Feel free to disagree and argue with them. To understand how the “got theory” argument operates in this area it is important only to understand the issues themselves; it is not necessary to agree with my positions on them.

A. *Gerrymandering the House of Representatives*

The Framers envisioned the House of Representatives as a unique structure of the national government. Unlike the Senate, the President, or the courts, it was to have “an immediate dependence on, and an intimate sympathy with, the people.”⁷² As John Adams put it, the body of the people’s representatives should “be in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them.”⁷³ With this in mind, the Framers carefully designed the House with an eye toward “binding the representatives to their constituents” and to “extend[ing] the influence of the people over their representatives.”⁷⁴ They insisted on direct election “by the People of the several States,”⁷⁵ a broad franchise,⁷⁶ regular reapportionment as among the states,⁷⁷ and frequent elections.⁷⁸ Of these, the last was the most important, for “without the restraint of frequent elections” in the House, the Framers thought, “[a]ll [other] securities [against oligarchy] would be found very insufficient.”⁷⁹ By this device:

⁷² THE FEDERALIST NO. 52, at 337 (James Madison (or Alexander Hamilton)) (Robert Scigliano ed., 2000).

⁷³ John Adams, *Thoughts on Government*, in 4 PAPERS OF JOHN ADAMS 87 (Robert J. Taylor ed., 1979).

⁷⁴ THE FEDERALIST NO. 52, at 339 (James Madison (or Alexander Hamilton)) (Robert Scigliano ed., 2000).

⁷⁵ U.S. CONST. art. I, § 2.

⁷⁶ See THE FEDERALIST NO. 57, at 366 (James Madison (or Alexander Hamilton)) (Robert Scigliano ed., 2000) (discussing the composition of electorate).

⁷⁷ See THE FEDERALIST NO. 55, at 356-57 (James Madison (or Alexander Hamilton)) (Robert Scigliano ed., 2000) (noting the effect of the census on the composition of the House of Representatives).

⁷⁸ See THE FEDERALIST NO. 52, at 337 (James Madison (or Alexander Hamilton)) (Robert Scigliano ed., 2000) (citing frequent elections as the only way to maintain common interests between the elected and the people).

⁷⁹ THE FEDERALIST NO. 57, at 367 (James Madison (or Alexander Hamilton)) (Robert Scigliano ed., 2000).

[T]he House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it.⁸⁰

Nearly every special feature of the House's design was meant to ensure that it, unlike the other primary structures of the federal government, was highly responsive to public sentiment.

To some people, congressional redistricting has defeated much of the Framers' vision. They believe that high rates of incumbent reelection, declining competitiveness of congressional districts, and long periods of one-party control of the House have eroded the accountability and legitimacy of the people's chamber.⁸¹ The 2002 congressional elections suggest this point strongly. Only four challengers defeated House incumbents—the lowest number in modern American history.⁸² Only forty-three House incumbents, moreover, won reelection “narrowly”—defined generously as by less than sixty percent of the vote—while 338 House incumbents enjoyed very large victory margins—twenty percent or more, including seventy-eight incumbents who ran unopposed by a major party challenger.⁸³ In the nation's largest state, California, not a single challenger in the general election received as much as forty percent of the vote.⁸⁴ And more than a third of all States sent *exactly* the same House delegation to Congress as was in place before the election.⁸⁵

⁸⁰ *Id.*

⁸¹ The best and most forceful advocate of this position is Sam Hirsch. See Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 179 (2003) (discussing how “redistricting has helped to transform the U.S. House of Representatives into a body that will no longer accurately reflect majority will”).

⁸² *Id.* at 182; see also MICHAEL J. DUBIN, UNITED STATES CONGRESSIONAL ELECTIONS, 1788-1997: THE OFFICIAL RESULTS, at xx-xxi (1998) (showing percentage of incumbents defeated in each election from the 2nd to the 105th Congresses); NORMAN J. ORNSTEIN, THOMAS E. MANN, & MICHAEL J. MALBIN, VITAL STATISTICS ON CONGRESS 2003-2004 (forthcoming 2004) (manuscript at tbl.2-10) [hereinafter VITAL STATISTICS], to be available at <http://www.aei.org>.

⁸³ VITAL STATISTICS, *supra* note 82, at tbl.2-12.

⁸⁴ Hirsch, *supra* note 81, at 182.

⁸⁵ *Id.*

These facts are particularly striking because the 2002 elections were the first elections held after the latest reapportionment.⁸⁶ Historically, incumbents suffer in such elections. As their old voters disappear and new voters replace old voters, incumbents usually find their seats less secure. These new voters can have quite different interests than previous constituents. From 1972 to 1992, in fact, House turnover averaged forty-five percent higher in immediate post-reapportionment Congresses. These Congresses contained an average of eighty-seven freshmen, while the others in this period contained only sixty.⁸⁷ In 2002, however, only fifty-four freshmen were elected to the House—less than half the number elected in 1992.⁸⁸ In 2002, incumbents had a very easy ride overall. Only thirty-five incumbents retired (rather than the average of forty-eight in other recent post-reapportionment Congress), only eight lost in the primaries, and only eight lost in the general election—in each case half the losses were to another incumbent.⁸⁹ This lack of competition was, moreover, peculiar to the people's chamber. On the same day that less than ten percent of House races were being decided by margins of ten percent or less, nearly half of all gubernatorial and U.S. Senate races were that close.⁹⁰ As one critic of the practice has pointed out, no one can gerrymander a statewide district.⁹¹

To critics of partisan gerrymandering, current political conditions have both increased the incentives to gerrymander and exacerbated the democratic pathologies caused by gerrymandering. Over the last fifteen years, American politics on the national level has been subject to a striking paradox: it has become much more competitive at the macro level, when it comes to institutional control, but much less competitive at the micro level, when it comes to individual seats. Recent presidential elections have been very close and the Senate and House have been evenly or nearly evenly divided. As the 2000 elections showed, the two major parties enjoy nearly equal popular support across the nation as a whole. While one presidential candidate won a plurality of votes, the other won a victory in the Electoral Col-

⁸⁶ See *id.* at 184 (discussing reapportionment following the 2000 census).

⁸⁷ *Id.* at 183.

⁸⁸ VITAL STATISTICS, *supra* note 82, at tbl.2-7.

⁸⁹ *Id.*

⁹⁰ Hirsch, *supra*, note 81, at 183.

⁹¹ See *id.* (discussing the peculiarity that roughly half the Senate elections were competitive, despite the lack of competition in the House elections during the same period).

lege; the Senate became split exactly in two; and the majority party's control of the House stood on an extremely slim margin (221-212).⁹²

In terms of popular support, the two major parties are more evenly matched than at any time since the nineteenth century.⁹³ And although the midterm elections of 2002 increased the size of the ruling party's margin in the House by six seats,⁹⁴ that margin still stands near its modern low. The 2002 elections culminated a decade-long trend. The *largest* margin of majority in the House since 1992 was less than one-third the historical average from 1960 until 1992, and the average margin for the last ten years is barely one-sixth of the average for the preceding period.⁹⁵ By any standard—historical or absolute—the margin of control in the House has been astonishingly narrow over the past ten years.

At first that might appear to be a good thing. After all, one might think that small margins of control would force the parties to cooperate, solve problems together, and allow some of their more centrist representatives a greater voice. However, the opposite may be true. First, the major parties in the House have become increasingly homogeneous and ideologically polarized.⁹⁶ Poole-Rosenthal DW-NOMINATE scores, a widely accepted measure of congressional ideology, show how markedly the parties have diverged over the last thirty years.⁹⁷ These scores place each member of Congress on a liberal-conservative scale from -1.0 (liberal) to 1.0 (conservative) on the basis of nonunanimous roll call votes. From the early 1970s on, the average scores for House members of the Democratic and Republican parties have steadily and radically diverged.⁹⁸ In fact, the score gap nearly

⁹² Gary C. Jacobson, *A House and Senate Divided: The Clinton Legacy and the Congressional Elections of 2000*, 116 POL. SCI. Q. 5, 5 (2001).

⁹³ *Id.* at 5-6.

⁹⁴ Hirsch, *supra* note 81, at 182 (noting the direction and magnitude of the shift in House seats in the 2002 midterm election).

⁹⁵ See Brief of Political Scientists Bernard Grofman and Gary Jacobson as Amici Curiae in Support of Neither Party at 4 fig.1, *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004) (No. 02-1580) (charting the size of House majorities between 1960 and 2002; the largest margin after 1992 is 13, the average margin for the period 1960 to 1992 is 45).

⁹⁶ See GARY C. JACOBSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* 242-50 (5th ed. 2001).

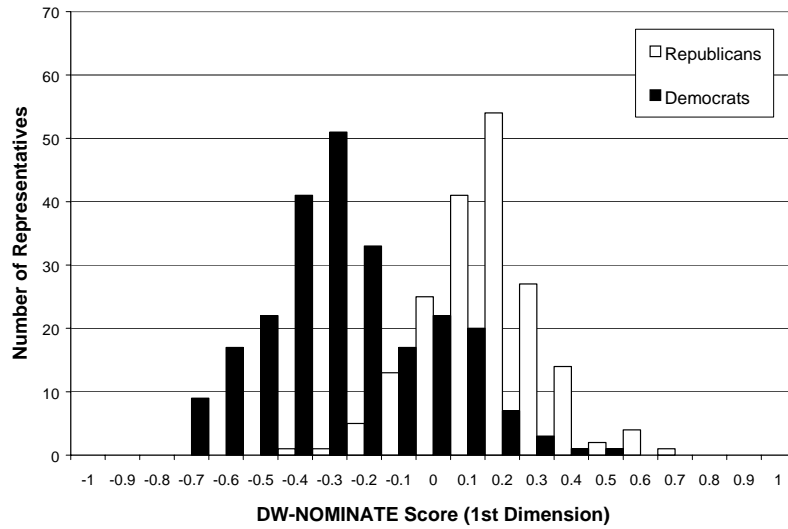
⁹⁷ See KEITH T. POOLE & HOWARD ROSENTHAL, *CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING* chs. 2-4, app. A (1997) (explaining and justifying DW-NOMINATE scores as a method of measuring congressional ideology); see also David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 980-81 (1999) (using DW-NOMINATE scores to evaluate committee and party preferences).

⁹⁸ See Brief of Political Scientists at 11 fig.6, *Vieth* (No. 02-1580).

doubled over that time and now amounts to over 0.86 points on what is only a 2-point scale.⁹⁹

Second, the major parties in the House have become much more internally homogeneous. There is now much less divergence than before *within* each party. As a comparison of Figures 1 through 4 shows, not only have both parties in the House shifted more towards the extremes, leading to less overlap in their policy positions, but each party has a much more cohesive focus than before.¹⁰⁰

Figure 1: 93rd Congress (1973-1974)¹⁰¹



⁹⁹ See *id.* at 9 (showing an increase from slightly less than 0.5 for the 87th Congress in the 1961-1962 term, to well over 0.8 by the 106th Congress in the 1999-2000 term).

¹⁰⁰ JACOBSON, *supra* note 96, at 246-47 figs.8-4A to -4D.

¹⁰¹ Figure 1 is taken from *id.* at 246 fig.8-4A.

Figure 2: 97th Congress (1981-1982)¹⁰²

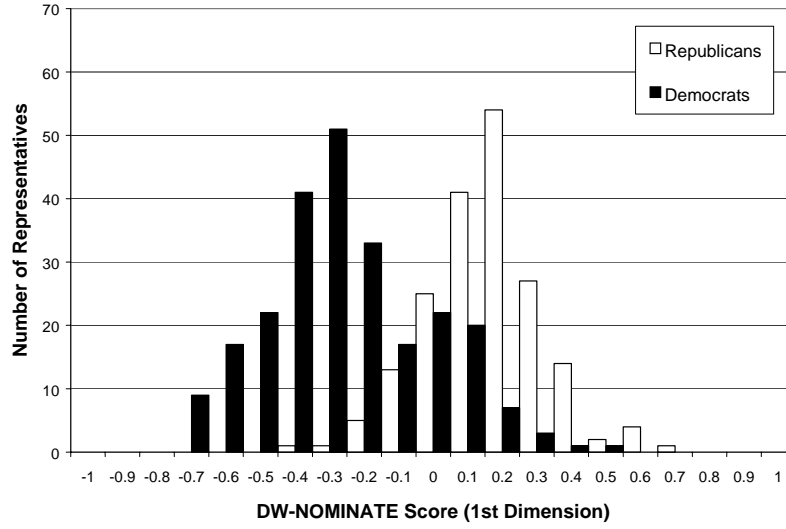
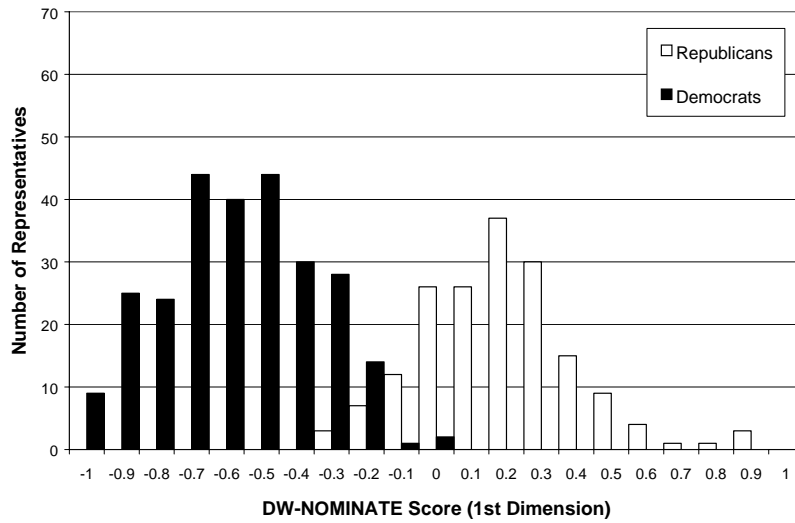
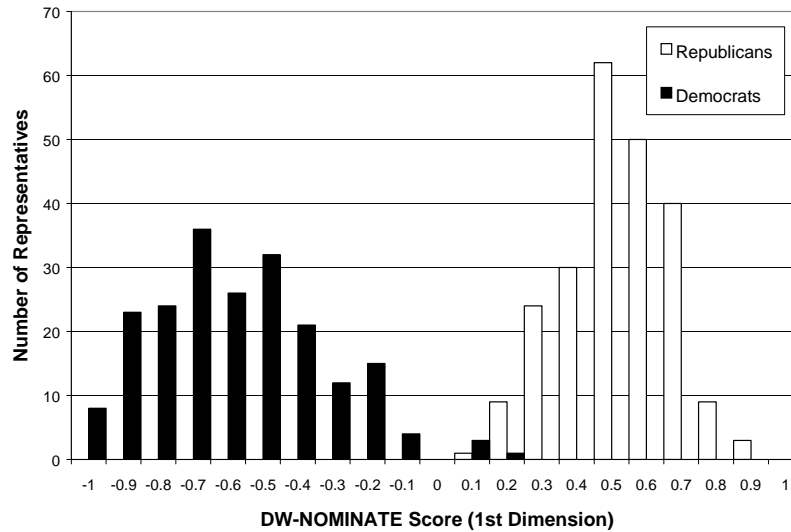


Figure 3: 101st Congress (1989-1990)¹⁰³



¹⁰² Figure 2 is taken from *id.* at 246 fig.8-4B.

¹⁰³ Figure 3 is taken from *id.* at 247 fig.8-4C.

Figure 4: 105th Congress (1997-1998)¹⁰⁴

In other words, the two major parties in the House have become increasingly discrete and insular. On policy issues, they are both more distant from each other and more internally homogeneous than before.

In such a world, small differences matter. The increasingly narrow margins of control over the past ten years mean that a gain of just a few seats can completely switch party control of the House. From the 1970s through the early 1990s, for example, changes of up to twenty-five seats in any election would have made no difference to which party controlled the House.¹⁰⁵ After 1992, however, a difference of as few as six seats and at most thirteen would have made all the difference.¹⁰⁶ The increasing homogeneity of each party over that same time, moreover, means that the party in control now should have a

¹⁰⁴ Figure 4 is taken from *id.* at 247 fig.8-4D.

¹⁰⁵ For example, the 92nd Congress (1971-1973 term) had a seventy-five seat Democrat-Republican differential—255 Democrats and 180 Republicans—in the House of Representatives. See DUBIN, *supra* note 82, at 675. The 103rd Congress (1993-1995 term) had an eighty-two seat Democratic-Republican differential—258 Democrats, 176 Republicans, and one independent—in the House of Representatives. See *id.* at 785.

¹⁰⁶ For example, the 104th Congress (1995-1997 term) had just a twenty-six seat Republican-Democrat differential—230 Republicans, 204 Democrats, and one independent—in the House of Representatives. If just thirteen districts had voted for Democrats instead of Republicans, the House would have been equally divided. See *id.* at 796.

greater focus and should have to worry less about its individual members deviating from its preferred policy positions. The increasing polarization sharply raises the stakes of House control for each side. Since larger policy differences separate the parties, such control presumably has a greater effect on legislative policy outcomes.

In the 1970s, when less distance separated the two parties and they were less homogeneous, control of the House mattered less because the policy outcomes sought and produced under one party would have been relatively similar to those sought and produced under the other. Once the parties' policy preferences markedly diverged and party members in the House voted more in lockstep than before, the policy stakes greatly increased. Because of their ideological polarization, each party wants more extreme policies than before and, because of homogenization, the party in control finds it much easier to achieve its preferred policies, even with a small margin.¹⁰⁷ Thus, the stakes of redistricting have grown in two mutually reinforcing ways: narrow margins of control mean that differences in just a few seats can change which party controls the House, and a difference in party control makes a much larger difference in legislative policy outcomes. Shifting fewer seats produces larger legislative payoffs than before.

To gain seats through redistricting requires a party in control of the redistricting process in individual states to follow a simple strategy: that party must make its opponent's districts as few as possible and its own as many as possible. To minimize the number of opposition districts, the party in control must pack as many of its opponent's voters as possible into each district the opponent controls. This leads to the opposition party winning districts by a landslide, but winning fewer districts. By contrast, to maximize the number of its own districts, the controlling party must assign as few of its own voters to as many districts as it can while maintaining a reliable majority in each of them. This leads to the controlling party giving itself a comfortable but less sizeable margin in the maximum number of districts. The strategy thus aims to make virtually every district noncompetitive and achieves its partisan ends by making the districts differentially noncompetitive for each party. By creating super-safe districts for the opposing party and merely safe districts for itself, the controlling party "wastes" minority party votes and efficiently distributes its own. Knowing that "one person, one vote" and race are virtually their only legal con-

¹⁰⁷ In other words, because homogenization reduces ideological differences within a party, members of a given party are more likely to share ideologies and goals.

straints,¹⁰⁸ party strategists feel free to draw such lines. In a real sense, representatives can reflect the districts of the people, rather than the people of the districts.

A party, of course, wants to reach no further than it can reliably grasp. Otherwise, a small shift in public opinion can cause its gerrymandering to backfire, giving the district to the other party.¹⁰⁹ To prevent this, the party in control of redistricting can be expected to give itself more than a thin margin of victory in its districts. It may even sacrifice a seat or two to ensure that it will maintain control over a majority of districts should voter sentiment shift somewhat in the later years of the reapportionment cycle. This insurance reduces competition in nearly every district. The party that is victim to the gerrymander will enjoy wins in as few districts as possible but will win each by a landslide; the party in control of the gerrymander will enjoy wins in a disproportionately large number of districts but by smaller margins. Few, if any, districts will remain in true competition.

Empirical research shows how great this effect is. As one leading political scientist describes it, redistricting after the last census gave:

[M]arginal incumbents of both parties got safer districts. Redistricting gave eight Democrat incumbents who had been representing Bush-majority districts [districts in which Republican George W. Bush had won the popular vote in the 2000 presidential election] new Gore-majority districts [districts in which Democrat Al Gore had won the popular vote in that election]; only one suffered the contrary switch All thirteen of the switches involving Republican incumbents were from Gore- to Bush-majority districts. Of the twenty-five districts Republicans had won in 2000 with less than 55 percent of the major-party vote, eighteen were strengthened by increasing the proportion of Bush voters; of the nineteen similarly marginal Democratic districts, fifteen were given a larger share of Gore voters. Thus three quarters of the marginal districts were made safer by redistricting, half of them by more than 2 percentage points (in presidential vote share). If analysis is confined to districts with

¹⁰⁸ See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (holding that state legislative districts must be divided equally by population); see also David M. Guin et al., *Redistricting in 2001 and Beyond: Navigating the Narrow Channel Between the Equal Protection Clause and the Voting Rights Act*, 51 BAYLOR L. REV. 225, 228 (1999) (listing districting principles, including one person, one vote); Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201, 1204-05 (1996) (explaining how one person, one vote limits apportionment possibilities); Eric J. Stockman, *Constitutional Gerrymandering: Fonfara v. Reapportionment Commission*, 25 CONN. L. REV. 1227, 1257 (1993) (discussing the Supreme Court's one person, one vote limit on reapportionment).

¹⁰⁹ Cf. BRUCE E. CAIN, *THE REAPPORTIONMENT PUZZLE* 151-59 (1984) ("If [the party] believes that future electoral or demographic tides will flow in its direction, then the party will be more willing to take chances by creating more competitive seats.").

marginal incumbents who sought reelection in 2002, thirty-two of their forty districts (80 percent) were made safer by redistricting.¹¹⁰

In individual states, the effects could be even more extreme. Gerymandering in California after the last census, for example, “left not a single one of the state’s fifty-three House districts truly competitive.”¹¹¹

Long-term trends exacerbate this effect. Since at least the mid-twentieth century, competitiveness in House districts has markedly declined. In the decade of elections after the 1960s reapportionment, for example, an average of 74 seats were won with less than 55% of the majority party vote.¹¹² In the decade of elections after the 1990s reapportionment, by contrast, that figure fell by more than 10% to 65 seats.¹¹³

More ominously, in the years prior to the 2002 election (with the exception of the 1972 Nixon-McGovern election), elections immediately following reapportionment have always shown an increase in district competitiveness. As one commentator has summed up the data shown in Table 1:

[E]lections held in the immediate aftermath of reapportionment . . . have generated particularly large freshman classes and have returned fewer incumbents than have other elections. On average, more incumbents retire from the House in post-reapportionment election cycles, more are defeated in primaries, more lose in the November general elections, and fewer win landslide reelections. . . . [O]n average, since 1972, membership turnover has been about 45% larger in post-reapportionment Congresses, with 87 freshmen rather than 60. If anything, this tendency for greater turnover in post-redistricting election cycles had appeared to be increasing, as the 1992 elections had generated a freshman class with 110 members.

The normal pattern did not hold up in 2002. Quite the opposite: The 108th Congress (2003-2004) will have only 54 freshmen—fewer than in the typical non-reapportionment election cycle, far below the norm for a redistricting year, and less than half the 1992 figure. . . .

¹¹⁰ Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 POL. SCI. Q. 1, 10 (2003).

¹¹¹ *Id.*

¹¹² See Brief of Political Scientists at 6 fig.2, *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004) (No. 02-1580) (showing that 74 seats in 1962, 106 in 1964, 74 in 1966, 63 in 1968, and 52 in 1970 were won with less than fifty-five percent of the majority vote).

¹¹³ *Id.* (showing that 81 seats in 1992, 85 in 1994, 77 in 1996, 42 in 1998, and 42 in 2000 were won with less than fifty-five percent of the majority vote).

This lack of competition was peculiar to U.S. House elections: On the same day when barely one out of twelve House elections were being decided by ten percentage points or less, roughly half of all gubernatorial and U.S. Senate elections were that close.¹¹⁴

Table 1: Comparison of the 2002 Election with Elections from 1972 through 2000¹¹⁵

Category	Average "Normal" Election (1974-1980, 1984-1990, 1994-2000)	Average Post-Reapportionment Election (1972, 1982, 1992)	2002 Election
Incumbents Reelected	375	348	381
By >20 Points	297	261	338
By <20 Points	78	87	43
Incumbents Defeated	21	35	16
In the Primary	3	13	8
In the General	18	22	8
Incumbent Retirements	37	48	35
New Members	60	87	54

Deadened competition has both individual and aggregate effects. On the individual level, it means that representatives have less fear of the regular judgment of the voters. The less competitive districts are, the less incumbents will fear defeat at the polls, thus making them less responsive to general election voters. A representative who squeaks by will be very sensitive to what constituents want; a representative assured of a landslide will be less so. Uncompetitive districts, then, weaken the structures of accountability that the Framers believed made members of the House truly responsive to—and thus truly representative of—the people.

On the aggregate level, deadened competition means that the House of Representatives as a whole will not reflect changes in sentiment among voters as well. Because so few districts can realistically change parties, the House as a whole will fail to track shifts in underly-

¹¹⁴ Hirsch, *supra* note 81, at 183.

¹¹⁵ The data shown in Table 1 are taken from *id.* at 183 tbl.1.

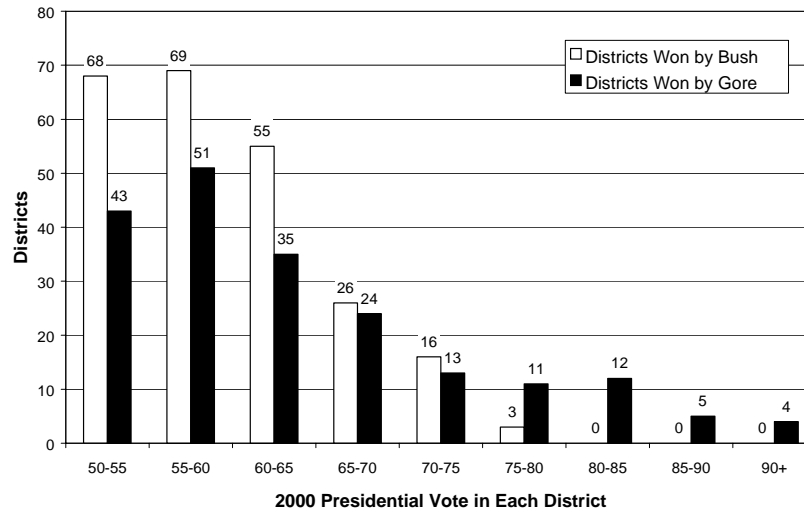
ing popular opinion. A national swing of five percent in voter opinion—a sea change in most elections—will change very few seats in the current House of Representatives. Gerrymandering thus creates a kind of inertia that arrests the House’s dynamic process. It makes it less certain that votes in the chamber will reflect shifts in popular opinion, and thus frustrates change and creates undemocratic slippage between the people and their government.

Although partisan gerrymandering deadens competition within individual districts, that is its method, not its aim. Its aim, of course, is to give one of the major parties an advantage over the other in Congress.¹¹⁶ Comparing the major parties’ shares of the 2000 presidential vote in the pre- and post-reapportionment House districts demonstrates how thoroughly current political gerrymandering has achieved this. As Gary Jacobson has explained, “[t]he Bush-Gore vote division provides an excellent approximation of district partisanship. Short-term forces were evenly balanced in 2000, and party line voting was the highest in decades; hence, both the national and district-level vote reflected the underlying partisan balance with unusual accuracy.”¹¹⁷ In other words, districts won by Democratic candidate Al Gore are generally Democratic while districts won by Republican candidate George W. Bush are generally Republican. As Figure 5 shows, the post-census redistrictings helped make many districts comfortably but leanly Republican and many other districts landslide Democratic. The last cycle of redistricting, in other words, made the parties’ seats differentially safe in a way that gave one side an artificial edge in the House.

¹¹⁶ See, e.g., Richard G. Niemi, *The Relationship Between Votes and Seats: The Ultimate Question in Political Gerrymandering*, 33 UCLA L. REV. 185, 187-88 (1985) (noting that gerrymandering “is an inherently political process” and is “unashamedly partisan” (quoting *Bandemer v. Davis*, 603 F. Supp. 1479, 1484 (S.D. Ind. 1984), *rev’d*, 478 U.S. 109 (1986))).

¹¹⁷ Jacobson, *supra* note 110, at 9.

Figure 5: Distribution of Bush Districts and Gore Districts in the 2002 Plans¹¹⁸



In fact, all the districts in the country with party landslides of over eighty percent were won by Democrats. In some states, of course, Democratic-controlled redistrictings artificially plumped the Democrats' share of the state congressional delegation; in others, Republican-controlled redistrictings artificially plumped the Republicans' share. Both sides are guilty of taking advantage of such possibilities because the stakes are so high. In the 1980s, California Democrats were among the most notorious offenders;¹¹⁹ in 2003, the Texas Republicans were the notable offenders.¹²⁰ On balance, however, as Figure 5 shows, the post-2000 census plans advantaged the Republicans.

¹¹⁸ Figure 5 is taken from Hirsch, *supra* note 81, at 197 fig.2. Figure 5 shows the number of districts won by Bush and by Gore, broken down by the percentage of the vote that the winner received in that district. For instance, Bush won by receiving 50-55% of the votes in 68 districts, while Gore won with 50-55% of the votes in only 43 districts; Bush did not win a single district by more than 90% of the vote, whereas Gore won four districts with more than 90% of the vote.

¹¹⁹ See *Badham v. Eu*, 694 F. Supp. 664, 666 (N.D. Cal. 1988) (discussing a California redistricting plan that changed the composition of the California legislature from twenty-two Democrats and twenty-one Republicans to twenty-eight Democrats and seventeen Republicans), *aff'd*, 488 U.S. 1024 (1989).

¹²⁰ See Note, *The Implications of Coalitional and Influence Districts for Vote Dilution Litigation*, 117 HARV. L. REV. 2598, 2614 (2004) ("Texas Republicans, having taken control of the legislature in 2003, attempted to redraw the state's district lines between decennial censuses to increase the Republican Party's representation in Congress.").

The net effect was to increase the number of Republican districts by nine, from 228 to 237¹²¹—perhaps giving Republicans control of the House for the remainder of the decade.

By making individual districts noncompetitive, partisan gerrymandering also frustrates the representation of centrist views in the House. Safe districts are drawn to be either more conservative or more liberal than a non-gerrymandered district would be; their average voter is intended to be reliably off the overall median. Artificially skewing districts in this way ensures the election of candidates from particular parties, but also makes it less likely that candidates who reflect the views of these median voters will be elected. In advantaging one political party, then, partisan gerrymandering not only disadvantages the other major political party and makes districts uncompetitive, but it also makes the representation of centrist views more difficult.

Another feature of elections exacerbates this effect. Deadening competition between the major parties shifts any real political competition in the district into one party's primary, where ideological activists dominate.¹²² Centrist candidates of both parties have trouble surviving in safe districts because in the primaries they must appeal to a group of voters representative neither of the district as a whole, nor of the party as a whole—rather, the group of voters at primaries represents only the party's more partisan members.¹²³ More sharply ideological candidates appeal to this primary electorate. Democratic primary voters vote for more left-leaning candidates than the average Democrat, let alone the average voter, would, and Republican primary voters vote for more right-leaning candidates than the average Republican or average voter would. As a result, districts elect candidates more extreme than the general population of voters in the district, and the House has become bipolar¹²⁴ even though the country has

¹²¹ Jacobson, *supra* note 110, at 9 (citing Jacobson, *supra* note 92, at 5-13).

¹²² David Brady & Morris Fiorina, *Congress in the Era of the Permanent Campaign*, in *THE PERMANENT CAMPAIGN AND ITS FUTURE* 134, 135-36 (Norman Ornstein & Thomas Mann eds., 2000) (stating that because primary electorates are small and unrepresentative, "members of Congress may be forced to play to noncentrist elements of their constituencies").

¹²³ *Id.*

¹²⁴ See *supra* notes 97-99 and accompanying text (discussing DW-NOMINATE scores and their suggestion that the ideological gap between political parties has grown in the last several decades).

stayed largely in the middle.¹²⁵ Making districts safe thus silences the center.

Unlike the Framers' vision, a gerrymandered House does not reflect popular sentiment in all its diversity, but the sentiment of one extreme or the other in districts across the country. And that is not the worst. Just as polarization within the House is one of the primary effects of partisan gerrymandering, it is also one of the primary causes. Polarization of a nearly evenly split House greatly raises the stakes of redistricting and so increases the incentives to gerrymander, which in turn leads to further polarization in the House. Far from limiting itself, under these conditions, partisan gerrymandering is self-intensifying. Polarization and partisan gerrymandering thus form a vicious circle where increases in one increase the likelihood of the other.

The issues surrounding partisan gerrymandering are thus quite complex. It raises not only the obvious concern of partisan political bias, but also less obvious concerns like the artificial lock-in of a temporary majority in what was intended to be the most responsive part of the federal government; reduced competition within districts; reduced accountability and responsiveness of House members; and increased polarization in the legislature. Existing doctrine does not consider, let alone address, most of these concerns.

B. *Saving Politics from Theory: Political Gerrymandering in the Court*

In *Davis v. Bandemer*,¹²⁶ the Supreme Court first took up the gerrymandering issue and splintered over whether and how to address it. Although a majority of six Justices believed that partisan gerrymandering claims were justiciable,¹²⁷ no majority agreed as to how to handle them.¹²⁸ The decisive plurality of four generally followed the ap-

¹²⁵ *Democrats Still Hold a Small Lead in Party Identification, According to National Harris Interactive Survey; Almost No Change in Proportion That Consider Themselves Conservatives, Liberals and Moderates*, PR NEWSWIRE, Feb. 27, 2004, available at LEXIS, Campaign 2004 News. ("Self-described moderates (40%) continue to outnumber those who consider themselves conservatives (33%) or liberals (18%). These numbers have been remarkably stable over more than 30 years.")

¹²⁶ 478 U.S. 109 (1986) (White, J., plurality opinion).

¹²⁷ Justices White, Brennan, Marshall, Blackmun, *id.* at 123-25, Powell, and Stevens, *id.* at 161 (Powell, J., concurring in part and dissenting in part, joined by Stevens, J.,) believed the partisan gerrymandering claims were justiciable.

¹²⁸ Justice White wrote the plurality opinion, in which Justices Brennan, Marshall, and Blackmun joined. *Id.* at 123 (White, J., plurality opinion). Chief Justice Burger concurred in the judgment, *id.* at 143 (Burger, C.J., concurring), as did Justice

proach taken in the racial gerrymandering cases, but changed the governing equal protection standards to account for perceived differences between race and politics.¹²⁹ The doctrinal shift was dramatic. Ordinary equal protection doctrine requires a showing of both discriminatory intent and discriminatory effects.¹³⁰ Of these two requirements, intent is usually the more difficult to prove.¹³¹ In *Bandemer*, however, the plurality turned that on its head. “As long as redistricting is done by a legislature,” the plurality wrote, “it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.”¹³² Discriminatory effects, by contrast, would be very difficult to prove. As the plurality described the standard, “unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.”¹³³

Two parts of this standard posed special difficulties to plaintiffs. First, showing that a system *consistently* degrades a voter’s or group of voters’ influence requires several election cycles of experience, or very firm predictive data, which is difficult to obtain. Plaintiffs, then, would likely not be able to assert any claim until far into the ten-year districting cycle. Second, plaintiffs had to show not just that the

O’Connor, whose concurring opinion was joined by Chief Justice Burger and Justice Rehnquist, *id.* at 144 (O’Connor, J., concurring). Justice Powell concurred in part and dissented in part, joined by Justice Stevens. *Id.* at 161 (Powell, J., concurring in part and dissenting in part).

¹²⁹ See *id.* at 141-43 (“We . . . conclude . . . that a threshold showing of discriminatory vote dilution is required for a prima facie case of an equal protection violation.”).

¹³⁰ See, e.g., *Mobile v. Bolden*, 446 U.S. 55, 67-68 (1980) (“Although dicta may be drawn from a few of the Court’s earlier opinions suggesting that disproportionate effects alone may establish a claim of unconstitutional racial vote dilution, the fact is that such a view is not supported by any decision of this Court.”); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.”).

¹³¹ See e.g., *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (“As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find.”); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1137 (1989) (“Not only is it much more difficult to prove intent in the housing and employment cases, but, more interestingly, they involve a completely different kind of inquiry.”).

¹³² *Bandemer*, 478 U.S. at 129 (White, J., plurality opinion). In an accompanying footnote, the plurality softened this view somewhat. It noted that because “discriminatory intent may not be difficult to prove in this context does not, of course, mean that it need not be proved at all to succeed on such a claim.” *Id.* at 129 n.11.

¹³³ *Id.* at 132.

scheme degraded their voting power but also that it degraded their influence on the “political process *as a whole*.”¹³⁴

In *Badham v. Eu*,¹³⁵ for example, a district court found that this second requirement saved an egregious Democratic gerrymander of California’s congressional districts after the 1980 census. Since there were no allegations that California Republicans were “shut out of the political process” or that anyone had ever “interfered with Republican registration, organizing, voting, fund-raising, or campaigning” or Republicans’ ability “to speak out on issues of public concern,”¹³⁶ the district court granted the state’s motion to dismiss.¹³⁷ The court, in fact, dismissed the case *with prejudice* because other facts of which it took judicial notice showed that Republicans had some influence in other parts of the political process. Chief among these facts was that California had a Republican governor, one Republican senator, and a former Republican governor who, for seven years, had been President of the United States.¹³⁸ But of course none of those officials had been elected from individual districts.

The plurality believed that such a high standard was appropriate because “the power to influence the political process is not limited to winning elections.”¹³⁹ As the plurality in *Bandemer* stated:

An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters. This is true even in a safe district where the losing group loses election after election. Thus, a group’s electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.¹⁴⁰

¹³⁴ *Id.* (emphasis added).

¹³⁵ 694 F. Supp. 664 (N.D. Cal. 1988), *aff’d*, 488 U.S. 1024 (1989).

¹³⁶ *Id.* at 670.

¹³⁷ *See id.* at 672 (noting that because California Republicans represent a potent political force, it is unnecessary for the judiciary to intervene as it would in order to “protect the trampled rights of a disadvantaged political or racial minority”).

¹³⁸ *Id.*

¹³⁹ *Bandemer*, 478 U.S. at 132 (White, J., plurality opinion).

¹⁴⁰ *Id.*

While it is true that voters can achieve some representation even through representatives they voted against, it is also true that “winning elections” is the most powerful way to influence the political process and that artificially making winning elections more difficult for one group than for others impairs that group’s political power. Not only did the plurality’s reasoning surprisingly underplay the importance of elections, it also failed to consider the wider range of concerns raised by partisan gerrymandering. Although it acknowledged the partisan skew that gerrymandering may give to politics,¹⁴¹ it did not consider issues of lock-in, competitiveness, responsiveness, accountability, and polarization—all of which deeply affect the substance and structure of politics. The equal protection lens developed by the plurality placed all these concerns far out of focus.

To her credit, Justice O’Connor did look more broadly.¹⁴² Even she, however, saw only one larger political concern implicated in the dispute: whether constitutional regulation of partisan gerrymandering would undermine the two-party system, which she viewed as the bedrock of our political system. As Justice O’Connor put it:

There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government. The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change.¹⁴³

Her fear was that once the Court entered this area it would have no choice but to apply a proportionality test to all identifiable “political, religious, ethnic, racial, occupational, and socioeconomic groups.”¹⁴⁴ And even if the Court limited the inquiry to just political groups, she believed “[t]here is simply no clear stopping point to prevent the gradual evolution of a requirement of roughly proportional representation for every cohesive political group.”¹⁴⁵ If realized, her fear would have moved the country towards a coalitional multiparty

¹⁴¹ See *id.* at 116-17 (acknowledging that a Republican advantage was “achieved by ‘stacking’ Democrats into districts with large Democratic majorities and ‘splitting’ them in other districts so as to give Republicans safe but not excessive majorities in those districts”).

¹⁴² See *id.* at 144-45 (O’Connor, J., concurring in judgment) (expressing concern that if political gerrymandering becomes justiciable, such judicial intervention will pose a risk to our political institution).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 147.

¹⁴⁵ *Id.*

government. That, by itself, was enough for her to deny the courts power to hear these claims.¹⁴⁶

Her approach represents another version of the “got theory” argument. Unlike what Justices Frankfurter and Harlan might argue,¹⁴⁷ Justice O’Connor does not argue that a viable competing theory of representation underlies partisan gerrymandering. Two-party government, she recognized, is not the aim of partisan gerrymandering. Rather, artificially “skewed” two-party government is its effect. But that is still a form of two-party politics. By contrast, imposing a theory of partisan fairness on the redistricting process would, she believes, have the effect of undermining what she sees as a foundational value of our political system.¹⁴⁸ Whether she is right or not, her argument does extend the frame of analysis to encompass a relevant political value invisible to ordinary equal protection doctrine, and implicitly weighs that value against others that judicial intervention would promote. She invokes a type of “got theory” argument to decide what would make the best pragmatic sense, not to reflexively foreclose judicial inquiry.

In *Vieth v. Jubelirer*,¹⁴⁹ the Supreme Court’s recent political gerrymandering decision, the Court surprisingly avoided “got theory” arguments altogether. This case challenged a 2002 Pennsylvania congressional districting scheme that aided Republican congressional candidates, and which was passed by a Republican-controlled state legislature and signed by a Republican governor.¹⁵⁰ The Court reached no majority opinion. Instead, Justice Scalia, writing for a plurality of four Justices,¹⁵¹ found all political gerrymandering claims nonjusticiable for lack of any judicially manageable standards to us in deciding them.¹⁵² Justice Kennedy, by contrast, found political gerrymandering

¹⁴⁶ See *id.* at 145, 147 (“[N]o group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment.”).

¹⁴⁷ Cf. *supra* text accompanying note 60 (concluding that under Justices Frankfurter and Harlan’s “got theory” argument the mere possibility of a civic rationale would validate seemingly racial motives).

¹⁴⁸ See *Bandemer*, 478 U.S. at 145 (O’Connor, J., concurring in judgment) (“[T]he proportional representation towards which the Court’s expansion of equal protection doctrine will lead is [not] consistent with our history, our traditions, or our political institutions.”).

¹⁴⁹ 124 S. Ct. 1769 (2004).

¹⁵⁰ *Id.* at 1773 (Scalia, J., plurality opinion).

¹⁵¹ Justices Rehnquist, O’Connor, and Thomas joined Justice Scalia’s plurality opinion. *Id.* Justice Kennedy concurred in the judgment. *Id.* at 1792 (Kennedy, J., concurring in the judgment).

¹⁵² See *id.* at 1778 (Scalia, J., plurality opinion) (“[N]o judicially discernible and

claims to be justiciable, but rejected the claim in *Vieth* itself.¹⁵³ Although the plaintiffs, in his view, had not carried their burden of showing that judicially manageable standards existed, he believed that others in the future might be able to carry this burden.¹⁵⁴ And Justices Stevens, Souter, Ginsburg, and Breyer believed manageable standards existed to adjudicate such claims, although they differed somewhat as to what those standards were.¹⁵⁵ In short, five Justices believed political gerrymandering claims were or could be justiciable, while five Justices rejected the political gerrymandering claim in *Vieth* because no judicially manageable standards were available to decide it.

This confusing fragmentation on the Court obscures a surprising and deep agreement. Despite their great differences as to whether the courts can decide such claims, eight Justices agree that the Constitution forbids at least extreme forms of partisan gerrymandering and the remaining Justice, Justice Kennedy, believes that it might do so. The four dissenting Justices, of course, necessarily believe this. Otherwise, they could not authorize judicial intervention. And Justice Kennedy must hold out this possibility if he truly believes that future plaintiffs might persuade the Court that judicially manageable standards to address such claims exist.¹⁵⁶ The positions of these five are unsurprising. What is surprising is that the four Justices who held that no judicially manageable standards exist could believe that the Constitution itself proscribes extreme gerrymandering. As they make clear, the justiciability problem is epistemological, not ontological. In other words, they believe a constitutional rule against such gerrymandering

manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable”).

¹⁵³ See *id.* at 1793 (Kennedy, J., concurring in the judgment) (“I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.”).

¹⁵⁴ See *id.* at 1798-99 (“If workable standards do emerge to measure these burdens, however, courts should be prepared to order relief.”).

¹⁵⁵ See *id.* at 1812 (Stevens, J., dissenting) (advocating a standard that asks “whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles.”); *id.* at 1817 (Souter, J., dissenting, joined by Ginsburg, J.) (calling for a standard that requires “a plaintiff to satisfy elements of a prima facie cause of action” and then allowing the state to rebut the evidence and “offer an affirmative justification for the districting choices”); *id.* at 1827-29 (Breyer, J., dissenting) (providing indicia to identify the “unjustified entrenching in power of a political party that the voters have rejected”).

¹⁵⁶ See *id.* at 1795 (Kennedy, J., concurring in the judgment) (“That no . . . standard has emerged in this case should not be taken to prove that none will emerge in the future.”).

exists but that the courts cannot describe it. It is like firmly believing there is a God, but that knowing anything about this God lies beyond human understanding.

Justice Scalia makes this clear for the plurality in his criticism of Justice Stevens's recognition of individual district-specific gerrymandering claims. Justice Scalia carefully separates out the argument that political gerrymandering poses no constitutional difficulties, an argument with which he disagrees, from the argument that the courts can do anything about these difficulties. He writes:

Much of [Justice Stevens's] dissent is addressed to the incompatibility of severe partisan gerrymanders with democratic principles. We do not disagree with that judgment, any more than we disagree with the judgment that it would be unconstitutional for the Senate to employ, in impeachment proceedings, procedures that are incompatible with its obligation to "try" impeachments. The issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy. . . .

. . . Justice Stevens says we err in assuming that politics is an ordinary and lawful motive in districting—but all he brings forward to contest that is the argument that an *excessive* injection of politics is *unlawful*. So it is, and so does our opinion assume.¹⁵⁷

Justiciability difficulties spring not from any doubt that the Constitution forbids some gerrymandering. There is none. They spring rather from the courts' inability to identify and correct unconstitutional gerrymandering. Excessive politics is unconstitutional; the courts, however, cannot tell when the line is crossed.

Given this particular view of why the courts cannot entertain political gerrymandering claims, it is not surprising that "got theory" arguments play no real role in the decision. Those in the strategic position to invoke the arguments, the plurality, share with the dissenters the belief that the Constitution *does* have a particular democratic theory which trumps conflicting legislative theories. They just do not know what it is and, unlike Justice Kennedy, they think that such knowledge is forever unattainable. This position, although it points to the same remedial consequence that a "got theory" argument would—namely, none—has quite different legitimating implications. Unlike

¹⁵⁷ *Id.* at 1785 (Scalia, J., plurality opinion) (internal citations, some internal quotation marks, and alteration omitted).

Justices Frankfurter and Harlan's "got theory" argument,¹⁵⁸ the plurality's position provides no fig leaf for improper legislative motivations. It does not pretend to defer to a conflicting but permissible theory of democracy. It just steps out of the way without making any statement about what the legislature did and so creates no dangerous false consciousness about legislative motivations. In fact, insofar as it insists that the Constitution does care about improper partisanship in redistricting but remains silent as to how it cares, the plurality's position may encourage citizens to engage and evaluate gerrymanders more critically. They will, after all, have little by which to judge them other than their own best "theories" of democratic fair play.

C. *The Academic Debate*

The academic commentary on partisan gerrymandering looks a little different. It reaches more widely than the reasoning of the Supreme Court and at times illustrates the more traditional use of the "got theory" argument as a conversation-stopper. The best example of the debate is the recent spirited interchange between Samuel Issacharoff and Nathaniel Persily in the *Harvard Law Review*. In his piece, Issacharoff criticizes partisan gerrymandering primarily because it leads to uncompetitive districts, and he ultimately proposes a strong form of prophylaxis: "[T]he Court should forbid *ex ante* the participation of self-interested insiders in the redistricting process, instead of trying to police redistricting outcomes *ex post*."¹⁵⁹ In other words, he would find unconstitutional any plan resulting from a process controlled by insiders. In his response, Persily takes on many of Issacharoff's claims. He argues, among other things, that incumbent turnover rates are healthy,¹⁶⁰ that congressional districts are largely competitive,¹⁶¹ and that because incumbency rates are similar in state-wide and districted races that gerrymandering cannot be responsible

¹⁵⁸ See *supra* text accompanying notes 13-29, 39-48 (discussing Justices Frankfurter and Harlan's "got theory" arguments in *Colegrove v. Green* and *Baker v. Carr*, respectively).

¹⁵⁹ Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 643 (2002) (emphasis added).

¹⁶⁰ See Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 654 (2002) ("[T]here has been steady and significant turnover both in Congress and in state legislatures—a quite healthy level of 'ritual cleansing' despite bipartisan gerrymanders." (footnote omitted) (quoting Issacharoff, *supra* note 159, at 615)).

¹⁶¹ See *id.* at 661-64 ("[A] large share, perhaps a majority, of the districts might be considered competitive.").

for any lack of competitiveness.¹⁶² Both he and Issacharoff impressively mount a wide variety of empirical evidence in support of their respective positions.¹⁶³

At bottom, however, their disagreement is largely normative. Issacharoff believes that most districting plans reflect officeholders' political self-interest, which impairs political competitiveness, responsiveness, and accountability. Persily, on the other hand, believes that these are only some of many possible legitimate values and that legislatures should remain free to pursue others. As he puts it:

[F]or several reasons politicians should be in charge of politics. . . . [C]oncerns about representation and governance are of equal weight to concerns about electoral competition, and there is no philosophically uncontested reason why judges should force one set of values rather than another down the throat of state governments.¹⁶⁴

To Persily, a constitutional rule, let alone one that takes redistricting out of the hands of legislatures, will foreclose "alternative redistricting strategies [that] maximize . . . welfare in different ways."¹⁶⁵ In particular:

One approach might maximize intradistrict competition, another might try to maximize competition for control of the legislature, another might seek to maximize the number of voters who are happy with their representative, and still others might seek to increase the probability that government will work better. There are tradeoffs for each approach. Good arguments can defend each approach, but it would be truly remarkable for unelected judges with lifetime appointments to decide that competition is the value that should be placed above all others.¹⁶⁶

Persily sums up his disagreement with Issacharoff in the final lines of his piece. Issacharoff's approach, he believes, suffers from:

[A] preoccupation with one democratic value without situating it in the political system as a whole. Perhaps district-level competition is "an independent democratic good"; rules governing redistricting need only be "normatively proper" rather than empirically justifiable; and certain

¹⁶² See *id.* at 664-67 (arguing that the causal relationship between gerrymandering and any lack of competitiveness is undermined by the "high reelection rates of incumbents in statewide races, such as those for the U.S. Senate, which are unaffected by redistricting").

¹⁶³ See, e.g., *id.* at 666 tbl.1 (comparing data on rates of incumbent reelection in the Senate and House of Representatives to undermine the causal relationship between gerrymandering and any lack of competitiveness).

¹⁶⁴ *Id.* at 678.

¹⁶⁵ *Id.* at 680.

¹⁶⁶ *Id.* (footnote omitted).

groups, such as moderate voters, should be given greater voice. By breathing those principles into the Constitution and striking down every existing districting system, however, judges would be mandating a particularistic and highly contestable vision of the proper working of American democracy. Those hoping to take the politics out of the redistricting process must be very confident that they have discovered a way to strike the balance between the competing political values central to democratic government. Lacking that confidence, I would leave the ultimate decision to the admittedly self-interested but more accountable political bodies that have found various ways of striking the balance.¹⁶⁷

Sound familiar? Persily is channeling Justices Frankfurter and Harlan. Like them, he points to other theories of politics as a reason to foreclose constitutional regulation. Where he differs from his predecessors is that he offers arguments in support of some of these alternatives. Although many will not agree with his reasoning,¹⁶⁸ he does defend his theories. Unlike his predecessors, he does not simply assert or assume their validity.

Another similarity between Persily and his predecessors, however, undermines his effort to employ these alternative theories to normatively justify districting plans. Like Justices Frankfurter and Harlan, Persily does not require that any of these theories actually underlie a districting plan. That one *could* support a plan will suffice.¹⁶⁹ His reluctance to require a showing that a disputed plan actually embodies a theory is understandable. Doing so would follow Justice Stewart down his blind alley.¹⁷⁰ How would a court tell the difference between a plan embodying a possibly confusing mixture of theories and one embodying no theory at all? How civically embarrassing would it be to uncover the actual justification for a plan, which may often be nothing

¹⁶⁷ *Id.* at 680-81 (footnotes omitted) (quoting Issacharoff, *supra* note 159, at 622, 626).

¹⁶⁸ This is particularly true of his argument that maximizing intradistrict homogeneity is normatively attractive. *See id.* at 668; *see, e.g.*, Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Associating*, 91 CAL. L. REV. 1209, 1254 (2003) (“[B]y reducing political competition through limiting the pool of individuals the plaintiffs could reach out to for political support . . . [t]he state stunted the process of democracy.” (footnote omitted)); Issacharoff, *supra* note 159, at 617 (noting the “legitimizing role of competition before the electorate”); Spencer Overton, *Restraint and Responsibility: Judicial Review of Campaign Reform*, 61 WASH. & LEE L. REV. 663, 718 (2004) (“[A] court should aspire to ensure that reforms do not, on the whole, diminish competition.”).

¹⁶⁹ *See* Persily, *supra* note 160, at 680-81 (noting the many values that might underlie a districting plan and observing that “good arguments can defend each approach”).

¹⁷⁰ *See supra* text accompanying notes 65-66 (arguing that Justice Stewart’s approach is unmanageable because it requires difficult judicial inquiry).

more than incumbent self-interest? In short, Persily is absolutely right, as were Justices Frankfurter and Harlan before him. Imposing one particular theory on politics comes at a loss, for it displaces other possibly valid theories. But his own approach, like Justices Frankfurter and Harlan's, fails to require—or even make likely—that a districting plan will embody any theory at all.

This is not to say that Issacharoff is right. His approach will strike many as exceeding clear constitutional authority. Indeed, any broad *ex ante* prophylactic approach will be controversial in this way. It is easy, though, to see his motivation. Putting districting into the hands of people who have no direct partisan or incumbency interest in its outcome would presumably reduce the influence of these types of self-interest, while leaving room for the plan to reflect the types of values Persily mentions¹⁷¹—and others. Although Issacharoff is concerned with competitiveness and incumbent entrenchment, he does not actually impose competitiveness on the redistricting process to the exclusion of other values. Rather, Issacharoff tries to remove direct incumbency and partisan concerns from the process as much as possible so that other more legitimate values may flourish. Unless I am misreading him, an independent redistricting commission should be free to follow the kinds of policies Persily advocates if it thought them wise.

That leaves two other options. One is to follow the course the Court itself took in the original reapportionment cases. There the Court imposed a particular theory of representation on the redistricting process to the exclusion of other theories.¹⁷² It did not do so, however, because the theory was incontestably better than all others. It was not. It did so rather because the theory was easy to administer and had some democratic virtues¹⁷³ and, most importantly, because imposing *some* theory was the only way to ensure that *any* theory other than legislative self interest underlay districting schemes.¹⁷⁴

¹⁷¹ See Persily, *supra* note 160, at 680 (arguing that redistricting should be delegated to those who are able to “strike the balance between the competing political values central to democratic government”).

¹⁷² See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (holding that state legislative districts must be divided equally by population).

¹⁷³ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 121 (1998) (“In fact, administrability is [the] long suit [of the one person, one vote principle] . . .”).

¹⁷⁴ See text accompanying notes 70-71 (arguing that the one person, one vote standard was chosen because it was an administrable theory of apportionment that would ensure *some* theoretical basis).

In the gerrymandering context, there is no simple, obvious candidate for such a theory, but there are several messy contenders. One approach would be to return to so-called traditional redistricting principles like geographical compactness, contiguity, and preserving political subdivisions and communities of interest.¹⁷⁵ While clear, agreed-upon yardsticks to measure these factors are unavailable, and trade-offs among them can be made in many legitimate ways, forcing some concern for these issues would reduce the freedom legislators now have to pursue unwholesome ends.

A quite different approach, which was argued by some in *Vieth v. Jubelirer*, looks to legislative motive.¹⁷⁶ Like Issacharoff's approach, it seeks to prevent bad motives from infecting districting plans, but does so through ex post review rather than ex ante prophylactic structuring. This approach would follow the controversial lead of the Court's *Shaw v. Reno* line of cases.¹⁷⁷ Many have criticized that line of cases,¹⁷⁸ but their aim is to screen plans after enactment for impermissible levels of racial motivation. The Court could take a similar (and perhaps similarly uncomfortable) approach with respect to certain partisan and incumbency motivations. In fact, the dissenters in *Vieth* argued different combinations of these two approaches.¹⁷⁹ It was their messiness, however, that persuaded the plurality that no judicially manageable standards existed.

¹⁷⁵ See, e.g., Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993).

¹⁷⁶ See 124 S. Ct. 1769, 1812 (Stevens, J., dissenting) (advocating a standard that asks "whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles").

¹⁷⁷ The Supreme Court has held that while race may be a factor in districting, a plan which is primarily motivated by racial considerations to the point of subordinating traditional districting principles is unconstitutional. For examples from this line of cases, see *Easley v. Cromartie*, 532 U.S. 234 (2001); *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Abrams v. Johnson*, 521 U.S. 74 (1997); *Bush v. Vera*, 517 U.S. 952 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).

¹⁷⁸ See Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287 (1996) (exploring the tensions introduced into districting by the *Shaw* line of cases); see also SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* 906 n.3 (2d ed. 2002) (noting the plethora of articles written in response to the *Shaw* line of cases).

¹⁷⁹ See *Vieth*, 124 S. Ct. at 1799 (Stevens, J., dissenting) (acknowledging the shared view of all dissenters it would be "profoundly unwise to foreclose all judicial review of similar claims" in the future).

CONCLUSION

The “got theory” argument, as employed by Justice Frankfurter, Justice Harlan, and Professor Persily, of course, easily avoids the difficulties of these alternative approaches. In avoiding difficulty, however, it does both too little and too much. It does too little in allowing plans reflecting only legislative self-interest to escape scrutiny. It does too much in suggesting that the reason plans should do so is that they actually reflect some lofty theory of politics. The “got theory” argument can be both a boon and a trap. When used by Justice O’Connor in *Bandemer* or by Justice Frankfurter in *Colegrove*, it can help deepen discussion. Although both Justices’ views in those cases are controversial,¹⁸⁰ they invoked this type of argument to analyze political concerns to which ordinary First Amendment doctrine is blind. When used by Justices Frankfurter and Harlan in *Baker* or by some academicians in the current debate, however, the argument has exactly the opposite effect. By holding out the likely false hope that a districting plan embodies a public-regarding purpose, it forecloses analysis of what the plan actually does. It stops rather than furthers conversation.

¹⁸⁰ See, e.g., *Vieth*, 124 S. Ct. at 1822 (Breyer, J., dissenting) (arguing, contrary to Justice O’Connor’s *Bandemer* concurrence, that there exist “applicable judicially manageable standards”). In *Colegrove*, Justice Frankfurter held that Congress had exclusive authority over the Illinois districting. However, the majority in *Baker v. Carr* found that a similar matter presented a justiciable cause of action. 369 U.S. 186 (1962).