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Lessons from the *Vieth* Dissents: Partisan Gerrymandering, Party Construction, and the Challenge of Judicial Intervention

ABSTRACT

No topic endured more uncertainty over the past fifty years than the legality of politicized districting. In 1986's Davis v. Bandemer, *the Supreme Court first indicated that sufficiently egregious partisan gerrymanders might be unconstitutional, while offering a test so vague that federal courts virtually never found districtings to be illegal. In 2004's* Vieth v. Jubelirer, *a plurality of the bench announced the Supreme Court lacked appropriate constitutional tools to identify such partisan gerrymanders—but Justice Kennedy's concurrence suggested that while no test had yet been found, one might be found in the future. It was not until 2019's* Rucho v. Common Cause *that a conservative majority finally laid the struggle over partisan gerrymandering to rest by concluding that politicized districting was a political problem beyond the competence of the federal judiciary.*

The functionally fruitless partisan gerrymandering debate was full of sound and fury, but it did signify something: the multifaceted nature of party organization and subsequent complexities in judicial oversight of partisan democracy. While the Rucho *Court ultimately used the political question doctrine to justify judicial abstention, this is only a*

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formalist wrapper. Underlying it is the nature of parties as emerging from the interplay of popular will and elite maneuvering. The partisanship that politicized districtings exploit is as much an expression of democratic preference as a prospective tool of technocratic oppression. This Article draws forth this tension by looking to an underappreciated contribution to the understanding of parties in democracy: the three ardent dissents in Vieth, *each of which articulated a different view of when partisanship should be illegal. Together they illustrate the difficulty of neutral judges decisively imposing a view of the legitimate role of parties.*

This Article uses the Vieth *dissents to demonstrate the intrinsic complexity of party governance and the subsequent challenges for robust judicial intervention. It first reconstructs the role of parties in governance and law (Part I) and then reviews the reception of parties in legal scholarship (Part II). These understandings have been marked by significant variation in the desirability of parties as participants in democratic governance. Part III offers a detailed doctrinal construction of the Supreme Court's 40-year foray into the partisan gerrymandering challenge. Part IV observes how the Vieth dissents themselves reveal the foundational difficulty with innovative judicial intervention: partisan gerrymandering is one of the (less savory) practices by which party composition is dynamically constructed. Part V observes other available mechanisms for judicial intervention in party politics that enhance rank-and-file participation, rather than constrain party practice.*

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I. PARTIES IN GOVERNANCE AND PARTISANSHIP IN LAW

Parties occupy a liminal position in American politics. They are an omnipresent mechanism for organizing governance. Parties coordinate the otherwise atomistic and disorganized preferences of political actors into coherent blocks, facilitating decisive political outcomes. In the context of elections, parties provide voters with information signals and consistent affinities in a dizzying policy landscape. Parties thereby provide coalitions for voters to join and enable commitment to durable policy stances even as leadership personnel turn over. For political representatives, parties act as "teams" in the processes of

governance. Parties organize legislators into disciplined blocs that can propose coherent agendas and assemble majorities to pass legislation.[1] Parties are thus indispensable intermediaries in democracy. This reality makes E. E. Schattschneider's quip that "modern democracy is unthinkable save in terms of the parties" so widely quoted.[2]

Yet, American parties generally operate outside formal governmental structures.[3] While Schattschneider's assertion that "parties and the law are nonassimilable"[4] may be an overgeneralization, it captures the spirit of party governance in American constitutional law. No part of the Constitution formally recognizes or accommodates governance, and party influence operates largely outside or at the margins of the formal apparatus of government. When voters in a district elect a representative, the representative is empowered by and obligated to serve the district and its constituents, not the party. When a legislature enacts a statute, the statute is passed in the name of the entire polity, rather than merely the partisan block that might have provided the organizational structure to draft and pass the law. Parties are intermediaries, but that process of mediation occurs outside of, rather than within, formal structures.

The crosscutting, multifaceted nature of parties makes their extralegality inevitable. As Samuel Issacharoff observes, a party is "an

1. Gary W. Cox & Mathew D. McCubbins, Setting the Agenda: Responsible Party Government in the U.S. House of Representatives 17–18 (2005) (describing both sets of benefits).

2. ELMER E. SCHATTSCHNEIDER, PARTY GOVERNMENT 1 (Rinehart & Co., 1942). *See* JACOB EISLER, THE LAW OF FREEDOM 203 n.8 (2023) for a collection of leading scholarship that opens with Schattschneider's quote.

3. Not all democracies share this feature, and America is comparatively unique in the predominantly extralegal (but still enormously powerful) status of parties. In Germany, parties are highly regulated by statute as well as constitution-level basic law. *See* Der Bund und die Länder [Political Parties], Dec. 19, 2022, BANZ at 2478 (Beilage no. 21) (Ger.), https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0114 [https://perma.cc/6Z5J-8TE2] (Basic Law dictating properties of property and penalizing parties deemed to have antidemocratic values); Gesetz über die politischen Parteien [Part G] [Law of the Federal Republic of Germany on Political Parties], July 24, 1967, BGBl. I at 773, as amended, BGBl. I at 2093 (1999) (Ger.), https://legislationline.org/taxonomy/term/13175 [https://perma.cc/6XDK-8DKM] (elaborating the necessary properties of political parties); Bundeswahlgesetz [BWG] [Federal Elections Act] § 6, July 24, 1967, BGBl. 1 at 773 (Ger.), www.bundeswahlleiterin.de/en/dam/jcr/4ff317c1-041f-4ba7-bbbf-1e5dc45097b3/bundeswahlgesetz_engl.pdf [https://perma.cc/TLP4-J5HZ] (allocating a significant proportion of representatives by voter commitment to a party-selected list of candidates as a block). Similarly, in the United Kingdom, with a famously uncodified constitution, parties play a much more formally central role in establishing terms of governance insofar as party decisions form the government and select a Prime Minister. *See* THOMAS QUINN, ELECTING AND EJECTING PARTY LEADERS IN BRITAIN (2012). As one result of this, American voters tend to be more weakly bound to their particular parties than voters in many other democracies. *See* LEON EPSTEIN, POLITICAL PARTIES IN THE AMERICAN MOLD 4 (1986).

4. SCHATTSCHNEIDER, *supra* note 2, at 11.

unstable amalgam of voter preferences, an internal apparatus driven by activists, and a structure through which party affiliates participate in government."[5] This complicates any precise delineation of the actors who comprise "the party." When a "party" is described (for example) as possessing a particular policy bent or undergoing some crisis or transformation, this is a multipronged description. It typically would refer to a change in the preferences of voters who form the rank-and-file of the party, in the goals pursued by extra-governmental elites and activists who articulate the party's agenda, and the policies pursued by party members who enact policy within government. Furthermore, the relationship between the different facets of a party is dynamic and reciprocal. A change in voters' preferences (which can occur through membership change as well as the change in the preferences of existing voters) will influence the elites inside and outside government. Decisions by party leadership to change the substantive commitments of the party will prompt a response by voters as well, who will pressure leadership or choose to leave or join the party in response.

The multifaceted nature of parties also complicates subjecting them to coherent legal discipline. It is challenging to identify exactly who (rank-and-file, activist, extra-governmental elite, or member in the government) should be subject to regulatory or legal consequences; the best that can be done is selecting some actor with a role in party organization and requiring that actor to conform to certain standards. For example, it is entirely possible for the Supreme Court to constitutionally prohibit governmental officials from engaging in patronage-based hiring based on partisan affiliation;[6] it would likewise be possible for a legislature to pass a rule prohibiting consideration of party in other contexts with clearly defined outputs. Similarly, a rule against considering partisanship in governmental awarding of contracts, for example, could be easily specified and, if evidence can be obtained, readily enforced. However, this does not impact the party's core constitution but merely prevents reliance upon party identity in one end product of political decision-making.

The extralegal status of parties has limited judicial interventions in the context of democratic processes and elections.[7] In the past

5. Samuel Issacharoff, Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition, 101 COLUM. L. REV. 274, 279 (2001).

6. *See, e.g.*, Rutan v. Republican Party of Ill., 497 U.S. 62 (1990). For a fuller description of the anti-patronage principle, see Micheal S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351 (2017).

7. A general threshold challenge is that constitutional rights are usually deployed to ensure the liberty of private actors by constraining the state, and constitutional rules more generally apply to the state, not to private entities. This is explicit in the context of the Fourteenth Amendment, which has had a momentous impact in election law (particularly with regards to race). The (controversial) state action doctrine limits the equal protection clause to action by government organs. *See*

25 years,[8] the Supreme Court has tangled with two major sets of topics regarding party practice. The first is the parties' authority to set the terms of their primary elections, thereby influencing which candidates will stand in general elections. Party elites may wish to narrow or widen constituencies by, for example, limiting primary participation to voters who are registered members of that party or expanding participation to any voters regardless of party affiliation. This, in turn, will impact which candidates are adopted as the party's in-government standard-bearer.[9] However, the government may wish to impose an alternative set of rules for administering primaries, including requirements regarding party affiliation of voters. As party primaries involve collaboration between the state (who administers the election) and the parties (who advance the slates of candidates), the question is which entity should have the authority to set terms of primaries.[10] Parties have invoked the First Amendment right to association to constrain legislative determination of party practice. However, such a constraint of legislative authority is not absolute.[11] Courts have permitted state governments to impose some rules upon party primaries, so long as such rules do not *excessively* burden the party's ability to establish terms of its own association.[12] The Goldilocks quality of the primary jurisprudence reflects the inevitable clash between rights, governmental interests, and the complexity of party ontology itself. The party's

Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767 (2010); *cf.* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. L. REV. 503, 536–47 (1985) (arguing that the state action requirement is harmful to the most important personal liberties and unnecessary to protect private autonomy and state sovereignty).

8. Earlier jurisprudence addressed topics with some resonance, often protecting voters and parties from government regulation that tried to dictate terms of voter participation, party access to the political process, or party self-governance. *See* Rosario v. Rockefeller, 410 U.S. 752 (1973) (voter participation); Storer v. Brown, 415 U.S. 724 (1974) (voter participation); Williams v. Rhodes, 393 U.S. 23, 32 (1968) (political process); Bullock v. Carter, 405 U.S. 134 (1972) (political process); Democratic Party v. Wisconsin ex rel. La Follette, 450 U.S. 107, 123 (1981) (self-governance); Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 232 (1989) (self-governance). These cases reflected an attempt by the Court to protect party autonomy and political access while also recognizing the need of the government to establish rules for self-governance, particularly related to elections, that might involve denying parties certain goods such as ballot access.

9. *See, e.g.*, Cal. Democratic Party v. Jones, 530 U.S. 567 (2000) (holding that mandated partisan blanket primary violated associational rights); Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) (holding likewise for mandated closed primaries).

10. *See* Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815 (2004).

11. The Court has upheld semi-closed and modified blanket primaries but not the more absolutist regimes in *Jones* and *Tashjian*. *See* Clingman v. Beaver, 544 U.S. 581 (2005) (semi-closed primaries); Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008) (modified blanket primaries).

12. EISLER, *supra* note 2, at 224–25.

own rules for determining who can participate in the primary is an imposition by party elites who make such rules upon the rank-and-file, and underlying party affiliations can animate the government that adopts rules regarding primaries.[13] It is thus challenging to identify a precise point at which the party's asserted right to determine its own membership should dominate governmental (presumptively popular) preferences regarding primary design.

However, the fiercest battles in the past two decades have been fought over the legality of party manipulation of districting to achieve a competitive advantage in elections (partisan gerrymandering). A party that controls a state legislature can draw districting lines that favor that party, thereby gaining disproportionate representation in future elections.[14] Partisan gerrymandering even more vividly elicits the multifaceted nature of parties and the difficulty of disciplining them with legal rules. The institution that implements a partisan gerrymander is the state. When legislators implement a partisan gerrymander, they typically coordinate as party members ("party in government");[15] this exploitation of their governmental authority to partisan ends is objectionable.[16] However, such districtings do no more than allocate voters to different districts. As such, they are only meaningful because they can appeal to another aspect of the party system—the voters themselves as the "party in the electorate."[17] Thus, while one can critique the *motivations* of legislators for effecting a partisan gerrymander, the efficacy of dividing voters depends upon the commitment and durability of voter partisan allegiance. Since partisan commitment by voters expresses their underlying political preferences (to partisan identity or to the values that a party's elite advance), a partisan gerrymander is only as effective as the party's ability to mobilize voters.[18]

13. Yet this need not be the case; the rule in *Jones* was adopted by popular referendum, leading Justice Stevens to protest vociferously against the Court's decision to strike it down. *Jones*, 530 U.S. at 590–603 (Stevens, J., dissenting). However, in one sense this is entirely logical; if rights are seen as protecting minorities from majorities (such as the majorities who advance referendums), it is a logical form of rights protection. The peculiarity is that the beneficiary of the rights protection here is precisely a major party who is itself a major player.
14. *See* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541 (2004).
15. Districtings with political motivations can also involve *cooperation* between parties, which the Supreme Court explicitly condoned. *See* Gaffney v. Cummings, 412 U.S. 735 (1973). Scholars who identify *Gaffney* as supporting entrenchment are skeptical of this reasoning. Issacharoff & Karlan, *supra* note 14, at 571. But it does not raise the same question of direct oppression as a gerrymander designed to maximize (or minimize) one party's power.
16. *See* Kang, *supra* note 6.
17. This phrase is derived from FRANK SOURAF, PARTY POLITICS IN AMERICA 133 (1968).
18. *See* Jacob Eisler, *Partisan Gerrymandering and the Illusion of Unfairness*, 67 CATH. U. L. REV. 229 (2018) (describing how partisan gerrymanders must exploit underlying cleavages in an electorate).

This means that a legal rule prohibiting partisan gerrymanders only addresses one aspect of a complex interaction of district design, party policy positions, and voter preferences. Other than the district lines themselves, all of these are fluid and capable of organic adjustment in response to changing political circumstances. The fuller implications of this are discussed in Part III *infra*.

II. THE PENDULUM OF PARTIES IN SCHOLARSHIP

The evaluation of political parties in American political and legal thought has seesawed since the founding of the Republic. Condemned as a dangerous faction yet prevalent as an organizational mechanism from the early days of the Republic,[19] parties did not become a subject of serious scholarly attention until E.E. Schattschneider's seminal *Party Government* in 1942.[20] Schattschneider was broadly approbative of parties, and subsequent social science scholarship has recognized the gritty realities of party competition[21] while simultaneously querying how party organization can promote competent and legitimate governance.[22] Conceived over the 250 years of American history, the treatment of parties in social science has undergone a dramatic shift: from morally condemned and analytically neglected (if practically omnipresent) pariah to a subject of appreciation and concern.

During the development of election law as a distinct field of legal scholarship, parties have undergone a similar pendulum swing. As the field matured during the 1990s and 2000s, scholarship was predominantly concerned with parties' ability to *dominate* democracy. The concern was that parties would exploit their role in the political structure to allow powerful actors to entrench themselves. By exploiting partisanship to organize electoral structures, parties can "render[] elections in the United States immune to voter preferences."[23] This reflects the broader focus of election law during this period: ensuring that elections

19. *See* Epstein, *supra* note 3, at 10–11 (explaining the neglect of political parties in American political science until Schattschneider); MARTY COHEN ET AL., THE PARTY DECIDES 19 (2008) (epitomizing condition of parties with recognition that Jefferson condemned parties during the Framing yet relied upon party organization to ascend to the presidency); James A. Gardner, *Madison's Hope: Virtue, Self-Interest, and the Design of Electoral Systems*, 86 IOWA L. REV. 87 (2000) (describing the pursuit of unified virtue as explaining Framer's resistance to party); *see generally* EISLER, *supra* note 2, at 202–05 (offering an overview of the scholarly accounts).

20. SCHATTSCHNEIDER, *supra* note 2 (identifying the importance of parties to American political organization).

21. V.O. KEY, JR., POLITICS, PARTIES AND PRESSURE GROUPS (1958); JOSEPH SCHLESINGER, POLITICAL PARTIES AND THE WINNING OF OFFICE (1994); RUSSELL MUIRHEAD, THE PROMISE OF PARTY IN A POLARIZED AGE (2014).

22. *See* JOHN H. ALDRICH, WHY PARTIES? A SECOND LOOK (Chicago: University of Chicago Press, 2011); Cox & McCubbins, *supra* note 1; NANCY L. ROSENBLUM, ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP (2010).

23. Issacharoff & Karlan, *supra* note 14, at 571.

are competitive so that voter preference, rather than elite-controlled structures, determine the outcome of elections.[24] During this period, scholars' prevailing interest was describing how parties could and should be disciplined and limited.[25] Parties were so influential in the design of the democratic process that they could "squeeze the competitive juices" out of elections.[26]

The political upheaval of the mid-2010s—Donald Trump's election, Brexit, and the broader rise of populism in Europe[27]—shifted academic evaluation of parties. Trump's capacity as an outsider to seize control of the Republican party through the primary process demonstrated the consequences when a party lacks the institutional capacity to influence political outcomes. The result was a flurry of scholarship shifting from concerns over parties being too *strong* and thereby interdicting or overwhelming voter preference to parties being too *weak* and unable to ameliorate extremism and polarization among the rank-and-file effectively. As Issacharoff—earlier, one of the leading proponents of limiting a party's power to ensure competition—summarizes, the "weakness of contemporary political parties . . . leave[s] them less able to control their internal party selection processes[,] . . . further hamper[ing] their ability to govern effectively."[28] In this vein, scholars have emphasized the importance of parties being able to act as intermediaries who control funding (rather than candidates independently obtaining money),[29]

24. *See, e.g.*, Samuel Issacharoff & Richard Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400 (2015); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002); *cf.* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses*, 116 Harv. L. Rev. 649 (2002) (questioning the focus on competition as the best locus of democratic theory).

25. *See, e.g.*, Issacharoff, *supra* note 24, at 645–47 (arguing for a prophylactic rule against anticompetitive party practices). For a full discussion of the various mechanisms advanced to limit partisan power, see Jacob Eisler, *Partisan Gerrymandering and the Constitutionalization of Statistics*, 68 EMORY L.J. 979, 982 n.13 (2019).

26. Issacharoff, *supra* note 24, at 600.

27. These events have been the subject of enormous scholarly attention. *See, e.g.*, STEVEN LEVITSKY & DANIEL ZIBLATT HOW DEMOCRACIES DIE (2018); DAVID RUNCIMAN, HOW DEMOCRACY ENDS (2018). Notably, Brexit, like Trump, exposed the *weakness* rather than the robustness of a party; putting "leaving the EU" to a popular referendum was meant to shore up the conservative coalition by failing, but it misfired spectacularly in passing the Brexit referendum, thereby exposing the weakness of existing party structures. *See* Tim Bale, *Why David Cameron Called the 2016 Referendum—and Why He Lost It*, UK CHANGING EUROPE (Oct. 4, 2022), https://ukandeu.ac.uk/why-david-cameron-called-the-2016-referendum/ [https://perma.cc/S46N-QNA2].

28. Samuel Issacharoff, *Outsourcing Politics: The Hostile Takeover of Our Hollowed-Out Political Parties*, 54 HOUS. L. REV. 845, 845 (2017).

29. Tabatha Abu El-Haj, *Networking the Party: First Amendment Rights and the Pursuit of Responsive Party Government*, 118 COLUM. L. REV. 1225, 1228 (2018); *see also* Issacharoff, *supra* note 28, at 864 (describing how channeling funding

have described the importance of party commitment to shared values of liberal constitutional democracy to its survival,[30] and have noted how weaker parties interact with a fragmented, polarized electorate to destabilize political dynamics and empower demagogues.[31]

There is a parallel between the treatment of parties in the longer arc of American political thinking and their specific treatment by legal scholars. Each began with the denigration of parties as pathological—a source of faction (in the case of social science) or depriving the people of genuine self-rule (in the legal scholarship). Yet, in each case, parties have come to be recognized as inevitably necessary or preferable to the chaotic alternative, and the question that has emerged is *how* parties can be appropriately nourished and prodded to aid democratic governance.

III. THE JUDICIARY'S LATEST ENTANGLEMENT WITH PARTY RULE: THE TANGLED PATH OF PARTISAN GERRYMANDERING

The judiciary's latest engagement with party rule parallels the twisted path of the scholarship. For the past decade, the question of if and how courts should prohibit partisan gerrymandering has produced an enormous amount of debate with little progress. Judicial oversight poses two levels of questions: the technical question of how to identify partisan gerrymanders that should be deemed illicit, and the higher-level institutional design question of whether courts should police partisan gerrymanders at all. There is widespread debate regarding the identification question. Unlike, for example, racial animus, the presence of *some* degree of partisan interest in districting is recognized as inevitable and legally permissible.[32] The question is at what point partisan influence becomes illicit. This question of line drawing leads to the issue

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through parties gives a national coherence to electoral politics because of parties' access to voters, candidates, and officeholders).

30. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 167 (2018).

31. Samuel Issacharoff, *Democracy's Deficits*, 85 U. CHI. L. REV 485, 490 (2018); Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 809 (2014); *cf.* Heather Gerken, *Playing Cards in a Hurricane: Party Reform in an Age of Polarization*, 54 HOUS. L. REV. 911, 916 (2017) (observing how polarization may make it difficult for even a strengthened party to stabilize politics).

32. *See, e.g.*, Rucho v. Common Cause, 588 U.S. 684, 734 (2019) (Kagan, J., dissenting) (asserting "judges should not be striking down maps left, right, and center, on the view that every smidgen of politics is a smidgen too much" while arguing "egregious" gerrymanders should be unconstitutional); *cf.* Vieth v. Jubelirer, 541 U.S. 267, 286 (2004) (plurality opinion) ("[T]he fact that partisan districting is a lawful and common practice means that there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation; not so for claims of racial gerrymandering.").

of whether the Court is even the appropriate institution to make such an assessment. This question has received comparatively little attention. In the run-up to *Rucho*, the prevalent question—prompted by Justice Kennedy's speculation that a test *might* be available[33]—was the preferred test, not the question of whether judicial intervention was appropriate at all.

However, the complexity of these questions belies a starker pair of reactions to partisan gerrymandering. Firstly, there is almost complete consensus that partisan gerrymandering is pathological in a democracy.[34] Michael Klarman captures the zeitgeist in calling partisan gerrymandering "indefensibly antimajoritarian."[35] Even the *Rucho* bench that rejected the intervention of the federal judiciary conceded the practice is "incompatible with democratic principles."[36] Yet this zeal in condemning partisan gerrymandering is matched by the lack of consensus regarding how it should be identified. Scholars have advanced a dizzying array of tests for partisan gerrymandering, drawing from sophisticated quantitative methods[37] to legal history[38] to existing norms of constitutional fair play.[39] The fractured nature of the attempts to technically identify partisan gerrymanders is the obverse of the consensus in condemning it.

This quality has also characterized the status of partisan gerrymandering before the Supreme Court. The Court first broached the unconstitutionality of partisan gerrymandering in *Davis v. Bandemer* but proposed a test that offers little guidance. The Court proposed an equal protection violation where "the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively," marked by "continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a

33. *Vieth*, 541 U.S. at 311 (Kennedy, J., concurring) (Rejecting partisan gerrymandering "hinges entirely on proof that no standard could exist. This is difficult proposition to establish, for proving a negative is a challenge in any context. That no such standard has emerged in this case should not be taken to prove that none will emerge in the future.").

34. Recent apologism for partisan gerrymandering is highly conditional or cabined. Partisan gerrymandering may be better than the other also problematic alternatives. Persily, *supra* note 24. It may only be activated where there are other underlying pathologies. Eisler, *supra* note 18. Still, some forms of it may not be quite as bad as scholars fear. Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 443 (2005).

35. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 516 (1997).

36. *Rucho*, 588 U.S. at 718 (quoting Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015)).

37. For a summary of these methods, see Eisler, *supra* note 25, at 982 n.13.

38. Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655 (2017).

39. Kang, *supra* note 6.

fair chance to influence the political process."[40] Rather than providing clear guidance, the opinion invoked underinformed norms of fairness and democratic legitimacy. The test is such that virtually no districtings were struck down under the *Bandemer* regime (notably, *Bandemer* itself did not find the districting before it was illegal).[41]

However, beyond its implications for application by lower courts, the unhelpful *Bandemer* formulation had one other consequence: it shifted the debate over the legitimacy of judicial intervention from the validity of institutional power (Are courts the right institution to intervene?) to the efficacy of technical tools (Can courts deploy an effective test?). In the first Supreme Court case to meaningfully revisit the partisan gerrymandering question since *Bandemer*, a four-justice plurality in *Vieth* suggested that federal judicial intervention is inappropriate because of the lack of "judicially discoverable and manageable standards" and is thus a nonjusticiable political question.[42] Yet reliance on the justiciability issue conceals the deeper import of the question: is the practice of districting by party appropriately institutionally constrained by the judiciary (or some other institution)? As discussed in Part IV *infra*, clearly posing this question conceives it as a matter of power allocation in democratic governance, not the availability of a metric.

Yet the *Vieth* plurality did not end the partisan gerrymandering debate; in a coy one-justice swing concurrence, Justice Kennedy remarked that it was *plausible* that a manageable standard might "emerge in the future."[43] This left open the possibility that the federal judiciary might *later* adopt a test to identify and prohibit such gerrymanders and inspired the efflorescence of technical scholarship. Yet this hope was practically foreclosed as the Roberts bench became increasingly conservative with new appointments. In 2018, *Rucho v. Common Cause* finally laid the federal judicial foray into assessing constitutional gerrymanders to rest. *Rucho* reiterated the *Vieth* plurality's logic: without "especially clear standards," the Court lacks authority to decide "how much partisan dominance is too much."[44] Without any "legal standards discernible in the Constitution for making such judgments," the matter was a "political question beyond the competence of the federal courts."[45]

The difficulty with this conclusion is that it is unequivocal that *some* standard could be developed and imposed; scholars have offered many

40. Davis v. Bandemer, 478 U.S. 109, 133 (1986).
41. Vieth v. Jubelirer, 541 U.S. 267, 279 (2004) (plurality opinion).
42. *Id.* at 277 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).
43. *Vieth*, 541 U.S. at 311.
44. Rucho v. Common Cause, 588 U.S. 684, 704 (2019) (quoting League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 420 (2006) (plurality opinion)).
45. *Rucho*, 588 U.S. at 707.

such technical tests, some with exotic names like partisan symmetry[46] and the efficiency gap.[47] As Justice Kagan observes in her *Rucho* dissent, federal courts had, pre-*Rucho*, adopted some standards.[48] The issue appears not to be one of the availability of a test or the competence of the federal courts to identify gerrymanders, but instead finding the *right* test.

IV. PARTIES' EXTRALEGAL STATUS AND EMERGENT NATURE: LESSONS FROM THE *VIETH* DISSENTS

Proposals for new metrics dominated the post-*Vieth* partisan gerrymandering debate, obscuring the question of institutional legitimacy: are parties the type of entity that courts *should* police? If the only obstacle to the judicial prohibition of partisan gerrymanders were technical, the solution would be easy; if this were the case, Kagan's inference in *Rucho* would be, in one sense, incontrovertible. The Supreme Court could, of course, impose *some* requirement regarding when a districting produces too much partisan advantage and demand obedience to it. This is precisely what has happened with the thoroughly entrenched and legally noncontroversial rule of one person, one vote adopted in the 1960s. That rule notoriously lacks an explicit constitutional foundation[49]—likely less so than a principle against partisan gerrymandering, which can be framed as, in some sense, an equal protection prohibition of prejudice—but has survived regardless. While its most facial virtue is its mathematical simplicity in application, more importantly, it serves as an inexorable norm of equal voting power per citizen.[50] It is thus a relatively uncontroversial *normative* rule.

Conversely, the appropriate role of parties in democratic self-governance is fiercely contested, paralleling the diversity of democratic theories. If democracy should be a domain of collaboration and dialogue across the entire polity,[51] parties should facilitate such dialogue and advance consensus forged in mutual respect.[52] If democracy is a

46. *See* Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after LULAC v. Perry*, 6 ELECTION L.J. 2, 4 (2007).

47. *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 834 (2015).

48. *Rucho*, 588 U.S. at 734.

49. *See, e.g.*, Derek T. Muller, *Perpetuating "One Person, One Vote" Errors*, 39 HARV. J.L. & PUB. POL'Y 371 (2016); Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213 (2003).

50. For an argument that the durability and tenability of the one person, one vote rule can be attributed to its status as minimally defending the norm of equal democratic citizenship, see EISLER, *supra* note 2, at 117–57.

51. This view is most commonly associated with deliberative democracy. *See, e.g.*, DEBATING DELIBERATIVE DEMOCRACY (James S. Fishkin & Peter Laslett eds., 1998); THE DELIBERATIVE DEMOCRACY HANDBOOK (John Gastil & Peter Levine eds., 2005).

52. MUIRHEAD, *supra* note 21, at 256 (defending "high" but not "low" partisanship).

rough-knuckle struggle among wedge block interest groups,[53] parties' benefit is organizational, promoting efficient conflict resolution.[54] If parties primarily provide a forum for elite leadership that is accountable and *somewhat* responsive to the rank-and-file,[55] parties are a comparatively tolerable arena for competition among such elites.[56] Each of these conceptions is defensible, and deciding which is most legitimate is one of the outputs of democratic contestation itself. Imposing by autocratic fiat one conception would itself contravene the basic norm of democratic autonomy.

Applying this question to the microcosm of partisan gerrymandering yields the same possible diverse understandings of the permissibility of the practice and when it should be identified as illicit. A collaborative understanding of democracy might reject it as undermining civic unity and contravening norms of fair play. However, if democracy is seen as a competitive process, partisan gerrymandering might be conceded as a particularly ruthless but permissible mechanism for accumulating political capital (a "victory bonus" in Peter Schuck's words),[57] albeit one that comes with risks due to future changes in voter affiliation.[58] If parties are predominantly a venue for elite competition, partisan gerrymandering is one (and perhaps not the most dangerous) sub-venue for struggle among ambitious elites. And so forth.

The diverse conceptualizations of the party in a democracy, and thus of partisan gerrymandering, complicate decisive, legitimate judicial intervention. This is not because partisan gerrymanders cannot be identified—a problem of *descriptive metrics*—but because any intervention demands an assumption about the valid role of parties—a problem of an institution *imposing moral values*. Since parties are, at least in the American system, extralegal, there is no obvious instruction or content for such an instruction in sources of the law. If a judiciary imposes—without some explicit constitutional authorization—a view of partisan gerrymanders, it entails a view on parties. This threatens to displace the scope of democratic debate that should fall to politics. The problem is not justiciability but the scope of the bench's ability to decisively assert moral norms. Per Ronald Dworkin, judges resolve cases by making moral judgments about a society's moral commitments in

53. IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY (2003).
54. COX & MCCUBBINS, *supra* note 1 (see note above).
55. *See generally* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (2010) (describing how in democracies parties function to coordinate action in competitive contests for political power, given that otherwise unorganized groups of voters only know how to "stampede").
56. V.O. KEY, *supra* note 21 (see note above).
57. Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1350 (1987).
58. BRUCE CAIN, THE REAPPORTIONMENT PUZZLE 156 (1984) (observing that partisan gerrymanders can spread a party thinner and that over time as voters drift from parties this can make districts held by the gerrymandering party vulnerable).

the complex context of constitutionalism.[59] But parties appear to be a type of dynamic, contextually determined, extralegal entity that defies any firm determination that allows for a ready reduction to stable precedent.

The shifting scholarly perception further complicates this challenge. When parties are identified as elite-serving institutions inclined towards entrenchment, partisan gerrymandering is yet another mechanism that can deny voters the ability to realize their preferences at the polls. However, if parties are fragile and liable to capture by dangerous outside forces,[60] then political gerrymanders can aid incumbents and produce longitudinal stability in the right circumstances.[61] Compared to populist or technocratic alternatives for districting like redistricting commissions, partisan determination (including partisan self-interest in districting) might slow capture by fringe political groups. This variable desirability of partisan gerrymandering complicates any judicial intervention because it radically increases the complexity of any generally applicable (and thus precedentially reliable) prohibitive rule. Courts would be required to make particularized assessments regarding political circumstances in condemning any partisan gerrymandering, a task to which they are ill-suited and which would entangle the judiciary in substantive politics in a manner that could undermine the rule of law.

Ironically enough, the dissents in the *Vieth* opinion—which argued standards *were* available to prohibit gerrymanders—provide a compelling indicator that judicial prohibition of gerrymanders encounters these difficulties. Addressing the inefficacy of the *Bandemer* test, the four progressive justices innovated new approaches to partisan gerrymandering. Yet rather than rally behind a single vision, they offered three distinct understandings of partisan fairness. Justice Stevens argued districtings that "disadvantage members of a minority group" (e.g., racial, religious, or political) are permissible only when the disadvantage is an incidental effect of a neutral policy based on a permissible reason.[62] Given the absence of an equal protection clause claim where racial discrimination is based on impact rather than intent,[63] Stevens' approach is most compatible with existing equal protection jurisprudence (prohibition of discriminatory purpose) but would broaden the range of attributes excluded from consideration in districting. It would thus merely extend the logic of condemning racial gerrymanders to new

59. This is the defining feature of judges. RONALD DWORKIN, LAW'S EMPIRE 226 (1986).
60. Critically, such an assessment challenges Justice O'Connor's skepticism of partisan gerrymandering on the grounds that parties can "fend[] for themselves" in politics. Davis v. Bandemer, 478 U.S. 109, 152–56 (1986) (O'Connor, J., concurring).
61. *See* Persily, *supra* note 24; Kang, *supra* note 6.
62. Vieth v. Jubelirer, 541 U.S. 267, 333–34 (2004) (Stevens, J., dissenting).
63. *See* Washington v. Davis, 426 U.S. 229 (1976).

categories of personal identity.[64] Conversely, Justice Souter wished to innovate the *McDonnell Douglas* burden-shifting tests used to identify employment discrimination, proposing a five-element test that plaintiffs must satisfy initially.[65] Souter's test prioritizes empirical demonstration of a deviation from neutral districting factors in the asserted partisan gerrymander.[66] Finally, Justice Breyer focuses on pure normativity, defined as "*unjustified* entrenchment [such] that the minority's hold on power is purely the result of partisan manipulation[.]"[67]

While Stevens argues that "the areas of agreement set forth in the separate opinions are of far greater significance" than their differences,[68] the reality is that each test hangs upon a different conception of legitimate party governance. Stevens' approach, forged from the equal protection clause, would extend traditional prohibitions of animus, thereby prioritizing the importance of shared civic unity and mutual respect. Souter's five-element test emphasizes the realistic features of partisan competition and prohibiting their excesses.[69] Seeking to prevent the power distortions of vote dilution implies a concern with parties as instrumentalities for distributing power. Stevens' and Souter's tests thus differ in the legitimizing core of party governance—accountability to and empowerment of rank-and-file individuals, as opposed to acting as effective intermediaries in power distribution. Breyer's anti-entrenchment approach, meanwhile, draws directly from leading election law scholarship (particularly Issacharoff and Pildes),[70] and thereby expresses skepticism that party elites can be trusted to use their power responsibly. The strongest distinction between the three opinions may be a focus on rank-and-file as the essential unit of politics (salient in Stevens' opinion) and identifying party leadership's manipulation of the electoral process (salient in Souter's and Breyer's power-oriented tests).

The dissents agree, challenging the antijusticiability argument advanced by Scalia's plurality opinion. However, as Scalia intimates, they still reflect three distinct conceptions of party governance.[71] That each of the three dissenting proposals has a strong moral appeal reinforces, rather than alleviates, the idea that the appropriate unfolding of party power is a matter to be struggled over in politics itself.

64. *See, e.g.*, Miller v. Johnson, 515 U.S. 900 (1995).
65. *Vieth*, 541 U.S. at 345–52 (Souter, J., dissenting).
66. *Id.* (Souter, J., dissenting).
67. *Id.* at 360 (Breyer, J., dissenting).
68. *Id.* at 317 (Stevens, J., dissenting).
69. *Id.* at 347–51 (Souter, J., dissenting).
70. *See id.* at 364 (Breyer, J., dissenting).
71. *Id.* at 292.

V. ALTERNATIVE PATHWAYS FOR POPULAR SELF-RULE

The difficulties of combatting partisan gerrymandering through a precedential rule do not alter the fact that it can be a tool of elite domination. Partisan gerrymandering can prohibit the accurate expression of popular will. The difficulty is that prohibiting the practice demands a conception of legitimate party rule, ironically imposing a variant of the same evil—stripping the electorate of democratic autonomy.[72]

As a result, the judicial prohibition of partisan gerrymandering faces the same objection that Justice Frankfurter posed to one person, one vote in *Baker v. Carr*:

> [T]here is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power . . . . Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives.[73]

Frankfurter's concern can be ameliorated with regards to the one person, one vote rule by observing that, despite its lack of clear constitutional grounding, equivalent per-person voting power is a minimal precondition of legitimate democratic process.[74] Conversely, as this Article has established, party governance lacks any such incontrovertible principle. The preferable and legitimate terms of party governance are, to use Jeremy Waldron's term, entirely "up for grabs."[75]

Does this mean the judiciary is wholly helpless before the ill of partisan gerrymandering? Perhaps direct prohibition or monitoring of partisan gerrymandering (at least without a clearly articulated, popularly empowered regulatory or statutory instruction)[76] is unavailable (a point hardened in the case law since *Rucho*). Still, the very nature of partisanship indicates an alternative. As Stevens notes in his *Vieth* dissent, "Elected officials in some sense serve two masters: the constituents who elected them and the political sponsors who support them."[77] The innovation of a judicial rule that attacks partisan gerrymandering directly attempts to constrain one side of the equation—the "political sponsors" (i.e., elites) who benefit from the gerrymander. The difficulty with a judicial proscription of partisan gerrymandering is that it necessarily has knock-on effects on the relationship between constituents

72. This is a general problem for judicial review, see ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1986), but is especially urgent when a Court countermands the will of the electorate in the context of setting democratic procedure.
73. Baker v. Carr, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting).
74. See generally EISLER, *supra* note 2, at 117–57 for a defense of this proposition and context.
75. JEREMY WALDRON, LAW AND DISAGREEMENT 303 (1999).
76. Notably, the Court has been explicitly approbative of such solutions in cases such as Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787 (2015).
77. Vieth v. Jubelirer, 541 U.S. 267, 332 (2004) (Stevens, J., dissenting).

and elites, and this relationship is the substance as well as the validation of party governance itself. Judicial intervention deprives the rank-and-file constituency of authority over its own governance.

The *aim* of combatting partisan gerrymandering is precisely to empower this constituency—and this reveals another way forward. Frankfurter suggests that the only appropriate solution to unfairness in *political* manipulation of the procedure is to appeal to the electorate itself. This is especially apt for partisan gerrymandering.

Synthesizing Frankfurter's poetic appeal to civic engagement and Stevens' recognition of both sides of the partisan equation reveals the preferable alternative to a prohibition. The best solution is for the judiciary to take measures that *affirmatively* enhance rank-and-file power over party governance. There are multiple points of contact by which this enhancement can occur—and many have been advanced (at least in part) by the courts. One is to ensure that internal party processes favor the authority of rank-and-file over the power of elites. Cases such as *Arizona Redistricting* (upholding the legitimacy of a referendum that established an independent redistricting commission)[78] and *Moore v. Harper* (allowing state constitutions to police electoral process, including gerrymandering)[79] show the Supreme Court can be already sympathetic to such approaches. These cases defended points of contact where the popular bottom of political power—referendums and state constitutional amendments—can discipline party leadership.

Other possible means of enhancing rank-and-file power include making substantive choices in institutional design that can modulate the power of party leadership in contexts such as primary design and ballot access. The Supreme Court's records on associational rights that have been the context for such analysis are mixed. The Court has recognized some right to access the ballot for popularly supported parties,[80] but limited by administrative interests of the state.[81] In the primary design context, the Court has notably limited rules that dictate terms of party primaries, even where adopted by referendum.[82] Allowing for greater rank-and-file control of party-shaping processes like primaries could transfer power back to voters without necessarily dictating a specific conception of party governance. Moreover, these questions of ballot access and primary design have received comparatively little attention compared to anxieties surrounding partisan gerrymandering. These rules allow for voter-*enhancing*, rather than elite-limiting,

78. *Ariz. Redistricting*, 576 U.S. at 787.
79. 600 U.S. 1 (2023).
80. Williams v. Rhodes, 393 U.S. 23, 32 (1968).
81. Am. Party of Tex. v. White, 415 U.S. 767, 783 (1974).
82. Notably, Stevens observed the paradox of such a decision. *See* Clingman v. Beaver, 544 U.S. 581, 620 (2005) (Stevens, J., dissenting).

judicial intervention. Such interventions would facilitate the responsiveness of party leadership to the preferences of rank-and-file voters, improving coalition efficiency without artificially distorting the terms of party competition.

Focusing on empowering voters in the dynamic, multifaceted unfolding of party governance thus offers an alternative to the judicial constraint of elites. Such intervention is preferable at multiple levels. It lessens concerns regarding juristocratic overdetermination of the democratic process because it operates through positive enhancement of voter power rather than condemnation of a party practice. It emphasizes the virtues rather than the vices of party rule by recognizing the ultimate validity and authority of power rule within the rank-and-file. And because there are so many points of contact for enhancing rank-and-file control, it allows for a more diverse and potentially more appealing type of judicial response to the challenge of elite domination of party practice. Most of all, it can be implemented in a manner that does not dictate the terms of party composition and the natural evolution of party competition, thereby permitting an autonomously popular democratic process.