

## THE PARTISANSHIP SPECTRUM

JUSTIN LEVITT\*

### ABSTRACT

*In a polarized political environment, allegations of excessive partisanship by public actors are ubiquitous. Commentators, courts, and activists levy these allegations daily. But with remarkable consistency, they do so as if “partisanship” described a single phenomenon. This Article recognizes that the default mode of understanding partisanship is a descriptive and diagnostic failure with meaningful consequences. We mean different things when we discuss partisanship, but we do not have the vocabulary to understand that we are talking past each other.*

*Without a robust conceptualization of partisanship, it is difficult to treat pathologies of partisan governance. Indeed, an undifferentiated approach to partisanship makes it difficult to distinguish the features from the bugs in our political system.*

*Moreover, the failure to understand partisanship impairs our ability to confront the partisanship we care about most. Most observers attempt to constrain unwanted partisanship through substantive rules and structural design. But parsing the spectrum of partisanship shows that these tools are neither necessary nor sufficient to address partisanship in its most disparaged forms.*

---

\* Visiting Associate Professor of Law, Yale Law School; Associate Professor, Loyola Law School, Los Angeles. B.A., Harvard University, 1995; M.P.A., Harvard Kennedy School, 2002; J.D., Harvard Law School, 2002. I am grateful to the *Foxes, Henhouses, and Commissions* symposium at the University of California, Irvine School of Law, for supplying food for thought, and to the participants in the Southern California Junior Faculty Workshop and the Junior Faculty Workshop at the University of Toronto School of Law. I would also like to thank Samuel Bray, Bruce Cain, Yasmin Dawood, Josh Douglas, Chris Elmendorf, Ned Foley, Heather Gerken, Rick Hasen, Ellen Katz, Jessica Levinson, Derek Muller, Nathaniel Persily, and Michael Waterstone for their helpful comments and suggestions, and Marty Koresawa, Allen Park, Renata Strause, and Carla Wirtschafter for exceptional research assistance. All errors, of course, are my own.

*Conversely, analysts have failed to appreciate the power of strong situational norms to combat the least justifiable partisanship. Contrary to conventional wisdom, officials seem to refrain from this form of partisanship far more often than they succumb to it, and norms may provide the explanation. Because these norms are socially constructed, the way we talk about partisanship matters. And we are likely getting the discussion very wrong, undermining exactly what we would hope to preserve.*

*This Article attempts to flesh out the distinctions that have been heretofore elided. It develops a typology of partisanship, and then engages that conceptual structure to assess the various tools by which forms of partisanship—including the most pernicious portions of the partisan structure—may be addressed.*

## TABLE OF CONTENTS

|  |      |
|--|------|
| INTRODUCTION .....   | 1790 |
| I. THE SPECTRUM OF PARTISANSHIP .....  | 1793 |
| A. <i>Different Manifestations of Partisanship</i> .....                                   | 1794 |
| 1. <i>Coincidental Partisanship</i> .....  | 1795 |
| 2. <i>Ideological Partisanship</i> .....   | 1796 |
| 3. <i>Responsive Partisanship</i> .....  | 1797 |
| 4. <i>Tribal Partisanship</i> .....  | 1798 |
| B. <i>Normative Distinctions Along the Spectrum</i> .....                                  | 1801 |
| C. <i>A Second Normative Axis</i> .....  | 1809 |
| II. THE SPECIAL ROLE OF PARTISANSHIP IN ELECTORAL  |      |
| RULES .....  | 1810 |
| III. CONFRONTING PARTISANSHIP .....  | 1819 |
| A. <i>Rules Regulating Effect</i> .....  | 1821 |
| B. <i>Structural Design</i> .....  | 1826 |
| C. <i>The Limits of Rules and Structure As Constraints on</i><br><i>Partisanship</i> ..... | 1829 |
| 1. <i>Judiciary</i> .....  | 1831 |
| 2. <i>Executive</i> .....  | 1832 |
| 3. <i>Legislature</i> .....  | 1836 |
| D. <i>Role Morality and Situational Norms</i> .....  | 1843 |
| E. <i>Maintaining Role Morality</i> .....  | 1853 |
| CONCLUSION .....   | 1864 |

## INTRODUCTION

We are repeatedly told, by scholars<sup>1</sup> as well as the popular press,<sup>2</sup> that we are living in an age of astonishing political partisanship by public officials. These descriptive assertions often arrive with normative critique and prescriptive responses. In response to the outcry, other scholars vigorously defend partisanship in public office.<sup>3</sup> And the Supreme Court, while generally offering neither defense nor critique, has also noted the extensive influence of political partisanship in public policy.<sup>4</sup>

The vast majority of these observations share a common flaw that distorts diagnosis, analysis, and (where appropriate) treatment. Discussions of political partisanship in public office too often misunderstand the object of their attention as a concept uniform in

---

1. Consider, from 2012 alone, Chad Flanders, *Election Law Behind a Veil of Ignorance*, 64 FLA. L. REV. 1369, 1379 (2012) (“[In] election law, ... partisanship is not only ubiquitous, but essentially ineliminable.”); Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 66 (2012) (“We live in an era of hyperpolarized, ugly partisanship.”); Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1394-95 (2012) (“In an era riven by partisanship, it is ... hard to quarrel with an approach that might weaken the grip of political parties.”); Saul Zipkin, *Administering Election Law*, 95 MARQ. L. REV. 641, 643 (2011-12) (“In recent years, commentators and judges have displayed heightened concern about political actors making decisions about the electoral process on partisan or incumbent-protecting bases.”); Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 550, 553 (2012) (book review) (“[F]ixing [Washington’s] broader problems likely will have to await a societal shift that alleviates the partisanship currently gripping national politics.”).

2. Consider, from 2012 alone, Evan Bayh, *Profiles in Partisanship*, CHI. TRIB., May 15, 2012, at 17, available at 2012 WLNR 10222945; Callum Borchers, *Jeb Bush Criticizes GOP Partisanship*, BOST. GLOBE, June 12, 2012, at 8, available at 2012 WLNR 12268930; Editorial, *Partisanship at Its Worst*, TAMPA BAY TIMES, Dec. 8, 2012, at 16A, available at 2012 WLNR 26267315; Editorial, *Rank Partisanship*, COURIER-J. (Louisville, Ky.), Jan. 24, 2012, at A6, available at 2012 WLNR 1653436; Editorial, *Supreme Court Tipping Scales of Partisanship*, PHILA. DAILY NEWS, May 29, 2012, [http://articles.philly.com/2012-05-30/news/31888660\\_1\\_insurance-mandate-justices-affordable-care-act](http://articles.philly.com/2012-05-30/news/31888660_1_insurance-mandate-justices-affordable-care-act); Editorial, *Toxic Politics: Poisonous Partisanship Claims More Moderates*, PITTSBURGH POST-GAZETTE, Aug. 21, 2012, at B6, available at 2012 WLNR 17681992.

3. See, e.g., WILLIAM F. CONNELLY, JR., JAMES MADISON RULES AMERICA: THE CONSTITUTIONAL ORIGINS OF CONGRESSIONAL PARTISANSHIP 2-6 (2010); NANCY L. ROSENBLUM, ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP (2008); Franita Tolson, *Benign Partisanship*, 88 NOTRE DAME L. REV. 395 (2012).

4. See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 203-04 (2008) (plurality opinion); *Vieth v. Jubelirer*, 541 U.S. 267, 285-86 (2004) (plurality opinion).

character. The labels “partisan” and “nonpartisan” are ubiquitous in the discourse but elide meaningful and under-recognized distinctions in the underlying character of the phenomenon to be addressed.

The repeated conflation of distinct forms of partisanship is not merely a semantic problem. Imagine the pragmatic difficulties confronting geologists with just one word for “rock” or physicians with just two words for “body stuff.” Or, even more apt, imagine a descriptively impoverished conception of light. To early civilizations, light appeared undifferentiated. One could conceive of more light or less light, but the only variable of interest was magnitude. We now understand that the light we observe has different components, some of which are valuable and some of which are harmful, in different combinations and to different degrees. That enlightened understanding is not merely of theoretical interest. It helps us recognize the utility of tools to replicate the aspects we favor and limit those that we do not, and establishes a foundation for building those tools. Understanding the spectrum of light creates the possibility of sunscreen and tanning booths, reflective blankets and microwave ovens.

So too with partisanship. Understanding the spectrum of partisanship similarly aids both theorists and practitioners of modern democracy. Without a robust conceptualization of partisanship, analysts misdiagnose. Reformers aim at mistaken targets. Observers evaluating reforms critique the innovations for failing to achieve results that they were not meant to achieve. We fail to accurately articulate and analyze what we perceive; that impoverished descriptive capacity leads directly to impoverished theoretical and remedial capacity. We do not recognize the problem we are attempting to solve or how to solve the problem we observe—if, indeed, what we observe is truly problematic at all. We may well be focused on solutions to effects that are not problematic, and we may be unwittingly undermining the central component of our most successful tool against the partisanship we rightly fear most. Perhaps public institutions are not nearly as “partisan” as we think—and perhaps we are unintentionally encouraging them to become more so.

Below, I attempt to articulate the distinctions that have been heretofore elided, rendering a deeper conceptualization of the modes of official political partisanship than has appeared thus far in the literature. The development of the spectrum of partisanship may help scholars theorize public action and its occasional pathologies, which are of particular consequence in the context of electoral regulation. It may also lead, down the road, to doctrinal clarification. For example, understanding the spectrum of partisanship provides new insight on the Supreme Court's unduly unrefined approach to partisanship in the redistricting arena.<sup>5</sup>

But this is not primarily a piece about judicial review. Beyond the judiciary, descriptive precision yields tangible payoff by allowing a thorough examination of extant policy models to confront partisanship, revealing the degree to which they may be suited to address some forms of partisanship but not others. In this vein, the prevailing thrust of recent work focuses on effect-based rules<sup>6</sup> and structural design.<sup>7</sup> Both are undeniably important. But commentators seem to have missed that their favored reforms may be neither necessary nor sufficient to address the most pernicious forms of partisanship. In particular, I point out that the most disfavored form of partisanship is—despite the hyperbole—far less prevalent than should be expected given current rules and structure. That is, the spectrum of partisanship shows that the world we live in is actually far less partisan than conventionally believed, when it comes to the form of partisanship that we care about most. And the reformers' most favored tools are not primarily responsible for this state of affairs.

Instead, I posit that situational norms and role morality are bearing most of the existing load. These norms are surprisingly powerful but also surprisingly fragile. Role morality is maintained by targeted social sanction for violating shared norms: that is, norms are maintained based on how and when we laud or criticize the public action we observe. Misdirected approval or critique erodes the strength of the norm.<sup>8</sup> Without a nuanced understanding of

---

5. See *infra* notes 83-93 and accompanying text.

6. See *infra* Part III.A.

7. See *infra* Part III.B.

8. See *infra* Part III.D.

partisanship, current discourse is often exceedingly poorly targeted, undermining one of the most effective weapons against undesirable partisan action. This Article attempts to correct that misstep.

The Article proceeds as follows. Part I brings some descriptive precision to bear on the spectrum of partisanship in public office, working through an introductory typology. These distinct forms of partisanship have different normative valences in different contexts: some partisanship is valued, and some is not. Part II turns briefly to partisanship in the creation of electoral rules, which exacerbate the impact of partisan behavior and thereby give rise to concerns of greater weight. Part III examines the prevailing means to address different forms of partisanship, noting the strengths and limitations of each. It then demonstrates that the best recognized tools cannot explain what we observe in the real world—and discusses situational norms, the underappreciated tools that can do so.

## I. THE SPECTRUM OF PARTISANSHIP

The literature reflecting upon political partisanship in public office is plentiful. It spans disciplines and methodologies, from the rigorously empirical to the resolutely philosophical to the emphatically pop.<sup>9</sup> Yet most of this work shares a common unrecognized flaw: an assessment of “partisanship” as if the concept were uniform.<sup>10</sup>

In this Article, I treat political partisanship in public office as a category of activity: a genus rather than a species. It comprises

---

9. See, e.g., *supra* notes 1-2.

10. One of the few exceptions is Professor Brian Tamanaha’s valuable recent exposition on the nature of judicial decision making. Brian Z. Tamanaha, *The Several Meanings of “Politics” in Judicial Politics Studies: Why “Ideological Influence” Is Not “Partisanship,”* 61 EMORY L.J. 759 (2012). Tamanaha articulates a slightly different vision of “ideology” and “politics” and “partisanship,” and the proper place of each, than that set forth in this paper. And even he conflates political partisanship (for example, favoring Democrats or Republicans) with undue favoritism on behalf of an ideology or cause. *E.g., id.* at 775 (“Partisanship is ... [when] judges decide cases with a conscious conservative or liberal agenda driving their legal analysis.”).

Other work recognizing differences among actions deemed “partisan” tends to succumb to tautology in explaining these distinctions. See, e.g., Michael J. Pitts, *Defining “Partisan” Law Enforcement*, 18 STAN. L. & POL’Y REV. 324, 340-42 (2007) (defining actions as impermissibly partisan when they are “illegitimate or largely illegitimate,” but refraining from defining when actions are “illegitimate”).

activity reliably favoring or appealing to adherents of one political party<sup>11</sup> over others or injuring adherents of one or more political parties more than others.<sup>12</sup> This may include activity reliably favoring or injuring individually identified political actors or party adherents as a class. The preceding participles are both ambiguous and intentional: “favoring” and “appealing” and “injuring” may refer to intent, or effect, or both. And this definition is also not exclusive. That which reliably and systematically favors Republicans over others, or that which is designed to do so, may be understood as partisan even if it also favors some Democrats or third party members to a lesser degree.

As should be clear from this discussion, political partisanship is distinct from polarization—though the terms are often improperly conflated. Political partisanship refers to the activity of public officeholders benefitting or harming adherents of particular political parties. Polarization refers to the degree to which adherents of particular political parties—whether public officials or private individuals—have contrasting or overlapping preferences. This paper concerns only the former, though the degree of polarization may well exacerbate some of the effects of political partisanship discussed below.

#### *A. Different Manifestations of Partisanship*

Partisan effect, in the main, is relatively straightforward to understand. It is a measure of differential policy output: one party’s supporters gain more than the supporters of a different party.

---

11. I include both members of the political party in question and those who, without formally becoming members, consistently vote as if they were members: independents or third-party members who consistently vote as Republicans or Democrats. *See generally* BRUCE E. KEITH ET AL., *THE MYTH OF THE INDEPENDENT VOTER* (1992); *see id.* at 4 (concluding that independents “are largely closet Democrats and Republicans”); Larry M. Bartels, *Partisanship and Voting Behavior, 1952-1996*, 44 *AM. J. POL. SCI.* 35, 36-37 (2000) (finding that though voters continue to self-identify as independents in greater numbers, the proportion of independents who do not favor one party is declining); Jon Cohen & Dan Balz, *Independents Are Key. So Who Are They?*, *WASH. POST*, Aug. 21, 2012, at A1, *available at* 2012 WLNR 17665707 (“Nearly two-thirds of Americans who describe themselves as independents act very much like partisan Republicans or partisan Democrats.”).

12. This definition acknowledges the possibility that bipartisan agreement among major parties and their proponents might well entail partisanship with respect to minor parties.

Partisan effect may be fleeting or enduring, large or small. And it may be assessed in various ways—for example, by evaluations of the relative impact of government action on types of candidates or on subgroups of voters known to prefer candidates of one party or another.

Partisan effect, particularly in the extreme, matters. But a study of partisanship is impoverished if it concerns only the partisan effect of public actions. Estimations of partisan effect do not reveal why that effect exists.<sup>13</sup> And if we seek to not only measure but influence partisan effect—to foster, limit, harness, or control it—we must also be concerned with the inputs to partisan decisions.

Just like partisan effect, partisan motivation is typically conceived as a single appraisable phenomenon. A decision may be thought of as strongly partisan, weakly partisan, or nonpartisan, but conventional wisdom conceives of the variation only in degree.

This conventional wisdom, I argue, is wrong. Partisan motivation is more accurately—and more usefully—represented by a spectrum than a single categorical box. I describe four distinct forms of partisan motivation, related but distinct.

### *1. Coincidental Partisanship*

On one end of the spectrum is action that produces partisan impact purely by happenstance. That is, the policies that policymakers favor for improving the commonweal happen also to favor voters of the same partisan stripe, but the relationship is pure coincidence. A public hospital may be placed in a neighborhood that happens to be marginally closer to Republicans, or notarization requirements may leave permitting procedures marginally more accessible to Democrats. Flip a coin, and it sometimes comes up Democratic and sometimes comes up Republican. This is partisanship observable

---

13. See, e.g., Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051, 1057 n.23 (2010) (reviewing research on judicial partisanship, including correlations between the party of the judge or the appointing president and the party favored by the judicial ruling in an election matter, and noting that these studies do not clarify whether the effect “has anything to do with the pursuit of partisan advantage or whether it instead reflects a party-correlated difference in judicial ideology”).

only in its effect, not in the process of its creation. We may call this coincidental partisanship.<sup>14</sup>

## 2. *Ideological Partisanship*

Some partisan impact will be “lightly” caused by partisan considerations. Here, there is more causal linkage than a coin flip. Officials with a partisan affiliation have chosen a party that reflects their preferred approach to public policy—or, more likely, the officials’ experience supporting a party has informed their approach to policy.<sup>15</sup> For example, a legislator who favors a smaller government role may join the Republican Party because that party has built a brand extolling smaller government. Or a legislator with a long history of support for the Republican Party may come to support smaller government based on the party’s ideological commitments. Either way, the official’s favored policies will reflect the broad preferences of party members more closely than they reflect the broad preferences of members of competing parties.<sup>16</sup> The relationship is neither coincidental nor drawn directly from consideration of the wishes of fellow partisans. It is instead driven

---

14. This notion echoes Robert Dixon’s idea of “innocent partisanship.” See ROBERT G. DIXON, JR., *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 534 (1968).

15. See, e.g., Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 374-76; Alan S. Gerber et al., *Party Affiliation, Partisanship, and Political Beliefs: A Field Experiment*, 104 AM. POL. SCI. REV. 720, 720-21 (2010).

16. I understand that individuals may sometimes prefer policies that appear to work to their immediate disfavor. See, e.g., HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 162-65, 204-05 (1967). This appearance may be illusory. That is, a policy may appear to work to an individual’s disfavor when it actually increases her welfare ... as long as the assessment of “welfare” includes, as it must, not only objective external determinants of well-being but also the individual’s subjective preferences and tastes. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 980, 982, 1334, 1350-54 (2001).

For purposes of this Article, when there is an apparent conflict between an individual’s expressed preference and an external assessment of her welfare, ideological partisanship follows expressed preferences as the relevant measure. If Democrats (but not Republicans) in a jurisdiction reliably prefer strict limits on campaign finance contributions, but would reliably be able to elect more Democratic candidates in that jurisdiction without strict limits, a policy implementing strict limits on campaign finance contributions would reflect ideological partisanship favoring that jurisdiction’s Democrats.

by the official's desire to effectuate her own policy preferences, some of which also reflect salient partisan cleavages. We may call this ideological partisanship.

### *3. Responsive Partisanship*

Much partisan impact will be more “heavily” caused by partisan considerations. In a world that recognizes value pluralism, policies will have competing legitimate claims to represent the substantive common good. Policymakers may choose some of these proposals over others (or choose to prioritize implementation of some over others) primarily because voters with a shared partisan affiliation prefer the policies in question to their alternatives. That is, a Republican legislator who is personally agnostic about the virtues of smaller government, but who understands smaller government to be a plausibly superior policy goal, may prefer smaller-government policies over other plausible contenders because Republican voters appear to prefer smaller-government policies. And a Democratic executive who is charged with enforcing all existing law but strapped by finite resources may devote comparatively more energy to enforcing or implementing laws preferred by Democratic voters than to enforcing or implementing those that are not. In contrast to the forms of partisanship above, this is conscious, volitional partisanship: choosing to act in a certain way consistent with a conception of the public good, but based primarily on the understood partisan preferences of an external population whom the official in question desires to please.<sup>17</sup> We may call this responsive partisanship.<sup>18</sup>

Responsive partisanship may be responsive to one or more of several different constituencies. A Democratic legislator, for example, may choose among several policies plausibly in the public

---

17. For any given representative, these will normally be policy preferences reflecting a plurality of the relevant jurisdiction—but need not be exclusively so. A Democratic official representing a jurisdiction that normally favors Republicans may decide to act on a policy with a plausible claim to the common good because the Democrats of the jurisdiction favor that policy. In so doing, she would be acting on responsive partisanship.

18. As with ideological partisanship, when there is an apparent conflict between a voter's expressed preference and an external assessment of her welfare, responsive partisanship follows expressed preferences as the relevant measure. *See supra* note 16.

interest by responding to the perceived wishes of Democratic voters in her district, or Democratic voters in her state, or Democratic voters countrywide (or a subset thereof). Or she may opt for the policy choices of Democratic party leadership, serving as proxies for these constituencies, in selecting among policies plausibly in the public interest.<sup>19</sup> Each would represent a form of responsive partisanship.<sup>20</sup>

#### 4. *Tribal Partisanship*

And some of the partisan impact observed in the world will be “venally” caused by partisan considerations.<sup>21</sup> Here, policymakers may favor public action purely because the policy in question is perceived to benefit those with a shared partisan affiliation, or because the policy in question is perceived to injure partisan opponents, wholly divorced from—or stronger yet, contrary to—the policymaker’s conception of the policy’s other merits. For example, a Republican official who believes that smaller government is in the immediate public interest may prefer to direct increased government spending to those perceived to be fellow Republicans or to exact increased taxation from those perceived to be “enemy” Democrats, solely because of their partisan affiliation. The exclusive focus is the intent to aid one’s own team or injure the other side. We may call this tribal partisanship.<sup>22</sup>

---

19. Cf. Richard H. Pildes & Elizabeth Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2179-80 (1990) (listing various constituencies to whom representatives may respond).

20. The key to responsive partisanship is that the public actor, while responding to the wishes of an aligned partisan constituency, independently considers whether the policy choice in question is plausibly in the public interest. Blindly following the perceived wishes of a partisan constituency without even cursory regard to the substantive merits is an example of tribal partisanship, explained in further detail below.

21. These are, to be sure, not the only motivations for public action. I focus here on motives that reflect only what might be understood as partisan considerations.

22. If officials undertake action plausibly supported by their conception (or conceptions) of the common good, it may represent coincidental, ideological, or responsive partisanship—but, by definition, it will not exemplify tribal partisanship. Tribal partisanship is necessarily divorced from or contrary to the substantive merit of a given public act: it is concerned only with achieving partisan effect. This distinction between tribal partisanship and other forms of partisanship echoes Professor Kathryn Watts’s distinction between legitimate and illegitimate political influences in administrative agency decision making.

There are more or less specific versions of this tribal partisanship. Officials may seek to benefit—or injure—broad classes of partisan constituents, affiliated policy-making colleagues, or particular named individuals. A Democratic prosecutor who declined to prosecute a Democrat or chose to prosecute a Republican, because of that individual’s partisan affiliation, would be engaging in tribal partisanship.<sup>23</sup>

I wish to distinguish the spectrum described above, which is designed to be helpful in understanding the motivation for public action, from one common use of the term “partisan” in evaluating public officials: the term used purely as a description of personal affiliation. Commentators may speak of Republican legislators, Democratic judges, or Independent administrators, and mean many different things by the adjective. For example, a judge may be labeled as “Democratic” because she prefers (or once preferred) to vote for Democratic candidates, or because she is (or was) registered as a Democrat, or because she won judicial (or prior) office running as a Democrat in an election, or because she was appointed to the bench by a Democratic official. All of these features may (or may not) be correlated with a judge’s ruling in a particular case,<sup>24</sup> but they shed little incremental light on how or why the affiliation may impact the result, or whether we should be concerned by the connection.

---

Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 9, 53-57 (2009), or Professor Sandy Levinson’s distinction between “low” politics and “high” politics in judicial decision making, Sanford Levinson, *Return of Legal Realism*, NATION, Jan. 8, 2001, at 8, available at 2001 WLNR 12077334. Tribal partisanship also seems to be one form—indeed, perhaps the principal disfavored form—of “naked preference” described by Professor Cass Sunstein. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1690 (1984).

23. It is possible that officials will not always be aware of the reasons for their action. Much as actions may be undertaken solely because of race due to unconscious bias, see Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 952-58 (2006); cf. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004) (finding substantial racial discrimination, perhaps unconscious, in the employment market), it is possible that actions may be undertaken solely because of tribal partisanship due to unconscious bias.

24. See generally CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? (2006) (empirically exploring the ways in which the party affiliation of the President appointing a federal judge may be correlated with his appointee’s judicial decisions).

Put differently: officials with a personal partisan affiliation, or who are chosen in a partisan election or by someone chosen in a partisan election, may or may not act in ways reflecting different forms of partisanship, which may themselves be desirable or undesirable. And officials without a personal partisan affiliation, or who are chosen in a manner divorced from a partisan election process, may act in ways reflecting a form of partisanship, which (again) may be desirable or undesirable. If we aspire to useful analysis and potential modification of public *activity*, “partisan” as a description of personal affiliation—rather than the outcome of or motivation for public action—is not up to the task.

In scholarship no less than popular commentary, the different forms of partisanship above are repeatedly and carelessly conflated. This, in turn, leaves commentators talking entirely past each other. *Bush v. Gore* provides an infamous example.<sup>25</sup> At the time of the Supreme Court’s decision on December 12, 2000, the existing ballot count in the presidential election favored Republican candidate George W. Bush over Democratic candidate Al Gore in the electorally decisive state of Florida, by the most slender of margins.<sup>26</sup> The Court’s five-to-four decision, with the more conservative Justices in the majority and the more liberal Justices dissenting, stopped a recount sought by Gore and set in motion by a Florida Supreme Court<sup>27</sup> appointed entirely by Democratic governors.<sup>28</sup> The decision effectively ensured that Bush would become President. *Bush v. Gore* was a decision with unquestioned partisan effects, and every consequential actor involved had a readily observable link to a political party.<sup>29</sup> But describing it as a “partisan” decision is just as

---

25. 531 U.S. 98 (2000) (per curiam).

26. For a discussion of the changes in Bush’s margin of victory preceding the Court’s decision in *Bush v. Gore*, see Martin H. Belsky, *Bush v. Gore—A Critique of Critiques*, 37 TULSA L. REV. 45, 48 & n.29 (2001).

27. *Bush*, 531 U.S. at 102-03, 111.

28. Richard A. Oppel Jr., *In Florida’s State Government, Court Is a Democratic Enclave*, N.Y. TIMES, Nov. 17, 2000, at A27, available at 2000 WLNR 3265455.

29. Some of the “readily observable” links may be less straightforward than they appear. For example, it is common to refer to the partisan affiliation of a judge by referring to the partisan affiliation of the nominating President. But of the nine Justices who decided *Bush v. Gore*, none were selected through channels of unilateral partisan control. All five of the Justices in the majority were nominated by Republican Presidents—but Democratic Senates confirmed Justices Kennedy and Thomas, and though Republican Senates confirmed Chief Justice Rehnquist, Justice Scalia, and Justice O’Connor, none of those confirming Senates had

inadequate an assessment as describing it as a case about elections or as a case decided in December. The lack of further descriptive rigor obscures meaningful discussion about the merits of the decision and the decision-making process.<sup>30</sup> Some believe that the partisanship was coincidental,<sup>31</sup> some ideological,<sup>32</sup> and some tribal.<sup>33</sup> The differences matter to our understanding of the doctrine, its normative underpinnings, and its precedential value—and hence, our understanding of the law going forward.

### *B. Normative Distinctions Along the Spectrum*

By articulating the various distinct phenomena often conflated in a uniform conception of partisanship, I do not mean to suggest that all are bad, much less equally bad. In popular parlance, “partisanship” often suggests a strongly negative connotation. But recognizing

---

a Republican majority voting bloc sufficient for cloture. Two of the dissenting Justices, Justices Stevens and Souter, were nominated by Republican Presidents but confirmed by Democratic Senates (Democrats controlled sixty-one seats for Justice Stevens’ confirmation, nine months after cloture had been reduced to a sixty-vote threshold). The other two dissenting Justices, Justices Ginsburg and Breyer, were nominated by Democratic Presidents, and though they were both confirmed by Democratic Senates, neither had a Democratic majority voting bloc sufficient for cloture. See RICHARD S. BETH & VALERIE HEITSHUSEN, CONG. RESEARCH SERV., RL30360, *FILIBUSTERS AND CLOTURE IN THE SENATE* 8-9 (2013); *Party Divisions in the Senate, 1789-Present*, U.S. SENATE, [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm) (last visited Feb. 28, 2014) (listing the composition of the Senate by party); *Supreme Court Nominations, 1789-Present*, U.S. SENATE, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited Feb. 28, 2014) (displaying the nomination and confirmation dates of all Supreme Court Justices).

30. Cf. Flanders, *supra* note 1, at 1371 (“It became hard to separate the criticism that the decision was wrong from the criticism that the decision was partisan....”).

31. See, e.g., Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219 (2002); Douglas W. Kmiec, *The Court’s Decision Is Law, Not Politics*, L.A. TIMES, Dec. 14, 2000, available at 2000 WLNR 8338898.

32. See, e.g., Richard A. Posner, *Realism About Judges*, 105 NW. U. L. REV. 577, 583-84 (2011).

33. See, e.g., ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000*, at 4 (2001); Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408-09, 1442-43 (2001) (distinguishing “between the ‘high’ politics of political principle and the ‘low’ politics of partisan advantage,” and speculating that the Court was guided by the latter); Law Professors for the Rule of Law, *554 Law Professors Say: By Stopping the Vote Count in Florida, the U.S. Supreme Court Used Its Power to Act as Political Partisans, Not Judges of a Court of Law*, N.Y. TIMES, Jan. 13, 2001, at A7 (advertisement). But see Erwin Chemerinsky, *How Should We Think About Bush v. Gore*, 34 LOY. U. CHI. L.J. 1, 5-7 (2002) (articulating, and perhaps rejecting, this view).

partisanship as a set of distinct phenomena helps explain why partisanship is encouraged, tolerated, or denigrated to different degrees in different contexts. There is a distinct, often disputed, normative valence that attaches to different manifestations of partisanship, often depending on the scenarios in which they arise.<sup>34</sup>

As discussed in more detail below, coincidental partisanship is largely tolerated, in part because it is inevitable.<sup>35</sup> Partisan effects are natural consequences of public policy. If it is possible to conceive, in theory, of a policy that affects those who favor Democrats to exactly the same degree as those who favor Republicans, Greens, Conservatives, and Libertarians, surely such instances must be vanishingly rare in the real world. Though it may rarely be sought, coincidental partisanship therefore seems to be actively disfavored only when the magnitude of the partisan effects are excessive.<sup>36</sup>

Ideological partisanship is, in contrast, an affirmative goal of most partisan elected positions, and therefore beneficial in those positions, when present to a moderate degree. Partisan elections exist, *inter alia*, in order to help voters roughly assess comparative distinctions in policy and ideological preferences.<sup>37</sup> If there were truly no ideological distinctions among Democratic, Republican, and third-party candidates—or if those distinctions were not correlated with the preferences of voters generally preferring those parties—there would be little utility in choosing officials via a partisan election.<sup>38</sup>

Similarly, though less firmly, ideological partisanship is baked into the design of public positions appointed by officials who are

---

34. See, e.g., Heather K. Gerken & Michael S. Kang, *Déjà Vu All Over Again: Courts, Corporate Law, and Election Law*, 126 HARV. L. REV. F. 86, 89 (2013).

35. See *infra* Part III.A.

36. See *infra* Part III.A.

37. See Ethan J. Leib & Christopher S. Elmendorf, *Why Party Democrats Need Popular Democracy and Popular Democrats Need Parties*, 100 CALIF. L. REV. 69, 83-87 (2012). Of course, in any given election, the partisan cue may be more or less useful in this respect.

38. Charles Krauthammer, *Partisanship Isn't Divisive*, VIRGINIAN-PILOT (Norfolk, Va.), Oct. 30, 2010, at B7, available at 2012 WLNR 21721057; see also Elmendorf & Schleicher, *supra* note 15, at 393-408 (noting accountability difficulties when the policy-related differences between local candidates do not track party affiliation).

Crucially, I do not claim that ideologically partisan actions by officials selected in partisan fashion are inherently correct or proper. I claim only that if they are wrong, they are wrong for reasons other than the simple fact of ideological correlation with party.

chosen through partisan election. Among equally qualified candidates for an appointed position, there must be some basis for choosing some and not others. It should not be surprising that, in the aggregate, a Justice (or cabinet Secretary, or General) appointed by a Democratic President will have a baseline judicial (administrative, military) orientation more aligned with the preferences of Democratic voters than a Justice appointed by a Republican President.<sup>39</sup>

Responsive partisanship has a more mixed normative pedigree. In some positions—like the appointed judiciary—direct responsiveness to a partisan electorate is roundly disapproved. There are ongoing discussions, certainly, about the degree to which institutions like the Supreme Court are, or should be, responsive to the American public generally,<sup>40</sup> but the notion that the Justices would tailor legal doctrine specifically to the preferences of an affiliated partisan public is wholly foreign. We do not believe that Justices appointed by Republicans should decide legal cases, or even that they should exercise docket control by deciding which legal cases to hear, by assessing what Republican voters prefer.

With respect to other public positions—like elected legislators—opinions are split. Some believe that direct responsiveness to a partisan electorate is the primary beneficial engine of social policy, and that when resource-constrained officials select among plausible

---

39. See Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 159 (2012). As the Court explained in *Republican Party of Minnesota v. White*:

“Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers.” Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. “Proof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.”

536 U.S. 765, 777-78 (2002) (quoting *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (memorandum opinion)).

40. See, e.g., Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003); Lain, *supra* note 39, at 157-67; Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1033 (2004); Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 104-05.

options in the public interest, they ought to select the generalized policy most likely to gain the approval of aligned partisan voters.<sup>41</sup> As a corollary, this necessarily entails less responsiveness to constituents with opposing partisan preferences. Others favor a more detached trusteeship model of representation, with officials owing more than mere responsiveness to the affiliated portion of the represented population.<sup>42</sup> The debate is both longstanding and unresolved.<sup>43</sup>

Finally, tribal partisanship is generally denigrated, even with respect to officials who might be expected to engage in responsive partisanship. This general assertion depends somewhat on the perceived role of the official. Consider legislators elected in partisan contests. Tribal partisanship seems to be widely tolerated in the legislator's role as an employer: despite a broader shift from patronage to performance standards in the executive,<sup>44</sup> legislative

---

41. See, e.g., Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 122-23 (discussing, without adopting, the "purely populist variant of procedural democracy"); cf. PITKIN, *supra* note 16, at 222, 227 (recognizing the notion of representation as fealty to partisan constituencies); Lawrence Lessig, *Democracy After Citizens United*, BOS. REV., Sept. 4, 2010, <http://www.bostonreview.net/lessig-democracy-after-citizens-united> ("[F]avoring the policies that one's constituents favor is the essence of representative democracy (on at least one dominant conception of it).").

42. See, e.g., THE FEDERALIST NO. 57, at 318 (James Madison) (Clinton Rossiter ed., 1961); Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), in 2 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 89, 95-97 (John C. Nimmo ed., 1887); Memorandum from Clark Clifford to Harry S. Truman 29 (Nov. 19, 1947), available at [http://trumanlibrary.org/whistlestop/study\\_collections/1948campaign/large/docs/documents/pdfs/1-1.pdf](http://trumanlibrary.org/whistlestop/study_collections/1948campaign/large/docs/documents/pdfs/1-1.pdf) ("The people are inconsistent and capricious but there is no argument that they feel deeply on this —: [The President] must be President of *all* the people and not merely the leader of a party...."); Jay Carney, White House Press Sec'y, Press Briefing (Sept. 18, 2012, 11:33 AM), available at <http://www.whitehouse.gov/the-press-office/2012/09/18/press-briefing-press-secretary-jay-carney-9182012> ("When you're President of the United States you are President of all the people, not just the people who voted for you."); see also 1994 CONST. art. 42 (Belg.) ("The members of the two Houses represent the Nation, and not only those who elected them."); cf. George Washington, Farewell Address (Sept. 17, 1796), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 213, 218-19 (James D. Richardson ed., 1896) (warning against the "baneful effects of the spirit of party generally").

43. Even within the trusteeship model, there remain thorny questions about the geographic scope of the constituency to which a representative owes fealty. See Ethan J. Leib et al., *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91, 94-96 (2013). This Article makes no attempt to "resolve" this debate; indeed, it is not clear that resolution is possible.

44. See *Branti v. Finkel*, 445 U.S. 507, 518 (1980) (finding unconstitutional the firing of executive employees based on their partisan preference, unless "party affiliation is an

hiring has to some extent gone in the other direction.<sup>45</sup> It is now unremarkable for a legislator to hire members of her own party as staff, simply because the applicants belong to the same party.<sup>46</sup> Truly tribal partisanship is less well received in the representative's role as a legislator. General legislation is supposed to bear at least some passing connection to the public interest.<sup>47</sup> A tax break issued to all registered Republicans, solely *because* they are registered Republicans, seems not only legislatively unlikely but normatively beyond the pale. And tribal partisanship seems less tolerable still in the representative's role performing constituent service as an ombudsman. Even those who champion the right of Democratic legislators to legislate with the intent to favor Democrats and disfavor Republicans, regardless of plausible public interest, would likely balk at a Democratic representative refusing to respond to a request for administrative assistance by a Republican constituent.<sup>48</sup>

It is a bit challenging to articulate precisely why tribal partisanship should be denigrated in official action by persons known to

---

appropriate requirement for the effective performance of the public office involved”).

45. See George K. Yin, *Legislative Gridlock and Nonpartisan Staff*, 88 NOTRE DAME L. REV. 2287, 2290-92 (2013) (describing congressional committee staff hiring practices over time).

46. It is possible, of course, that such hires do not represent tribal partisanship, but instead represent a legislator's desire for staff who share ideological commitments and will therefore work toward policy goals that the legislator prefers. In this context, party membership may be a heuristic for personal loyalty and ideological fit that helps to reduce principal-agent friction between a legislator and her staff. It is also possible that the motivation for the hires is tribal partisanship, plain and simple: providing a benefit to those with the same partisan affiliation solely because of “team” membership.

47. See THE FEDERALIST NO. 10, *supra* note 42, at 47 (James Madison).

48. The assessment of normative valence is not an assertion that legislators actually forego tribal partisanship in constituent service. See, e.g., Daniel M. Butler & David E. Broockman, *Do Politicians Racially Discriminate Against Constituents? A Field Experiment on State Legislators*, 55 AM. J. POL. SCI. 463, 469, 472 (2011) (finding, in an experiment based on legislators' responses to constituents' email requests for help registering to vote, that “[l]egislators are more responsive to requests from individuals of their own party,” albeit without testing whether legislators consciously sought to respond to co-partisans differently). That said, even if representatives *do* respond differently to co-partisans, they rarely justify such behavior as legitimate. See, e.g., Paul Demko, *Minnesota Senate Panel Dismisses Newman Ethics Complaint*, ST. PAUL LEGAL LEDGER, Feb. 10, 2011, available at 2011 WLNR 27971055 (describing an email from a state Senator's office declaring that the Senator “will not see any organizations that donated to/supported his opponent,” and noting that the Senator disclaimed responsibility for sending the email and claimed that it did not actually reflect his policy).

have partisan loyalties and recognized—indeed, expected—to act in their own self-interest. The best answer may be that, unique among the forms of partisanship, tribal partisanship is the attempt by public officials to favor or disfavor particular colleagues, competitors, or constituents not because of any plausible conception of immediate public welfare, but because of the political beliefs that those individuals express. Such acts offend the basic principle of freedom of conscience and the basic tenets of civic republicanism.<sup>49</sup> But they also violate the principles inherent in equal protection that government should treat individuals differently only when a legally relevant distinction forms the basis for such different treatment<sup>50</sup>—and differences in beliefs and the lawful expression of those beliefs, protected by the First Amendment, do not amount to distinctions that individuals acting in the public trust may properly treat differently.<sup>51</sup>

There are, to be sure, defenses of tribal partisanship with some surface appeal. Cynics may defend tribally partisan action as a response to perceived tribal partisanship by opponents: a useful weapon in a tit-for-tat exchange. And if the frame is expanded sufficiently, immediate acts of tribal partisanship aimed purely at benefitting one's own supporters (or one's own lot), or at weakening the voter base or candidacy of a partisan opponent, may be seen as effective means to better achieve the legitimate policy goals of like-minded constituents down the road.<sup>52</sup> But this sort of gross utilitarian

---

49. See Sunstein, *supra* note 22, at 1690-92. A related strain of political philosophy holds that without resort to brute force, political majorities are able to inspire the allegiance of political minorities only to the extent that the minorities perceive themselves to belong to the same political community. See, e.g., ROSENBLUM, *supra* note 3, at 51. Tribal partisanship—acts taken without regard to a plausible notion of the good of the shared community, and based solely on “in-group” and “out-group” team identity—will tend to erode that shared community, thereby eroding the consent of political minorities to submit to majority dominance without brute force.

50. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

51. See *Brass v. State*, 291 P.3d 145, 150 (Nev. 2012) (Gibbons, J., concurring) (concluding that political affiliation is not a legitimate reason to challenge a juror).

52. This may be, for example, the most charitable light in which to construe Senate Majority Leader Mitch McConnell's 2010 statement articulating a vision for his Republican party colleagues: “The single most important thing we want to achieve is for President Obama to be a one-term president.” Major Garrett, *After the Wave: Mitch McConnell Wants to Learn from History, but His New Recruits Will Not Be Easily Led*, NAT'L J., Oct. 23, 2010, at 60, 61; see also Jonathan Zasloff, *Courts in the Age of Dysfunction*, 121 YALE L.J. ONLINE 479, 484

calculus amounts to a scorched-earth politics wherein contested long-term ends justify means that all actors understand to be either irrelevant or contrary to more immediate public interest. The logic also tends to foster a dangerous collapse in which legitimate long-term ends vanish entirely. The premise that it is acceptable for public actors to pursue intermediate ends purely beneficial to one's own party, because one's party supports policies that benefit constituents, leads quickly to the notion that it is acceptable to pursue pure benefit to one's own party as an end in itself. There is good reason to disfavor such an approach as the default mode of executing the responsibilities of public office.

The distinct normative valences of points along the partisanship spectrum makes clear that motive matters in evaluating an accusation of "partisanship."<sup>53</sup> Consider a policy pursued with no reference to party that just happens to burden Republicans more than Democrats. Such a policy will (and should) be evaluated differently from one with the same impact but pursued because of an ideological commitment correlated with Democratic preferences, or because of a conscious attempt to choose from among plausible public goods by responding to Democratic voters or their proxies, or because of a conscious attempt to aid Democrats and hurt Republicans no matter what the other benefits or detriments of the policy in question. Little wonder that officials object to assertions that they have engaged in partisanship,<sup>54</sup> as if all such activity were equally subject to scorn.

There are undoubtedly points along the spectrum, as one mode of partisanship phases into another, where difficult definitional lines

---

(2012) ("It is unprecedented for a party to consistently reject its own ideas in the hopes of preventing another party's President from advancing his legislative agenda. But such behavior is not petty partisanship: it is *grand* partisanship."). McConnell's statement necessarily implies that actions to undermine President Obama would take priority over policies to improve the welfare of Republican voters in the short term; otherwise, making Obama a one-term president would not be the "single most important thing" to achieve.

53. See, e.g., OLIVER WENDELL HOLMES, *THE COMMON LAW* 7 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881) ("Even a dog distinguishes between being stumbled over and being kicked.")

54. Cf. Adam Liptak, *Politicians in Robes? Not Exactly, but ...*, N.Y. TIMES, Nov. 27, 2012, at A17, available at 2012 WLNR 25180165 (noting that "[m]any [federal] judges hate it when news reports note" the partisan affiliation of the President who nominated them).

in tricky contexts raise difficult normative questions.<sup>55</sup> But the existence of fuzzy boundaries on the spectrum of partisanship, and contested normative approaches to particular tricky circumstances, does not mean that assessing the normative valence of the partisanship of every act will be fuzzy or tricky.

Return to *Bush v. Gore*. If coincidental partisanship—the price of most any action—best explains the partisan effect of the decision, then whatever the concern with the doctrinal merits of the case, it seems out of place to highlight judicial partisanship as the proper subject for attack. Similarly, if the Justices were motivated by ideological considerations generally affiliated with one party or another,<sup>56</sup> we might reflect on the normative desirability of allowing elected partisan political actors to nominate and confirm Justices more generally. But normative critique likely would not then focus on undue partisanship as the driving force behind this decision as distinct from others.<sup>57</sup> If, instead, the Justices in the majority were

---

55. Indeed, in any particular situation, it may be immensely difficult for external observers to discern which of several forms of partisanship is operating, or whether certain forms of partisanship are operating in tandem. These questions may be particularly difficult for courts to parse given the evidentiary tools available. In this Article, I delineate the spectrum, but I do not attempt to operationalize it in the context of judicial review.

56. It would be easy—and unfortunate—to reduce these considerations to one-note caricatures. Some commentators noted that the five Justices in the majority, nominated by Republican Presidents, overrode the Florida Supreme Court; they further noted that the protection of state sovereignty is often associated with the Republican party. Juxtaposing the two facts, these commentators concluded that the Court could not have been acting with ideological consistency. See Levinson, *supra* note 22 (articulating this view). But the Court's reversal of a state actor was not the only relevant explanatory factor in the case. For example, the state judiciary had allegedly departed from the instructions of the state legislature in a manner establishing a purported conflict with federal constitutional text, and it had done so in order to give dispositive federal weight to an ad hoc and chaotic recount process uncertain to yield a more accurate result than the status quo. See *Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam); *id.* at 113-14, 116-20 (Rehnquist, C.J., concurring). The extent to which any of these factors actually motivated the Court, and the extent to which any of these factors are aligned with more traditional Republican concerns, is not clear.

My intent above is neither to defend nor to critique the Court's decision or the process producing that decision. Instead, I mean to question a supposition of ideological inconsistency premised upon only one factor in the case and suggest that a more robust assessment is necessary to support or refute a plausible assertion of ideological partisanship.

57. In order to justify critique of *Bush v. Gore* as an illegitimate example of ideological partisanship (if, indeed, the decision was actually motivated by ideological partisanship), it is necessary to articulate why Justices chosen by officials selected in partisan elections should be expected to be free from ideological partisanship in cases like *Bush v. Gore* but not in other decisions.

motivated by the opportunity to benefit particular Republican voters, or simply to punish a Democratic enemy and reward a Republican friend, the cries of partisanship would be backed by more legitimately righteous anger, and attention would rightly focus on preventing a recurrence of similar forms of partisanship in other cases. Analytical rigor helps parse what kind of partisanship is operating—and, thus, whether “partisanship” is actually the problem.

### *C. A Second Normative Axis*

The discussion above attempts to review the normative valence of certain forms of partisanship. Coincidental partisanship is generally tolerated; ideological partisanship—at least in positions elected in partisan contests or appointed by those elected in partisan contests—should always be expected and is often preferred; responsive partisanship is disfavored in some public offices and vigorously contested in others; and tribal partisanship is generally denigrated.

But this rough breakdown should not imply that all partisanship within a generally beneficial category is benign.<sup>58</sup> Motive matters, but magnitude matters as well. In the electromagnetic spectrum, visible light can illuminate but also blind. So too with partisanship.

As an example, consider ideological partisanship. A moderate degree of ideological partisanship, particularly by officials elected through partisan contests, can help an electorate make coherent decisions about which candidates they prefer to others. When officials conceive of the public weal in ways roughly correlated with partisan preferences, that ideological partisanship gives voters a ready heuristic at the ballot box.<sup>59</sup> But too much devotion to ideology can be dysfunctional. Ideological commitments become inflexible dogmatic mandates at the extremes, crowding out logical and moral reasoning, and even (perhaps especially) assessment of fact,<sup>60</sup> let

---

58. And, of course, actions based on beneficial or normatively neutral forms of partisanship may be detrimental for reasons having nothing to do with the partisan impetus for the action. Beneficial forms of partisanship do not provide absolution for other substantive or procedural harms.

59. See Elmendorf & Schleicher, *supra* note 15.

60. See generally Larry M. Bartels, *Beyond the Running Tally: Partisan Bias in Political*

alone the capacity to understand and appreciate the merits of contrary views. This is no less true when officials' sincerely held ideological commitments mirror (or are created by) partisan divisions as when they are not. To the extent that we prefer public action to be premised on productive deliberation, empirical fact, empathy, and logic, extremes of ideological partisanship are to be avoided.<sup>61</sup>

The point is that there are two axes of normative valence: category and magnitude. Some forms of partisanship—like ideological partisanship—may be beneficial in some roles, but they are beneficial only in moderation and undesirable in the extreme. Some forms of partisanship—like tribal partisanship—are undesirable no matter how modest or intense their manifestation. Either an undesirable form of partisanship or an undesirable extent of partisanship may be sufficient for condemnation on its own.

## II. THE SPECIAL ROLE OF PARTISANSHIP IN ELECTORAL RULES

The discussion above pertains to partisanship in any substantive policy area. But one particular policy arena provokes partisanship concerns of qualitatively distinct salience: the regulation of the political process. Policies governing the rules of democratic participation—the infrastructure of democracy—amplify both the motivations for and the effects of partisanship.

In other substantive arenas, policymakers are tangibly affected by their policy decisions, but they are affected largely as other similarly situated citizens are affected.<sup>62</sup> Officials, for example, generally have to suffer the same income tax increases as every other citizen in their income bracket. On occasion, individual policy

---

*Perceptions*, 24 POL. BEHAV. 117, 133-38 (2002) (discussing motivated cognition in the context of partisan affiliation); Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 7-8, 19-24 (2011) (discussing motivated cognition more generally); Ross Douthat, Op-Ed, *The Partisan Mind*, N.Y. TIMES, Nov. 29, 2010, at A25, available at 2010 WLNR 23689122 (same).

61. See, e.g., Yasmin Dawood, *Democracy and the Problem of the Partisan State*, in NOMOS LIV: LOYALTY 257, 266 (Sanford Levinson et al. eds., 2013) (discussing the problems of partisan extremism).

62. See PITKIN, *supra* note 16, at 201 (“[E]ach representative has to live as a subject under the laws he has made.”).

decisions may become sufficiently salient to cost the official his or her job. But such moments of political accountability for particularized policy decisions are vanishingly rare.<sup>63</sup> Outside of electoral regulation, it is unusual for policymakers to bear the primary or exclusive impact, beneficial or otherwise, of the policy in question.<sup>64</sup>

This is not so for the rules of the election process. These regulations—redistricting, (more indirectly) election administration procedures, and (more indirectly still) campaign finance policy—have greater impact on elected officials than on most other constituents. The rules of the election process can meaningfully affect an elected official's ability to stay in office and her ability to become, or remain, a member of a controlling faction with increasing clout. For policymakers, the stakes for these rules are deep and personal to an extent qualitatively distinct from policy decisions in other areas.<sup>65</sup>

As a result, elected officials are more likely to feel keen pressure to promote their own immediate interests and those of their friends, and to target perceived enemies, by modifying these regulations or applying them for immediate tribal partisan gain.<sup>66</sup> Appointed officials are likely to feel similar pressures to help those elected political colleagues who appointed them to past office or are likely to appoint them to future office, and to curry favor with those colleagues by hampering their opponents.

---

63. Some see the significant Republican victories in the 2010 midterm elections as such a moment. Under this view, the voters exacted political retribution for Democratic support for the Affordable Care Act. See, e.g., Robert E. Moffit, *Expanding Choice Through Defined Contributions: Overcoming a Non-Participatory Health Care Economy*, 40 J.L. MED. & ETHICS 558, 558 (2012) ("Since its enactment, popular opposition to the Affordable Care Act has hardened, and was a significant factor in the 2010 congressional election...."). The extent to which any given piece of legislation is the cause of a political backlash is exceedingly difficult to assess with any empirical rigor.

64. Regulation of institutional prerequisites like legislator health care may be among the unusual exceptions.

65. See Justin Levitt, *Weighing the Potential of Citizen Redistricting*, 44 LOY. L.A. L. REV. 513, 520-21 (2011); Dennis F. Thompson, *Election Time: Normative Implications of Temporal Properties of the Electoral Process in the United States*, 98 AM. POL. SCI. REV. 51, 54 (2004) (noting Madison's sharp distinction between ordinary legislation and electoral regulation, and highlighting his observation that representatives "have a personal interest distinct from that of their constituents" in the latter).

66. See Levitt, *supra* note 65, at 520-22; Daniel P. Tokaji, *Lowenstein Contra Lowenstein: Conflicts of Interest in Election Administration*, 9 ELECTION L.J. 421, 422, 431-32 (2010).

Moreover, not only is tribal partisanship more enticing in this realm, but it exacts a special harm. Although coincidental partisanship, ideological partisanship, and responsive partisanship can all yield partisan effects, tribal partisanship is more likely to do so—and in more extreme fashion—because partisan impact is its sole objective. Benefit to fellow adherents and/or injury to others is the whole point.

And partisan effects in the electoral realm are particularly pernicious. Vigorous partisanship in tax policy may not be subject to the pluralist diffusion contemplated by the Framers in an era without a national partisan duopoly,<sup>67</sup> but it will at least be subject to cyclical rotation. That which is given in some years may be taken away in a subsequent political cycle or political age, as control shifts among the parties. The prospect for eventual retribution may dull the tribal partisan instinct in most substantive areas, serving as something of a deterrent as partisanship approaches an extreme. Tax structures designed solely to favor Republicans and disfavor Democrats, for example, may provoke responsive tax structures designed solely to disfavor Republicans and favor Democrats—and that possibility should deter the opening tribally partisan salvo.<sup>68</sup>

But as scholars have long recognized, partisanship in the rules of democratic participation<sup>69</sup> can make it systematically more difficult for out-parties to reclaim control.<sup>70</sup> That is, a sufficiently large

---

67. See THE FEDERALIST NO. 10, *supra* note 42, at 51-52 (James Madison); THE FEDERALIST NO. 51, *supra* note 42 at 289-92 (James Madison).

68. The cyclical nature of nonelectoral policy may deter tribally partisan action, and it may mitigate the impact of tribally partisan action when it does occur (though those who are injured today may not be exactly the same individuals who gain in a future cycle). But it is important to emphasize that the potential for cyclical retribution does not justify conduct that is indefensible on its own merits.

69. This is at least true for partisan effects that are not only favored by one party but that also promote that party's electoral success. See *supra* note 16.

70. See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103, 120-21 (1980); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 595-96 (2002); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646-48, 709, 712 (1998); cf. THE FEDERALIST NO. 60, *supra* note 42, at 335-37 (Alexander Hamilton) (recognizing the possibility of legislators' collusion over their own prospects of re-election, and placing faith in the different structure of House and Senate and in the diversity of partisan interests—in an era before the Seventeenth Amendment and consolidation of two major parties—to blunt this danger); Gerken & Kang, *supra* note 34, at 87 (noting that “for the last two decades the field [of election law] has devoted itself” to addressing the principal-agent problem of elected

partisan impact in electoral rules can blunt the very cyclical wave that, in other arenas, helps to deter extreme partisanship. A change to the tax system today that transparently and massively injures Republicans may well be met by a future change to the tax system that transparently and massively injures Democrats; a change to the electoral system today that transparently and massively injures Republicans may well maintain Democratic control.

The concern above is familiar to scholars of democratic theory. But there exists a further objection to tribal partisanship in the electoral realm that is less frequently recognized. In generalized policy, extreme partisanship is subject to political feedback even apart from the normal political cycle. Extreme partisanship in, for example, tax policy, may not only exact retribution in a future political period, but may also help *further* a political shift to the out-party. Despite stark divisions in personal partisan affiliation and policy preferences, many Americans favor the idea of compromise<sup>71</sup> and tend to dislike displays of excessive partisanship, even when the displays are purely symbolic.<sup>72</sup> There is at least the theoretical possibility that unadulterated and unrestrained responsive or tribal partisanship will translate to displeasure expressed at the polls, even by co-partisans. That is, the possibility exists that extreme responsive or tribal partisanship generates at least some marginal cost when deployed in the service of environmental regulation, health care, or tax policy. Moreover, distaste for such partisanship need not be felt by a majority of co-partisans in order to be meaningful. If an incumbent Democrat believes that her hyperpartisan stance on tax policy will disillusion just five percent of her own

---

representatives legislating to favor themselves).

71. See Ronald Brownstein, *Public to Congress: Bend, Don't Break*, NAT'L J. DAILY, July 24, 2012, available at 2012 WLNR 15508712; Tim Mak, *Poll: Americans Want Compromise*, POLITICO (Sept. 27, 2011, 7:32 AM), <http://www.politico.com/news/stories/0911/64499.html>; Pew Research Ctr. for the People & the Press, *Trends in American Values: 1987-2012: Partisan Polarization Surges in Bush, Obama Years* 55 (June 4, 2012), <http://www.people-press.org/files/legacy-pdf/06-04-12%20Values%20Release.pdf>. That said, even the idea of partisan compromise reflects a partisan divide: Democrats apparently favor compromise to a greater degree than Republicans. See *id.*

72. See Daniel Strauss, *Poll: Americans Want Bipartisan Seating at State of the Union*, THE HILL (Jan. 21, 2011, 1:40 PM), <http://thehill.com/blogs/blog-briefing-room/news/139353-poll-americans-want-bipartisan-seating-at-state-of-the-union> (citing a poll claiming that 72 percent of Americans said that Republicans and Democrats should sit together at the State of the Union address).

Democratic voters simply based on their dislike of excess, and that disillusionment will jeopardize their turnout for her in the next election, the prospect of disillusioning her own supporters should serve as a deterrent in any jurisdiction where races are mildly competitive.<sup>73</sup>

---

73. This possibility may be more theoretical than real, given the low salience of most particularized political action and the limited range of competitive electorates. If it happened at all, the path to electoral payback would likely come from a highly motivated set of opponents combining with a set of proponents mildly disillusioned by a partisan overreach and, therefore, modestly less enthusiastic about turning out to vote.

In a noncompetitive electorate, even this combination may not be sufficient to deliver electoral payback. Consider the 2011 Maryland redistricting plan, which was widely portrayed as an illegitimate Democratic act of tribal partisanship, even by media endorsing Democratic candidates. *See, e.g.*, Editorial, *Cardin for Senate*, BALT. SUN, NOV. 1, 2012, available at 2012 WLNR 23298154; Editorial, *Obama for President*, BALT. SUN, NOV. 4, 2012, available at 2012 WLNR 23571683; *Against Question 5*, BALT. SUN, OCT. 21, 2012, at 24A, available at 2012 WLNR 22406045 (“Maryland’s congressional maps are a product of the politicians, for the politicians, by the politicians. They were born of the two competing desires of the state’s Democratic Party bosses: to give incumbent Democrats the precincts they want to make their re-election efforts easier, and to put one of the state’s two Republican-held congressional seats at risk.”).

There was a referendum on the congressional map in 2012. It is unclear whether the vote against the map attracted any Democrats who were displeased with the display of tribal partisanship, over and above Republicans and third-party candidates with presumably stronger reactions to the adverse partisan action. The vote against the map (36 percent) mirrored the Republican vote for President (36 percent), overperformed the two-party Republican vote for U.S. Senate (32 percent), and significantly underperformed the combined Senate tally of the Republican candidate and the independent, formerly Republican, challenger (43 percent). *Official 2012 Presidential General Election Results for All State Questions*, MD. STATE BD. ELECTIONS (Nov. 28, 2012, 8:56 AM), [http://elections.state.md.us/elections/2012/results/general/gen\\_qresults\\_2012\\_4\\_00\\_1.html](http://elections.state.md.us/elections/2012/results/general/gen_qresults_2012_4_00_1.html) (Question 5); *Official 2012 Presidential General Election Results for President of the United States*, MD. STATE BD. ELECTIONS (Nov. 28, 2012, 8:56 AM), [http://elections.state.md.us/elections/2012/results/general/gen\\_results\\_2012\\_4\\_001-.html](http://elections.state.md.us/elections/2012/results/general/gen_results_2012_4_001-.html); *Official 2012 Presidential General Election Results for U.S. Senator*, MD. STATE BD. ELECTIONS (Nov. 28, 2012, 8:56 AM), [http://elections.state.md.us/elections/2012/results/general/gen\\_results\\_2012\\_4\\_007-.html](http://elections.state.md.us/elections/2012/results/general/gen_results_2012_4_007-.html).

Moreover, the wording of the ballot question would have presented a referendum on tribal partisanship for only the most informed voters. *2012 General Election Ballot Question Language*, MD. STATE BD. ELECTIONS, [http://elections.state.md.us/elections/2012/ballot\\_question\\_language.html](http://elections.state.md.us/elections/2012/ballot_question_language.html) (last visited Oct. 15, 2013) (Question 5 read: “[e]stablishes the boundaries for the State’s eight United States Congressional Districts based on recent census figures, as required by the United States Constitution”). Even if some Democrats did defect from their immediate partisan interest based on a dislike of tribal partisanship, the maps were nevertheless overwhelmingly approved, by 64 percent of those voting on the question. *Official 2012 Presidential General Election Results for All State Questions, supra* (Question 5).

Partisan impact in electoral rules blunts this feedback mechanism. As long as a policy's electoral impact on the other "team" exceeds the marginal loss in votes from the official's own "team" due to the disfavored display of partisanship, policymakers have ample incentive to drive electoral policy based on tribal partisanship, even against the wishes of some of their own constituents. Consider an elected Democratic official in a jurisdiction where half of her constituents are Democrats and half are Republicans. If her hyperpartisan election regulation causes five percent of her own Democratic voters to become disillusioned and withhold their support, the regulation will nevertheless be in her immediate electoral interest if it leaves at least six percent of opposing Republicans unable or unwilling to vote. In electoral regulation, actions inspired by tribal partisanship may not represent an impregnable barrier to electoral feedback, but they can serve as formidable seawalls limiting the impact of a naturally reactive tide.<sup>74</sup>

I want to be clear: I am not asserting that all, or even much, of the partisan impact of policy generally, or electoral policy in particular, is actually driven by the most extreme form of tribal partisanship. Tribal partisanship is probably, in most circumstances, the exception rather than the norm. Indeed, it is surely the rare policy driven by any one of the above archetypes of partisanship in isolation. Policymakers are, I suspect, normally driven by a combination of motives—say, an ideological preference for a certain policy arguably in the public interest, which is seen as responsive to the expressed preferences of aligned partisan constituents, and

---

74. To be sure, these "seawalls" may result from any extreme partisan effect, even when caused by coincidental partisanship. But as demonstrated in this Part, there are greater incentives to engage in tribal partisanship in the electoral realm. And it is to be expected that tribal partisanship will reliably cause extreme partisan effect more often than other forms of partisanship along the spectrum simply because partisan effect is the aim of tribal partisanship. Moreover, because partisan effect is the exclusive aim of tribal partisanship, there are no countervailing socially beneficial considerations that mitigate in favor of normatively tolerating the partisan effect of tribal partisanship in the electoral realm.

Indeed, the most plausible defense of tribal partisanship in the electoral realm is no defense at all. It is merely a protestation that tribal partisanship cannot be prevented without also preventing more beneficial forms of partisanship: that this range of the spectrum cannot meaningfully be isolated. I am not so sure. I discuss various methods for confronting different forms of partisanship, including methods with the potential to isolate tribal partisanship in Part III.

which may also be perceived as damaging to the other side.<sup>75</sup> That said, given the natural temptations of tribal partisanship in the electoral arena, there are unfortunate examples of electoral actions that are difficult to explain based on anything other than the narrowest forms of the most reprehensible motivation.<sup>76</sup>

Redistricting, often described as a “bloodsport,”<sup>77</sup> seems particularly susceptible to tribal partisan impulses.<sup>78</sup> As I have elsewhere recounted:

In 2001, ... a federal judge described the redistricting process for Madison County, Illinois, as full of “threats, coercion, bullying, and a skewed view of the law,” with the process “so far short of representing the electorate that it seems the citizens of Madison County were not so much as an afterthought.” Said the redistricting committee chairman to one of his committee colleagues: “We are going to shove [the map] up your f----- a-- and you are going to like it, and I’ll f--- any Republican I can.”<sup>79</sup>

---

75. See Sunstein, *supra* note 22, at 1695.

76. See Tokaji, *supra* note 66, at 434.

77. T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 588 (1993); Howard Fineman, *1986: Year of the Seesaw*, NEWSWEEK, Jan. 13, 1986, at 32.

78. Consider the Republican State Leadership Committee, which boasted of its own “strategy and execution of its efforts in the 2010 election cycle to erect a Republican firewall through the redistricting process that paved the way to Republicans retaining a U.S. House majority in 2012.... The rationale was straightforward: ... Drawing new district lines in states with the most redistricting activity presented the opportunity to solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade.” *REDMAP 2012 Summary Report*, REPUBLICAN STATE LEADERSHIP COMM. (Jan. 4, 2013), [http://www.rslc.com/redmap\\_2012\\_summary\\_report](http://www.rslc.com/redmap_2012_summary_report).

79. JUSTIN LEVITT, *A CITIZEN’S GUIDE TO REDISTRICTING 13* (2010) (quoting *Hulme v. Madison Cnty.*, 188 F. Supp. 2d 1041, 1044, 1051 (S.D. Ill. 2001)).

The quote above sounds extreme.<sup>80</sup> But most commentators have not had the theoretical tools to articulate a distinction between Madison County and Mayberry<sup>81</sup> in the regulation of the electoral process. Undifferentiated notions of partisanship conflate actions that have partisan impact but are driven by pursuit of a goal with public-regarding bona fides and those that are driven by a desire to “f--- any Republican I can.”<sup>82</sup>

The Supreme Court has also not escaped this unnecessary myopia. Indeed, the Court’s lack of insight may well be responsible for substantial clouds in the doctrine. The best example is the Court’s approach to partisan gerrymandering, explored most recently in *Vieth v. Jubelirer*.<sup>83</sup> *Vieth* concerned a claim that the 2002 Pennsylvania legislature, under unified Republican control and with a Republican governor approving the legislation, adopted a congressional redistricting plan that amounted to a partisan gerrymander.<sup>84</sup> The Court’s opinion was fractured. A four-Justice plurality, reviewing what it considered to be the Court’s failed intervention into the “political thicket,” considered the claim nonjusticiable,<sup>85</sup> four Justices in dissent proposed several different standards for adjudicating political gerrymandering claims;<sup>86</sup> and Justice Kennedy, concurring in the judgment, found a claim of

---

80. And, indeed, as demonstrated below, it is extreme. But it is not completely singular. See Shaila Dewan, *Fighting to Regain Right Some Felons Never Lost*, N.Y. TIMES, Mar. 2, 2008, at A21, available at 2008 WLNR 4135758 (quoting the chairman of the Alabama Republican Party, referring to a statute facilitating the enfranchisement of some persons with felony convictions, as saying, “As frank as I can be, we’re opposed to it because felons don’t tend to vote Republican.”); Dara Kam & John Lantigua, *Former Florida GOP Leaders Say Voter Suppression Was Reason They Pushed New Election Law*, PALM BEACH POST, Nov. 25, 2012, available at 2012 WLNR 25062079 (“A new Florida law ... was intentionally designed by Florida GOP staff and consultants to inhibit Democratic voters, former GOP officials and current GOP consultants have told The Palm Beach Post.”).

81. Mayberry was, to many, the idealized epitome of small-town America. See Martha Waggoner, *Beloved Actor Gave Us Mayberry, Dies at 86*, DAILY HERALD (Arlington Heights, Ill.), July 4, 2012, at 1, available at 2012 WLNR 14147077.

82. See Tokaji, *supra* note 66, at 434 (recognizing the difference between ideological partisanship and tribal partisanship, albeit not in those terms).

83. 541 U.S. 267 (2004).

84. *Id.* at 272-73 (plurality opinion).

85. *Id.* at 305-06.

86. *Id.* at 339 (Stevens, J., dissenting); *id.* at 346-47 (Souter, J., dissenting); *id.* at 356, 365-67 (Breyer, J., dissenting).

political gerrymandering theoretically justiciable but did not locate an acceptable standard for “justishing”<sup>87</sup> such claims.<sup>88</sup>

All of the Justices seem to have labored through the misconception of partisanship as a unitary object, available only in lesser or greater degree.<sup>89</sup> That is, the Justices accepted the framing of the problem as a search for the threshold level of “*too much* partisanship,”<sup>90</sup> in part because they did not have the analytical structure to define a search for partisanship of an appropriate type. Consider the Justices’ complaint that they were unable to define a particular threshold level of constitutionally troublesome partisan effect.<sup>91</sup> This is an unusual requirement for a claim of constitutional wrong: in other contexts, the Court has found unconstitutional even minimal cognizable disparate impact when caused by an impermissible purpose.<sup>92</sup> Most of the *Vieth* Justices demanded more. They sought a demonstrable threshold level of partisan effect because they could not accept that minimal partisan effect, when caused by an

---

87. The delightful verb is attributed to Professor Gary King. See Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 204 (2003).

88. *Vieth*, 541 U.S. at 317 (Kennedy, J., concurring in the judgment).

89. Indeed, the plurality seemed to conflate partisanship with politics. See *id.* at 285 (plurality opinion) (stating, in discussing claims of excessive partisan gerrymandering, that “[t]he Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics”); *id.* (“[I]t would be quixotic to attempt to bar state legislatures from considering politics as they redraw district lines....” (citation omitted) (internal quotation marks omitted)). All redistricting is political, in the sense that it requires contested choices about government action; in this sense, redistricting is no more or less political than any other public act. Cf. Levitt, *supra* note 65, at 517-18 (arguing that redistricting is both political and pre-political, because it not only responds to, but defines, the relevant cleavages in a jurisdiction). And all redistricting is political, in the sense that all redistricting affects the likelihood that particular representatives will be elected. See Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts*, 9 POL’Y STUD. J. 839, 839-40 (1981). The vast majority of redistricting also has partisan effects, in that different parties will be bolstered or harmed by different redistricting plans—though the political effects and the partisan effects may not always be the same. And each of these claims is distinct from a claim that redistricting is, or must necessarily be, undertaken with a particular form of partisan intent.

90. *Vieth*, 541 U.S. at 286 (plurality opinion).

91. *Id.* at 281-83, 287-91; *id.* at 306-309 (Kennedy, J., concurring in the judgment). In contrast, for example, Justice Stevens found a harm in the communicative impact of any improper partisan intent. *Id.* at 331-33 (Stevens, J., dissenting).

92. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Equal Protection Clause); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Establishment Clause).

impermissible partisan purpose, would suffice. This is because they were unable to accept that a partisan purpose could be deemed truly impermissible; they viewed partisan purpose as both omnipresent and inevitable.<sup>93</sup> And they viewed partisan purpose as omnipresent and inevitable only because they could not see that all partisan purposes are not alike: that is, that there is a spectrum of partisanship.

In a companion piece, I explore the roads not taken in *Vieth*.<sup>94</sup> It is possible that, despite a strong line of cases disfavoring detrimental government action solely on the basis of protected political association,<sup>95</sup> the Court would have constitutionally blessed tribal partisanship. It is also possible that the Court would have refused to bless tribal partisanship, but recognized evidentiary limitations linked to its institutional role, and declared itself unable to reliably distinguish one form of partisanship from another in a litigation setting.<sup>96</sup> For purposes of this Article, it is not necessary to claim that the result in *Vieth* would have been different or should have been different. It is enough to claim that without understanding the spectrum of partisanship, the Court was blind to the possibility of a different approach.

### III. CONFRONTING PARTISANSHIP

Anecdotes like the Madison County experience and the knuckles bared during Pennsylvania's redistricting capture attention, at least within the limited sphere of attention that fights over the details of electoral regulations are ever able to capture. Advocates and commentators have, accordingly, devoted substantial time to confronting concerns about undue partisanship in the establishment of electoral policy and—related, but distinct—concerns that the public perceives electoral policy to be unduly partisan. It should be clear from the discussion above that partisanship is neither uniformly nor universally reviled. Revealing the spectrum of partisanship helps observers deploy the most appropriately targeted

---

93. See *Vieth*, 541 U.S. at 286 (plurality opinion).

94. See Justin Levitt, Problems of Public Purpose (working title) (on file with author).

95. See, e.g., *Elrod v. Burns*, 427 U.S. 347, 356-57, 359-60 (1976).

96. Cf. *Easley v. Cromartie*, 532 U.S. 234, 257-58 (2001) (indicating difficulty in discerning legislative intent based on race rather than politics or partisanship).

design choices to foster the forms of partisanship they prefer and confront or combat partisanship in the manifestations they find less benevolent.

Similarly, parsing the spectrum of partisanship contributes meaningfully to evaluating efforts at “nonpartisanship.”<sup>97</sup> Efforts to combat particular forms of partisanship are too readily caricatured as fool’s quests for “nonpartisan” individuals to take “nonpartisan” action.<sup>98</sup> Very few—perhaps vanishingly few—individuals are truly nonpartisan, in the sense that they have absolutely no private personal preference for the announced ideological commitments of major political parties.<sup>99</sup> And particularly in the arena of electoral regulation, very few—and perhaps no—actions are truly nonpartisan, in the sense that they have absolutely no differential impact on those affiliated with one party or another. But most efforts to restrain partisanship, mischaracterized as nonpartisan, do not depend on a quest for these unicorns.

Instead, the search for nonpartisanship is more properly understood as a search for the absence of, or constraints on, a particular form or forms of partisanship in the spectrum described above. Often, the partisanship targeted is tribal partisanship: promotion of one’s own partisan fortunes or the opposition’s partisan misfortunes purely for its own sake and wholly independent of any conceivable notion of the common good. Under the right conditions, individuals and entities can and do forego extremes of tribal partisanship in practice all the time;<sup>100</sup> it is not pollyannish to consciously

---

97. The term has many meanings. See George K. Yin, *The Role of Nonpartisan Staff in the Legislative Process 7-9* (John M. Olin Law & Econ. Research Paper Series No. 2013-03, 2013), available at <http://ssrn.com/abstract=2261221> (describing just a few).

98. Cf. Dixon, *supra* note 89, at 840 (“My own experience tells me that although I may find nonpartisanship in heaven, in the real world ... there are no nonpartisans, although there may be noncombatants.”).

99. It is important to understand that individuals who do not choose to affiliate with or belong to a political party are rarely truly nonpartisan. Studies consistently demonstrate that most people who are not inclined to become members of a political party—who are not identified or registered as Democrats, Republicans, Greens, et cetera—nevertheless demonstrate reliable voting patterns aligned with a single consistent political party. See sources cited *supra* note 11. This is likely true for officials as well. See, e.g., Barry C. Burden et al., *Selection Method, Partisanship, and the Administration of Elections*, 41 AM. POL. RES. 903, 918-19 (2013) (finding that more than two-thirds of nonpartisan Wisconsin election officials expressed a personal partisan preference).

100. See *infra* Part III.C-D.

seek those conditions in institutional design. As a corollary, it is unsurprising that a “nonpartisan” model aimed specifically at tribal partisanship would not necessarily be tailored to rooting out responsive, ideological, or coincidental partisanship (or partisan effects from any of the three). Indeed, such a model may—without any inconsistency—be agnostic with respect to these other forms of partisanship, or even attempt to promote them. Different models will seek to address different types of partisanship to different degrees or with different degrees of priority.

Sophisticated assessments of efforts to combat undue partisanship in electoral regulation must therefore transcend casual deriding of a “nonpartisan” fantasy. They must instead focus on the particular type or types of partisanship to be confronted in any given context, with attention to the ways in which distinct regulatory models have the capacity to constrain partisanship at various points along the spectrum.

#### *A. Rules Regulating Effect*

One strategy to confront partisanship in the rules of the electoral process is to focus on partisan effect. Indeed, aiming directly at effect may be the only means to confront the impact of coincidental partisanship.<sup>101</sup>

For good reason, calls to eliminate partisan effect entirely are extraordinarily rare. Indeed, in the electoral context, I have seen such a proposal only in the redistricting process—and there, only in the suggestion to draw districts with no partisan bias.<sup>102</sup> Partisan

---

101. In addition to the strategies discussed below, some proposals would eliminate partisan effect by eliminating entirely the premise for electoral regulation. For example, some would cut the Gordian knot of partisanship in redistricting by eliminating districts entirely and using alternative voting systems like cumulative voting or choice voting to select members of multimember bodies. See, e.g., LANI GUINIER, *THE TYRANNY OF THE MAJORITY* (1994) (describing alternatives to plurality voting); Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 251-56 (same).

102. Cf. *Alexander v. Taylor*, 51 P.3d 1204, 1219 (Okla. 2002) (Opala, J., dissenting in part) (recommending that courts refrain from accepting “any tendered party-sponsored plan laden with excisable partisan bias, however slight”).

Presumably, even a proposal this stringent would be confined to eliminating partisan bias for the Democratic and Republican parties, which is not necessarily a result devoid of partisan effect on third parties. Though intriguing to contemplate, it is well beyond the scope of this Article to evaluate whether it is possible to arrive at a stable equilibrium for a redistricting

bias is a measure of the extent to which redistricting plans favor a particular party consistently over time, such that the party is statistically likely to win more seats with a certain percentage of the vote than its opposing party would.<sup>103</sup> For example, if districts were drawn such that Republicans would be likely to win 58 percent of a given jurisdiction's seats with 52 percent of the votes in that jurisdiction, but Democrats would be likely to win only 54 percent of the seats with 52 percent of the votes, the district's plan would have a partisan bias favoring Republicans.<sup>104</sup> Districts drawn with partisan bias yield an inherent structural advantage, allowing one party to gain legislative seats based on a given generalized level of support more easily than its rivals. Zero partisan bias—also known as perfect partisan symmetry—would eliminate such structural advantage, with no room even for coincidental partisanship in the design of district lines.<sup>105</sup>

---

plan with zero partisan bias among three or more political parties. See Gary King, *Electoral Responsiveness and Partisan Bias in Multiparty Democracies*, 15 LEGIS. STUD. Q. 159, 163-65, (1990) (describing the calculations necessary to such an evaluation).

103. 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, 8 (2007); Gary King & Robert X. Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 AM. POL. SCI. REV. 1251, 1251-52 (1987).

104. Partisan bias is often confused with disproportion. Disproportion simply refers to a difference between the composition of the electorate and the composition of a representative body. For example, in a jurisdiction where 52 percent of the voters are Democrats, a disproportion would result if greater (or less) than 52 percent of the legislative delegation were Democrats. This sort of deviation from strictly proportional representation is likely in any system that does not set out to distribute representation proportionally by party, and all but inherent in any system that elects representatives from districts that are not perfectly homogenous by party. See Grofman & King, *supra* note 103, at 8-9. In any such system, there will be a minority in each district—say, 42 Democrats in a 100-voter Republican district—and the results will be proportional only upon the coincidence that an equal number of opposing-party voters are minorities in their respective districts.

Put differently, the partisan effect of a deviation from perfect proportionality is inherent not only in the choice of redistricting lines but in the fact of districted single-member elections. Much of the partisan impact of the pure disproportion inherent in districted elections, however, should not reliably and consistently favor one party over time. To the extent that specific lines are designed in a way that does produce a consistent effect, that effect is measured by the calculation of partisan bias.

105. Note that adopting this standard for the first time would presumably involve a partisan effect with respect to the status quo. Few existing maps display perfect partisan symmetry, and a move in that direction would therefore usually involve gain for one party and loss for another relative to the map enacted in a prior cycle.

Such dramatic proposals have dramatic consequences. Virtually every means of dividing a jurisdiction into districts will have some reliable and identifiable (even if unintentional) partisan impact. This is a product of dividing people into districts, not a product of any given method. It will be true whether a legislature, a commission, a computer algorithm, or a random number generator performs the task, simply because different district configurations naturally and predictably favor different constellations of voters. The only way to ensure the complete absence of partisan bias is to expressly and exclusively prioritize partisan symmetry: to draw districts that achieve partisan symmetry no matter what the other consequences, and fulfill other objectives only to the extent that they do not result in districts reliably favoring or disfavoring any particular party. Put differently, in most jurisdictions, driving first and foremost toward partisan symmetry will necessarily put dramatic limits on other legal and policy objectives<sup>106</sup>—limiting drawers' ability to comply with the Voting Rights Act, recognize communities or political boundaries, or encourage districts that are responsive to changes in public opinion.<sup>107</sup>

The corollary and more general point is that, in redistricting and beyond, some degree of partisan impact at the end of the day is usually the necessary price of policy flexibility to accomplish other objectives. And perhaps as a result, to my knowledge, no jurisdiction in the country has attempted to put an inflexible zero-partisan-effect mandate into practice in any sphere of electoral regulation.<sup>108</sup>

Of course, partisan effect repudiated in extremes may be tolerated in minor doses. To use the same redistricting example, it is possible to test a redistricting plan for partisan bias, and to attempt to limit

---

106. See, e.g., Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1402-04 (2012).

107. Generally, the more starkly noncompetitive a district is—the more reliably “safe Democrat” or “safe Republican”—the more reliably it can be matched with a corresponding safe district likely to vote for a candidate of the opposing party. At the extreme, if every district in a jurisdiction were entirely “safe” to the same degree, and the districts were divided evenly between the major parties, the resulting plan would show zero partisan bias. Each party would predictably win the same percentage of seats no matter what the distribution of the vote.

108. Indeed, even the foremost proponents of the use of partisan bias measurements as a buttress against undue partisan gerrymandering do not recommend the adoption of a zero-bias standard. See Grofman & King, *supra* note 103, at 21-25 (recommending that courts consider five different standards using partisan bias but not a zero-bias standard).

that bias, without demanding that a plan exhibit zero bias. Such an approach would be entirely internally consistent. One might, for example, set an outer threshold on the degree of acceptable partisan bias or require that partisan bias be minimized given other superseding constraints.<sup>109</sup> In either situation, the objective would be to constrain but not eradicate partisan effect, no matter what form of partisanship was the cause.

Some states have actually implemented this sort of direct “outer threshold” approach to constraining partisan effects—or, more accurately, some states have legal provisions embracing such approaches that are at least theoretically enforceable. For example, again in the redistricting context, several state laws purport to impose limits on the permissible partisan effect of any given district. Hawaii’s constitution states that “[n]o district shall be so drawn as to unduly favor a person or political faction.”<sup>110</sup> Delaware law is similar: “Each district shall, insofar as is possible ... [n]ot be created so as to unduly favor any person or political party.”<sup>111</sup> The “so as to” formulation is not free of ambiguity: it might represent an injunction against districting undertaken “in order to” unduly favor (that is, a constraint on partisan intent), or it might represent an injunction against districting “that has the effect of” unduly favoring (that is, a constraint on impact). Neither of these provisions appears to have been further construed by the courts or used as the basis to overturn a redistricting map, nor is it clear how “undue” favoritism in any particular district would be assessed.<sup>112</sup> Still, these laws at least plausibly represent a rare statutory attempt to constrain partisan effects directly.<sup>113</sup>

---

109. *See id.*

110. HAW. CONST. art. IV, § 6(2).

111. DEL. CODE ANN. tit. 29, § 804(4) (West 2013); *see also* Act Establishing a Reapportionment Commission, 2011 R.I. Pub. Laws 389, § 2(d) (“Congressional and state legislative districts ..., to the extent practicable, shall reflect ... the right of all Rhode Islanders to fair representation and equal access to the political process.”).

112. In particular, neither articulation fits particularly well with the partisan bias measure discussed above. Partisan bias is a measure applicable to a legislative districting plan as a whole and not designed to yield a usable measurement conducive to deciding whether any particular district is “unduly” partisan.

113. Federal constitutional rulings directly attacking partisan effect are even rarer. The effects standard announced in partisan gerrymandering cases like *Davis v. Bandemer* may perhaps represent an example of such an outer limit. *Bandemer* established an effects standard dependent on an arrangement of the electoral system “that will consistently degrade

A second method of constraining partisan effect involves sharp restraints on outcomes other than partisan effect, which are really just restraints on discretion more generally. If individuals may act only within a limited menu of permissible options, it may be unlikely, depending on the nature of the constraint, that the action will result in the most extreme partisan effects. For example, strict campaign finance limits on the amount of money that an individual or entity may contribute to a candidate—whatever their other policy merits or detriments—may serve this function.<sup>114</sup> With a finite number of real persons each able to contribute directly a finite number of dollars, contribution limits will not prevent partisan bias, but they may cap it. And in redistricting, rules allowing officials very little flexibility to deviate from county boundaries will also allow very little flexibility to pursue partisan outcomes beyond those already embedded in county configurations. It is important to note that both of these examples are very different from efforts to minimize partisan effect. Contribution limits and existing county boundaries may well yield a rather skewed partisan effect (as well as desirable or undesirable effects on other dimensions). Instead, the point is merely that the tighter the constraint on official action, the more the partisan effect will be baked into the limitation, with little opportunity for partisan impact to expand beyond that inherent limit.<sup>115</sup>

Finally, entities may seek to constrain (though not eliminate) partisan effects by attempting to curb or eliminate various forms of partisan intent. Prohibiting tribal and responsive partisanship, for example, would limit partisan effects to those caused by coincidental and ideological partisanship. This, too, is no guarantee of minimiz-

---

a voter's or a group of voters' influence on the political process as a whole." 478 U.S. 109, 132 (1986) (plurality opinion). Such unconstitutionality remains premised on an additional finding of express intent to discriminate against voters on the basis of partisanship, *id.* at 127, which makes it an awkward fit for a category of rules aimed only at the partisan effect of a public act. On the other hand, it may be that *Bandemer's* extreme standard could never be met under circumstances arising coincidentally.

114. The fact that contribution limits may end up serving this function does not imply that they are intended to serve this function. And it may be that the potential degree of partisan bias permitted under a regime of contribution limits is sufficiently large that, for practical purposes, it does not feel like a meaningful cap at all.

115. Of course, the tighter the constraint on official action, the more it may preclude policy choices beneficial for reasons beyond their partisan impact. See Levitt, *supra* note 65, at 526-29.

ing partisan effects; it may be that the partisan effect of ideological partisanship is, in any given circumstance, quite substantial. But it may rein in the most extreme partisan effects achievable only with a direct intent to maximize partisan impact. I address these sorts of limitations on partisan intent below.<sup>116</sup>

### *B. Structural Design*

A second strategy to confront partisanship in the electoral process is through the structure of the decision-making body. In many ways, this is a preoccupation of current scholarship; the “new institutionalism” of election law work has naturally led to a focus on institutional design.<sup>117</sup> Some of my own work has been in this vein: I have, for example, examined the capacity of independent commissions to blunt some of the most self-interested tribal partisanship of the redistricting process.<sup>118</sup> But in many ways, this is also a preoccupation that is quite old. The basic conception of the separation of powers, the bicameral national legislature, and the federal reliance on competing state and national governments all mark attempts to blunt the force of faction through structure.<sup>119</sup>

Structure is unquestionably important. The structure of public institutions should be expected to further some forms of partisanship and mitigate others. Legislatures elected in partisan contests, for example, are designed to promote ideological (and perhaps responsive)<sup>120</sup> partisanship. We not only expect that a legislator will vote in line with his or her ideological precommitments (and most likely with the wishes of like-minded constituents), but in many ways, the idea of republican representation through partisan elections relies on the assumption that the expectation will prove

---

116. See *infra* Part III.B-D.

117. See Heather K. Gerken & Michael S. Kang, *The Institutional Turn in Election Law Scholarship*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS 86, 86-87 (Guy-Uriel E. Charles et al. eds., 2011); Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL'Y REV. 125, 126 (2009); Richard L. Hasen, *Election Administration Reform and the New Institutionalism*, 98 CALIF. L. REV. 1075, 1076, 1087-88 (2010) (book review).

118. See Levitt, *supra* note 65, at 530-42.

119. See *INS v. Chadha*, 462 U.S. 919, 949-51 (1983); THE FEDERALIST NO. 10, *supra* note 42, at 51-52 (James Madison); THE FEDERALIST NO. 51, *supra* note 42, at 289-92 (James Madison); THE FEDERALIST NO. 63, *supra* note 42, at 350-53 (James Madison).

120. See *supra* text accompanying notes 40-43.

true. In these systems, ideological partisanship, at the least, is a feature, not a bug. Given the close connection to legislators' own employment fortunes and opportunities for advancement through party-based legislative power structures, tribal partisanship is also lamentably to be expected in partisan elected legislatures, absent other constraints. One might expect the same, absent other constraints,<sup>121</sup> from those in the executive or judiciary chosen through partisan elections.

In contrast, nonpartisan elections may not alone prevent responsive or tribal partisanship—after all, there may be a close connection between parties and candidates in nonpartisan elections everywhere other than the ballot<sup>122</sup>—but neither should nonpartisan elections systematically foster tribal partisanship. That difference can be significant. And appointed officials' structural proclivity to various forms of partisanship will, all else equal, likely vary based on their proximity to or dependence on the partisanship of those who appoint them.

Other structural rules or limitations, beyond the selection process,<sup>123</sup> may serve to counter or defuse some forms of partisanship. Supermajority rules, for example, are often designed to blunt not only partisan intent (of all kinds) but also partisan effects, by limiting a narrow majority's ability to control policy unilaterally. The same is true for bipartisan or multipartisan structures with a balanced partisan composition.<sup>124</sup>

---

121. These other—quite powerful—restraints are discussed below. *See infra* Part III.C.

122. *See, e.g.*, *Sanders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 747-48 (9th Cir. 2012) (holding that political parties have a First Amendment right to endorse and to publicize their endorsement of judicial candidates in a nonpartisan election).

123. Some believe that automated procedures allow policymakers to forego a “selection process” entirely, and thereby amount to a structural constraint on partisanship. As I have discussed elsewhere, these automated procedures must be programmed somehow; any fostering of, or limitation on, particular forms of partisanship will be embedded in the mechanism by which programmers are selected. *See Levitt, supra* note 65, at 522-25.

124. Of course, these structures are not themselves sufficient to block all partisanship, including tribal partisanship. For example, neither supermajority requirements nor balanced bipartisan structures may prevent a redistricting majority from targeting specific out-party competitors based purely on their identity or partisan affiliation, by “buying off” enough out-party allies to acquire a supermajority. And similarly, neither supermajority requirements nor balanced bipartisan structures will prevent a partisan contingent from refusing to consent to action based purely on the partisan affiliation of individuals affected, leaving the body powerless to act. Where the body bestows or withdraws benefits, a partisan contingent may prevent the distribution of benefits to individuals affiliated with the opposing party or the

Timing rules represent another form of structural constraint that may be designed to limit short-term responsive or tribal partisanship. These features entail decisions undertaken with some gap between the decision and its implementation; the idea is that policymakers will be less able to tailor the policies they prefer to achieve partisan consequences if they do not know exactly how implementation will proceed. Examples include districts that take effect years down the road when the local political climates may have shifted,<sup>125</sup> or regulations of election procedures drawn up before it is apparent that they will benefit or disfavor certain voters or candidates.<sup>126</sup> Strong stare decisis rules may play a similar role in the judiciary. These structures blunt the most aggressive forms of tribal partisanship by making it more difficult to reliably know how decisions will affect particular electoral prospects in the future.

Finally, despite all of the ink spilled on judicial review over the centuries, few have noted that judicial review may be seen as another structural protection against the most extreme forms of partisanship. The very fact that a court is watching and prepared to enforce substantive rules helps to confine partisan effect and partisan intent within a permissible, albeit quite broad, zone. And the process of judicial review might, at least in theory, smoke out policies explicable purely by tribal partisanship.<sup>127</sup> Those who have watched the redistricting process, and the Supreme Court's steady abdication of any role in policing partisan gerrymandering, may believe that such a structural constraint amounts to little. Still, even with unilateral partisan control, no major party in any

---

withdrawal of benefits from like-minded partisans. Where the body is an enforcement body, a partisan contingent may prevent enforcement against like-minded affiliated partisans. The Federal Election Commission (FEC) is structurally designed in this fashion. See, e.g., Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 *YALE L. & POL'Y REV.* 279, 286 (1991) ("[P]arty-line deadlocks reduce the chance that the Commission will investigate violations of the law...."). But see Michael M. Franz, *The Devil We Know? Evaluating the Federal Election Commission As Enforcer*, 8 *ELECTION L.J.* 167, 176-77 (2009) (showing only 19 party-line three-to-three deadlocks of 1342 votes evaluated in enforcement actions by the FEC over several recent years).

125. See Adam B. Cox, *Designing Redistricting Institutions*, 5 *ELECTION L.J.* 412, 412 (2006).

126. See Flanders, *supra* note 1.

127. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 203-04 (2008) (plurality opinion) (examining legislation passed on partisan lines for justifications other than tribal partisanship and implying a capacity to distinguish when no such justifications exist).

jurisdiction has yet attempted to legislate its chief competitor completely out of existence, despite substantial short-term incentives to do so. It is likely that the institutional power of the judiciary stands as one explanation why such partisan displays still remain beyond the pale.

*C. The Limits of Rules and Structure As Constraints on Partisanship*

The substantive rules and institutional structures discussed above have dominated analysts' discussions of constraints on partisanship. Still, despite the ability of both substantive rules and institutional structure to constrain partisanship, it remains too easy to overstate their impact. This seems to be a lesson that many theorists of both "Old Institutionalism" and "New Institutionalism" alike have brushed briskly past. Substantive rules and institutional structure alone are insufficient to constrain certain forms of partisanship in theory, or to explain their absence in practice. It takes more than zoning permission and a good architect to make a house a home.<sup>128</sup>

Consider, for example, a hypothetical commission designed to draw district lines; the commission is populated by individuals carefully screened to ensure that none is beholden to a particular incumbent, and there is no indication that any individual commissioner has any particular electoral ambitions of her own. To mute ideological partisanship, the commission is structured to include an equal number of registered Democrats and registered Republicans.<sup>129</sup> To mute coincidental partisanship, the commission must follow county lines where doing so would not violate constitutional equipopulation mandates<sup>130</sup> or federal statutes like the Voting Rights Act.<sup>131</sup>

---

128. Cf. THE STAPLE SINGERS, *Hammer and Nails*, on HAMMER AND NAILS (Riverside Records 1962) ("It takes more than a hammer and nails to make a house a home.").

129. Note that such a structure would not mute ideological partisanship with respect to redistricting-related policy commitments shared by adherents of the two major parties but not by adherents of minor parties.

130. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).

131. 42 U.S.C. §§ 1973 to 1973bb-1 (2006).

These rules and structural elements are typically seen as meaningful constraints. And yet, with these constraints alone, this hypothetical commission is not as far from the Madison County legislature of 2001<sup>132</sup> as many likely assume. The federal requirements create pockets of substantial discretion for those drawing the lines. The commissioners may be independent from incumbents and without self-interested incentives, and yet still be fervent party enthusiasts.<sup>133</sup> Savvy actors will soon discover that they can best promote their party's interests through *détente*.<sup>134</sup> In a jurisdiction that can support rough partisan equity, a fight between rational opposing forces seeking maximum partisan effect will often resolve into equal numbers of maximally safe districts, just as surely as a fight over a dollar yields fifty cents for each equally matched contestant. True, the resulting lines may contribute rough partisan equity in the legislative delegation. But rough partisan equity is not the only conceivable interest to be sought in the design of representative districts. The incentives of tribal partisanship, bounded only by substantive rules and institutional structural design, may overwhelm otherwise beneficial public policy even under conditions of partisan stalemate.

The above scenario suggests that rules and structure may not alone constrain the possibility of partisanship—or, at least, of some forms of partisanship. Real-world examples carry the point one step further. We can observe many public entities that do not normally behave in tribally partisan fashion, even when substantive rules and institutional structure would make such tribal partisanship possible, and when natural incentives would make it desirable. These examples make clear that some other phenomenon is doing much of the real work.

---

132. See *supra* text accompanying note 79.

133. See Peter Callaghan, *Redistricting Shows How Far Incumbents Go*, NEWS TRIB. (Tacoma, Wash.), Aug. 19, 2012, available at 2012 WLNR 17552635 (describing e-mails revealing that several commissioners on Washington state's independent redistricting body seemed to make decisions rife with tribal partisanship).

134. This depends on an assumption that inactivity—and thus default to the courts or to another backup actor—does not yield significant potential for predictably superior outcomes for any given party. If one party's adherents know that they stand a chance at a far better result by refusing to act, they will naturally prefer to ensure that their process yields no map at all. See Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1812 (2012).

### 1. *Judiciary*

Consider the state court justice system. Despite the American Bar Association's contrary recommendation,<sup>135</sup> many judges are elected in partisan contests.<sup>136</sup> In several states, lower-court judges elected in partisan races will have their decisions reviewed by appellate and supreme court panels comprising judges who were also elected in partisan races.<sup>137</sup> Given the political composition of the electorate and much of the bench in these states, there is a relatively high likelihood that litigation will be overseen, from start to finish, by state-court judges of a single partisan persuasion who were elected in expressly partisan contests.<sup>138</sup> In any given piece of litigation, the substantive rules of law may provide outer boundaries for partisanship, but judges have plentiful discretion in evidentiary rulings, sentencing determination, fact-finding, and the application of facts to law, not to mention construction of ambiguous statutes and the development of legal rules within the common law. Structural features like stare decisis and appellate review provide only modest bolstering of these outer boundaries.<sup>139</sup> There is plentiful room within these bounds for judges elected in partisan contests to systematically and routinely favor or punish Republican or Democratic

---

135. AM. BAR ASS'N, JUSTICE IN JEOPARDY app. A, at 4 (2003), available at <http://www.abanet.org/judind/jeopardy/pdf/report.pdf>; cf. Sandra Day O'Connor, Op-Ed., *Justice for Sale*, WALL ST. J., Nov. 15, 2007, at A25 (promoting merit selection and nonpartisan elections for the judiciary).

136. Partisan primaries or general elections or both are used, in at least part of a state, to select Supreme Court justices in nine states, appellate judges in seven states, and trial judges in fourteen states. See *Methods of Judicial Selection*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm) (last visited Mar. 8, 2014).

137. These states include Alabama, Illinois, Louisiana, New Mexico, Pennsylvania, Texas, and West Virginia. See *id.*

138. Supreme Court review of these decisions is unlikely at best. As one of the authors of the leading Supreme Court practice treatise explains, "The Court never grants certiorari to review state court applications of state law." Stephen M. Shapiro, *Certiorari Practice: The Supreme Court's Shrinking Docket*, 24 LITIG. 25, 27 (1998). Even without a foray into the circumstances under which the U.S. Supreme Court will find a reviewable federal issue embedded in a state case, see *California v. Byers*, 402 U.S. 424 (1971); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938), it suffices for these purposes to note that certiorari grants are still exceptionally rare, and grants from state courts are rarer still. See, e.g., *The Supreme Court, 2011 Term—The Statistics*, 126 HARV. L. REV. 388, 395, 397 (2012).

139. See Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129, 137 (1980).

litigants, depending on their personal partisan proclivities and their jurisdiction's political composition. Many litigants are not pleased with the delivery of justice in state courts.<sup>140</sup> But credible examples of these judges deciding cases based on responsive or tribal partisanship are notable for their extreme rarity.<sup>141</sup> Rules and structure do not, on their own, explain the manifestation of partisanship or its absence.

## 2. Executive

Or consider an example from administrative law. The Federal Election Commission (FEC) is the agency with responsibility for federal campaign finance regulation. Its six commissioners are appointed by the President and confirmed by the Senate,<sup>142</sup> but as commentators have recognized, “[t]hanks to a well-settled convention with roots in an earlier, unconstitutional FEC selection procedure, the FEC really consists of three Democrats and three Republicans selected by party leaders in Congress and then ‘made official’ by the White House.”<sup>143</sup> Among the FEC's many responsibilities is a role in the enforcement of campaign finance laws by levying civil penalties against offenders and referring egregious cases to the Attorney General.<sup>144</sup> But a structural supermajority provision is built into the statute: at least four votes are required for action.<sup>145</sup>

---

140. Cf. NAT'L CTR. FOR STATE CTS., *Special Impeachment Edition*, GAVEL TO GAVEL (Dec. 2010), [http://www.ncsc.org/sitecore/content/microsites/gavel-to-gavel/older-issues/home/~/\\_media/microsites/Files/Gavel%20to%20Gavel/archived%20pdfs/G%20to%20G%20Special%20Impeachment.ashx](http://www.ncsc.org/sitecore/content/microsites/gavel-to-gavel/older-issues/home/~/_media/microsites/Files/Gavel%20to%20Gavel/archived%20pdfs/G%20to%20G%20Special%20Impeachment.ashx) (listing numerous legislative bills seeking to impeach state court judges as a result of displeasure with judicial rulings).

141. Cf. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872-75, 884, 886-87 (2009) (recounting “exceptional” and “extraordinary” allegations of favoritism based on a state judge's response to a particular campaign supporter).

142. 2 U.S.C. § 437c(a)(1).

143. Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366, 1443 (2005). Formally, the FEC's authorizing statute states only that no more than three of the six commissioners may be affiliated with the same political party. 2 U.S.C. § 437c(a)(1). In practice, the six commissioners are always three Democrats and three Republicans chosen by congressional leadership.

144. 2 U.S.C. §§ 437d(a)(6), 437g(a)(5).

145. *Id.* §§ 437c(c), 437g(a)(4)-(6).

While the judicial example above seems ripe for partisan action, the FEC setup seems ripe for partisan stasis<sup>146</sup>—and, indeed, the FEC has been roundly condemned, early and often, as a poster child for purported partisan deadlock.<sup>147</sup> Even the newest FEC commissioner made headlines recently when she commented, just a few months after arriving, that “she found the level of partisan division at the FEC ‘very surprising.’”<sup>148</sup>

Commissioner Ravel’s general observation, however, could indicate any of several different forms of partisanship, from narrow tribal favoritism to ideological disagreement over vigorously contested terms of campaign finance regulation. Individual enforcement actions help put the observation under a microscope. Most actors in the federal campaign sphere will be either openly partisan or primarily aligned with partisan actors, and so it is reasonable to expect that most entities committing campaign finance violations, small or large, will similarly be openly partisan or primarily aligned with partisan actors. When potential enforcement actions arise, a particular entity is necessarily targeted, and the targeted entity’s partisanship or perceived partisanship is not only known but often unavoidably prominent. Moreover, the FEC has great discretion in this arena; though campaign finance law defines legal violations, no substantive rule compels Commission action to punish a violation.<sup>149</sup>

Given this environment, and given the structure of the FEC, one might expect three-to-three deadlock on every enforcement action. That is, with blanket authority to choose their own designees, party leaders should theoretically select commissioners with the incentive and proclivity to engage in tribal partisanship. Once in office, the three Democratic commissioners should theoretically vote against discipline of any Democratic-affiliated targets, and the three

---

146. See *supra* note 124.

147. See, e.g., Eliza Newlin Carney, *FEC Ruling Leaves Ad Uncertainty*, ROLL CALL, Apr. 9, 2012, available at 2012 WLNR 7479587 (“[T]he FEC is notorious for partisan deadlocks.”); Carol Matlack, *Frayed Finance Law*, NAT’L J., Mar. 5, 1988, at 591, 592; FRED WERTHEIMER & DON SIMON, THE FEC: THE FAILURE TO ENFORCE COMMISSION, AM. CONST. SOC’Y L. & POL’Y 1 (Jan. 2013), available at [https://www.acslaw.org/sites/default/files/Wertheimer\\_and\\_Simon\\_The\\_Failure\\_to\\_Enforce\\_Commission.pdf](https://www.acslaw.org/sites/default/files/Wertheimer_and_Simon_The_Failure_to_Enforce_Commission.pdf).

148. Kenneth P. Doyle, *Ravel: ‘Surprising’ Level of Partisanship at FEC Tempering Hopes for Consensus*, Money & Politics Rep. (BNA) (Dec. 4, 2013).

149. Commission authority to proceed beyond conciliation efforts toward a civil penalty is permissive; essentially, the Commission is given prosecutorial discretion to take action. See 2 U.S.C. § 437g.

Republican commissioners should theoretically do the same for their Republican counterparts.<sup>150</sup> We should expect enforcement to break down, three-to-three, in virtually every case against a recognizable partisan.<sup>151</sup>

We would expect enforcement to break down consistently, that is, if substantive rules and structure were the only relevant constraints on tribal partisanship. Yet actual enforcement practice does not fit the story of an FEC hopelessly divided in this way.<sup>152</sup> A recent study examined FEC enforcement decisions over several years and found

---

150. It is possible that individual acts of tribal partisanship with a longer strategic time horizon would involve voting against one's fellow partisans. For example, consider MUR 6344, an FEC enforcement action concerning a union accused of improperly requiring its employees to support independent advocacy favoring a Democratic congressional campaign. *See United Public Workers*, MUR 6344, Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn II and Matthew S. Petersen (Fed. Election Comm'n Aug. 7, 2012), available at <http://eqs.nictusa.com/eqsdocsMUR/12044320562.pdf>; *United Public Workers*, MUR 6344, Statement of Reasons of Vice Chair Ellen L. Weintraub and Commissioners Cynthia L. Bauerly and Steven T. Walther (Fed. Election Comm'n Aug. 7, 2012), available at <http://eqs.nictusa.com/eqsdocsMUR/12044314776.pdf>. Three Democratic appointees supported enforcement action against the union; three Republican appointees did not. *See id.*; *Commissioners*, FED. ELECTION COMM'N, <http://www.fec.gov/members/members.shtml> (last visited Mar. 8, 2014) (listing the appointment history of the current commissioners); *Former FEC Commissioners*, FED. ELECTION COMM'N, <http://www.fec.gov/members/formermembers.shtml> (last visited Mar. 8, 2014) (listing the appointment history of former commissioners).

I firmly believe that the three-to-three decision was in fact rooted in ideological partisanship, guiding the construction of statutory language that was not well designed to address the given fact pattern. *See* 11 C.F.R. § 114.2(f)(2)(iv) (2013) (prohibiting coercion directed at contributions, but not independent expenditures). It is conceivable, however, that tribal partisanship was instead the more substantial cause. In light of perceived corporate resources and partisan leanings, both Democratic and Republican appointees could have thought that punishing the coercion of employee electoral activity would be in Democrats' long-term interest.

Still, whether FEC enforcement votes involve partisans voting for or against fellow partisans, tribal partisanship should result in three-to-three ties. As explored below, such deadlocks are the exception rather than the norm. *See infra* text accompanying notes 152-53.

151. The caveat about "virtually" every case is necessary because strategic commissioners might well wish to punish same-party upstarts threatening the perceived interests of party leadership. The Democratic commissioners, for example, might block enforcement against aligned Democrats but permit enforcement against Democrats challenging the Democratic wing of the party with which they agree.

152. *Cf.* Daniel H. Lowenstein, Commentary, *Election Law Miscellany: Enforcement, Access to Debates, Qualification of Initiatives*, 77 TEX. L. REV. 2001, 2017 (1999) (reviewing the author's similar experience with California's campaign finance enforcement body); Keith S. Brown & Adam Candeub, *Partisans & Partisan Commissions*, 17 GEO. MASON L. REV. 789, 790 (2010) (finding that the party affiliation of Federal Communications Commission commissioners "does not drive voting to the degree one might expect").

that of the 1476 votes on enforcement actions, only 19 resulted in party-line three-to-three deadlocks.<sup>153</sup> I think it highly implausible that all 19 deadlocks represented action undertaken based primarily on the partisan identity of the targeted entities, rather than principled disagreements over the proper application of the substantive law. But even were this the case, these 19 deadlocks would

---

153. Franz, *supra* note 124, at 176-77. There are some limits to the conclusions that can be drawn from this data. Enforcement votes that do not deadlock three-to-three along party lines may reveal, as suggested in the text, a lack of tribal partisanship. But these four-to-two, five-to-one, or unanimous votes may also reveal other strategic dynamics. Because a three-commissioner bloc can preclude a decision to proceed with further enforcement action, it is possible that commissioners who naturally prefer action nevertheless join colleagues in voting against action once a three-vote threshold has been reached. That is, perhaps logrolling or other insincere votes mask an underlying partisanship rate that is higher than three-to-three splits would suggest. Imagine that three (say) Republican commissioners with tribal partisan incentives make clear that they will vote against imposing a fine on a Republican respondent. In such conditions, Democratic commissioners with opposing tribal partisan preferences would be powerless to achieve the enforcement they desire, and might therefore vote strategically, casting votes against enforcement for reasons other than their underlying preference. Such behavior would result in votes that appear to signify greater consensus (and less tribal partisanship) than the underlying reality.

That said, the strategic benefit of such voting is not clear in this context, where commissioners need no support from the opposition to block enforcement against their "team." And the hypothetical behavior above would explain only majority or supermajority votes *against* enforcement, with opposing-party commissioners joining a resolute block of commissioners refusing to levy fines on their copartisans. It cannot explain majority or supermajority votes *for* enforcement. In a regime of tribal partisanship constrained only by structure and substantive rules, such votes should not exist; in reality, they are fairly common. *See, e.g.*, In the Matter of Global Settlement with Senator Robert J. Dole for President, MUR 4382, Certification (Fed. Election Comm'n Sept. 7, 2001) (6-0 vote providing for civil penalty of \$75,000), *available at* <http://eqs.nictusa.com/eqsdocsMUR/000002D9.pdf>; *id.*, Conciliation Agreement (Fed. Election Comm'n Sept. 26, 2001) (same), *available at* <http://eqs.nictusa.com/eqsdocsMUR/000002DA.pdf>; In the Matter of DNC Services Corp., MUR 4530, Amended Certification (Fed. Election Comm'n Dec. 5, 2001) (5-0 vote providing for civil penalty of \$115,000), *available at* <http://eqs.nictusa.com/eqsdocsMUR/00000344.pdf>; *id.*, Conciliation Agreement 18 (Fed. Election Comm'n Dec. 6, 2001) (same), *available at* <http://eqs.nictusa.com/eqsdocsMUR/00000345.pdf>.

still amount to a tribal partisanship rate of 1.3 percent.<sup>154</sup> Something beyond rules and structure is driving the result.<sup>155</sup>

### 3. *Legislature*

Even the legislature, the public body designed to be most responsive to public partisan pressures, provides an example of the explanatory limits of rules and structure. And it does so in the most surprising of contexts: redistricting.

---

154. See Franz, *supra* note 124, at 176-77. A more recent report finds a sharp increase in the percentage of “split” votes on proposed enforcement actions to 10 percent in 2008 and 2010 and up to 16 percent in 2009. Press Release, Public Citizen, *Roiled in Partisan Deadlock, Federal Election Commission Is Failing* (Oct. 13, 2011), available at <http://www.citizen.org/documents/fec-deadlock-statement.pdf>. This percentage rose as the number of votes on enforcement matters fell sharply, caused in part by a 2008 delay in appointing commissioners and in part by deregulatory Supreme Court decisions like *FEC v. Wis. Right to Life*, 551 U.S. 449 (2007). The percentage of split votes that were three-to-three party-line deadlocks is not clear from the report. And of the three-to-three party-line deadlocks, it is not clear how many may have been due to forms of partisanship other than tribal partisanship; if the drop in total votes reflects a decrease in otherwise routine matters and a consequent increase in matters of more contested legal and ideological valence, it would not be surprising to see a spike of deadlocks due to ideological partisanship.

Moreover, a recent report, quite critical of the FEC, identified several of these split votes in which Democratic commissioners favored enforcement against Democratic respondents, but the enforcement action was blocked by Republican commissioners. This is consistent with ideological partisanship, and possibly responsive partisanship, but precisely the inverse of what we should normally expect from tribal partisanship. Wertheimer & Simon, *supra* note 147, at 15-16; cf. Kenneth P. Doyle, *FEC Deadlocked on Super PAC Ads Backing Democratic House Candidates*, *Money & Politics Rep.* (BNA) (Nov. 13, 2013) (reviewing an additional vote by Democratic commissioners to discipline Democratic candidates and by Republican commissioners against disciplining Democratic candidates). *But see supra* note 150 (discussing votes against fellow partisans that might still be motivated by tribal partisanship).

Even if all of the identified split votes did indeed represent tribal partisanship and not ideological or responsive partisanship, a 16 percent deadlock rate still reveals a condition other than tribal partisanship operating at least 84 percent of the time.

155. In theory, it is possible that FEC commissioners make tribally partisan enforcement decisions only in the cases most meaningful to their respective partisan teams, and forego tribal partisanship on cases perceived to be of lesser consequence. I am grateful to Professor Rick Hasen for this thought.

Still, I am skeptical that this sort of strategic opportunism explains the observed pattern. The strategic payoff of the restraint, for example, is not immediately apparent. Why would the commissioners take tribal positions in 19 of the presumably highest-profile cases, but forego incremental opportunities to assist their own partisan team in the 1457 incidents resolved on something other than tribal lines?

But note that even if commissioners found reason to deploy tribal partisanship in 19 cases while refraining in 1457 others, the 1457 cases of restraint remain unexplained by the rules or structure of the Commission. I explore an alternative explanation in Part III.D.

As noted above, redistricting is the substantive area providing the strongest incentives for legislators to indulge self-interest and partisan interest over the public interest.<sup>156</sup> In most states, the authority to draw state legislative districts rests with the state legislature<sup>157</sup>—in most cases with, in some cases without,<sup>158</sup> gubernatorial concurrence. Legislative control of redistricting rules will predictably foster ideological, responsive, and tribal partisanship, and will thus be expected to yield partisan effects, particularly with unified partisan control of the lawmaking process.<sup>159</sup>

Iowa's much-misunderstood redistricting process is a curious departure from this model.<sup>160</sup> It has been upheld by many as a national paragon of "nonpartisanship."<sup>161</sup> At first glance, it appears that both rules and structure are responsible. Iowa's legislative services agency (LSA)—a body established by statute as a nonpartisan agency and that hires employees subject to civil service procedures and limitations<sup>162</sup>—maintains ministerial control of the process. The LSA applies several redistricting criteria set by statute, which provide outer constraints on the expected partisan effect.<sup>163</sup> Where these statutory criteria permit discretion, the LSA must look for guidance to a commission of nonofficeholders, four of whom are selected by the legislative leadership but governed by a chair selected by supermajority vote.<sup>164</sup>

So far, so good. It appears that both rules and structure would constrain partisanship in the redistricting process. But the LSA and its advisory commission are, in a significant sense, merely placeholders. When the LSA draws congressional and legislative

---

156. See *supra* text accompanying note 78.

157. See Justin Levitt, *Who Draws the Lines?*, ALL ABOUT REDISTRICTING, <http://redistricting.ils.edu/who-state.php> (last visited Mar. 8, 2014).

158. See, e.g., CONN. CONST. art. III, § 6(a); FLA. CONST. art. III, § 16(a); MD. CONST. art. III, § 5; MISS. CONST. art. XIII, § 254; N.C. CONST. art. II, § 22(5).

159. See Grofman & King, *supra* note 103, at 25 & n.99 ("[S]tudies of past partisan gerrymanders have shown that most gerrymanders have a partisan bias of 1-3 percentage points in favor of the party controlling the redistricting.").

160. See Levitt, *supra* note 65, at 530 n.33.

161. See, e.g., Glenn D. Magpantay, *So Much Huff and Puff: Whether Independent Redistricting Commissions Are Inconsequential for Communities of Color*, 16 ASIAN PAC. AM. L.J. 4, 11 n.57 (2011).

162. IOWA CODE ANN. § 2A.1(1) (West 2013).

163. *Id.* §§ 42.4-.6.

164. *Id.* §§ 42.5-.6.

districts, it submits those plans to the state legislature, which may approve or reject them (and suggest changes).<sup>165</sup> If the first plans are rejected, the LSA will draw an expedited second set of plans, which the legislature may approve or reject.<sup>166</sup> If those second plans are rejected, the LSA will draw an expedited third set, which the legislature may approve or reject—or modify at will.<sup>167</sup> That is, the state legislature has the authority to completely revise the LSA plans for tribally partisan purposes as long as it has sufficient patience. But in four cycles of redistricting since the LSA took primary responsibility for the process, the legislature has never exercised the option to simply substitute its own plan.<sup>168</sup>

Even more remarkable is the fact that the regime continues to exist at all. The roles of the LSA and its advisory commission are both set by statute. So are all of the substantive criteria.<sup>169</sup> Thus, the legislature could repeal both the rules and the structure at any point, if its members were primarily interested in pursuing narrow self-interest in a fashion unregulated by the Iowa Constitution or federal law. It has not done so, even when the process produces districts pairing, and thus threatening, incumbent legislators.<sup>170</sup>

---

165. *Id.* § 42.3(1)(a).

166. *Id.* § 42.3(2).

167. *Id.* § 42.3(3).

168. See Levitt, *supra* note 65, at 530 n.33.

169. See IOWA CODE ANN. §§ 2A.1, 42.4, 42.6 (West 2013).

170. One explanation for the restraint is that the Iowa state government has been politically divided, with the governor and either the state senate or state house leadership representing differing parties, in the redistricting years 1991, 2001, and 2011. *History and the Constitution*, 74 IOWA OFFICIAL REG. 337, 356, 361, 364-65 (2011-2012), available at [http://www.legis.iowa.gov/Docs/Resources/Register/Chapter\\_7\\_History\\_and\\_Constitution.pdf](http://www.legis.iowa.gov/Docs/Resources/Register/Chapter_7_History_and_Constitution.pdf). Yet Iowa saw unified partisan government from 1997-1998 and 2007-2010—and still the LSA structure remains in place. Even more intriguing, the governor's mansion and statehouse were controlled uniformly by Republicans in 1980, when the special redistricting procedure was first implemented. See IOWA CANDIDATES FOR GENERAL ELECTION, NOVEMBER 7, 1978, available at <http://sos.iowa.gov/elections/pdf/results/70s/1978gencands.pdf>; STATE OF IOWA, CANVASS OF THE VOTE, GENERAL ELECTION: NOVEMBER 7, 1978, at 10-11, available at <http://sos.iowa.gov/elections/pdf/results/70s/1978gencanv.pdf>. It is understandable that the legislature would seek to avoid the extended court battles of the decade before, see *In re Legislative Districting of Gen. Assembly*, 196 N.W.2d 209 (Iowa 1972) (per curiam); *In re Legislative Districting of Gen. Assembly*, 193 N.W.2d 784 (Iowa 1972); *In re Legislative Districting of Gen. Assembly*, 175 N.W.2d 20 (Iowa 1970); *Kruidenier v. McCulloch*, 142 N.W.2d 355 (Iowa 1966), but it is remarkable that the legislature ceded its own primary redistricting role in order to do so.

Finally, even in the redistricting years with divided government, the legislature could easily have repealed the LSA structure, or taken control of the map in the final round of

For those unconvinced by the Iowa story, another redistricting example is readily at hand. The impetus to redraw district lines ostensibly follows the decennial census, as a means of complying with the constitutional mandate of equal representation for equivalent populations.<sup>171</sup> But redrawing district lines can also help a legislative majority more tightly tailor districts for maximum partisan advantage.<sup>172</sup> After the Supreme Court's 2006 refusal in *LULAC v. Perry* to locate constitutional harm in a mid-decade redrawing of district lines that had already been brought into conformity with equal population standards, it appears that federal law places no restrictions on repeated redistricting.<sup>173</sup> And though there are some state constitutional limits, ten states—expressly or by silence—allow re-redrawing of state legislative districts (for congressional districts, thirty-three states with more than one district do so), and ambiguous text may support the practice in an additional twenty-one states for state legislative districts (for congressional districts, five states with more than one district).<sup>174</sup> That represents a striking opportunity for unified partisan governments to pursue repeated tribal partisanship. And yet, even after *LULAC*, the vast majority of states with the legal possibility, political opportunity, and partisan incentive to redraw district lines chose not to do so.<sup>175</sup>

---

redistricting, in order to enact a bipartisan gerrymander focused purely on self-regarding behavior. It did not do so, even in years like 2001, in which 64 of the 150 legislative incumbents were forced by LSA maps to run against each other, move, or retire. LEGISLATIVE SERVS. AGENCY, PROPOSED REDISTRICTING PLAN 23 (Mar. 31, 2011), available at <https://www.legis.iowa.gov/DOCS/LSA/IntComHand/2011/IHEGC000.pdf>.

171. *Reynolds v. Sims*, 377 U.S. 533, 583-84 (1964).

172. See Grofman & King, *supra* note 103, at 25.

173. 548 U.S. 399, 416-23 (2006). *LULAC* concerned the Texas legislature's decision to redraw lines previously drawn by a court, rather than a legislature; it is possible that the Court would more readily find fault with legislative adjustment of a legislature's valid lines. Still, the Court's decision turned on the out-party plaintiffs' inability to prove a constitutionally suspect effect. See *id.* It is likely that the same proof-of-harm problems—at least under the Court's current partisan gerrymandering doctrine—would present difficulties for any mid-decade re-redistricting claim.

174. Justin Levitt & Michael P. McDonald, *Taking the "Re" out of Redistricting: State Constitutional Provisions on Redistricting Timing*, 95 GEO. L.J. 1247, 1258-66, 1280-85 (2007); see ARIZ. CONST. art. IV, pt. 2, § 1(23); N.D. CONST. art. IV, § 2.

175. From 2007-2010, Arkansas, Florida, Georgia, Iowa, Maine, Maryland, Massachusetts, North Dakota, Oregon, South Carolina, Texas, and Utah had unified partisan government and plausible state constitutional permission to redraw state legislative lines. In 2007, Louisiana had similar opportunity, and in 2009 and 2010, Delaware joined the list.

The authority of each congressional chamber to judge the legitimacy of elections to its own seats provides another example. The Constitution delegates sole and unconditional power to each House of Congress to determine the “Elections, Returns, and Qualifications of its own Members.”<sup>176</sup> Even absent a nominally credible challenge, there is no justiciable rule precluding a partisan majority of the House of Representatives from simply unseating opposition winners, and the structure of the House is certainly designed to promote majoritarian action. There were 601 contested election cases in the House from 1789-2002.<sup>177</sup> Binding rules and structure alone would suggest that 601 cases should favor the majority party’s claimant. Indeed, rules and structure alone would suggest that there would be far more than 600 cases in two centuries, because a losing candidate from the majority party would have little to lose by bringing a challenge. Yet in fact, only 50.2 percent of the decisions favored the majority party candidate.<sup>178</sup> Remove the 262 contested cases between the Civil War and the turn of the century—when a large number of contested cases were based on disenfranchisement of African Americans in the South, and resolved by Republican Congresses to favor Republican contestants and by Democratic Congresses to favor Democratic contestants—and the majority party wins decisively less than half of all contested cases.<sup>179</sup>

---

And yet, only Georgia, North Carolina, and Texas conducted late-decade redistricting; only Georgia did so without the need to replace maps struck by courts. Levitt, *supra* note 157, at <http://redistricting.ills.edu/states-GA.php> (state senate); *id.* at <http://redistricting.ills.edu/states-NC.php> (state legislature); *id.* at <http://redistricting.ills.edu/states-TX.php> (Congress). Analysis compiled from data at Levitt, *supra* note 157; Levitt & McDonald, *supra* note 174; U.S. CENSUS BUREAU, *Composition of State Legislatures, by Political Party Affiliation* tbl.419 (2011), available at <http://1.usa.gov/YuHLR6>; *2007 Partisan Composition by State*, THE GREEN PAPERS, <http://thegreenpapers.com/G07/composition.phtml> (last visited Mar. 9, 2014) (listing gubernatorial political affiliation); *2008 Partisan Composition by State*, THE GREEN PAPERS, <http://thegreenpapers.com/G08/composition.phtml> (last visited Mar. 9, 2014) (same); *2009 Partisan Composition by State*, THE GREEN PAPERS, <http://thegreenpapers.com/G09/composition.phtml> (last visited Mar. 9, 2014) (same); *2010 Partisan Composition by State*, THE GREEN PAPERS, <http://thegreenpapers.com/G10/composition.phtml> (last visited Mar. 9, 2014) (same).

176. U.S. CONST. art. I, § 5.

177. Jeffery A. Jenkins, *Partisanship and Contested Election Cases in the House of Representatives, 1789-2002*, 18 *STUD. AMER. POL. DEV.* 112, 115 (2004).

178. *Id.* at 120.

179. *Id.* at 128-32.

Much of the time, redistricting is an object lesson in the various forms of partisanship. And a House vote on a contested election presents unquestionable tribal partisan temptation. But even as legislators undertake electoral regulation with tribal partisanship in some ways, they forego tempting opportunities to pursue others. And not all legislators pursue tribal partisanship in electoral regulation, or do so to the same degree. Rules and structure are insufficient to explain the variation.

One possible explanation for officials' failure to capitalize on the opportunities for tribal partisanship permitted by rules and structure is cost. Partisan acts—particularly acts of tribal partisanship—are not cost-free. Even assuming that the immediate electoral benefit of tribal partisanship exceeds its immediate electoral cost,<sup>180</sup> there may still be opportunity costs in terms of officials' time and energy, litigation risk, and damage to a future policy-making agenda. The repeated re-redistricting scenario above provides an example. When the Texas legislature attempted to redraw already valid lines in 2003, minority party legislators twice fled the state to deprive the majority of a quorum; the aftermath of the effort led to three additional years of litigation and destroyed whatever minimal possibility of cross-aisle cooperation theretofore existed.<sup>181</sup>

Another form of cost may relate to the iterative nature of government action. Tribal partisanship in the electoral arena is often aimed at perpetuating control by an existing slate of partisan incumbents. But if a contemplated act of tribal partisanship is insufficient to lock in that control (or if local officials cannot prevent statewide shifts in partisan control, or state officials cannot prevent national shifts in partisan control), opposing partisans may exact payback in the future.<sup>182</sup> Officials who question whether their

---

180. See *supra* text accompanying note 74.

181. Michael J. Kasper, *The Almost Rise and Not Quite Fall of the Political Gerrymander*, 27 N. ILL. U. L. REV. 409, 421-22 (2007) (describing the tactic); see also Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J. L. & PUB. POL'Y 443, 465-67 (2005) (surveying Texas state officials' distaste for re-drawing district lines because of the distraction and difficulty in passing a second plan). See generally STEVE BICKERSTAFF, *LINES IN THE SAND: CONGRESSIONAL REDISTRICTING IN TEXAS AND THE DOWNFALL OF TOM DELAY* (2007) (recounting the Texas experience).

182. The analogies of "payback" and "retribution" are at best imperfect in this context. Some tribal partisanship in the electoral arena may be aimed directly at fellow officials in

avored measures will secure indefinite control may fear retribution enough to maintain a rough *détente*, foregoing tribal partisanship while in power in exchange for an implicit agreement that opposing partisans will forego tribal partisanship should they gain control.<sup>183</sup>

Public response to tribal partisanship, and its impact on personal ambition, may provide still a third form of cost. Officials seeking to pursue higher office may conclude that the electoral gains from tribal partisanship within a smaller jurisdiction do not sufficiently compensate for political backlash in a larger area. Local election administrators looking toward future campaigns, for example, may choose to forego tribal partisanship if they believe that the local gains will be outweighed by potential statewide backlash.<sup>184</sup>

That is, some officials with the potential to engage in tribal partisanship will simply calculate that the benefit is not worth the cost. And yet, instrumental cost-benefit analysis as the sole remaining constraint on responsive and tribal partisanship seems an impoverished theoretical backstop. Even when substantive rules and institutional structure would otherwise permit partisanship, there remain uncaptured partisan opportunities in which tangible benefits to self or team would seem to exceed tangible costs. And even when costs are substantial, it does not appear that cost-benefit analysis based on tangible outcomes is actually motivating all actors who refrain. Legislators, perhaps. Maybe some election officials

---

ways readily susceptible to retribution: when redistricting maps are designed to excise an opposing legislator from “his” district, a switch in partisan control may well leave the architect of such a plan excised from “his” own district in the next cycle. But other examples do not suggest similarly parallel tit-for-tat opportunities. If a judge decides a close election contest based on tribal partisanship or a prosecutor brings a particular case based on tribal partisanship, opportunities for direct payback may be substantially less straightforward.

183. *Cf.* ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (rev. ed. 2006) (discussing the potential for cooperation in the context of a prisoner’s dilemma game known to be iterative). It is important to emphasize that the incentive for restraint caused by a potential shift in partisan control depends on the possibility of a shift in partisan control. An annual partisan re-redistricting, for example, should substantially blunt the pragmatic possibility of a shift in partisan control—and so it would be difficult to explain the absence of annual partisan re-redistricting if the only motivation were fear of reprisal.

184. This is not to suggest that all such calculations will counsel against tribal partisanship. It may well be that tribal partisanship in local office is sufficiently valued by party leadership that it increases a local official’s support from the party for a future run for higher office, and that the value of this party support—endorsements, volunteers, fundraising, and an eased path through a primary—exceeds any backlash from the electorate.

(though I remain skeptical). But FEC commissioners? Prosecutors? Judges? Juries?

#### *D. Role Morality and Situational Norms*

I suggest that an underrecognized—and perhaps more powerful—explanation for the observed absence of partisanship when it might otherwise be expected is a phenomenon sometimes called “situational ethics” and sometimes “role morality.” It is the notion that contextual norms matter and engender contextual behavioral responsibilities, sometimes dependent on occupation or professional role.<sup>185</sup> Norms are generally supported by social approval for conformity or sanction for misbehavior, and so reproof for violating these contextual norms might well be considered still another cost of partisanship like the costs surveyed above: a reputational cost (or foregone opportunity for reputational benefit).<sup>186</sup> And departure from a deeply internalized norm might well involve a “guilt cost”<sup>187</sup> to one’s self-perception: that is, the mindset that “no matter what others think, X is not the sort of thing that I do.” Yet these costs are different in kind from the costs discussed previously. Social reproof or cognitive dissonance with one’s self-image need not be consciously anticipated or recognized in order to be feared or avoided.<sup>188</sup> Situational ethics are distinct—and distinctly powerful—levers of behavior.

---

185. See Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1663-64 (1996).

186. Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 366-72 (1997).

187. See Cooter, *supra* note 185, at 1662. Professor McAdams distinguishes this internalized cost from an externalized cost by describing the former as “guilt” and the latter as “shame.” See McAdams, *supra* note 186, at 380. Psychologists tend to define the terms a bit differently: “guilt” refers to costs (whether self-imposed or socially imposed) for particular behaviors, and “shame” refers to costs (whether self-imposed or socially imposed) concerning evaluations of the self not confined to a particular event or action. That is, guilt may be encapsulated by a feeling that “I *did* that horrible *thing*” (which was a bad thing to do) and shame by a feeling that “I *did* that horrible thing” (and therefore I am a bad person). See June Price Tangney et al., *Moral Emotions and Moral Behavior*, 58 ANN. REV. PSYCHOL. 345, 348-49 (2007).

188. See Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1259-60 (1999) (recognizing that traditional conscious cost-benefit analysis is insufficient to explain some compliance with moral norms).

Role morality is among the most familiar of principles for attorneys, each of whom swears to abide by a distinct code of professional ethics that only rarely governs her conduct as a parent, child, friend, patient, customer, investor, sports competitor, or actor in hundreds of other roles.<sup>189</sup> And recognition of the special ethical demands on public officials generally is similarly widespread.<sup>190</sup> But the role of situational ethics in tempering partisanship in the public sphere, particularly in the regulation of electoral processes, is underappreciated.<sup>191</sup> Indeed, even if the protections that norms provide are not ironclad, they may be the most powerful means to confront unwelcome forms of partisan intent.

Situational ethics yields the expectation that, under the right circumstances, individuals with intense partisan preferences will forego disfavored forms of partisanship: they will act in distinctly “nonpartisan” ways in certain roles, even without “being” nonpartisan, and even without the rules-based and structural constraints discussed above. Examples abound.<sup>192</sup> Consider a judge with a deep personal affection for the Republican party. She may vote a straight ticket for Republican candidates. She may even give the maximum permissible campaign contribution to those candidates from her personal funds. But even if the judge were selected in a partisan election, it would be shocking to imagine that judge consciously

---

189. See generally MODEL RULES OF PROF'L CONDUCT (2013). Most of the rules that may limit a lawyer's conduct in other roles pertain to potential conflicts with a professional client or conduct undertaken on a client's behalf, not limits inherent in the nature of the alternative role. See, e.g., *id.* R. 1.8, 1.9, 4.1, 4.4. One of the rare exceptions is Rule 8.4(c), providing that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation,” no matter the context. *Id.* R. 8.4(c).

190. See, e.g., Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 789 (2000) (“It is an uncontroversial proposition in mainstream American legal thought that government lawyers have greater responsibilities to pursue the common good or the public interest than their counterparts in private practice, who represent non-governmental persons and entities.”).

191. In this vein, I agree entirely with Professor Heather Gerken in her call to develop and enhance professional norms among election administrators. See HEATHER K. GERKEN, *THE DEMOCRACY INDEX* 88-89 (2009). But though, as she suggests, particular performance norms and metrics may well be “largely absent in the elections arena,” *id.* at 88, I suggest below that the norm against tribal partisanship may actually be widespread, even if undercultivated.

192. The examples below are drawn from the United States, though of course the concept is not distinctly American. For an exploration of how the Speaker of the Canadian House of Commons may maintain both private partisan preference and a role-based abdication of tribal partisanship, see, for example, Dale Lovick, *Impartial but Not Non-Partisan: Re-Examining the Mythology of the Speakership*, CANADIAN PARLIAMENTARY REV., Winter 1996/97, at 4-6.

deciding to rule for or against a litigant based purely on that litigant's partisan affiliation, in an election case or otherwise.<sup>193</sup> Indeed, it would be exceedingly unusual to find that judge willing to rule on a case based purely on the expressed preferences of most Republican voters in the jurisdiction, without any personal jurisprudential preference for the underlying legal principle.<sup>194</sup> This is because the ethics of the judicial role—specific situational ethics, inapplicable to those who are not judges and inapplicable to judges when acting in a different capacity (for example, as a voter)—preclude acting with tribal or responsive partisan intent.

True, judicial officials are bound by an ethical code with substantial theoretical teeth. The ABA's Model Code of Judicial Conduct, for example, states that "[a] judge shall not permit ... political ... interests or relationships to influence the judge's judicial conduct or judgment,"<sup>195</sup> and stresses that:

---

193. The unlikely hypothetical is distinct from the observation that a judge's party affiliation (which, in appointed judiciaries, is usually assumed to be the party affiliation of the appointing entity) may sometimes be correlated with the party affiliation of victorious litigants. See, e.g., Randall D. Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 AM. POL. SCI. REV. 413 (1995) (presenting one study finding that federal judges are less likely to vote against redistricting plans drawn by legislatures of "their" party than plans drawn by legislatures of an opposing party). The existence of the correlation does not indicate the form of partisanship responsible for the outcome.

194. That said, some research points toward a potential counterexample. There is robust evidence that elected judges impose stricter criminal sentences, to a statistically significant degree, toward the end of their term, as elections approach. See Carlos Berdejo & Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 REV. ECON. & STAT. 741, 742 (2013). Unlike the simple partisan correlation reviewed *supra* note 193, there are few explanations for this election-cycle timing effect beyond responsiveness to the electorate. It is not clear whether the judges would themselves recognize this fact. That is, it is not clear whether the judges are consciously modifying their behavior in light of their perception of the electorate's preferences or whether this is a pattern fostered by subconscious beliefs. Cf. Kyle C. Kopko et al., *In the Eye of the Beholder? Motivated Reasoning in Disputed Elections*, 33 POL. BEHAV. 271 (2011) (finding voting patterns on hypothetical ballot challenges explicable only by either tribal partisanship or unconscious partisan bias—albeit in an experimental setting unlikely to replicate the rigorously maintained role morality of real-world judges).

195. MODEL CODE OF JUD. CONDUCT R. 2.4(B) (2011). As of 2014, at least nineteen states had adopted language identical to the model rule; nine further states had similar language. ABA Comm. on CPR Policy Implementation, *Comparison of ABA Model Judicial Code and State Variations*, Rule 2.4, at 1 (2014), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2\\_4.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_4.authcheckdam.pdf).

Even when subject to public election, a judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure.<sup>196</sup>

In theory, at least, where states incorporate the ABA's Model Rules, judges who violate these ethical obligations may be not only stripped of their judicial positions, but disbarred.<sup>197</sup>

Other public officials abide by similar ethical constraints on election-related tribal partisanship, with similarly severe consequences. Most officials in the federal executive branch, for example, may not undertake any "activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group" while on duty or otherwise using the trappings of federal authority.<sup>198</sup> Similar prohibitions apply to state and local officials employed in connection with any activity receiving federal appropriations.<sup>199</sup> Violations may subject offenders not only to removal<sup>200</sup> but also to criminal sanctions.<sup>201</sup>

---

196. MODEL CODE OF JUD. CONDUCT R. 4.1 cmt. 1. As of 2014, at least twenty states had adopted language similar to the comment in the model rule. ABA Comm. on CPR Policy Implementation, Comparison of ABA Model Judicial Code and State Variations, Rule 4.1, at 4-20 (2014), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/4\\_1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/4_1.authcheckdam.pdf).

197. See MODEL RULES FOR JUD. DISCIPLINARY ENFORCEMENT § 2, R. 6(2) & cmt. (2013) ("Some misconduct is so serious that the respondent should not only be removed from judicial office but also be disbarred or suspended from the practice of law.").

198. 5 U.S.C. § 7324(a) (2006); 5 C.F.R. § 734.101 (2013); see 5 U.S.C. § 7323(a)(1) (stating that an employee "may not use his official authority or influence for the purpose of interfering with or affecting the result of an election"); 5 C.F.R. §§ 734.302(a), 734.407 (same); see also U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 564-65 (1973) ("It seems fundamental in the first place that employees in the Executive Branch of the Government, or those working for any of its agencies, ... are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof.").

199. 5 U.S.C. §§ 1501, 1502(a)(1).

200. *Id.* §§ 1505, 7326.

201. 18 U.S.C. § 595 (2006) (establishing criminal penalties for federal employees, or state employees engaged in activity receiving federal funds, for the use of "official authority for the purpose of interfering with, or affecting, the nomination or the election of any candidate" for

Situational ethics confronting partisanship may also be enforced by legal mechanisms beyond direct employment-related or criminal consequences. For example, a recent Florida ballot initiative codified an ethical prohibition on tribal partisanship in redistricting: “No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent....”<sup>202</sup> This law regulates partisan intent, not partisan effect. Indeed, by directly aiming at the intent of the policymaker, it is best seen as a binding norm of situational ethics.<sup>203</sup> It is enforced not by sanctions on individual policymakers engaging in partisanship but by judicial review of the redistricting plans that result. That said, norms take time to develop, and this particular norm may not yet have sunk in in Florida. In its first review of a redistricting plan since the prohibition on tribal partisanship went into effect, the Florida Supreme Court struck a state plan because it found that those drawing the lines failed to live up to their new ethical requirement.<sup>204</sup>

---

federal office).

202. FLA. CONST. art. III, §§ 20(a), 21(a). At least six other states have similar laws or policies. *See, e.g.*, CAL. CONST. art. XXI, § 2(e) (“Districts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party.”); IDAHO CODE ANN. § 72-1506(8) (West 2013) (“Counties shall not be divided to protect a particular political party or a particular incumbent.”); IOWA CODE ANN. § 42.4(5) (West 2013) (“No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group.”); OR. REV. STAT. ANN. § 188.010(2) (West 2013) (“No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person.”); WASH. REV. CODE ANN. § 44.05.090(5) (West 2013) (“The commission’s plan shall not be drawn purposefully to favor or discriminate against any political party or group.”); Leg. Res. 102, 102d Leg., 1st Sess., at ¶ 5 (Neb. 2011), *available at* [http://nebraskalegislature.gov/bills/view\\_bill.php?DocumentID=13489](http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=13489) (“District boundaries shall not be established with the intention of favoring a political party or any other group or person.”).

Montana statutes purport to have a similar law, which at least expresses the norm. MONT. CODE ANN. § 5-1-115(3) (West 2013) (“A district may not be drawn for the purposes of favoring a political party or an incumbent legislator or member of congress.”). However, in 2004, related statutes were found to unlawfully limit the authority of the redistricting body under the state constitution; it is possible that the limitation is therefore no longer legally binding. *Wheat v. Brown*, 85 P.3d 765, 771 (Mont. 2004); *Brown v. Mont. Districting & Apportionment Comm’n*, Case No. ADV 2003-72 (Mont. Dist. Ct. July 2, 2003), *available at* [http://leg.mt.gov/content/committees/interim/2003\\_2004/dist\\_apport/work\\_plan/BrownvMontanaDistricting.pdf](http://leg.mt.gov/content/committees/interim/2003_2004/dist_apport/work_plan/BrownvMontanaDistricting.pdf).

203. *See In re* Senate Joint Resolution of Legislative Apportionment 1176, 83 So. 3d 597, 617, 643 (Fla. 2012).

204. *Id.* at 615-19 (discussing the standard); *id.* at 654, 657-62, 669-79 (applying the

The examples above show that situational ethical norms may limit the forms of partisanship at which they are aimed, at least when there is the realistic prospect of legal enforcement by an external body.<sup>205</sup> But though likely legal enforcement may be sufficient to support strong ethical norms against partisanship, it is not necessary. In other arenas, scholars have recognized the immense power of norms to regulate behavior even without legal sanction.<sup>206</sup> Norms regarding partisanship are not inherently less

---

standard to strike down the redistricting plan for the Florida State Senate).

205. In some cases, the structure of an electoral institution may impact the realistic prospect of legal enforcement. Although private individuals, nonprofit entities, and minor parties may challenge electoral regulation, the major parties generally have more resources to initiate (or support) litigation; this is particularly important when legal enforcement of a norm related to partisanship requires extensive factual discovery. An institution with a bipartisan structure fostering détente between the major parties may limit the likelihood that one major party or the other would support litigation undoing any resulting compromise. That reluctance, in turn, limits the likelihood that resources would be made available to enforce existing legal provisions setting norms against partisanship.

This structural pattern may help to explain the apparent presence of tribal partisanship in Washington State's redistricting process, *see* Callaghan, *supra* note 133, despite a statute providing that a redistricting plan "shall not be drawn purposely to favor or discriminate against any political party or group." WASH. REV. CODE ANN. § 44.05.090(5) (West 2013). It is possible that the statute might be interpreted to preclude only plan-wide tribal partisanship, rather than tribal partisanship in the design of any single district. But to the extent that the latter interpretation is more plausible, it may be that the norm does not face a realistic prospect of enforcement in the event of a bipartisan gerrymander. If the commissioners appointed by Republicans and those appointed by Democrats all engage in tribal partisanship, and officials from their respective parties are relatively pleased with the result, there will be little incentive for either party to provide funding for a suit.

Still, the fact that enforcement is less likely does not render it unthinkable. In this cycle, a pro se petitioner did in fact file suit against the Washington plan (though he passed away before litigation was complete). Petition for Declaratory Judgment, *In re* 2012 Wash. State Redistricting Plan, Case No. 86976-6 (Wash. Feb. 8, 2012), *available at* <http://redistricting.lls.edu/files/WA%20milem%2020120208%20petition.pdf>. Also in this cycle, lawsuits were filed against redistricting plans drawn by bipartisan or multipartisan institutions in California, Idaho, and Montana, all of which have legal provisions restraining tribal partisanship. *See* Radanovich v. Bowen, Case No. 2:11-cv-09786 (C.D. Cal. Feb. 9, 2012), *available at* <http://redistricting.lls.edu/files/CA%20radanovich%2020120209%20order.pdf>; Radanovich v. Bowen, Case No. S196852 (Cal. Sup. Ct. Oct. 26, 2011), *available at* [http://wedrawthelines.ca.gov/downloads/meeting\\_handouts\\_102011/handouts\\_20111026\\_csc.pdf](http://wedrawthelines.ca.gov/downloads/meeting_handouts_102011/handouts_20111026_csc.pdf); Order, Vandermost v. Bowen, Case No. S196493 (Cal. Sup. Ct. Oct. 26, 2011), *available at* [http://wedrawthelines.ca.gov/downloads/meeting\\_handouts\\_102011/handouts\\_20111026\\_csc.pdf](http://wedrawthelines.ca.gov/downloads/meeting_handouts_102011/handouts_20111026_csc.pdf); Twin Falls Cnty. v. Idaho Comm'n on Redistricting, 271 P.3d 1202, 1207 (Idaho 2012); Complaint for Injunctive and Declaratory Relief, *Willems v. Montana*, Case No. DV-13-C7 (Mont. 14th Jud. Dist. Ct. Mar. 14, 2013). Only the Montana case, currently pending, alleged any violation of legal prohibitions on tribal partisanship.

206. *See, e.g.*, RICHARD F. FENNO, JR., *THE POWER OF THE PURSE* xxi (1966) ("[I]n a

powerful. For those with strong incentives to act in partisan fashion, ethical norms against tribal partisanship that are stronger still may govern behavior even in the absence of credible legal enforcement.

I recognize that this assertion may seem hopelessly naïve. Nevertheless, it seems to describe the world in which we live.<sup>207</sup> Many, and perhaps most, ethical norms against tribal partisanship backed by ostensible legal sanctions are not capable of ready enforcement. Prosecutors, for example, may not select individuals to prosecute based on their partisan affiliation.<sup>208</sup> But absent a smoking-gun memorandum carefully describing the partisan basis for a prosecution, the evidentiary hurdles to establish such a disposition are immense, and perhaps insurmountable. It would be exceedingly difficult for any criminal defendant to nullify the prosecution—and even more difficult to gain sanctions against the prosecutor outside of the instant criminal case—based on a violation of this ethical rule.<sup>209</sup> And there are few effect-based rules or structures that meaningfully constrain prosecution based on tribal partisan intent, particularly when such intent can be masked with relative ease.<sup>210</sup> Yet it does not seem wildly speculative to contend

---

reasonable stable system, patterns of behavior tend to coincide with patterns of expectations. People usually do what they are expected to do.”); Eisenberg, *supra* note 188, at 1254 n.2 (cataloguing recent work on the power of social norms to regulate behavior).

207. Indeed, the Framers seem to have relied on the power of ethical norms—and social sanction—to govern official behavior as well. Even as he recognized the salience of notable departures from the pursuit of the public interest, James Madison remarked that the protest they occasioned also served as evidence of their rarity. *See THE FEDERALIST NO. 57, supra* note 42, at 320 (James Madison) (“[Excessive self-regarding behavior] is a common topic of declamation against human nature; and it must be confessed that instances of it are but too frequent and flagrant, both in public and in private life. But the universal and extreme indignation which it inspires is itself a proof of the energy and prevalence of the contrary sentiment.”).

208. *See Hartman v. Moore*, 547 U.S. 250, 256 (2006) (noting that “the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions,” for the exercise of constitutionally protected rights); *United States v. Torquato*, 602 F.2d 564, 569 n.9 (3d Cir. 1979).

209. *See, e.g., Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-90 (1999) (describing the extraordinary burden of proof involved in such cases); *see also Van de Kamp v. Goldstein*, 555 U.S. 335, 340-43 (2009) (reviewing absolute prosecutorial immunity with respect to personal liability for actions “associated with the judicial phase of the criminal process”).

210. Any given prosecutor’s office may, of course, structure itself to include layers of review for any given prosecution by persons with differing partisan affiliation. To the extent that such structures exist, there is no evidence that they are standard features of prosecutorial offices generally.

that such prosecutions are rare.<sup>211</sup> If that is indeed the case, the cause must be an ethical norm sufficiently powerful that it governs practice even in the absence of a reliable legal enforcement mechanism. More simply: most prosecutors—including those elected in partisan contests—tend to take quite seriously their situational ethical obligation to avoid tribal partisanship in their professional role, even without a real chance of getting caught. To the extent that there is a legal prohibition against tribal partisanship, it is effective not because it creates the fear of punishment but because it specifically articulates, publicizes, and supports the relevant norm.<sup>212</sup> The norm, not the legal repercussion, is doing the real work.

Other examples are stronger still, as they confirm the potential power of an ethical norm that is not backed by any threat of legal sanction, defeating the urge to indulge tribal partisanship with enormous pragmatic political repercussions. Professor Ned Foley recounts the object lesson of Samuel Randall, Democratic Speaker of the House in 1877, and his conduct during the enormously contentious dispute over the 1876 Hayes-Tilden election.<sup>213</sup> Randall was no stranger to apparent tribal partisanship.<sup>214</sup> But on March 1, 1877, he refused to permit the only last-ditch legislative procedural maneuver that could have denied Republican Rutherford B. Hayes the presidency and led to Democrat Samuel Tilden's inauguration.<sup>215</sup>

---

211. Even unconfirmed allegations of such prosecutions are notable for their rarity. *See, e.g.*, Richard B. Schmitt, *Ex-Atty. Gen. Says Prosecutor Played Politics*, L.A. TIMES, Oct. 24, 2007, at 10, available at 2007 WLNR 20871998; Adam Zagorin, *More Allegations of Misconduct in Alabama Governor Case*, TIME, Nov. 14, 2008, available at <http://content.time.com/time/nation/article/0,8599,1858991,00.html>.

212. *See* Eisenberg, *supra* note 188, at 1269-70; McAdams, *supra* note 186, at 397-400; *see also* M. Mindy Moretti, *Doing a Nonpartisan Job in a Hyper-Partisan World*, ELECTIONLINE WEEKLY (Feb. 9, 2012), <http://electionline.org/index.php/2012/726-electionlineweekly-february-9-2012> ("Delaware law requires that I as well as my staff and all of the Elections employees in the three county offices be non-partisan.... Having this law as a backdrop is a constant reminder to us as well as to the politicians we interact with that we remain non-partisan.") (quoting Delaware commissioner of elections Elaine Manlove).

213. Edward B. Foley, *Virtue over Party: Samuel Randall's Electoral Heroism and Its Continuing Importance* (Ohio State Univ. Moritz Coll. of Pub. Law & Legal Theory, Working Paper No. 189, 2013), available at <http://papers.ssrn.com/abstract=2210388>.

214. *Id.* at 6-7.

215. The procedural dispute itself is considerably complex, even to summarize: it involved the refusal to delay consideration of the validity of a certificate of electoral votes from Vermont. Doing so might have delayed the electoral count sufficiently to yield no majority of

That is, with no legal sanction whatsoever governing his behavior, Randall refused to pursue tribal partisanship, even at the cost of denying his party's candidate the presidency.

Iowa's redistricting process provides a more modern, if less extreme, example. In addition to the rules and structural provisions discussed above,<sup>216</sup> ethical norms subject to enforceable legal sanction at first appear to govern the process. The ministerial body at the heart of the process comprises civil servants prohibited by law from "participat[ing] in partisan political activities."<sup>217</sup> And an overriding ethical norm governs both the commission advising the LSA and the legislature's role in modifying LSA plans: "No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group."<sup>218</sup>

But as discussed above, both of these norms exist at the whim of the legislature. The legislature could repeal this statutory structure at any point without legal sanction, to pursue tribal partisanship in the redistricting process that is unregulated by the Iowa Constitution or federal law. It has not done so. There is some dispute about the extent to which Iowa districts are actually drawn for the purpose of favoring incumbents, despite the current statutory scheme.<sup>219</sup> But to the extent that the current process lives up to the

---

state electors by a designated date, allowing the Democratic House of Representatives to vote unilaterally on the President. *Id.* at 9-19.

216. See *supra* text accompanying notes 160-64.

217. IOWA CODE ANN. § 2A.1(4) (West 2013). It is unclear whether this prohibition is meant to define the full scope of the agency's nonpartisanship, or whether it amounts to an additional restriction. Moreover, "partisan political activities" are not further defined in Iowa law. Federal law defines the term, for purposes of restrictions on federal executive personnel, to essentially preclude tribal partisanship: "[p]olitical activity means an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group." 5 C.F.R. § 734.101 (2013).

218. IOWA CODE ANN. § 42.4(5) (West 2013).

219. Cf. Bruce E. Cain et al., *From Equality to Fairness: The Path of Political Reform Since Baker v. Carr*, in PARTY LINES 6, 27 (Thomas E. Mann & Bruce E. Cain eds., 2005) ("According to *Congressional Quarterly Weekly*, when Republicans controlled the [Iowa] state government in 1981, the legislature approved a map on the third attempt, after rejecting two previous maps that would have had a negative impact on the reelection of two incumbent Republicans."); Thomas E. Mann, *Redistricting Reform: What Is Desirable? Possible?*, in PARTY LINES, *supra*, at 102 ("[I]n 1981, when Republican leaders complained that two of their House incumbents were thrown together in a Democratic-leaning district, the 'problem' was ameliorated in the second and ultimately successful third plan."). The preceding quotes strongly imply (but do not assert) tribal partisan intent on the part of those drawing the maps.

“nonpartisan” hype, the most compelling explanation is the notion that the ethical norm against tribal partisanship has developed sufficient strength to keep the existing rules in place even without a legal mandate requiring its existence.

The strength of norms against tribal partisanship will vary from institution to institution, as public actors are socialized by their superiors and peers (and, to a lesser extent, their publics).<sup>220</sup> But the ethical limits on Iowa’s redistricting process are in a curious way closer to the norm than the exception.<sup>221</sup> Some redistricting is indeed infused through-and-through with extremes of tribal partisanship.<sup>222</sup> But most electoral regulation is not. Serious ideological partisanship persists in the construction and enforcement of election laws, and serious ideological and responsive partisanship persists in the creation of election legislation. By and large, however, the Madison County experience, which surprises few cynical redistricting practitioners—“We are going to shove [the map] up your f----- a-- and you are going to like it, and I’ll f--- any Republican I can”<sup>223</sup>—would still have the capacity to surprise in the campaign finance or election administration context, or in the administrative or judicial enforcement of existing redistricting laws. Salient examples of tribal partisanship in the regulation of the electoral process persist, but they may be salient because of their comparative

---

220. Roger H. Davidson, *Socialization and Ethics in Congress*, in REPRESENTATION AND RESPONSIBILITY: EXPLORING LEGISLATIVE ETHICS 109, 110-113 (Bruce Jennings & Daniel Callahan eds., 1985).

221. Consider as well a North Carolina law stating that “all drafting and information requests to legislative employees and documents prepared by legislative employees for legislators concerning redistricting” by the state legislature become public records once a redistricting plan is enacted. N.C. GEN. STAT. ANN. § 120-133 (West 2013). This is an intriguing departure from the norm: in the federal legislature, and in many states, the legislative activities of staff are privileged. See Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 251-53, 255-56, 265-70 (2003) (reviewing the federal model and a few limited state departures).

The North Carolina statute was enacted in 1983; the legislature could have repealed or modified it at any point, but despite the enormously contentious redistricting battles of the ensuing decades, it remains in place. It is difficult to justify this unusual assertion of transparency based on the tribal self-interest of a legislature under unified partisan control. Instead, the provision modestly increases the chance of public sanction for acts of tribal partisanship—and as such, it becomes a wholly voluntary enforcement mechanism supporting a norm against tribal partisanship in redistricting.

222. See *supra* note 82 and accompanying text.

223. See *supra* note 79 and accompanying text.

rarity.<sup>224</sup> The ocean of decisions to forego tribal partisanship while regulating elections, despite ample available opportunity to indulge partisan impulses, does not make the front page of the papers.

That is, public officials with recognizable partisan affiliations can leave behind private tribal partisan impulses when acting in a public capacity, even when their self-interest is implicated. Indeed, our lived experience is that they not only can but repeatedly do, in daily official acts large and small, even when there are opportunities to behave otherwise. Some groups of officials have firmer norms against tribal partisanship than others, and these norms are stronger in some circumstances than others. But even the weaker end of the spectrum is stronger than conventional wisdom suggests. The “voting wars”<sup>225</sup> are intense, but they are not yet nuclear. Imagine a world in which legislative majorities and administrators had no constraints at all on the extent of their tribal partisanship—a world in which most election-related decisions, minutiae and sweeping initiatives alike, were undertaken by most officials for tribal partisan reasons most of the time. It would look little like the world we inhabit. The difference between that world and ours is that situational ethics exist and have real power.

### *E. Maintaining Role Morality*

Like all norms, situational norms and standards of role morality are difficult to build and require substantial upkeep.<sup>226</sup> Once a

---

224. See, e.g., Cain, *supra* note 134, at 1822 n.50 (noting that “[n]either the 1982 California nor the 2002 Texas congressional redistricting”—both extremes of the partisan gerrymandering genre—“are usual cases”). Allegations of tribal partisanship dogged a 2011 Florida law that, among other things, reduced early voting hours; the allegations were themselves newsworthy. See Kam & Lantigua, *supra* note 80; cf. Justin Levitt, *Election Deform: The Pursuit of Unwarranted Electoral Regulation*, 11 *ELECTION L.J.* 97, 99-102 (2012) (finding that the new law’s costs exceeded its recognizable public benefits). Notably, in denying the allegations, the spokesman for the accused party did not defend tribal partisan action, but confirmed that such partisanship would have violated role norms had it occurred. Kam & Lantigua, *supra* note 80 (“‘If what [the former party chair] said had happened, that would be wrong and he should have fired those men,’ [the current party spokesman] said.”).

225. See generally RICHARD L. HASEN, *THE VOTING WARS* (2012) (discussing current election law controversies).

226. See William K. Jones, *A Theory of Social Norms*, 1994 *U. ILL. L. REV.* 545, 569 (1994) (“In order to remain viable, even the most elementary and noncontroversial of norms require reinforcement through regular social interactions.”).

critical mass of actors adopts a regular norm, that social expectation exerts a powerful influence on action by all in the relevant community.<sup>227</sup> But when norms are not consistently followed, and where deviation from the recognized norms is either undetected or validated rather than sanctioned, the norms will tend to lose their power to influence behavior.<sup>228</sup>

Because social expectation defines norms, public commentary plays a significant role in maintaining—or subverting—the strength of these norms. Of the forms of partisanship, tribal partisanship is the manifestation of partisanship most consistently normatively denigrated, by scholars and the lay public alike. Curiously, this social norm against tribal partisanship in official action may even extend to the official's own fellow partisans. Democrats may love it when Democratic officials vigorously fight for ideologically aligned principles, but even fellow Democrats tend to be leery of action taken by Democratic officials purely for the private gain of particular Democratic partisans.<sup>229</sup>

Consistent reaction against official displays of tribal partisanship, particularly in official action with respect to electoral regulation, may help reinforce this apparent norm.<sup>230</sup> However, this reaction must be carefully calibrated in order to be effective—and in practice, it is too infrequently carefully calibrated. Some of the imprecision is due to the fact that it is difficult to sanction tribal partisanship if it cannot be reliably detected or diagnosed; that is, if tribal partisanship cannot be reliably distinguished from coincidental, ideological,

---

227. See, e.g., Cooter, *supra* note 185, at 1665; Eisenberg, *supra* note 188, at 1260-61, 1264-65; McAdams, *supra* note 186, at 366-72 (discussing the feedback effect of behavioral compliance with a shared value); cf. THE FEDERALIST NO. 61, *supra* note 42, at 343 (Alexander Hamilton) (“There is a contagion in example which few men have sufficient force of mind to resist.”). See generally ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991) (discussing the development of behavioral norms even without legal sanction).

228. See, e.g., TOM R. TYLER, WHY PEOPLE OBEY THE LAW 27-28 (2006); Eisenberg, *supra* note 188, at 1288-91 (describing the collapse of a pre-existing norm); Jones, *supra* note 226, at 567-68; McAdams, *supra* note 186, at 368.

229. See *supra* notes 71-72.

230. It is unclear whether, or to what degree, social strata make a difference here: whether disapprobation from those perceived to be above one's own social station, or from perceived peers, or from perceived constituents, or from a broader lay audience is any more or less impactful. I suspect that approbation or disapprobation by perceived superiors and perceived peers is most powerful as a driver of behavior, but that is an empirical hypothesis subject to testing.

or responsive partisanship, it is difficult to target it effectively for disapproval.<sup>231</sup>

But not all of the lost opportunity to reinforce the norm against tribal partisanship is based on accurate detection. For example, some jaded observers simply shrug at tribal partisanship when it is admitted, behind the scenes or in public. Refusing to condemn tribal partisanship when it does occur is not merely a neutral omission. Norms hold their power as effective social regulatory mechanisms, in part, because actors fear social sanction for violating the norm, when (and only when) they violate the norm.<sup>232</sup> In a society that prizes weekly tithing at church, it may be known that he who publicly fails to contribute to the collection basket will receive negative social feedback: glares, mutters, an indignant lecture. Consistent negative feedback (or withholding of positive feedback) for those who fail to contribute reinforces the norm. In contrast, if a shirker receives no sanction—or worse, approval—the church should expect more shirkers in subsequent weeks. Mistargeted public approval of tribal partisanship, or at least decisions to refrain from sanctioning it, are likely to weaken the norm.<sup>233</sup>

The answer, however, is not merely more public rancor whenever partisanship is alleged or uncertain. Mistargeted public disapproval may weaken the norm as well. Consider an individual who tithes, but receives the same neighborly glare as a shirker. When the individual repeatedly receives that same feedback despite contributing to the collection basket, he learns that abiding by the norm does not prevent the disfavored feedback. With no way to avoid the social sanction usually associated with disobeying the norm, the norm

---

231. See Richard L. Hasen, *Beyond the Margin of Litigation, Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 982 (2005) (“It is, of course, impossible to know in most instances the extent to which a discretionary decision made by a partisan elections official can best be explained by partisan bias rather than a reasoned decision on an issue on the merits.”); Tokaji, *supra* note 66, at 437 (“I do not deny the difficult problem ... of disentangling *partisan* motivations from *ideological* ones.”); cf. McAdams, *supra* note 186, at 361 (noting that there must be “an inherent risk that anyone who engages in the behavior at issue will be detected”).

232. See McAdams, *supra* note 186, at 352 (“A norm exists as long as the sanctions imposed on violators create an expected cost for noncompliance that exceeds the expected cost of compliance.”).

233. See Patrick J. Keenan, *Do Norms Still Matter? The Corrosive Effects of Globalization on the Vitality of Norms*, 41 VAND. J. TRANSNAT'L L. 327, 367, 369 (2008).

quickly loses its force. Glare at a tither often enough, and he will not feel the need to tithe in order to avoid an unwelcome glare.

So too with partisanship. Public officials with control of the electoral reins may forego tribal partisanship in their official capacities because of a deeply held situational norm. If they stray into tribal partisanship and are castigated for the deviation by people whose opinions they prize, the norm will be reinforced. If they stray into tribal partisanship without such castigation, however, the norm may lose some of its conditioning force. And the reverse—which may be more frequent in the modern media environment—is also true. If public officials receive the same castigation as tribal partisans when they have not acted with tribal partisanship—when, perhaps, partisanship resulting from their actions has been coincidental or ideological or responsive (or nonexistent)—the norm may be similarly degraded.<sup>234</sup> Alleging tribal partisanship where none exists simply decreases the power of the social sanction for tribal partisanship when it does exist.<sup>235</sup>

---

234. The most straightforward form of castigation is an angry accusation that an official has engaged in improper tribal partisanship. But unwarranted speculation—“Has official X engaged in improper tribal partisanship?” or “There are questions about whether official X has engaged in improper tribal partisanship” or “We cannot discount the possibility that official X engaged in improper tribal partisanship”—may have much the same effect. Observers—and more importantly, the relevant officials themselves—will more naturally tend to perceive the linkage to improper tribal partisanship as an accusation than as a statement or question with neutral valence. That is, wondering aloud whether a particular act is the product of tribal partisanship, without sufficient evidence to support the idea, is likely to have the same impact as an unwarranted allegation of impropriety. Cf. EDW LYNCH, *Twitterbot ‘The Answer Is No’ Responds ‘No’ to Questions Posed by Headlines*, LAUGHING SQUID (May 7, 2013, 4:58 PM), <http://laughingsquid.com/twitterbot-the-answer-is-no-responds-no-to-questions-posed-by-headlines/> (describing a Twitter feed automatically answering “No” to news headlines that end in a question mark, to bring attention to the perceived equivalence between speculative questions and assertions).

235. Allegations of partisanship based purely on past activities or affiliations are likely to have the same effect. Role morality may well cause the same individual to act quite differently as a voter, a contributor, a party employee, a nonprofit activist, an attorney, a prosecutor, and a legislative candidate. But some observers show a disturbing predilection to assume that this role morality does not exist: to assume that an individual will engage in similar forms of partisanship in dissimilar roles. See Tony Mauro, *Is Ted Olson Too Partisan to Run Justice?*, LEGAL TIMES, Sept. 17, 2007, at 12; Robert McCartney, *Fairfax Democrats Worry GOP May Taint Vote Process*, WASH. POST, Oct. 18, 2012, at B1, available at 2012 WLNR 22078819; *‘Every Single One’: PJ Media’s Investigation of Justice Department Hiring Practices*, PJ MEDIA, <http://pjmedia.com/every-single-one-pj-medias-investigation-of-justice-department-hiring-practices/> (last visited Mar. 9, 2014). Simple assertions or insinuations that individuals will engage in tribal partisanship in a new role, based solely on the partisan nature of activity

Consider an official with private partisan preferences who foregoes tribal partisanship in accord with the prevailing situational norm. Glare at her long enough based on misplaced allegations of tribal partisan behavior, and she will not feel the need to refrain in order to avoid an unwelcome glare.<sup>236</sup>

I want to be clear: norms are group phenomena, created by repeated stimuli and undermined by repeated stimuli, with stimuli from some actors more meaningful than stimuli from others. Few public officials are likely to change their behavior based on isolated unwarranted slurs from sources with no personal relationship. But groups are merely collections of individuals, and we are all capable of contributing in various degrees to the strength or weakness of a situational norm. Moreover, to the extent—and it may be quite a limited extent—that public officials give substantial weight to the opinion of scholarly commentators in assessing social approval or sanction,<sup>237</sup> the scholarly community has particular responsibility

---

undertaken while wearing a distinct prior “hat,” fail to recognize that people can and do behave differently in different roles. *See, e.g., supra* text accompanying notes 185-88. If the new role involves norms against tribal partisanship, and the individual refrains from tribal partisanship but nevertheless draws social sanction, the critique may well undermine the norms of the new role. That is, unwarranted critique that an individual is acting in tribally partisan fashion may undermine norms against tribal partisanship, fostering the possibility of the very tribal partisanship that the critics find objectionable.

236. Misplaced allegations of tribal partisanship in electoral regulation also have effects beyond the erosion of norms against such partisan activity. Electoral regulations purport to establish a legitimate process by which we select representatives to resolve vigorously contested substantive issues. Citizens will inevitably disagree about the wisdom of the electoral regulations as well. But describing electoral regulations as the product of tribal partisanship when they are not so motivated brands the regulations as not merely suboptimal but illegitimate. This is a difference in kind. And to the extent that illegitimate electoral regulations are material to the election of particular candidates, those representatives and all of their public actions also labor under a cloud of illegitimacy. Government by consent of the governed cannot long survive when the conditions for allotting representation are widely perceived as fundamentally illegitimate. Or, as Professor Chris Elmendorf phrased the point, “there may be a duty to avoid hyperbole in the domain of election-law lawmaking that does not extend to other areas.” E-mail from Christopher S. Elmendorf, Professor of Law, U.C. Davis School of Law, to Justin Levitt, Associate Professor of Law, Loyola Law School (Oct. 31, 2013, 10:27 AM) (on file with author).

237. It is clear that “high-status individuals will have relatively more influence on the creation of new norms” and on the maintenance or dissolution of existing ones. McAdams, *supra* note 186, at 416. Whether public officials view scholarly commentators as “high-status individuals” is an entirely different question.

to ensure that musings about partisanship do not unwittingly encourage the weakening of preferred norms.<sup>238</sup>

A recent piece by Professor Ellen Katz shows the need for increased vigilance in this regard—and the value of disaggregating the spectrum of partisanship. Professor Katz, whom I respect and admire, presented a challenging thought piece in the *Stanford Law and Policy Review*, advocating for the unrecognized benefits of Department of Justice (DOJ) action against opposing partisan actors in the preclearance process required by the Voting Rights Act (VRA).<sup>239</sup> This process represents a federal regime unique in the legislative toolbox: No jurisdiction within selected geographies<sup>240</sup>

---

238. SCOTUSblog's revered reporter Lyle Denniston deserves special commendation in this regard. In reporting on judicial decisions, he has conscientiously refrained from referring to the party affiliation of presidents appointing the judges, to avoid the strong implication of responsive or tribal partisanship where none is warranted. *See, e.g.*, Lyle Denniston, *Michigan Affirmative Action Ban Nullified*, SCOTUSBLOG (Nov. 15, 2012, 3:23 PM), <http://www.scotusblog.com/2012/11/michigan-affirmative-action-ban-nullified/> (“Readers will find, in some news accounts about this decision, references to the political party affiliation of the Presidents who named the judges to the bench, referring to them as Republican or Democratic appointees. The author of this blog will provide that information only when it is clearly demonstrated that the political source of a judge’s selection had a direct bearing upon how that judge voted — admittedly, a very difficult thing to prove. Otherwise, the use of such references invites the reader to draw such a conclusion about partisan influence, without proof.”).

239. Ellen D. Katz, *Democrats at DOJ: Why Partisan Use of the Voting Rights Act Might Not Be So Bad After All*, 23 STAN. L. & POL'Y REV. 415 (2012).

240. Before June 25, 2013, these geographies were largely determined by statutory formula. *See* 42 U.S.C. § 1973b(b) (2006). That formula, reauthorized by Congress in 2006, was struck down by the Supreme Court as insufficiently tailored to present conditions. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2627-29 (2013). In the absence of further congressional action, the only jurisdictions required to preclear new election-related policies will be those that have been individually subjected to the preclearance process by a federal court, known generally as “bail in.” 42 U.S.C. § 1973a(e).

In the wake of *Shelby County*, far fewer jurisdictions will be subject to preclearance. However, the preclearance structure still exists, and several jurisdictions are presently subject to preclearance requirements under § 1973(c). *See* *United States v. Vill. of Port Chester*, No. 06-cv-15173, ¶¶ 8-10 (S.D.N.Y. Dec. 22, 2009) (consent decree) (preclearance requirement until 2016), *available at* <http://redistricting.lls.edu/files/Port%20Chester%20consent%20decree.pdf>; *Blackmoon v. Charles Mix Cnty.*, No. 05-cv-04017, ¶ 2 (D.S.D. Dec. 4, 2007) (consent decree) (preclearance requirement until 2024), *available at* [https://www.aclu.org/files/pdfs/votingrights/blackmoon\\_v\\_charlesmixcounty\\_consent\\_decree.pdf](https://www.aclu.org/files/pdfs/votingrights/blackmoon_v_charlesmixcounty_consent_decree.pdf); *Allen v. City of Evergreen*, No. 13-cv-00107 (S.D. Ala. Jan. 13, 2014) (order) (preclearance requirement until 2020), *available at* <http://redistricting.lls.edu/files/Evergreen,%20Alabama%20order.pdf>.

More jurisdictions may join them: since *Shelby County*, litigants have requested judicially imposed preclearance requirements in at least six jurisdictions. *See, e.g.*, Complaint at 22-23, *Terrebonne Parish Branch NAACP v. Jindal*, No. 3:14-cv-00069 (M.D. La. Feb. 3, 2014)

may implement a new election-related policy until the policy has been approved either by the DOJ or by a federal court.<sup>241</sup> Approval is guided by distinct statutory standards developed through case law and designed to ensure that new election policies betray neither discriminatory effect nor discriminatory intent with respect to the effective exercise of the franchise by racial and language minorities.<sup>242</sup> If the DOJ approves a policy pursuant to the statutory standard, that decision is unreviewable; if, however, the DOJ declines to give its approval, the jurisdiction in question may seek a “second opinion” by the federal court.<sup>243</sup>

Professor Katz recognized, quite correctly, that preclearance denials by the DOJ may provide a more public opportunity to review and evaluate the proper role of race in the electoral process.<sup>244</sup> Preclearance approvals are generally form letters, with little or no explanation of the reasons for the decision, and though the DOJ often seeks public input on policies subject to preclearance, that input is rarely released for public view. Approvals, as mentioned above, are unreviewable; legal deliberations on the substantive preclearance standard begin and end, for approved submissions,

---

(Terrebonne Parish, Louisiana); Complaint at 20, *Walker v. Beaumont Ind. Sch. Dist.*, No. 1:13-cv-00728 (S.D. Tex. Dec. 23, 2013) (Beaumont Sch. Dist., Texas); Complaint at 17, *Petteway v. Galveston Cnty.*, No. 3:13-cv-00308 (S.D. Tex. Aug. 26, 2013) (Galveston County, Texas); Complaint at 31, *N.C. State Conference of the NAACP v. McCrory*, No. 1:13-cv-658 (M.D.N.C. Aug. 12, 2013) (North Carolina); Complaint at ¶ 27, *Jackson v. Bd. of Trs. of Wolf Point, Mont., Sch. Dist. No. 45-45A*, No. 4:13-cv-00065-DLC-RKS (D. Mont. Aug. 7, 2013) (Wolf Point Sch. Dist. No. 45-45A, Montana); Plaintiffs’ Joint Advisory to the Court on Issues Relating to Section 3(c) of the Voting Rights Act at 7-8, 26, *Perez v. Texas*, No. 5:11-cv-00360-OLG-JES-XR (W.D. Tex. July 22, 2013) (Texas). And whatever the current prevalence of preclearance, the preclearance structure and the argument of the Katz article mentioned in the text nicely demonstrate the need to be precise in evaluating the merits of different forms of partisanship.

241. 42 U.S.C. § 1973a(c). Before congressional reauthorization of the preclearance “formula” was struck in *Shelby County*, the relevant court was most often a federal court in Washington, D.C. *Id.* § 1973c. Now, the most relevant federal court supervising electoral changes is the local federal court originally responsible for ordering judicial preclearance.

242. *Id.* § 1973c(b); see also Justin Levitt, *Democracy on the High Wire: Citizen Commission Implementation of the Voting Rights Act*, 46 U.C. DAVIS L. REV. 1041, 1060-67 (2013) (elaborating the substantive standard).

243. A jurisdiction may also forego DOJ review entirely and proceed directly to federal court seeking a declaratory judgment that the new policy should be precleared under the statute. 42 U.S.C. §§ 1973a(c), 1973c(a).

244. See Katz, *supra* note 239, at 419, 422-23. Although I agree that there is great need for a national conversation on racial justice in the electoral process, I am less sanguine that the most appropriate or productive forum for such a conversation is adversarial litigation.

with the form letter. In contrast, preclearance denials are usually delivered with some explanatory rationale and may be pursued further in court, with a far more public airing of the relevant claims, the role of public officials, and the impact on minority electors in the jurisdiction. These judicial preclearance actions also provide a rare opportunity for authoritative judicial construction of the substantive standards involved in preclearance.<sup>245</sup>

Professor Katz also noted the partisan effects of some preclearance decisions: a Democratic DOJ's decision to deny preclearance to new electoral policies promulgated by Republican jurisdictions may favor the Administration's party, and a Republican DOJ's decision with respect to local Democrats' policies may have similar effects.<sup>246</sup> Such actions are often criticized as exercises in illegitimate partisanship. But Katz wondered whether, given the opportunity that such actions create for judicial grappling with the role of race in the electoral process, "partisan use of the VRA by the DOJ (and, indeed, other actors) is not the cause for concern it is often made out to be and instead often has beneficial consequences."<sup>247</sup> After all, if the DOJ's legal position in a preclearance denial motivated by partisanship is flawed, courts may have the opportunity to correct the substantive error.

What this articulation elides are the distinctions in the spectrum of partisanship that make all the difference. To the extent that a Democratic DOJ denies preclearance to a Republican electoral change (or vice versa) based solely on the straightforward application of an unambiguous statutory standard—that is, to the extent that coincidental partisanship is the cause—there is no normative counterweight to whatever deliberative benefits result from the denial. To the extent that the DOJ denies preclearance based on an ideologically distinct understanding of ambiguous statutory text, different from the understanding of a different DOJ under a different administration, that is the natural byproduct of an administrative structure designed to change from partisan election to partisan election, and should similarly provide little normative

---

245. See *Redistricting and the 2010 Census: Enforcing Section 5 of the VRA: Hearing Before the U.S. Comm'n on Civil Rights*, at 9 (Feb. 3, 2012) (statement of Justin Levitt), available at <http://redistricting.lls.edu/files/USCCR%20testimony.pdf>.

246. See Katz, *supra* note 239, at 417.

247. See *id.* at 418, 422-23.

hesitation. But “partisan use” of the VRA driven by responsive or tribal partisanship is neither contemplated nor benign. And regardless of the deliberative benefits it may provoke, such activity is likely to have substantial undesired ripple effects.<sup>248</sup>

The reason is role morality. The existing norm against tribal partisanship is attached to the role of DOJ attorney. While wearing that particular hat, individuals may not practice tribal partisanship, particularly in the election process.<sup>249</sup> If the norm were not only eroded but reversed, such that tribal partisanship were condoned or favored in certain factual scenarios, it is not clear whether the mental category “reviewing preclearance submissions by opposing partisans” would retain stable boundaries. It is not far-fetched to imagine that DOJ attorneys would begin to allow tribal partisanship to favor preclearance approvals for policies submitted by officials of their own party, despite the fact that such approvals are not subject to judicial review and do not provoke any positive deliberative externality.<sup>250</sup> Moreover, at a leadership level, the same officials are involved in affirmative voting rights litigation well beyond preclearance; tribal partisanship might predictably begin to infect those other cases as well. Once it becomes acceptable to practice tribal partisanship as a DOJ attorney in some circumstances, there is a serious concern that tribal partisanship would drive decisions in other circumstances as well. The categorical nature of role-based norms helps those who freely indulge tribal partisanship “at home” to effectively turn off such instincts “at work.” But that same property raises the risk of introducing tribal partisanship, for some decisions but not others, into a role where it was previously denigrated. Such partisanship may not be so easily cabined.<sup>251</sup>

---

248. Of course, well beyond any beneficial effects on the development of the law of the VRA, and beyond any negative effects based on role morality, there are plentiful additional concerns with the use of DOJ authority based on tribal partisanship, including legal barriers, *see* 18 U.S.C. § 595 (2006), moral concerns (which may have contributed to criminalization of the behavior), and concerns over the resources involved in forcing the preclearance process into the courts.

249. *See supra* text accompanying notes 198-201.

250. Professor Katz expressly acknowledges that such cases raise “distinct and more troubling concerns,” Katz, *supra* note 239, at 417; my argument is that it may be quite difficult to maintain a norm condoning tribal partisanship only against disfavored partisans while prohibiting tribal partisanship with respect to others.

251. For this reason, I argue that tribal partisanship in the DOJ’s enforcement of voting

Or perhaps it may. The concerns above ultimately resolve to empirical questions about the ease with which boundaries between roles become more or less permeable. The hypothesis set forth herein is that role morality is “sticky” within private and public spheres (for example, that individuals behave differently as voters and contributors than they do while acting in a public capacity or wielding public authority), and “sticky” within particular public employment positions (for example, that individuals behave differently as judges than they do as administrators or legislators),<sup>252</sup> but comparatively fluid across public functions or subject matter areas within any given position (for example, that administrators’ approach to campaign finance and election adminis-

---

rights should not be condoned, even theoretically. By the same token, it is dangerous to lambaste DOJ actions as motivated by tribal partisanship when they are not, lest the norm against tribal partisanship be eroded through unwarranted critique. *See supra* text accompanying note 234. For example, recent actions by the DOJ to seek judicial preclearance for Texas and to contest Texas’s new requirement for voters to show photo identification at the polls prompted Senator John Cornyn to claim that “[f]acts mean little to a politicized Justice Department bent on inserting itself into the sovereign affairs of Texas and a lame-duck Administration trying to turn our state blue.” Holly Yeager, *Justice Dept. Sues Texas Over New Voter ID Measure*, WASH. POST, Aug. 23, 2013, at A1, available at 2013 WLNR 20944092. If tribal partisanship is indeed motivating DOJ action, the stark rebuke is warranted; if, as I suspect, other motivations are more plausibly responsible, the accusation actually helps to undermine norms against tribal partisanship.

252. *But see* Brannon P. Denning, *The Case Against Appointing Politicians to the Supreme Court*, 64 FLA. L. REV. F. 31, 32 (2012) (speculating that “it might be difficult for a politician *cum* Justice to shed party attachments even after donning her robes”).

In a different context, Professor James Sample presents the story of Justice Menis Ketchum’s transition from judicial candidate to judge. James J. Sample, *Lawyer, Candidate, Beneficiary, AND Judge? Role Differentiation in Elected Judiciaries*, 2011 U. CHI. L. F. 279, 281-83. The issue was precommitment rather than partisanship: as a candidate, Ketchum had “flatly and categorically promised” not to vote, as a West Virginia Supreme Court Justice, to overturn a state cap on punitive damage awards. *Id.* at 281. When the issue came before the Court, Justice Ketchum refused to recuse himself, claiming that he had made his promises in a different role; when his refusal to recuse was publicized, he maintained that there was no legal basis for his recusal, but nevertheless reversed his earlier decision and disqualified himself from the case. *Id.* at 282-83. Whatever the merits of the recusal decision itself, the episode seems salient to the discussion of role morality above. First, Justice Ketchum perceived (in my view, correctly) a distinction between the expectations for the conduct of a candidate for office and the expectations for that same individual as an officeholder. Moreover, when his conduct in office was publicized, he took immediate action to bring his conduct in line with his perception of a shared public norm. He believed the action to be legally unnecessary (and it was almost certainly insulated from binding legal reversal), but the notion of public disapproval nevertheless brought his conduct in line with the socially expected situational norm. Role morality can be a powerful behavioral impetus.

tration is similar).<sup>253</sup> The reason is that public and private spheres, and different job titles, appear relatively clearly delineated, while functions and subject-matter categories appear relatively less so. But perhaps the bounds of these latter areas are actually fairly stable as well. There are few reliable measures of such behavior, but, for example, tribal partisanship seems far less prevalent among legislators in most legislative arenas than in the redistricting process, and less prevalent still in their approach to constituent service.<sup>254</sup>

More empirical work on the boundaries of roles, and the conditions under which they remain stable for purposes of situational ethics, is warranted.<sup>255</sup> It may be that officials who see nothing wrong with engaging in tribal partisanship in one subject-matter area will refrain from doing so in others, even while serving the same function in the same articulated position. Still, without better understanding of the circumstances in which norm boundaries collapse, it seems dangerous to introduce or foster a disfavored form of partisanship in an environment with strong existing normative constraints. Once degraded, norms against disfavored forms of partisanship may be quite difficult to repair.

---

253. Consider, for example, the hypothesis that situational norms are relatively sticky across private/public spheres but relatively fluid across one position's several functions. This may offer one explanation for the fact that there are few calls for election officials to forego voting or contributing privately to candidates they support, but plentiful calls for such officials to forego public endorsements or fundraising solicitations for candidates' campaigns. *See, e.g.,* Ray Martinez III, *Greater Impartiality in Election Administration: Prudent Steps Toward Improving Voter Confidence*, 5 ELECTION L.J. 235, 245-46 (2006). Particularly when such recommendations extend even to officials elected in partisan contests, *id.*, it is more plausible that the proposed restraint responds more to concerns regarding officials' actual conduct (and the bleed of situational norms) than concerns regarding voter perception.

254. *But see* Butler & Broockman, *supra* note 48, at 469, 472 (finding that in practice, legislators respond more readily to requests from constituents of the same party).

255. There are also intriguing empirical questions about the characteristics of individual public officials that suggest different conclusions with respect to the efficacy of situational norms. For example, some individuals are more guilt-prone than others, *see* Tangney et al., *supra* note 187, at 351, 354, which suggests that the costs of breaching role norms may be higher for such individuals than others. It would be intriguing to test whether public officials, or certain types of public officials, are meaningfully distinct from the general population in the extent to which they are guilt-prone.

## CONCLUSION

Current thinking about partisanship is beset by imprecision that leaves observers talking past each other. Partisanship is often described as if it were uniform, when it in fact comprises a spectrum of phenomena. We may sometimes seek to understand, dilute, or foster the partisan effects of public policy. On other occasions, we may instead seek to understand, dilute, or foster the undertaking of public policy with partisan intent, whether coincidental, ideological, responsive, or tribal. We cannot reliably affect the partisanship we wish to affect without more precisely analyzing the part of the partisanship spectrum we wish to influence.

In formulating the rules of the electoral process, partisanship may have particularly pronounced consequences; that insight has spurred various attempts to limit partisanship in its most pernicious manifestations. But here too, those who seek to combat partisanship may misunderstand the scope—and limitations—of their toolbox. In particular, given all of the attention to effect-based rules and structural design, observers may be discounting not just the value of role morality, but the substantial work that it presently does and the threats to its continued vitality.

The most effective efforts to confront partisanship, of course, will involve all three tools working in concert. Consider, as just one example, California's newly created redistricting commission.<sup>256</sup> In 2008 and 2010, California voters passed two ballot initiatives ceding control of state legislative and congressional redistricting to a multipartisan<sup>257</sup> commission of citizens not beholden to incumbent elected officials;<sup>258</sup> the commission drew districts for the first time in 2011.

---

256. I do not present California's commission as a Platonic ideal, either for confronting partisanship or for achieving other objectives of the redistricting process. Instead, I offer it merely as a prominent example of a policy tool relying on multiple tools in concert in order to confront partisanship.

257. By statute, the commission comprised five individuals registered with the largest political party, five registrants from the second-largest political party, and four individuals not registered with either major party. CAL. CONST. art. XXI, § 2(c)(2).

258. *Id.* § 2(c)(1); CAL. GOV'T CODE § 8252(a)(2) (West 2008).

The commission was described as “nonpartisan”<sup>259</sup> and as deploying “nonpartisan” rules,<sup>260</sup> and it was critiqued because it was not, allegedly, “nonpartisan.”<sup>261</sup> But of course, it was not designed to be “nonpartisan” in every respect.<sup>262</sup> In particular, it was not designed to eliminate all partisan effects nor all partisan influences; indeed, commissioners were, by design, selected in part based on

---

259. See, e.g., John S. Caragozian, *From Crisis to Solution—California’s Problems in Two Books: A Review of Remaking California and California Crackup*, 44 LOY. L.A. L. REV. 687, 691 (2011); Michael Barone, *The Casualty List Long for Obama’s Victory*, VALLEYTIMES-NEWS (Lonett, Ala.), Nov. 16, 2012, at 6, available at 2012 WLNR 24495332; Steven Greenhut, *More Proof of Redistricting Manipulation*, ORANGE COUNTY REG., Jan. 1, 2012, available at 2012 WLNR 44293.

260. See SEC’Y OF STATE OF CAL., CALIFORNIA GENERAL ELECTION: OFFICIAL VOTER INFORMATION GUIDE 137 (2008), available at <http://vig.cdn.sos.ca.gov/2008/general/pdf-guide/vig-nov-2008-principal.pdf> (Proposition 11 at § 2(d)). The notion of nonpartisan rules suffers from the same ambiguity concerning the terms “partisanship” and “nonpartisanship” lamented throughout this Article. To the extent that the notion implies that commission districts would have zero partisan effect, it certainly promises too much. But in context, the better explanation is that the description reflects the fact that the commission’s substantive rules were not designed in order to produce partisan bias—unlike, say, the guiding rules deployed by a legislative body affirmatively seeking partisan effect. Moreover, the commission’s rules affirmatively proscribed tribal partisanship intent. See *infra* text accompanying notes 268-69.

261. See, e.g., Barone, *supra* note 259; Greenhut, *supra* note 259. These critiques often focused on the perceived partisan effect of the commission’s work.

262. Professor Bruce Cain, one of the country’s most astute observers of institutional design and partisan political action in the electoral arena, has recently assessed California’s commission (and other similar models). See Cain, *supra* note 134, at 1812-13. He contrasts this citizens’ commission with “politician commissions” in states like New Jersey: “Whereas the premise of the independent citizen commission is that improvement will come from a more disinterested redistricting body utilizing neutral formal redistricting criteria, the premise of the politician commission is that redistricting is a political enterprise that ideally leads to a bargained compromise between stakeholders.” *Id.* at 1817; see also *id.* at 1823-24.

The central element of the distinction he draws is unquestionably valid. Commissions like California’s are intended to put “more disinterested” individuals at the helm, and commissions like New Jersey’s are intended to produce “bargained compromise” among political elites. *Id.* at 1817. But elements of his juxtaposition also bear shades of the critique of the nonpartisan unicorn. More precisely, the juxtaposition adds layers to the premise of each model that are not necessarily inherent in the genre.

California’s commission was put in place by popular initiative, and was certainly sold as delivering districts that would be “fair,” and less tailored to particular incumbents. See SEC’Y OF STATE OF CAL., *supra* note 260, at 72-73. But the search for “fair” representation is different from the naïvete implied by Cain’s juxtaposition: proponents did not promise that criteria would (or could) be “neutral,” or deny that redistricting is a political enterprise. And in a way, California’s commission also reflects the politician commission idea of bargained compromise among stakeholders—it just adopts a more expansive conception of the pool of stakeholders by looking beyond political party leadership.

their partisan affiliation. And it did not actually end up eliminating all partisan effects or influences. What it did do, notably, is deploy multiple tools designed to constrain specific forms of partisanship.

The commission was bound by effect-based rules: substantive criteria that were not intended to eliminate partisan effects but that, when followed, would constrain the most partisan outcomes.<sup>263</sup> The commission was also created with a supermajority structure: approval for final maps depended on consent by Democrats, Republicans, and those not registered with either party.<sup>264</sup> These constraints could be expected to rein in some versions of tribal and responsive partisanship. Indeed, even policy choices reflecting strong ideological partisanship, including choices undertaken by commissioners unaware that the available options reflected a partisan divide, could be expected to be defeated by a supermajority structure featuring contending ideological commitments.

Yet these two features alone would not have defeated those intent on pure tribal partisan gain. The substantive criteria left room for flexibility, and even if commissioners had not been able to impose their partisan preferences on each other, Republican commissioners

---

263. CAL. CONST. art. XXI, § 2(d). Despite the absence of a criterion explicitly encouraging competition, conventional wisdom seems to hold that the commission was intended to create competitive districts. See Cain, *supra* note 134, at 1824; Tony Quinn, Editorial, *Can Arnold Make You Care About Redistricting?*, L.A. TIMES, Dec. 17, 2006, at 2, available at 2006 WLNR 21900006. But at least some observers recognized that “Prop. 11 ... doesn’t require competitive districts”—and even used that fact in opposing the initiative. See *Prop 11: The Arizona Mirage*, NOON PROP 11, [http://digital.library.ucla.edu/websites/2008\\_993\\_117/www.noonprop11.org/updates.html](http://digital.library.ucla.edu/websites/2008_993_117/www.noonprop11.org/updates.html) (last visited Mar. 9, 2014).

Those who believe in the conventional wisdom have conflated the desire to seek competitive outcomes and the desire to deter the most anticompetitive outcomes. These desires are meaningfully distinct. And the commission was better designed for the latter than for the former. See Terry Christensen & Janet Flammang, *Proposition 11 Will Bring Fairness, Equity to Redistricting*, SAN JOSE MERCURY NEWS, Sept. 20, 2008, available at [http://www.mercurynews.com/ci\\_10518420](http://www.mercurynews.com/ci_10518420) (“We don’t want to exaggerate the prospects for competitive races, however. Whoever draws the lines, most districts will have substantial partisan majorities, since in California, Democrats tend to live among other Democrats and Republicans live among other Republicans.... This modest reform will not transform our political system or solve the problems of gridlock, but it will be a step in the right direction.”). As with partisan bias, see *supra* text accompanying note 109, it is not inconsistent to resist extremes of undesired partisan effects without specifying or seeking a particular optimal outcome; George Skelton, *Prop. 11 Foes Waging Orwellian Campaign*, L.A. TIMES, Oct. 9, 2008, available at 2005 WLNR 19178210 (“Opponents even have the chutzpa to complain that Prop. 11 ‘doesn’t require competitive districts.’ No, but unlike the Legislature, its goal would not be to make districts noncompetitive.”);

264. CAL. CONST. art XXI, § 2(c)(5).

had the raw voting power to deny a supermajority, forcing the drawing of a map to a California Supreme Court<sup>265</sup> comprised overwhelmingly of Justices appointed by Republican governors.<sup>266</sup> Absent any other constraints and individuals inclined to pursue tribal partisanship, game theory would predict final maps drawn by that Court and favoring Republican interests to the maximum extent allowed by the flexible substantive criteria.<sup>267</sup>

Other constraints, however, were not absent—and effect-based rules and structure were not left to operate alone. Role morality dictates that the Justices of the California Supreme Court refrain from tribal partisanship in their judicial capacity.<sup>268</sup> Commissioners were expected to do the same; they were chosen in part based on their ability to remain “impartial,”<sup>269</sup> but even more specifically were instructed to refrain from drawing districts “for the purpose of favoring or discriminating against an incumbent, political candidate, or political party.”<sup>270</sup> Commissioners were screened to prevent service by individuals beholden to incumbent legislators; part of the reason for this screening appears to be the supposition that independent individuals would more readily adopt the specified norms against tribal partisanship. And because the commissioners do indeed seem to have internalized these norms, a supermajority of the commission did pass final maps, validated in court. Though the resulting districts had undeniable partisan effects—as does virtually any electoral choice—there is little evidence to indicate that tribal partisanship was the cause.

Thus, in this example, flexible substantive rules constrain the expected degree of partisan effect. A balanced structure and supermajority rules constrain coincidental and ideological partisanship. Role norms constrain responsive and tribal partisanship. The three approaches work together and are designed to work together. And, perhaps most important for purposes of this Article, articulating the

---

265. *Id.* § 2(j). Time permitting, federal courts must generally defer to state institutions in the redistricting process. *See, e.g.*, *Grove v. Emison*, 507 U.S. 25, 33-37 (1993).

266. *Justices*, CAL. COURTS, <http://www.courts.ca.gov/3014.htm> (last visited Mar. 9, 2014); *State of California Governors*, US50, <http://www.theUS50.com/california/governors.php> (last visited Mar. 9, 2014).

267. *See supra* text accompanying notes 132-34 and note 134.

268. CAL. CODE JUD. ETHICS, Canons 2(B)(1), 3(B)(2), 5, 5(D) (2013).

269. CAL. GOV'T CODE § 8252(d); *see also* CAL. CONST. art. XXI, § 2(c)(6).

270. CAL. CONST. art. XXI, § 2(e).

distinctions among the forms of partisanship and the capacity of different policy responses to address those distinctions makes it possible to articulate how the approaches work together and where they might break down. This understanding, in turn, should facilitate the confrontation of partisanship in the regulation of electoral policy well beyond California's borders.