

INTENT IS ENOUGH:  
INVIDIOUS PARTISANSHIP IN REDISTRICTING

JUSTIN LEVITT\*

ABSTRACT

*When the Supreme Court last seriously grappled with partisan gerrymandering, all nine Justices concluded that an excessive injection of politics in the redistricting process violates the Constitution, but failed to agree on what is excessive (or who should decide). Commentators have since offered no shortage of assistance, offering various models to resolve exactly “how much is too much.” This effort is a sprint to answer the wrong question. It is perhaps the question Justices have asked, but not the one best illuminating the problem.*

*This Article suggests an alternative: not “how much,” but “what kind.” The Court wants to distinguish egregious unconstitutional partisanship from normal politics. In this endeavor, the nature of the intent, not the magnitude of the impact, matters more. A pivotal case from the October 2016 Term reveals that the invidious intent of a state actor to subordinate others based on perceived partisan affiliation constitutes a constitutional violation, no matter the severity of any resulting injury. Testing for this intent provides the screening device the Justices seek. Furthermore, this analysis reveals that the scholarly community’s quantitative tests to assess gerrymandering are valuable, but not for the reason most think: not because they show the threshold of impact necessary for a violation, but because they offer suggestive evidence of invidious intent.*

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\* Professor of Law, Loyola Law School, Los Angeles. I am grateful to the participants of the William & Mary Law Review 2020 Redistricting Symposium for supplying food for thought, and I would particularly like to thank Rick Hasen, Aziz Huq, Michael Kang, Pam Karlan, Lisa Marshall Manheim, Michael Parsons, Rick Pildes, and Cameron Schroeder for their helpful comments and suggestions. All errors, of course, are my own.

## TABLE OF CONTENTS

INTRODUCTION .....	1995
I. A SHORT HISTORY OF PARTISAN GERRYMANDERING	
DOCTRINE .....	1996
II. THE CONCERNS BEHIND THE DOCTRINE .....	2002
A. <i>The Search for a Workable Measure of Unconstitutional</i>	
<i>Effect</i> .....	2003
B. <i>An Alternative Focus on Intent</i> .....	2009
1. <i>The Invidious Intent that Matters</i> .....	2013
2. <i>The Nature of Effect in an Invidious Intent Claim</i> ...	2018
C. <i>Intent and the Concerns Behind the Doctrine</i> .....	2023
1. <i>Invidious Partisan Intent Is Not Just "Politics"</i> .....	2024
2. <i>The Capacity of Courts</i> .....	2034
3. <i>The Gatekeeping Function of the Burden of Proof</i> ...	2037
III. WHAT'S THE POINT? .....	2046

## INTRODUCTION

Academics, litigators, and politicians are notoriously averse to harmonious consensus. So we ought to take just a moment to celebrate a truly wondrous achievement. Against all odds, the Supreme Court has managed to unite a multitude of warring factions around one shared truth: partisan gerrymandering doctrine is, at present, a hot mess.

It is difficult to evaluate or critique the present doctrine of the Court with respect to partisan gerrymandering because the Court has offered little doctrine to evaluate. Various Justices have issued various opinions that have failed to command a majority or illuminate a durable path forward. Claims of partisan gerrymandering are, at least at the moment, justiciable. But, as political scientist Gary King memorably put it, none have thus far been sufficiently “justished” for the Court to deliver a meaningful and stable doctrinal standard.<sup>1</sup>

The status quo is chaos, yes.<sup>2</sup> But it is also opportunity. In the October 2017 Term, the Court is considering a Wisconsin case, on direct appeal of a finding that a challenged redistricting plan was unconstitutionally drawn.<sup>3</sup> The Court will have to decide *something*. Practitioners, scholars, and courts have put forth arguments and theories now pitched on unusually fluid terrain. Given the shards of past precedent, there are many plausible paths forward.

This Article surveys the landscape with a modest step back. Other scholars have attempted to craft standards addressing what the Court has requested—or more precisely, what Justice Anthony Kennedy has requested.<sup>4</sup> Instead, this Article addresses what the

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1. 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).

2. See, e.g., Lisa Marshall Manheim, *Belling the Cat: The Story of Vieth v. Jubelirer*, in ELECTION LAW STORIES 179, 180-81 (Joshua A. Douglas & Eugene D. Mazo eds., 2016).

3. See *Gill v. Whitford*, 137 S. Ct. 2268 (2017) (mem.) (setting hearing of the case on the merits and postponing consideration of the question of jurisdiction), *argued*, No. 16-1161 (U.S. Oct. 3, 2017).

4. See, e.g., Richard L. Hasen, *Justice Kennedy's Beauty Pageant*, ATLANTIC (June 19, 2017), <https://www.theatlantic.com/politics/archive/2017/06/justice-kennedys-beauty-pageant/530790/> [<https://perma.cc/62P7-GZF8>]. For Professor Hasen's earlier conclusion that Justice Kennedy has appeared to leave open no available standard that would meet his own terms,

Court seems to *want*. In a quest to investigate manageable limits on an inherently political process, the Court has been bedeviled by the wrong question. Rather than asking “how much” partisan gerrymandering is “too much,” the Court should be asking what *kind* of partisanship is improper in the redistricting context.<sup>5</sup> This inquiry would bring the Court back to familiar ground, harmonizing the jurisprudence of partisan gerrymandering with the Court’s approach to constitutional harm in other arenas. Moreover, the evidentiary tools in this arena are equally familiar, comfortably within the judicial role, and, when used properly, would confine judicial invalidation of a map to only exceptional cases. In partisan gerrymandering cases, focusing on the proper question would likely produce an impact on the redistricting process that is theoretically significant but pragmatically modest: an exercise in boundary policing well within the Court’s usual *modus operandi*.

Part I of this Article proceeds with a short history of partisan gerrymandering doctrine, capturing the Court’s struggle to settle on a workable standard and its arrival at the present doctrinal moment. Part II teases out the jurisprudential concerns behind that struggle, and the Court’s vain attempts to stumble toward a measure of impermissible partisan effect as the means to satisfy the most pertinent concerns. It then proposes, as an alternative, a standard of impermissible partisan intent and explains how that intent standard amply satisfies the concerns that have been motivating the Court thus far. In particular, the pragmatic deployment of an intent standard will likely be successful only in rare cases. Given the inherent limits of the doctrine, Part III explains why the effort is nevertheless worthwhile.

## I. A SHORT HISTORY OF PARTISAN GERRYMANDERING DOCTRINE

This Part briefly summarizes how the Court has arrived at the present doctrinal moment with respect to partisan gerrymandering.

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see Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims After Vieth*, 3 ELECTION L.J. 626, 628 (2004).

5. See Michael Parsons, *Clearing the Political Thicket: Why Political Gerrymandering for Partisan Advantage Is Unconstitutional*, 24 WM. & MARY BILL RTS. J. 1107, 1139 (2016).

Because this history has been recounted in detail by others, it receives comparatively cursory treatment here.

Conventional wisdom suggests that the Supreme Court first entered the “political thicket” of redistricting and gerrymandering in 1962.<sup>6</sup> Previously, state and local determinations on the location of the bounds of political districts had largely been considered questions of a “peculiarly political nature,” beyond the proper ken of the federal judiciary.<sup>7</sup> Then, in 1962, the Court decided *Baker v. Carr*,<sup>8</sup> the case Chief Justice Earl Warren famously branded “the most important” of his tenure on the Court.<sup>9</sup> *Baker* held that at least some state redistricting decisions presented justiciable questions under the Fourteenth Amendment,<sup>10</sup> launching a series of federal constitutional regulations of the redistricting process later deemed the “reapportionment revolution.”<sup>11</sup>

The initial cases of this “reapportionment revolution” confronted a particular form of political gerrymandering: the systematic refusal to adjust district lines as urban populations grew far faster than their rural counterparts. The disparate population growth meant that increasingly large urban populations were packed into remarkably few districts, diluting the representation of urban voters in state legislatures and Congress.<sup>12</sup> The Court’s solution was a doctrine of equal representation, requiring each local, state, and

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6. The term comes from a warning issued by Justice Felix Frankfurter in *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion). His point was that the topic was too fraught with politics for the Court to intercede. *See id.* Of course, gerrymandering itself is far older than the Supreme Court’s recognition of its authority to address the issue. This is the point in any redistricting article when it is mandatory to note both that allegations of gerrymandering date back to the very earliest American struggles over representation, *see generally* ELMER C. GRIFFITH, *THE RISE AND DEVELOPMENT OF THE GERRYMANDER* (Arno Press 1974) (1907); James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 *RUTGERS L.J.* 881, 891-94 (2006), and that the age of a practice may be constitutionally relevant but does not itself provide constitutional immunity, *see, e.g.*, *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (invalidating racial segregation under the Fifth Amendment).

7. *See, e.g.*, *Colgrove*, 328 U.S. at 552-54. *But see infra* text accompanying notes 124-30 (describing *Gomillion v. Lightfoot*, decided in 1960).

8. 369 U.S. 186 (1962).

9. *See* EARL WARREN, *THE MEMOIRS OF EARL WARREN* 306 (1977).

10. *See Baker*, 369 U.S. at 209, 226-29, 237.

11. *See generally* GORDON E. BAKER, *THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER, AND THE SUPREME COURT* (1966).

12. *See Reynolds v. Sims*, 377 U.S. 533, 561-63, 567 (1964).

federal political district to contain approximately the same population as others within the jurisdiction.<sup>13</sup>

Still, the requirement that districts be equally populated constrains only the number of people to put in each district, and not the choices about which people to put where. Partisan actors were engaged in the drawing of district lines. And as they drew districts, the Court found itself confronted with further claims that the Constitution sets limits on the degree to which partisanship may permissibly shape the district map. These cases have yielded relatively little clarity.

In 1973's *Gaffney v. Cummings*, the Court rejected a gerrymandering challenge.<sup>14</sup> The plan in question sought to "achieve a rough approximation of the statewide political strengths of ... the only two parties in the State large enough to elect legislators from discernible geographic areas."<sup>15</sup> That is, the plan sought roughly proportional representation of Democrats and Republicans. The Court acknowledged that the Equal Protection Clause might prevent invidious redistricting discrimination, employed to "minimize or cancel out the voting strength of racial or political elements of the voting population."<sup>16</sup> But it also explained that whatever the bounds of such a doctrine (which were not further clarified), a bipartisan plan designed for proportional representation posed no cognizable violation of equal protection.<sup>17</sup>

In *Davis v. Bandemer*, thirteen years later, the Court confronted Democratic allegations that Republicans drew Indiana state legislative districts in an impermissible Republican partisan gerrymander.<sup>18</sup> A majority agreed that the issue was justiciable,<sup>19</sup> and a majority agreed that the plaintiffs should not prevail, and there the agreement ended. A plurality of four affirmed the trial court's determination that districts were drawn with discriminatory

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13. *See id.* at 577 (state legislative districts); *see also* *Avery v. Midland County*, 390 U.S. 474, 476 (1968) (local government districts); *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) (congressional districts).

14. *See* 412 U.S. 735, 740-41 (1973).

15. *Id.* at 752.

16. *See id.* at 751 (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)).

17. *See id.* at 751-52.

18. *See* 478 U.S. 109 (1986).

19. *See id.* at 125.

partisan intent, but found an insufficiently adverse effect to make out a violation of the Equal Protection Clause.<sup>20</sup> These Justices would have required proof not merely of resulting disadvantage at the polls, but of “continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.”<sup>21</sup>

That standard is exceedingly high, and it all but precluded successful partisan gerrymandering claims. For eighteen years after *Bandemer*, no lower court granted relief on a claim that district lines were drawn with unconstitutional partisanship, and few professed to understand what plaintiffs would need to show in order to prove such a claim.<sup>22</sup>

In *Vieth v. Jubelirer*, the Court returned to the issue, assessing another equal protection claim against partisan gerrymandering.<sup>23</sup> In one small sense, there was unanimity: all nine Justices agreed that “an excessive injection of politics” in the redistricting process violates the Constitution.<sup>24</sup> But the Court could not agree on how to determine “excessive,” nor who should make that decision. Four Justices believed that the courts should adjudicate partisan gerrymandering claims,<sup>25</sup> but in three different opinions offered three distinct standards for establishing a violation.<sup>26</sup> Four rejected each of the

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20. *See id.* at 127, 129.

21. *See id.* at 133. Three Justices would have found the claim to be nonjusticiable, punting to the political branches any remedy for partisan gerrymandering claims. *See id.* at 144 (O'Connor, J., concurring in the judgment). Justices Lewis Powell and John Paul Stevens would have affirmed the finding of an equal protection violation, based on the notion that gerrymandering violates the Constitution when a redistricting plan serves no purpose other than favoring a strong political bloc or disfavoring a weak one. *See id.* at 164 (Powell, J., concurring in part and dissenting in part).

22. *See Vieth v. Jubelirer*, 541 U.S. 267, 279-80, 282-83 (2004) (plurality opinion).

23. *See id.* at 271-72.

24. *See id.* at 293; *id.* at 312, 316-17 (Kennedy, J., concurring in the judgment); *id.* at 318, 326 (Stevens, J., dissenting); *id.* at 343-44 (Souter, J., dissenting); *id.* at 355, 360 (Breyer, J., dissenting); *see also* Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 782, 809-10 (2005) (noting this agreement). In the popular understanding, legislators and the public seem to have lost this point, conflating the Court's reluctance to fashion standards for an Article III court's adjudication of a partisan gerrymandering claim with a lack of constitutional limits on partisan gerrymandering. *See, e.g.*, Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1220-21 (1978).

25. *See Vieth*, 541 U.S. at 327 (Stevens, J., dissenting); *id.* at 346 (Souter, J., dissenting); *id.* at 365 (Breyer, J., dissenting).

26. *See id.* at 318, 321, 339 (Stevens, J., dissenting) (articulating a standard largely based on the intent to pursue partisan advantage); *id.* at 347-52 (Souter, J., dissenting) (articulating

proffered tests, found no workable alternative, and would have reversed *Bandemer*, declaring partisan gerrymandering cases to be nonjusticiable based on the absence of a judicially manageable standard.<sup>27</sup> Justice Kennedy, writing only for himself, refused to turn back but provided little discernible way forward. He agreed that partisan gerrymandering cases should be justiciable, but rejected all of the alternative tests offered and presented no standard of his own.<sup>28</sup> Instead, he offered bits and pieces of potentially promising footholds—a pinch of empiricism,<sup>29</sup> a dash of the First Amendment<sup>30</sup>—imploring future litigants to shape the elements into a more coherent recipe.<sup>31</sup>

Courts and litigants since have valiantly struggled to meet this request. After a dozen years of wandering in the wilderness, a partisan gerrymandering decision out of Wisconsin cobbled together the scraps of binding precedent with some of the expressed concerns of individual Justices.<sup>32</sup> By statute, the decision of this three-judge court is heard by the Supreme Court on direct appeal, rather than

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a standard based on substantial departure from objective neutral principles in the pursuit of partisan advantage); *id.* at 360-62, 365 (Breyer, J., dissenting) (articulating a standard based on a minority's unjustified entrenchment of their power over a majority).

27. *See id.* at 281, 305 (plurality opinion).

28. *See id.* at 306, 309-11 (Kennedy, J., concurring in the judgment).

29. *See id.* at 312-13.

30. *See id.* at 314.

31. Two years later, the Court addressed another partisan gerrymandering claim but did not offer much incremental clarity. One of the many claims in *LULAC v. Perry*, 548 U.S. 399 (2006), was an allegation that Texas's decision to redraw district lines in 2003 was unconstitutional because it was accomplished for wholly partisan purposes. A majority of the Court refused to revisit the "justiciability holding" of *Bandemer*. *See id.* at 414. But a different majority rejected the claim pressed in the case, and did so in their own splintered fashion. Justices Antonin Scalia and Clarence Thomas reiterated their view that such claims were nonjusticiable. *See id.* at 511 (Scalia, J., concurring in the judgment in part and dissenting in part). The Chief Justice and Justice Samuel Alito explained merely that plaintiffs had not provided a workable standard, without further explanation. *See id.* at 492-93 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part). Only Justice Kennedy, writing again only for himself, engaged the claim substantively on the merits. In his view, not only was the evidence of impermissible motive questionable, but also he would have found motive alone to be insufficient to establish a violation, without a workable standard of unconstitutional representational effect. *See id.* at 417-18 (Kennedy, J.).

32. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 864-84 (W.D. Wis. 2016) (three-judge court), *argued*, No. 16-1161 (U.S. Oct. 3, 2017).



through certiorari,<sup>33</sup> which means that the Court will rule on the case in the 2017 term.<sup>34</sup>

The case stands on unusually fluid ground. Majorities of the Court have on several occasions held partisan gerrymandering cases to be justiciable.<sup>35</sup> But no particular standard has commanded a majority of the Court in a distinct holding. Indeed, no single majority opinion has rejected a standard, beyond rejecting any challenge to the bipartisan proportionality of *Gaffney*.<sup>36</sup> It is true that several proposed standards have been rejected by various coalitions of five (or more) Justices, writing separately and often with different premises.<sup>37</sup> But even when these overlapping negatives constitute holdings sufficient to bind lower courts, they are remarkably weak candidates for stare decisis treatment once the Court returns its own attention to the issue.<sup>38</sup> The present uneasy equilibrium—justiciable but without a standard for “justishing”—is the very definition of unworkable in practice, and was expressly premised on the desire for reconsideration in light of subsequent theoretical

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33. See 28 U.S.C. § 2284(a) (2012) (requiring a three-judge trial court for any action challenging the constitutionality of the apportionment of any statewide legislative body); *id.* § 1253 (permitting direct appeal to the Supreme Court).

34. See *Gill v. Whitford*, 137 S. Ct. 2268 (2017) (mem.) (setting hearing of the case on the merits and postponing consideration of the question of jurisdiction), *argued*, No. 16-1161 (U.S. Oct. 3, 2017).

35. See *LULAC*, 548 U.S. at 414; *Davis v. Bandemer*, 478 U.S. 109, 125 (1986); *Gaffney v. Cummings*, 412 U.S. 735, 751-52 (1973).

36. See *supra* text accompanying notes 14-17.

37. See generally *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Bandemer*, 478 U.S. 109; *Gaffney*, 412 U.S. 735.

38. Professor Dan Lowenstein, for example, attempts to give substance to the current state of the law only after essentially concluding that every available doctrine had been rejected by shifting majorities: his attempt, he confesses, relies on “the principle that you can’t replace something with nothing.” See Daniel H. Lowenstein, *Vieth’s Gap: Has the Supreme Court Gone from Bad to Worse on Partisan Gerrymandering?*, 14 CORNELL J.L. & PUB. POL’Y 367, 370 (2005). If he is fundamentally correct that differing majorities of the Court have left us with “nothing,” however, that is all the more reason to give little stare decisis effect to whatever it is that exists now.

In *Vieth*, four Justices recounted the reasons they felt it unnecessary to give substantial weight to stare decisis in the context of the Court’s prior justiciability holdings. See *Vieth*, 541 U.S. at 305-06 (plurality opinion) (noting the lesser impact of stare decisis in constitutional decisions than in statutory decisions, the lack of a prior agreement on a workable substantive standard, and the lack of specific action undertaken in reliance on prior decisions). Many of the same reasons counsel against lending strong stare decisis effect to Justices’ prior objections against particular substantive standards as well.

development and experience in the lower courts.<sup>39</sup> That is, the Court has expressly asked litigants to rescue it from the status quo of its own making. Moreover, the Court will issue its opinion on the eve of the 2020 census, whereupon districts large and small across the country will have to be redrawn no matter how the Court rules. There is therefore comparatively little risk of upsetting long-standing reliance on the present legal posture. In this unique environment, though litigants may well have strategic reason to present theories tailored to individual Justices' concerns, there is little institutional reason for the Court to avoid starting from a clean slate of first principles.

## II. THE CONCERNS BEHIND THE DOCTRINE

The Justices' repeated attempts to grapple with partisan gerrymandering seem driven by reactions to three basic, and shared, concerns. First is a shared acknowledgment that *some* partisan regulation of the political process violates constitutional norms, and perhaps constitutional commands, at least at the extremes. Second is the shared notion that political bodies not only will, but also should, act in political fashion—and that it is difficult to distinguish this lawful activity from that which is unlawful.<sup>40</sup> Third is the shared notion that cases turning on legislative intent<sup>41</sup> and redistricting cases, which have inevitable electoral ramifications for individual legislators,<sup>42</sup> make courts uncomfortable, with even more serious discomfort at the conjunction of both streams. Several members of the Court seem to want to address the most egregious cases of partisan overreach. But they also seem to desperately want a screen that allows politicians room to be politicians, turning aside all but the most egregious cases.

The first concern—the notion that extreme partisan electoral regulation violates the Constitution—is what has kept partisan gerrymandering claims alive, if only barely. In *Vieth*, this concern

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39. See *Vieth*, 541 U.S. at 312. (Kennedy, J., concurring in the judgment) (calling for a workable standard to “emerge”).

40. See, e.g., *Gaffney*, 412 U.S. at 753 (“Politics and political considerations are inseparable from districting and apportionment.”).

41. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 383 (1968).

42. See, e.g., *Gaffney*, 412 U.S. at 753.

commanded the agreement of all nine Justices.<sup>43</sup> The real dispute in that case was not over *whether* partisan gerrymandering is unconstitutional, but where to draw the line and whether the judiciary is the appropriate arbiter.

In contrast, the latter two concerns have kept coherent partisan gerrymandering doctrine at bay. The Justices have the responsibility to avoid undue interference with normal legislative behavior. In the service of this goal, they have erected an as yet undefined, and hence insurmountable, barrier to reaching the extreme partisanship they all find disturbing. The Justices believe that they cannot distinguish lawful from unlawful intent. And so they have pinned their hopes on one day discovering a workable measure of unconstitutional effect.

#### *A. The Search for a Workable Measure of Unconstitutional Effect*

The Justices' gatekeeping device of choice for partisan gerrymandering cases appears to involve the search for a standard of unconstitutional partisan impact. In this rubric, the partisan drawing of district lines becomes constitutionally impermissible when—and only when—deliberate partisan effects reach a particular, as yet undetermined, magnitude. In this structure, intent still matters, in the sense that the impermissible effects are unconstitutional only if they are not accidental.<sup>44</sup> But the effects analysis is the true star of the show.

The search for a dividing line on effect has been doing the real jurisprudential work since 1986. The *Bandemer* plurality was explicit on this point: the flaw in the claim presented was not the failure to prove requisite intent, but that the intentional act did not do sufficient constitutionally cognizable damage.<sup>45</sup> Twenty years later, Justice Kennedy was just as clearly focused on result: he required a constitutionally significant “burden, as measured by a

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43. See *supra* note 24 and accompanying text.

44. See *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986).

45. See *Davis v. Bandemer*, 478 U.S. 109, 127-30 (1986) (plurality opinion) (accepting the lower court's determination on intent but reversing for lack of a sufficiently adverse effect).

reliable standard, on the complainants' representational rights."<sup>46</sup> This theme recurs throughout the Court's gerrymandering cases.

In one sense, this is familiar constitutional analysis. Courts regularly evaluate the magnitude of burdens imposed by public actors to determine whether they sufficiently impair a protected outcome to be of constitutional significance. But with respect to the Fourteenth Amendment, it is usually the Due Process Clause, and not the Equal Protection Clause, that is the source of such doctrine. Substantive due process doctrine protects against the deprivation of specific substantive rights. It is in this context that the courts will often examine the magnitude of a burden on a right.<sup>47</sup> So, for example, precluding an individual from getting a marriage license may amount to a due process violation; the simple administrative requirement to get a marriage license in the first instance does not.<sup>48</sup> The magnitude of the imposition makes the difference. Similarly, the constitutional battles over abortion regulations often depend on assessments of the extent to which a regulation amounts to a "substantial obstacle" in the path of a woman seeking an abortion.<sup>49</sup> And courts assess laws imposing restrictions on eligible voters' ability to cast a valid ballot by evaluating the degree of the burden imposed.<sup>50</sup>

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46. See *LULAC v. Perry*, 548 U.S. 399, 418 (2006) (Kennedy, J.); see also *Vieth v. Jubelirer*, 541 U.S. 267, 308 (2004) (Kennedy, J., concurring in the judgment).

47. These burdens are then measured against the justification for their imposition.

48. See *Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1978).

49. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300, 2312-13, 2316-18 (2016); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion).

50. See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190-91 (2008) (plurality opinion). Even slight burdens must be justified, but the weight of the justification required varies with the extent of the burden. See *id.* at 191.

Professor Ned Foley suggests that this line of cases is premised on equal protection rather than due process. See Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 684 n.118 (2017). And it is true that the Court has been less than clear about the matter, usually referring to its undue burden cases as assessing claims under the "First and Fourteenth" Amendments, without further elaboration. See, e.g., *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). When the crux of the electoral issue is not the unequal treatment of different voters based on a particular characteristic, but the imposition on the right to vote imposed by a law that purports to apply across the board, the claim seems most consistent with the analysis normally reserved for substantive due process. That said, the proper textual "location" or "locations" of the multifaceted right (or rights) to vote is a topic well beyond this Article.

The apparent thrust of partisan gerrymandering doctrine is very much in this mold. Members of the Court have conceived of the partisan gerrymandering claim as one based on the voters' "representational rights."<sup>51</sup> Consistent with other constitutional claims based on the deprivation of rights, they have been searching for the appropriate constitutional threshold of partisan impairment of the representational right in question.<sup>52</sup>

In one respect, partisan gerrymandering claims have a significant advantage over other rights claims when it comes to questions of magnitude. It is difficult to quantify most assessments of constitutional burden. However, political scientists have developed several tools—some old, some new—for quantitatively assessing the partisan political consequence of a district map. One tool, for example, involves deviations from proportionality: the extent to which a certain percentage of votes fails to translate to a concomitant percentage of seats.<sup>53</sup> One involves deviations from partisan symmetry: the extent to which a certain percentage of votes that translates to a percentage of seats for one party would fail to translate to the same percentage of seats if achieved by another party.<sup>54</sup> One involves the "efficiency gap" measure prominently featured in the new Wisconsin case; it evaluates the degree to which own-party votes have been distributed "efficiently" and opposing-party votes have been "wasted."<sup>55</sup> There are many other tools.<sup>56</sup> There are

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51. See *LULAC*, 548 U.S. at 418 (Kennedy, J.).

52. Professor Mitchell Berman points out that Justice Kennedy actually seems to vacillate between a notion of the constitutional harm in partisan gerrymandering as an imposition on or impairment of representational rights, and a notion of the constitutional harm as an excessive deviation from other legitimate criteria, without an articulation of why that deviation should itself be constitutionally problematic. See Berman, *supra* note 24, at 822-23.

53. See, e.g., Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 397, 402-06 (2005) (articulating and critiquing such a standard); Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2547 (1997) (articulating, if not advocating for, such a standard).

54. So, for example, a redistricting plan in which Democrats would win 59 percent of the seats with 52 percent of the vote, but in which Republicans would win 54 percent of the seats with 52 percent of the vote, would exhibit a lack of partisan symmetry. See generally 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 (2007); Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263, 1306-09 (2016).

55. The most "efficient" electoral result for a party in any given district is bare victory; in contrast, both narrow losses and runaway wins are comparatively "inefficient." The efficiency

limitations for each of the measures, as for any tool.<sup>57</sup> But if the Court is seeking objective quantitative measures, there are plenty from which to choose.<sup>58</sup>

The fundamental problem, however, has never been the absence of a measure, nor the tool for measurement. The difficulty is with the propriety of a particular measure, and with the designation of

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gap measure assesses the comparative degree to which votes for two major parties are “wasted”: either cast in a losing effort within a district or cast in excess of the number needed to win. *See generally* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015).

56. One particularly powerful tool, involving enormously sophisticated supercomputing capacity, does not measure the degree of partisan consequence per se, but rather the degree to which the presented partisan consequence—along any measure—is an outlier, given the other choices the redistricting body might have otherwise chosen. *See* Wendy K. Tam Cho & Yan Y. Liu, *Toward a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 ELECTION L.J. 351, 357 (2016); *cf.* Jowei Chen & David Cottrell, *Evaluating Partisan Gains from Congressional Gerrymandering: Using Computer Simulations to Estimate the Effect of Gerrymandering in the U.S. House*, 44 ELECTORAL STUD. 329 (2016) (using a series of simulations with several simplifying assumptions); Jowei Chen & Jonathan Rodden, *Cutting Through the Thicket: Redistricting Simulations and the Detection of Partisan Gerrymanders*, 14 ELECTION L.J. 331 (2015) (same). *But see* Micah Altman et al., *Revealing Preferences: Why Gerrymanders Are Hard to Prove, and What to Do About It* 30-32 (Mar. 23, 2015) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2583528](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2583528) [<https://perma.cc/L8Z5-YMSM>] (critiquing simulations using simplifying assumptions as creating a biased, nonrandom sample of comparator plans); *cf.* Berman, *supra* note 24, at 839-40 (recognizing similar constraints).

57. For example, some measures may be better or worse than others in confronting assumptions about (or variations in) turnout; assumptions about (or variations in) straight-ticket voting; assumptions about the most appropriate races to assess performance, and anomalous election results in those races (including those that are uncontested); assumptions about uniformity of response in counterfactual variations; assumptions about the degree to which future results will mirror past outcomes; the degree of sensitivity to small outcome changes; environments in which the two major parties are not substantially competitive; significant pockets of third-party support; and so on.

58. *See* D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 674 (2013). There are also, of course, plentiful quantitative redistricting measures that do not purport to assess direct partisan consequence: manifold measures of geometric shape, population dispersion, adherence to county lines or municipal boundaries, and the like. *See generally, e.g.*, Micah Altman, *Districting Principles and Democratic Representation* ch. 2 (Mar. 31, 1998) (unpublished thesis, California Institute of Technology) (on file with author).

Because some (though perhaps not most) extreme partisan gerrymanders may be accomplished by plans that are also serious outliers on one or more of these dimensions, some scholars would identify deviant plans along these dimensions as proxy measures of unconstitutional partisan effect. *See, e.g.*, Edward B. Foley, *The Gerrymander and the Constitution: Two Avenues of Analysis and the Quest for a Durable Precedent*, 59 WM. & MARY L. REV. 1729 (2018); *cf.* Foley, *supra* note 50, at 721-23 (comparing the partisan effect of a plan with deviant compactness to the partisan effect of a plan without, as a measure of unconstitutional effect).

a meaningful threshold.<sup>59</sup> The fact that we can measure distance—and that calipers, rulers, tape measures, laser rangefinders, and odometers are all useful tools to measure distance, in different contexts—does not indicate whether distance is the most relevant trait for evaluating a problem, nor whether a given distance is “too close” or “too far.”

So too with the Court’s quest for a manageable impact standard in partisan gerrymandering. As long as the doctrine requires finding a substantial burden on a representational right, it will require more closely defining the affirmative representational right in question.<sup>60</sup> The Court will have to arrive at an understanding of how much representation a party *should* have under the Constitution.<sup>61</sup> Presumably, this will require a formulation accounting for both major parties and minor ones. Presumably, this will ultimately require assessment (or rejection) at various points of procedural efficacy: a vetoproof majority, a simple majority, and a committee chairmanship may all exercise very different degrees of control over the legislative process, and may implicate different forms of representational rights.<sup>62</sup> Presumably, this will require separating deviations from the affirmative representational right that are permissible from those that are impermissible—with the understanding that, if the effects-based standard is clear, the Court should expect redistricting plans designed to tiptoe right up to the impermissible line.<sup>63</sup> Indeed, this presumably requires defining

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59. See, e.g., Rave, *supra* note 58, at 674.

60. See, e.g., Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 563-64 (2004).

61. Several commentators have urged that the Constitution is wholly agnostic on this question, even in the extreme. See Larry Alexander & Saikrishna B. Prakash, *Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering*, 50 WM. & MARY L. REV. 1, 8-9 (2008); Lowenstein, *supra* note 38, at 382-83, 385.

62. The fact that any or all these questions may eventually arise, of course, does not imply that all facets of an effects-based standard must be determined at once. Courts regularly evaluate infringement within the core of a substantive right without defining the periphery of the right in advance. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 628-29, 635-36 (2008) (noting that a ban on handgun possession in the home for purposes of self-defense violates the Second Amendment in the circumstances before the Court, but declining to specify further violations of the Second Amendment or to elaborate all pertinent exceptions to that rule).

63. See, e.g., Foley, *supra* note 50, at 728 n.287 (recognizing this limitation). This caution reflects experience with redistricting doctrine premised on unequal population. The Court has determined that population deviations for state legislative districts are *prima facie* unconstitutional when they exceed 10 percent, and must be justified by a correspondingly weighty

acceptable deviation from the affirmative representational right *in advance*, so that we citizen frogs can identify the water as too hot without actually having to boil first.<sup>64</sup>

In sum, before the Court can recognize a partisan gerrymander along its current effects-based doctrinal pathway, it will have to establish at least a range or set of substantive partisan outcomes that are constitutionally preferred, so that it can assess impermissible “distortion of,” “deviation from,” or “burden on” those representational rights.<sup>65</sup> That requires constitutional interpretation heavily reliant on political science.<sup>66</sup> To date, such outcomes have been difficult for the Justices to locate.<sup>67</sup>

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legitimate state interest. *See* *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983). Below that 10 percent mark, deviations need not be justified, and are only invalid if plaintiffs can affirmatively prove an illegitimate interest drove the disparity. *See* *Harris v. Ariz. Indep. Redistricting Comm’n*, 136 S. Ct. 1301, 1307 (2016) (explaining the 10 percent threshold). That is, the Court erected a 10 percent population deviation as a measure of presumptively unconstitutional impact. The delineation of the 10 percent line was more or less arbitrary. And once established, it should not have been surprising to find some redistricting bodies drawing lines asymptotically approaching the 10 percent threshold. *See* *Larios v. Cox*, 300 F. Supp. 2d 1320, 1326-27 (N.D. Ga. 2004) (three-judge court) (per curiam) (describing a plan with a 9.98 percent deviation), *aff’d*, 542 U.S. 947 (2004).

64. The metaphor is offered in service of the point that plaintiffs should not optimally have to suffer through durable representational harm before knowing whether they will be able to contest a redistricting plan causing the damage. The metaphor is premised on amphibiological assertions that are, of course, entirely false. *See, e.g.*, James Fallows, *The Boiled-Frog Myth: Stop the Lying Now!*, ATLANTIC (Sept. 16, 2006), <https://www.theatlantic.com/technology/archive/2006/09/the-boiled-frog-myth-stop-the-lying-now/7446/> [<https://perma.cc/NEG4-REXU>].

65. The structure of most rights claims of this sort is not that the right, once located, is absolutely constitutionally required, but rather that the right is protected against abridgment for all but a set of particularly favored reasons. *See* Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 729-31 (1998).

66. *See, e.g.*, Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 640-41 (2007); Rave, *supra* note 58, at 692; *cf., e.g.*, *Holder v. Hall*, 512 U.S. 874, 893 (1994) (Thomas, J., concurring in the judgment) (“[I]t is only a resort to political theory that can enable a court to determine which electoral systems provide the ‘fairest’ levels of representation.”); Foley, *supra* note 58 (discussing a few proposed “universalistic” conceptions of electoral equality, and expressing skepticism that these political science measures, or any given impermissible threshold using these measures, find root in the Constitution); Foley, *supra* note 50, at 669-71 (same, with respect to the “efficiency gap” measurement).

67. The fact that agreement has not been forthcoming is not to say that such standards are inconceivable. Some observers press the claim that a partisan majority of voters have the constitutional right to elect a majority of representatives, finding support for such a standard in, *inter alia*, the constitutional guarantee of a “Republican Form of Government.” U.S. CONST. art. IV, § 4; *see, e.g.*, Michael W. McConnell, *The Redistricting Cases: Original*



### *B. An Alternative Focus on Intent*

This Article does not aim to settle the Court's present search for a workable effects-based approach, nor does it take sides as to whether such a standard is best articulated as an individual right or a structural one.<sup>68</sup> It neither proposes a standard of unconstitutional partisan impact nor declares such a standard to be unfindable.<sup>69</sup>

Instead, this Article aims to demonstrate that there is a ready alternative for addressing partisan gerrymandering claims, which the Court has overlooked or discarded based on what appears to be a fundamental misunderstanding. Independent from the debate sounding in substantive due process over a constitutionally cognizable effects-based burden on representational rights, the Court should recognize a cause of action grounded in impermissible invidious intent.<sup>70</sup> Such a claim would productively refocus adjudication

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*Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 116 (2000). Others believe that substantive constitutional limits may be found in significant departures from prior practice, constitutionalizing historical norms in a manner not unfamiliar to substantive due process analysis. *See, e.g.*, Foley, *supra* note 50, at 724-27; Foley, *supra* note 58; Stephanopoulos & McGhee, *supra* note 55, at 887-89; *see also* Michael H. v. Gerald D., 491 U.S. 110, 121-23 (1989) (describing the role of historical norms in due process analysis).

68. *See, e.g.*, Issacharoff & Karlan, *supra* note 60, at 577-78.

69. This Article also does not confront the wholly distinct argument over anticompetitive or incumbent-regarding policies, including bipartisan gerrymanders of the sort validated by *Gaffney*.

70. Several scholars have advanced claims concerning the recognition of invidious partisan intent in aspects of electoral regulation beyond redistricting. *See, e.g.*, Janai S. Nelson, *The First Amendment, Equal Protection, and Felon Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111, 120-21, 157 (2013); Lori A. Ringhand, *Voter Viewpoint Discrimination: A First Amendment Challenge to Voter Participation Restrictions*, 13 ELECTION L.J. 288, 291-96 (2014).

With respect to redistricting, several thoughtful scholars have articulated claims essentially based on unconstitutional intent, but propose broad prophylactic burden-shifting presumptions of unconstitutional intent whenever legislators are involved, essentially removing legislators from the process. *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 601, 643-44 (2002); Rave, *supra* note 58, at 723-24 (discussing a theory of conflict of interest discernible through the presence of legislators drawing the lines). Others have proffered less dramatic (but perhaps no more reliable) proxy presumptions for illicit intent, grounded in district shape. *See, e.g.*, Foley, *supra* note 50, at 668-69, 687-88, 728 (discussing a theory of constitutionally required "fair play" grounded in legislative intent, but also turning to a burden-shifting proxy grounded in a historically rooted compactness measure); *cf.* Pildes, *supra* note 53, at 2545-46, 2554 (advocating for effect-based measures like compactness in the context of race and redistricting, and hinting toward such a doctrine

not on the theoretically thorny question of “how much,” but on the more judicially amenable question of “what kind.”<sup>71</sup>

Constitutional claims of impermissible intent focus not on the outcomes the Constitution requires, but on the way that government goes about its task.<sup>72</sup> Most intent claims are more limited still: they focus not on identifying a particular correct way for government bodies to operate, but on specific prohibited or disfavored approaches.<sup>73</sup> Particularly in an arena like redistricting, with many varying and legitimate conceptions of the public good, constitutional claims of impermissible intent are appropriately agnostic about a wide range of representational preferences left to the political process. They identify only a narrow range of considerations as out of bounds. Specifically here, a cause of action focused on invidious partisan intent would merely explain that whatever other choices they make, government actors may not punish or subordinate citizens based on their partisan preferences.

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in the partisan political realm). A few others have briefly touched on the topic, without working through the particulars. See, e.g., Briffault, *supra* note 53, at 413-14, 417-18; Ronald A. Klain, *Success Changes Nothing: The 2006 Election Results and the Undiminished Need for a Progressive Response to Political Gerrymandering*, 1 HARV. L. & POLY REV. 75, 86-90 (2007) (sketching the contours of a claim based on invidious partisan intent). Professor Berman's work is most extensively on point in addressing impermissible intent, though he focuses far more on the “how much” question and far less on addressing the concerns behind the doctrine. See generally Berman, *supra* note 24. And, like scholars before him, Professor Richard Fallon, after addressing the pervasive nature of intent tests in the law, incisively critiques the entire intent enterprise, in redistricting and beyond. See generally Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523 (2016). I have attempted to address some of his concerns here, and I save the remainder for a forthcoming piece addressing intent more generally. See *infra* notes 105, 218.

Professor Michael Kang's recent work is a rare exception in this literature. He and I appear to have arrived at very similar and complementary conclusions on the central importance of intent, without finding invidious intent inextricably inherent in the legislative process and without deploying hard-and-fast proxies for adjudicating its existence. And he and I appear to have arrived there at much the same time, albeit by different routes. For his eloquent exploration of a thesis similar to that expressed in this Article, see Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351 (2017). See also generally Parsons, *supra* note 5 (raising similar issues and arriving at some similar conclusions, albeit with less theoretical development).

71. See, e.g., Parsons, *supra* note 5, at 1139.

72. Cf. Elana Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996).

73. See Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1612 (1999).

As developed in the remainder of this Article, this should not be a radical notion. First, such a claim would bring redistricting doctrine into line with the remainder of public law.<sup>74</sup> Second, there are seeds of such an invidious partisan intent claim even within the Court's past redistricting jurisprudence,<sup>75</sup> including gerrymandering cases beyond the traditional historical canon that are otherwise quite difficult to explain.<sup>76</sup> Perhaps most important, a cause of action for invidious partisan intent avoids the real concerns mentioned above that seem to be driving the current doctrinal morass.<sup>77</sup> Courts have the capacity to distinguish invidious partisanship from regular representative politics, not by continuing to search for a distinction in degree, but by recognizing that invidious partisan intent constitutes an observable difference of kind. Also, the existing doctrinal infrastructure for proving intent will render successful claims rare, serving the Court's apparent interest in policing only the extreme outliers.<sup>78</sup>

As an initial matter, despite frequent judicial protestations to the contrary,<sup>79</sup> intent claims are a regular staple of constitutional adjudication. Courts test public action for impermissible or suspect intent in a wide variety of constitutional circumstances.<sup>80</sup> Even beyond

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74. See *infra* notes 81-91 and accompanying text.

75. See, e.g., *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) ("A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population.'" (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965))).

76. See, e.g., *infra* notes 131-37 and accompanying text.

77. See *supra* text accompanying notes 40-42.

78. Recognizing such a cause of action is not inconsistent with the pursuit of a cause of action primarily based on effects. The two are independent (and potentially complementary): a claim that some partisan gerrymandering works an unconstitutional harm by exceeding some threshold partisan impact could exist whether or not those or other plans rose or fell based on proven invidious motive. And a claim premised on impermissible motive could exist whether or not there were also a claim premised on harm of a specific magnitude.

79. As just one recent example, in *United States v. Windsor*, Justice Scalia claimed that "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." 133 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting) (quoting *United States v. O'Brien*, 391 U.S. 367, 383 (1968)). Though the principle is indeed familiar, and frequently recited, it describes neither formal doctrine nor actual practice in vast swaths of constitutional analysis. See *infra* text accompanying notes 81-91.

80. See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 861 (2005) ("[G]overnmental purpose is a key element of a good deal of constitutional doctrine." (citing *Church of the Lukumi*

familiar claims of racial<sup>81</sup> or gender<sup>82</sup> discrimination, or protections against legislation based on animus,<sup>83</sup> intent may prove determinative in adjudicating ex post facto claims or those premised on bills of attainder;<sup>84</sup> claims under the First Amendment,<sup>85</sup> Fourth Amendment,<sup>86</sup> Fifth Amendment,<sup>87</sup> Sixth Amendment,<sup>88</sup> and Eighth Amendment;<sup>89</sup> and even potentially in adjudicating claims that a statute violates the dormant Commerce Clause doctrine,<sup>90</sup> or that a purported tax is actually a penalty, or vice versa.<sup>91</sup> In each of these

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*Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993)); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 352-53 (1977); *Washington v. Davis*, 426 U.S. 229 (1976)); *see also Pildes, supra* note 65, at 735.

81. *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986); *Hunter v. Underwood*, 471 U.S. 222 (1985); *Washington v. Davis*, 426 U.S. 229, 242-44 (1976).

82. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979).

83. *See, e.g., Windsor*, 133 S. Ct. 2675; *Romer v. Evans*, 517 U.S. 620, 632-34 (1996); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973).

84. *See, e.g., Smith v. Doe*, 538 U.S. 84, 92 (2003) (declaring such doctrines applicable to laws motivated by the desire to punish past wrongdoing, but not those motivated by nonpunitive, regulatory objectives).

85. *See, e.g., McCreary County*, 545 U.S. at 860 (declaring laws unconstitutional if passed for the principal purpose of advancing religion); *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998) (acknowledging prohibitions on public actors' retaliation against protected speech in other contexts); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (strictly scrutinizing laws with the purpose of suppressing religion or religious conduct because of its religious significance); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977) (prohibiting retaliation against a public employee's protected speech).

86. *See, e.g., Florida v. Jardines*, 133 S. Ct. 1409, 1415-17 (2013) (establishing that the implicit license permitting a police officer's warrantless presence in the curtilage of a home depends on the officer's purpose for being there); *City of Indianapolis v. Edmond*, 531 U.S. 32, 39-42 (2000) (permitting suspicionless searches if established primarily to preserve public safety, but not if the purpose is the detection of ordinary criminal wrongdoing).

87. *See, e.g., Missouri v. Siebert*, 542 U.S. 600, 617-18 (2004) (Breyer, J., concurring); *id.* at 621-22 (Kennedy, J., concurring in the judgment) (emphasizing that confessions produced after *Miranda* warnings, but procured because the same confession had earlier been extracted before offering *Miranda* warnings, are inadmissible if law enforcement structured their interrogation intentionally to subvert *Miranda*).

88. *See, e.g., Michigan v. Bryant*, 562 U.S. 344, 358-61 (2011) (barring third parties' out-of-court statements from a criminal trial if produced by a police interrogation intended to yield evidence for future prosecution, but not if the primary purpose of the interrogation was to enable police response to an ongoing emergency).

89. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 835 (1994); *Hudson v. McMillian*, 503 U.S. 1, 6 (1992) (permitting the use of force by a prison guard if motivated by the need to maintain or restore order, but not the same use of force deployed "maliciously and sadistically for the very purpose of causing harm" (quoting *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986))).

90. *See, e.g., Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 352-53 (1977).

91. *See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 571-72 (2012) (distin-

instances, an action may be constitutional or unconstitutional based on the intent of the government actor. And that is merely a summary of constitutional claims, leaving aside statutes that call for judicial examination of official motive. Evaluating the intent behind public action, whether by one decision maker or many collectively, is far more central to our legal system than courts like to admit.

With respect to partisan gerrymandering, Justices Stevens and Powell were willing to make intent the principal driver of a constitutional claim.<sup>92</sup> Other Justices, however, have shied away, apparently under the impression that there is no relevant impermissible intent in the redistricting process discernible from politics as usual.<sup>93</sup> This is an incorrect premise, resting on an impoverished vocabulary of politics and partisanship.

### *1. The Invidious Intent that Matters*

Prohibiting invidious partisan intent does not require a screed against politics. Political choices are not only inevitable in representative public bodies, but essential to their proper function. Legislative bodies enact statutes of general application, and executive actors choose the means by which they execute and enforce those statutes, based on shifting—and heavily contested—notions of the public good. Different citizens want different and often mutually exclusive actions from the public bodies they empower, and actors within our governmental institutions determine how to fulfill those desires in large part based on response to various constituencies and colleagues, sloppily intermingled with (and shaped by) the actors' own preconceptions. The process by which politicians arrive at any policy subject to divergent assessments of rectitude is politics as

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guishing taxes from penalties based on a nonpunitive motive).

92. See *Vieth v. Jubelirer*, 541 U.S. 267, 318, 321-22, 339 (2004) (Stevens, J., dissenting); *Davis v. Bandemer*, 478 U.S. 109, 164-65 (1986) (Powell, J., concurring in part and dissenting in part).

93. See, e.g., *LULAC v. Perry*, 548 U.S. 399, 418 (2006) (Kennedy, J.); *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment).

usual.<sup>94</sup> Redistricting is no more or less immune to this sort of politics than every other legislative act. Nor should it be.

But the fact that political bodies are inherently political, and that redistricting requires political choices, does not mean that all political choices are constitutionally permissible. In particular, based on First Amendment rights of individual and group expression, and related rights of political assembly, the Constitution generally forbids using government power in order to punish or subordinate disfavored partisan affiliation.<sup>95</sup> In other work, I have extensively described why this species of what I call “tribal partisanship,” particularly in the electoral sphere, is normatively undesirable.<sup>96</sup> It is not, however, merely a freefloating normative harm. Given constitutional protections for political affiliation, the desire to punish or subordinate members of an opposing partisan clan because of their political affiliation is also an invidious and legally suspect motivation for public action.<sup>97</sup>

The patronage cases provide an example. In *Elrod v. Burns*, the Court held that a public actor may not condition a non-policy-making government job on the employee’s pledge of allegiance to a particular political party.<sup>98</sup> A few years later, the Court determined that government employees for whom partisanship was not particularly relevant to job performance could not be dismissed simply

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94. “Political” choices are merely contested public actions in spaces where there is no inherently correct answer. “Political” is not merely either synonym or shorthand for “partisan,” as that term is often understood: political choices will not necessarily or inherently fall along lines defined by prominent political parties, nor will they necessarily or inherently be driven by considerations of political party gain. *See, e.g., infra* Part II.C.1.

95. This Article focuses on the invidious partisan intent to use the power of the state to “punish or subordinate” adherents of an opposing partisan view. That is, it addresses affirmative government action intended to subject members of an out-group defined by political party to inequitable and unfavorable conditions, or to artificially maintain existing inequitable and unfavorable conditions. It is informed by, but does not claim that partisan subordination is equivalent to, concerns about subordination of other out-groups. *Cf., e.g.,* Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 *YALE L.J.* 1329, 1399 (1991). And it also acknowledges that this form of invidious partisan intent may not exhaust the universe of invidious partisan intent addressed by the Constitution.

96. *See* Justin Levitt, *The Partisanship Spectrum*, 55 *WM. & MARY L. REV.* 1787, 1806-07, 1811-16 (2014).

97. *See, e.g.,* Klain, *supra* note 70, at 86; Parsons, *supra* note 5, at 1136-37.

98. *See* 427 U.S. 347, 355-57, 372-73 (1976) (plurality opinion); *see id.* at 375 (Stewart, J., concurring in the judgment).

because they were of the “wrong” political party.<sup>99</sup> So far, so good: partisan affiliation is constitutionally protected against public retaliation. Still, these decisions could be plausibly interpreted as cases based on effect: the threat of dismissal could be expected to coerce or deter the employees’ protected political expression, and perhaps that burden on expression was the only constitutional wrong.

During the October 2016 Term, the Court put such suspicions to rest. *Heffernan v. City of Paterson* helped clarify that a public employer’s improper political motivation (also) suffices to establish a constitutional claim for employment-based harm.<sup>100</sup> In *Heffernan*, the Court addressed a claim that a police chief *mistakenly* believed that a detective had engaged in political activity, and demoted the detective because of it.<sup>101</sup> The detective had not actually engaged in the activity in question, and so the demotion had not *actually* burdened any protected activity.<sup>102</sup> And the demotion did not on its face give independent reason for constitutional concern: the same personnel action, undertaken for permissible reasons, would have been constitutionally unremarkable. But the Court found that a demotion fueled by a desire to punish the detective’s political affiliation—an impermissible desire—amounted to a violation of the Constitution.<sup>103</sup> It was the motive, not the effect, that made the difference.<sup>104</sup>

Tribal partisanship, then, is an unlawful impetus for government action in the employment context, even when the desire to punish political affiliation does not actually result in a concrete or measurable burden on political affiliation.<sup>105</sup> First Amendment protection

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99. See *Branti v. Finkel*, 445 U.S. 507, 517-18 (1980); cf. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75-76 (1990); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 100 (1947) (agreeing “that Congress may not ‘enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office’”).

100. See 136 S. Ct. 1412, 1418 (2016).

101. See *id.* at 1416.

102. See *id.* at 1417.

103. See *id.* at 1418.

104. See Kagan, *supra* note 72, at 414 (recognizing that much of First Amendment law is designed to sniff out improper government motive).

105. There are several potential rationales for prohibiting action based on invidious motives, even absent a demonstrated measure of burden on an affirmative, substantive right. First, prohibiting the invidious action may be seen as prohibiting that which is simply *ultra vires*: beyond the legitimate authority of a body empowered to act on behalf of the people as a whole. See, e.g., *id.* at 511; Rave, *supra* note 58, at 720. Second, prohibiting the invidious

for partisan affiliation is not confined to the employment context, and there is no reason to believe that protections against public action reflecting tribal partisanship are limited to that context either.<sup>106</sup>

This assertion is not, I think, controversial. For example, a tax levied on registered Republicans solely because of their Republican registration—a tax levied solely because an individual chose to affiliate with a particular political team—would surely violate the First Amendment.<sup>107</sup> Such a tax would constitute intentional and official action by the state, undertaken to systematically disfavor one particular, protected, collective political expression.<sup>108</sup> And courts would have no difficulty distinguishing the invalid tribal partisanship displayed by such a tax from the myriad other properly political choices involved in any other tax levy, including tax choices that happen to inure to the benefit of many Democratic voters or tax choices with which Republicans might not agree.

This last point is worth repeating. The fact that legislators seeking the hypothetical tax above may be acting in order to pander to

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action may instrumentally protect the substance of constitutional rights against undue burden, if invidious acts are more likely to burden protected rights, including in ways in which the burden is more difficult to prove than the invidious intent itself. *See, e.g.,* Kagan, *supra* note 72, at 426, 509. Third, prohibiting the invidious action may protect third parties who see the invidious motive, and would preemptively trim their own activity so as to avoid being subjected to it. *See Heffernan*, 136 S. Ct. at 1418-19. Fourth, in at least some circumstances, public action premised on an invidious motive works an expressive harm that constitutes its own constitutional injury, and prohibiting the invidious action mitigates that expressive harm. *See, e.g.,* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1532-64 (2000); Kagan, *supra* note 72, at 510-11; Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506-13 (1993). In a forthcoming work addressing claims of intent more generally, I further develop these and other rationales for policing public activity premised primarily on intent. *See* Justin Levitt, *The Problems of Purpose* (working title) (on file with author).

106. *See, e.g.,* *Shapiro v. McManus*, 203 F. Supp. 3d 579, 598 (D. Md. 2016) (three-judge court) (explaining that the basic principle against invidious partisan action “applies with equal force in the redistricting context”).

107. *Cf. Vieth v. Jubelirer*, 541 U.S. 267, 337 (2004) (Stevens, J., dissenting) (“A legislature controlled by one party could not, for instance, impose special taxes on members of the minority party.”).

108. *Cf. W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics.”); Kagan, *supra* note 72, at 513 (“[T]he government cannot disadvantage a person because what she thinks or says is immoral or repellant or because others view it as such.”).



Democratic voters, or succumbing to political pressure by those voters, is not particularly relevant in determining whether the tax is constitutional. Action undertaken on legitimate policy grounds, but motivated by a legislator's ultimate objective of obtaining a partisan citizen's future electoral vote—what I call “responsive partisanship”—is largely the engine of the modern legislative process.<sup>109</sup> That urge to earn partisan votes through choices among legitimate policies is distinct from invidious tribal action undertaken against opposing partisans to punish that partisan affiliation<sup>110</sup>: it is the distinction between competition for or over voters, and competition against them. Tax decisions undertaken because Democrats will applaud them and Republicans will jeer them is responsive partisanship, and constitutionally unremarkable. Tax decisions undertaken because they will hurt voters who are Republican, because they are Republican, is invidiously tribal and unconstitutional.

Crucially, the unconstitutionality of this tax on Republican registration would not depend on the magnitude of the tax, the difficulty that Republicans might face in paying it, or the extent to which it would actually deter individuals from registering with the Republican Party. That is, the unconstitutionality of the tax on Republican registration does not depend on the degree of the practical burden it would exact or the amount of protected activity it would abridge.<sup>111</sup> The tax would be unconstitutional even if it were empirically proven to deter no voter from registering as a Republican. Like legislative acts motivated by animus, and like the demotion at issue in *Heffernan*, a tax whose purpose is the subordination of protected political expression is essentially *ultra vires*.<sup>112</sup> A two-cent tax on Republican registration is just as unconstitutional as a two-hundred-dollar tax or two-million-dollar tax. The invidious purpose is the constitutional flaw. The rest is just haggling over the price.<sup>113</sup>

If a tax on Republicans because they are Republicans is premised on a purpose we can recognize as unconstitutionally invidious, then

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109. See Levitt, *supra* note 96, at 1797-98, 1803-04.

110. See *id.* at 1798-1801, 1804-07.

111. Cf. Kang, *supra* note 70, at 404.

112. See *supra* note 105.

113. See *Now We're Just Haggling over the Price*, QUOTE INVESTIGATOR (Mar. 7, 2012), <http://quoteinvestigator.com/2012/03/07/haggling/> [<https://perma.cc/UGV4-EAB6>].

so too is a statute levying a tax on red baseball hats—no matter the size of the tax—if section one of the law recites that the legislature’s purpose in imposing the tax is to punish those who affiliate with the Republican Party.<sup>114</sup> An invidious purpose to subordinate or systematically disfavor specific protected political affiliation remains invidious no matter the means deployed, and no matter whether those means are overinclusive or underinclusive in accomplishing the impermissible aim.

There is no reason to exclude partisan gerrymandering from this general proposition.<sup>115</sup> District lines are, of course, facially neutral. But just as with a tax on red baseball hats, a redistricting statute declaring in section one that the purpose of the law is to punish or subordinate members of the Republican Party should be recognized to be based on an unconstitutionally invidious motive, no matter where the district lines actually fall.<sup>116</sup>

And a redistricting statute without such a declaration of purpose? The matter is merely a question of proof. Such a statute should be recognized as motivated by invidious tribal partisanship to the extent—but only to the extent—that plaintiffs are able to muster extrinsic evidence demonstrating that the lines were actually driven by impermissible tribal partisanship.<sup>117</sup>

## 2. *The Nature of Effect in an Invidious Intent Claim*

Consistent with the Court’s approach to invidious motive in other circumstances, a constitutional claim premised on the invidious intent to punish or subordinate a disfavored partisan affiliation would

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114. *Cf.* Ringhand, *supra* note 70, at 289.

115. *See* Klain, *supra* note 70, at 87-88.

116. *See, e.g.,* Vieth v. Jubelirer, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring in the judgment) (“If a State passed an enactment that declared ‘All future apportionment shall be drawn so as most to burden Party X’s rights to fair and effective representation, though still in accord with one-person, one-vote principles,’ we would surely conclude the Constitution had been violated.”); Transcript of Oral Argument at 19-20, 26-27, *Gill v. Whitford*, *argued*, No. 16-1161 (U.S. Oct. 3, 2017) (posing a similar hypothetical). Note that in this hypothetical, to which Justice Kennedy repeatedly returned in the *Gill v. Whitford* oral argument, the constitutionality of the statute does not depend on the extent to which any future enactments actually accomplish the invidious goal.

117. As discussed below, this evidence will likely be more difficult to muster than the courts appear to presume. *See infra* Part II.C.3.

not be complete without a showing of discriminatory effect.<sup>118</sup> Invidious intent may be constitutionally disfavored, but the Court has made clear that public action undertaken pursuant to an invidious motive does not amount to a constitutional violation on any given plaintiff if the plaintiff's lot is improved, or wholly unaffected, by the action in question.<sup>119</sup> Crucially, though, the effect required in an invidious intent case is not the showing of an independent breach of a separately defined constitutional right. For a claim of invidious *partisan* intent, the Court need not determine any constitutionally required threshold of partisan fairness.<sup>120</sup>

Instead, the standard of impact for invidious intent cases amounts to little more than the need to show tangible and redressable harm sufficient to yield standing.<sup>121</sup> An employee has no substantive constitutional right to a particular job under particular conditions. But she may press a constitutional claim if she can show that a tangibly disfavorable employment action was undertaken because of invidious and impermissible intent.<sup>122</sup> Mr. Heffernan was demoted, but he would have had the same constitutional claim whether he was fired, demoted, transferred to a slightly less desirable position, or denied one cent of earned overtime. As long as the action was adverse, it was actionable if driven by the intent to punish protected political activity; the magnitude of the adversity is irrelevant.<sup>123</sup> Accordingly, the remedy for such wrongdoing is not

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118. *Cf.* *Washington v. Davis*, 426 U.S. 229, 240-41, 243 (1976); *Palmer v. Thompson*, 403 U.S. 217, 225-26 (1971).

119. *Cf. Palmer*, 403 U.S. at 225-26.

120. *See, e.g., Benisek v. Lamone*, 266 F. Supp. 3d 799, 818-19 (D. Md. 2017) (three-judge court) (Niemeyer, J., dissenting) ("It is therefore sufficient in proving a violation under [the First Amendment] to show that a voter was targeted because of the way he voted in the past and that the action put the voter at a concrete disadvantage. The harm is not found in any particular election statistic, nor even in the outcome of an election, but instead [in] the intentional and targeted burdening of the effective exercise of a First Amendment representational right."), *argued*, No. 17-333 (U.S. Mar. 28, 2018).

121. *Cf. Anderson & Pildes, supra* note 105, at 1537 (arguing that constitutional claims revolving around expressive harm should focus on expressed intent, and that such laws should be invalidated "without regard to [their] further effects").

122. *Cf. Elrod v. Burns*, 427 U.S. 347, 360-61 (1976) (plurality opinion) (rejecting the notion that, because there was no right to a government benefit, the benefit may be denied for any reason).

123. "Invidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude." *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256, 277 (1979); *see also Rutan v. Republican Party of Ill.*, 497 U.S. 62, 66-67, 75 (1990) (finding valid claims

the guarantee of a particular set of job conditions, but the assurance that job conditions will be set by a constitutionally acceptable process, free from the taint of the invidious motive.

This emphasis on invidious intent, without requiring that discriminatory effect reach any particular threshold, comports with the approach that the Court has taken in several redistricting cases. Consider, for example, *Gomillion v. Lightfoot*, a case premised on invidious racial action rather than invidious partisan action.<sup>124</sup> *Gomillion* addressed a 1957 Alabama statute redrawing the bounds of Tuskegee from a square to a “strangely irregular twenty-eight-sided figure,” which removed the Tuskegee Institute from the city bounds—and also removed all but four or five of the 400 African American voters from the city limits without removing a single white resident.<sup>125</sup>

The Court described the injury as a discriminatory deprivation “of the municipal franchise.”<sup>126</sup> Depriving someone of a vote is an unquestionably serious impact. But—as the lone concurring opinion recognized—that is not really what the statute in question did, and it does not really describe why Alabama’s action was unconstitutional.<sup>127</sup> Voters beyond the bounds of incorporated cities in Macon County retained the ability to vote for local officials in county elections. Voters who had lived just outside of the preexisting square Tuskegee boundaries were not, presumably, deprived of the municipal franchise in a constitutionally significant way by virtue of their residence outside of pre-1957 incorporated Tuskegee.<sup>128</sup> Nor would Alabama’s statute have been constitutional if the legislature had simultaneously created a new town for the 400 displaced voters: “Black Tuskegee,” in which each of the displaced voters would have

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not only in denials of employment and promotion based on invidious partisan intent, but also the invidious partisan denial of a transfer to an office nearer the plaintiff’s home); *cf.* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (finding sufficient injury in the mere *potential* for adverse decisions when one of the decision-making criteria is insufficiently justified).

124. *See* 364 U.S. 339, 340 (1960).

125. *See id.* at 341.

126. *See id.* at 347.

127. *See id.* at 349 (Whittaker, J., concurring).

128. *Cf.* *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 61-63, 75 (1978) (refusing to grant the right to vote in a specific municipality to residents beyond municipal bounds, even when subject to the municipality’s police power).

enjoyed the full benefits of the “municipal franchise,” would not have fixed the problem. The Court never mentioned the African American voters’ comparative political strength before and after the boundary change, or their comparative access to relevant services; that information might well have been critical to vote dilution claims of a different sort,<sup>129</sup> but it was not particularly relevant for the claim at issue in *Gomillion*.

Rather, in 1957 Alabama, it was plain that the redrawn Tuskegee municipal lines were intended to denigrate and exclude—not just from the municipality, but from society. To the Court, that invidious intent was self-evident. The real communicative impact of that intent was also apparently self-evident.<sup>130</sup> But the Court found no need to address its size in order to find a constitutional violation. In *Gomillion*, given the unmistakable invidious legislative intent, the magnitude of the pragmatic impact on the franchise was not particularly meaningful.

The minimal role of effect in an intent-based partisan gerrymandering case is even clearer, because the Court has already addressed one, albeit only via summary affirmance.<sup>131</sup> *Cox v. Larios* affirmed a trial court’s determination that the Georgia legislature had drawn lines in order to intentionally subordinate the political power of Republicans by selectively overpopulating Republican districts and selectively pairing Republican incumbents.<sup>132</sup> The population disparities, in particular, amounted to plans with a total deviation of 9.98 percent,<sup>133</sup> within the 10 percent threshold at which population disparities for state legislative districts become presumptively constitutionally problematic based on their impact.<sup>134</sup> That is,

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129. *Cf. City of Port Arthur v. United States*, 459 U.S. 159, 165-168 (1982) (assessing whether a change in municipal boundaries, along with a change in electoral rules, diluted minority voting strength under section 5 of the Voting Rights Act); *Rogers v. Lodge*, 458 U.S. 613, 615 (1982).

130. *See Gomillion*, 364 U.S. at 347.

131. In the Court’s direct appeal docket, the Court will often summarily affirm a lower court’s case, without further explanation. Such summary affirmances indicate a Court majority’s agreement with the result below, but do not further elaborate the reasons for that agreement. *See, e.g., Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*per curiam*).

132. *See Larios v. Cox*, 300 F. Supp. 2d 1320, 1329-30, 1334 (N.D. Ga. 2004) (three-judge court) (*per curiam*), *aff’d*, 542 U.S. 947 (2004).

133. *See id.* at 1326-27.

134. *See Harris v. Ariz. Indep. Redistricting Comm’n*, 136 S. Ct. 1301, 1307 (2016) (explaining the 10 percent threshold).

without an invidious purpose, any burden on voters from a state legislative plan with a 9.98 percent population deviation does *not* create constitutionally significant concern.<sup>135</sup> But the Court affirmed the trial court's invalidation of those districts. If the magnitude of the deviation was not constitutionally infirm, the constitutional invalidity must have been because—and only because—plaintiffs had proven an invidious, illegitimate purpose.<sup>136</sup> The fact of harm was relevant, but not the degree of harm. Logically, any magnitude of systematic overpopulation would have sufficed to complete the constitutional claim, given the requisite proof of invalid intent.<sup>137</sup>

So what is the right measure of effect for a claimed invidious partisan gerrymander that does not involve overpopulation? If invidious motive is the meaningful constitutional impropriety, any consequent injury that establishes standing should be sufficient to adjudicate the claim. Ample additional evidence of partisan impact may well help in demonstrating the invidious intent behind a plan, but such evidence should not be necessary to contest invidious motive proven by other means.<sup>138</sup>

Because many varied circumstances may reveal an injury-in-fact, it may be more straightforward to articulate when plaintiffs who are able to prove invidious intent would *not* have a valid claim. For example, partisan plaintiffs who have already achieved proportional partisan strength within the jurisdiction might find it quite difficult to articulate an injury sufficient for standing purposes, even if they

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135. See *White v. Regester*, 412 U.S. 755, 763-64 (1973) (approving a population deviation of 9.9 percent without evidence of invidious motive).

136. Though the summary affirmance means that observers cannot reliably discern the precise reasons the Court thought the districts invalid, see *Mandel*, 432 U.S. at 176, if the magnitude itself was not constitutionally problematic, it must be that the motive was at issue.

137. If the Democrats had sought to punish Republicans but erred, leaving all Republican districts underpopulated (resulting in comparatively greater representational strength), Republican voters would have had no injury-in-fact, and no standing to pursue a claim. Cf. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

138. Courts need not fear a barrage of litigation over invidious intent with vanishingly small consequences: the more meager the damage, the harder it will be for plaintiffs to establish that the action was taken because of an invidious motive. Few entities setting out specifically to punish or subordinate are likely to aim for a negligible result. That they may, instead, aim for a significant result that is difficult to establish or prove as significant is reason to prefer a constitutional test focused on invidious intent without an artificial effects-based barrier. See *supra* note 105.

were able to show that the opposing party acted with invidious partisan intent.<sup>139</sup>

The fact that proportionality may preclude the ability to demonstrate injury-in-fact for an invidious intent claim does not imply that a standard of invidious intent drives inevitably toward a proportional partisan outcome. Nor does this render intent doctrine an attempt to introduce a constitutional proportionality requirement on the sly.<sup>140</sup> Many, if not most, maps drawn pursuant to legitimate redistricting ends will lead to disproportionate partisan results; these maps are not constitutionally assailable using a standard of invidious partisan intent.<sup>141</sup> On the other hand, maps that were drawn with invidious intent should be constitutionally vulnerable once they inflict any cognizable damage at all.

### *C. Intent and the Concerns Behind the Doctrine*

For the purposes of this Article, it is not particularly relevant whether the constitutional principle described above is located within the First or Fourteenth Amendment—or, more likely, both. This distinction appears to have taken on outsized importance, in part due to Justice Kennedy’s rejection of claims thus far lodged under the Equal Protection Clause and his invitation of claims

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139. *Cf.* LULAC v. Perry, 548 U.S. 399, 419 (2006) (Kennedy, J.) (“[A] congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority.” (citing Gaffney v. Cummings, 412 U.S. 735, 754 (1973))); Johnson v. De Grandy, 512 U.S. 997, 1014-21 (1994) (discussing the relevance of proportionality in a claim of vote dilution under section 2 of the Voting Rights Act).

As an alternative benchmark, some may believe that the failure to demonstrate retrogression—a change for the worse in practical electoral power, *cf.* Beer v. United States, 425 U.S. 130, 141 (1976)—would preclude a finding of injury-in-fact. Yet retrogression, a statutory standard, does not account for some real and tangible injuries flowing from discriminatory subordination that “merely” maintains the status quo. In the employment context, for example, the decision to block an employee’s promotion—maintaining the status quo without a change for the worse—may still constitute actionable injury if that decision is made for invidious reasons. *See, e.g.,* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

140. *See* Berman, *supra* note 24, at 820-21 (reviewing strawman arguments purporting to establish proportionality as a necessary constitutional standard for adjudicating partisan gerrymandering claims); Michael A. Carvin & Louis K. Fisher, “A Legislative Task”: Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts, 4 ELECTION L.J. 2, 5 (2005) (making such an argument).

141. *See* Kang, *supra* note 70, at 357.

under the First Amendment.<sup>142</sup> Both constitutional provisions prohibit discrimination with invidious intent against a particularly disfavored out-group;<sup>143</sup> both require, at least for purposes of adjudication in an Article III court, tangible harm sufficient to support standing;<sup>144</sup> and across the spectrum of cases beyond partisan gerrymandering, neither requires more than that constitutional minimum to adjudicate a claim of invidious intent. The Equal Protection Clause begins its inquiry from the proposition that similarly situated citizens are to be treated similarly, and travels to the notion that attempts to punish based on political affiliation do not reflect legally relevant differences and are therefore impermissible. The First Amendment begins its inquiry from the protection of expressions of political affiliation, and travels to the notion that attempts to punish only some citizens but not others based on that protected right are impermissible. In the context of partisan gerrymandering, both provisions arrive at the same place.

### *1. Invidious Partisan Intent Is Not Just “Politics”*

The standard articulated above satisfies the concerns I believe to be animating the present doctrinal struggle.<sup>145</sup> For example, a constitutional claim that turns on establishing that maps were drawn with the invidious intent to punish or subordinate one political party is not designed to remove politics from the redistricting process. The Justices have repeatedly said that redistricting is “root-and-branch a matter of politics.”<sup>146</sup> In this, they are absolutely correct. But the fact that redistricting involves innumerable political choices means neither that it is, nor that it need inevitably be, nor that it should be, root-and-branch tribally partisan.<sup>147</sup>

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142. See *Vieth v. Jubelirer*, 541 U.S. 267, 313-14 (2004) (Kennedy, J., concurring in the judgment).

143. See *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (equal protection); *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) (equal protection); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-30 (1995) (First Amendment); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (First Amendment).

144. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

145. See *supra* text accompanying note 43.

146. See *Vieth*, 541 U.S. at 285 (plurality opinion); see also *Gaffney*, 412 U.S. at 752-53.

147. Commentators have made a similar error, noting that redistricting—and politics generally—is political and involves political choices, while failing to understand that it does not



A requirement that public officials forego action specifically intended to punish or subordinate opposing partisans leaves ample room for redistricting bodies to engage in plenty of permissible political calculations. In most any redistricting map, beyond the few commands of federal law, drawers must make an array of choices, and those choices do not have predetermined correct answers. These choices are political.

These political choices include choices about whether to follow certain county lines and not others, certain city lines and not others, certain precinct lines and not others, certain roads or rivers or rail lines and not others; about the degree to which lines should follow Platonic geometric patterns or patterns of residential development; about allowing certain donors or activists or communities to congregate within one district or to span district lines; about the degree to which a district should have a distinct character or span multiple competing interests, and which of those interests should dominate. They include choices—even self-regarding choices—about whether to protect incumbents, at least in the sense of consistently protecting the relationship of incumbents to their constituents, rather than selectively protecting incumbents from their constituents.<sup>148</sup>

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necessarily follow that public action to tribally punish partisan affiliation is therefore permissible. To speak of political choices and choices premised on invidious partisan intent is to conflate two distinct concepts. *See, e.g.,* Klain, *supra* note 70, at 88; Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, Reply, 116 HARV. L. REV. 649, 677-79 (2002); Kevin D. Williamson, *In Praise of Gerrymandering*, NAT'L REV. (June 21, 2017, 8:00 AM), <http://www.nationalreview.com/article/448801/gerrymandering-supreme-court-case-redistricting-legislatures-job> [<https://perma.cc/9LP6-23BH>]. Michael Kang is one of the few other scholars to have not only articulated the distinction, but found it meaningful. *See* Kang, *supra* note 70, at 368.

148. *See* Parsons, *supra* note 5, at 1146. The Supreme Court has recognized this distinction. As Justice Kennedy explained,

The Court has noted that incumbency protection can be a legitimate factor in districting, but experience teaches that incumbency protection can take various forms, not all of them in the interests of the constituents. If the justification for incumbency protection is to keep the constituency intact so the officeholder is accountable for promises made or broken, then the protection seems to accord with concern for the voters. If, on the other hand, incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters.

*LULAC v. Perry*, 548 U.S. 399, 440-41 (2006) (citation omitted); *see also* *White v. Weiser*, 412 U.S. 783, 791 (1973) (finding valid a policy “aimed at maintaining existing relationships between incumbent congressmen and their constituents” and the drawing of district boundaries “in a way that minimizes the number of contests between present incumbents”

Maintaining the cores of existing districts and avoiding unnecessary contests between incumbents may allow a more consistent base of constituents to appraise their representative's performance over time; while not required, this is a constitutionally permissible choice, and hence part of the properly political calculus.

These choices are rarely meaningfully predetermined by state law, and may be resolved in different ways, to different degrees, with different priorities, in different parts of a jurisdiction. Decisions to keep a farming community whole despite an intervening county line in one part of a state, and in another portion of the state to follow a city boundary separating two parts of a community heavily engaged with the energy industry, are entirely political and entirely legitimate choices. These choices may involve crass constituency calculus or fundamental choices about the nature of representation, or both at once. Those are all choices that can be and are made by politics as usual. Indeed, those are choices made by politics as usual even when they are made by bipartisan or multipartisan bodies independent from the legislature, including bodies expressly charged with foregoing tribal partisan intent.<sup>149</sup> And even though there are always partisan impacts to each of these choices, any concern over those impacts is distinct from the concern over the decision makers' specific intent to punish or subordinate based on political party affiliation. Politics is inherent in the act of redistricting, but invidious partisan intent is not.

Some Justices and commentators have raised a related but slightly different issue: not the notion that redistricting is inherently political, but the notion that in a political body like a legislature, some intent to gain political—or even partisan—advantage is inevitable.<sup>150</sup> This instinct, too, is distinct from tribal partisan-

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(quoting *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966)).

149. See, e.g., CAL. CONST. art. XXI, § 2(c) (establishing a commission); *id.* § 2(e) (prohibiting partisan intent); HAW. CONST. art. IV, § 2 (establishing a commission); *id.* § 6(2) (prohibiting districts “so drawn as to unduly favor a person or political faction”); IDAHO CONST. art. III, § 2 (establishing a commission); IDAHO CODE § 72-1506(8) (2017) (prohibiting the dividing of counties “to protect a particular political party or a particular incumbent”); IOWA CODE §§ 42.3, 42.5-.6 (2017) (establishing a commission structure); *id.* § 42.4(5) (prohibiting partisan intent); N.Y. CONST. art. III, §§ 4, 5-b (establishing a commission structure); *id.* § 4(c)(5) (prohibiting partisan intent); WASH. CONST. art. II, § 43(1) (establishing a commission); *id.* § 43(5) (prohibiting partisan intent).

150. See *Vieth*, 541 U.S. at 344 (Souter, J., dissenting); Foley, *supra* note 58, at 1747-48;

ship.<sup>151</sup> The normal route to gain political advantage is to take action (or promote inaction) that voters favor; the normal route to gain partisan political advantage is to take those (in)actions that voters of a particular partisan stripe favor.<sup>152</sup> In designing, opposing, or enforcing virtually any legislation, public officials must prioritize subjects and select substance from among many plausible means to improve public welfare, and many (maybe all) of those elected in partisan contests may make their choices based on what they believe voters of their party prefer. Some may even make choices they personally believe to be contrary to the public welfare based on what they believe voters of their party prefer. Many will make choices to avoid what they believe voters of their party least prefer and feel strongly about.

And all of those choices are distinct from the choice to set out to punish or subordinate voters based on their affiliation.<sup>153</sup> That a Democratic or Republican legislator may vote on legislation with an eye toward improving her appeal in the next election is a very different matter than voting on legislation designed to improve her prospects by means *other* than appeal. Legislating with the intent to improve one's political prospects by injuring Democrats or Republicans, because they are Democrats or Republicans, is a distinctly toxic form of partisanship, readily distinguishable from the rough and tumble of other political choices. Moreover, not only is this invidious partisan intent distinguishable in theory, but as argued below, it also appears as an empirical matter to be quite rare in legislative arenas beyond redistricting.<sup>154</sup> That rarity further indicates that it is not inherent to the legislative enterprise.

Notably, a standard of invidious partisan intent is agnostic about the properly political choices above and the maps to which they lead. That is, an invidious intent standard is agnostic about the right way to draw district lines, the right things to think about when drawing lines, and the acceptable range of political, even partisan, outcomes. Just as it is not an attempt to purge politics from the process,

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Lowenstein, *supra* note 38, at 387-88.

151. I have called this sort of motivation "responsive partisanship." See *supra* note 109 and accompanying text.

152. See, e.g., Levitt, *supra* note 96, at 1797-98.

153. See *id.* at 1798-99.

154. See *infra* text accompanying notes 209-12.

redistricting without invidious partisan intent is not an effort to locate a system that is “fair,” much less a system that is “most fair.”<sup>155</sup> It is, instead, only a recognition that the public intent to punish citizens based on their partisan affiliation is *unfair*.<sup>156</sup> And identifying the small range of the affirmatively unfair, leaving most other options to the political process, is exceedingly consistent with the normal course of constitutional adjudication. Declaring the intent to subordinate protected political affiliation to be as impermissible in the redistricting realm as in others does not risk throwing the political baby out with the tribally partisan bathwater.

Even apart from the notion that tribal partisanship is *ultra vires* in public action, drawing districts specifically to punish or subordinate based on political party affiliation inflicts distinct harm that these other political choices do not.<sup>157</sup> Assuming a modicum of competence among redistricting bodies with invidious intent,<sup>158</sup> districts

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155. See *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (noting the absence of an agreed-upon model of fair representation).

156. That which we prohibit as unfair is not merely the inverse of that which is most fair. A tremendous amount of public policy nestles comfortably in between.

157. In addition to the harms described below, drawing districts specifically to punish or subordinate based on political party affiliation may work additional harms when those districts substantially deviate from recognizable territorial communities (or from the so-called “traditional redistricting principles”—like contiguity, compactness, or adherence to political boundaries—reflecting various proxies for territorial community). As just one example, districts deviating from community in order to achieve invidious partisan purposes may leave constituents of the district with little in common other than party affiliation, rendering it more difficult for the legislator to know what to represent and more difficult for the constituents to hold the legislator accountable on any substantive value beyond party membership. See, e.g., Klain, *supra* note 70, at 83-84; Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1392-93 (2012).

158. Professors Bernie Grofman and Tom Brunell have coined the term “dummymander” to describe partisan gerrymanders drawn to stretch such a narrow partisan advantage over so many districts that they are vulnerable, based on demographic shifts and wave elections, to durable changes in partisan control. See Bernard Grofman & Thomas L. Brunell, *The Art of the Dummymander: The Impact of Recent Redistrictings on the Partisan Makeup of Southern House Seats*, in REDISTRICTING IN THE NEW MILLENNIUM 183, 184 (Peter F. Galderisi ed., 2005). The theory is similar to Justice Sandra Day O’Connor’s notion that partisan gerrymanders are inherently self-limiting, because a party must convert safe seats into seats that are less safe in order to expand its control. See *Davis v. Bandemer*, 478 U.S. 109, 152 (1986) (O’Connor, J., concurring in the judgment); Lowenstein, *supra* note 38, at 379.

The self-regulating limits of the partisan gerrymandering process often prove more visible in theory than in practice. Though “dummymanders” exist, see Nicholas Goedert, *The Pseudoparadox of Partisan Mapmaking and Congressional Competition*, 17 ST. POL. & POL’Y Q. 47, 48-49 (2017), in many jurisdictions under unified partisan control at the time of

intentionally designed to subordinate voters based on party preference are more likely to actually suppress representation of that political viewpoint, whether that suppression is readily measurable or not.<sup>159</sup> And such districts are likely to do so in a way that resists a more regular political cycle, and hence more durably suppress that political representation, whether that durability is readily measurable or not.<sup>160</sup> Should an opposing party manage to retake power despite the intended subordination, the retributive impulse will likely drive ever-escalating exercises of invidious partisan intent in return.<sup>161</sup> It is to be expected that a redistricting body intending to punish or subordinate voters based on their affiliation will at some point achieve what it set out to achieve.

Moreover, the intent to punish or subordinate based on political party affiliation inflicts important communicative harm. Districts designed to subordinate voters based on party preference are also more likely to communicate (or reinforce) the notion that representatives should enact other legislation designed to subordinate or punish voters based on party preference, particularly in the electoral realm, where the political consequences of such action are

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redistricting, it will often be possible to create enough districts to retain ample partisan control despite normal political cyclical effects. *See, e.g.*, Issacharoff & Karlan, *supra* note 60, at 551-53; Klain, *supra* note 70, at 81-82; Dave Daley, *How Democrats Gerrymandered Their Way to Victory in Maryland*, ATLANTIC (June 25, 2017), <https://www.theatlantic.com/politics/archive/2017/06/how-deep-blue-maryland-shows-redistricting-is-broken/531492/> [<https://perma.cc/2B3D-MRKP>]. Seats that are “less safe” may nevertheless be sufficiently safe to deliver victory to the gerrymandering party even if a strong opposing wave makes the district appear to be within competitive reach. This possibility is enhanced even further in jurisdictions without temporal limits on redistricting, in which a legislative majority may redraw lines to fine-tune partisan advantage as often as they have the intestinal fortitude to do so. *See* Justin Levitt & Michael P. McDonald, *Taking the “Re” out of Redistricting: State Constitutional Provisions on Redistricting Timing*, 95 GEO. L.J. 1247, 1258-60, 1262-64, 1266 (2007).

159. *Cf.* Kagan, *supra* note 72, at 426, 508-09. This is not to claim that “neutral” criteria will always yield balanced maps, or even maps that are not radically unbalanced. It is merely an assertion that the intentional attempt to suppress an opposing party’s representation will be more likely to yield that result than the application of some criteria that are not so designed.

160. *See* Levitt, *supra* note 96, at 1810-15 (describing the particularly pernicious impact of tribal partisanship in electoral policy in abridging the normal political cycle).

161. *See* Issacharoff & Karlan, *supra* note 60, at 554 (describing this dynamic in Pennsylvania); Justin Levitt, LULAC v. Perry: *The Frumious Gerry-Mander, Rampant*, in ELECTION LAW STORIES, *supra* note 2, at 233, 234-35, 237-38, 245-48 (describing this dynamic in Texas).

blunted.<sup>162</sup> And when apparent, districting designed to subordinate voters based on party preference may have a powerful communicative effect on those voters as well. Apparent gerrymandering to subordinate based on party creates (or reinforces) the perception that voters are subject to the coercive power of an ostensibly “representative” government that not only does not represent or agree with them, but is actively working against them, without any viable electoral recourse.<sup>163</sup> That democratic disconnect seems a toxic and unsustainable consequence of constitutional inaction.

Because some of the expressive concerns above echo concerns articulated by the Court in *Shaw v. Reno* in evaluating districts drawn with an improper use of race,<sup>164</sup> it is useful to clarify that the claim described in this Article is not actually modeled on *Shaw*. Indeed, the prominence of the *Shaw* approach may be part of the morass befuddling the Court. *Shaw* and its progeny permit a nuanced approach to race in redistricting, but strike at hamhandedness.<sup>165</sup> Heightened scrutiny attaches only when significant populations are moved into or out of districts predominantly on the basis of race, and is satisfied even under those circumstances when the predominant attention to race is sufficiently justified.<sup>166</sup> The structure has evolved in an effort to acknowledge reality but fend off stereotype: it is not the presence of race-based decision-making that is the constitutional concern, but rather the presence of race-based decision-making that “goes too far.”

The “goes too far” question is precisely where partisan gerrymandering doctrine has become mired, and may reflect the Court’s

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162. See Levitt, *supra* note 96, at 1812-13, 1815-16.

163. Cf. Issacharoff, *supra* note 70, at 645.

164. See *Shaw v. Reno (Shaw I)*, 509 U.S. 630, 648 (1993) (“The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.”); Pildes, *supra* note 53, at 2539 (recognizing that this concern reflects “the social perceptions and understandings conveyed by extreme districting practices”).

165. See Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U. L. REV. 573, 578-79, 591 (2016).

166. See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455, 1463-64 (2017). The Court has long assumed that compliance with the Voting Rights Act constitutes one such compelling justification. See *id.* at 1464.

ambivalence over policing motives that are appropriate in moderation but somehow suspect when given full-throated voice.<sup>167</sup> This Article's claim is not of that ilk. It relies on a standard of invidious partisan intent that reflects a difference in kind: public action undertaken in order to disfavor citizens because of their party affiliation is not merely a species of normal politics, but impermissible in any degree. In that sense, the analog for this claim in the racial arena is not *Shaw*, but *Gomillion*.<sup>168</sup> Recall that the Court in *Gomillion* faced a gerrymander clearly communicating the intent to disfavor the African American citizens of Tuskegee.<sup>169</sup> Faced with invidious intent, the Court never thought to inquire exactly how far the lines would have to go, or what other factors the legislature may have been considering, in order to know that they "went too far." And while the Court has struggled with *Shaw*, the principles behind *Gomillion* were sufficiently clear that Justice Frankfurter—the same Justice who would, two years later, vigorously protest intervention into the "political thicket"<sup>170</sup>—commanded effective unanimity for his opinion.<sup>171</sup> Protections against invidious public action are clearer than *Shaw* has ever been, and should be similarly straightforward in the partisanship context.<sup>172</sup> At least, that is the theory. Discussion of the pragmatic implementation follows below.

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167. See, e.g., Pildes, *supra* note 53, at 2538 ("In no other constitutional area [other than *Shaw*] is intent discontinuously relevant.").

168. See *supra* text accompanying notes 124-30. The Court has recognized that a *Shaw* claim is "analytically distinct" from a cause of action premised on the intent to injure. See *LULAC v. Perry*, 548 U.S. 399, 513-14 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part). Several scholars have also addressed the degree to which the *Shaw* doctrine departs from traditional constitutional concerns over invidious intent. See, e.g., Pildes, *supra* note 53, at 2510-11.

169. See *Gomillion v. Lightfoot*, 364 U.S. 339, 341, 347 (1960).

170. See *Baker v. Carr*, 369 U.S. 186, 266-67 (1962) (Frankfurter, J., dissenting); *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion).

171. While Justice Charles Evan Whittaker concurred in the judgment, his only complaint was that the decision should have been grounded in the Fourteenth Amendment rather than the Fifteenth. See *Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring).

172. The claim here is not, of course, that political harms are equivalent to racial harms—in source, in degree, in constitutional centrality, or in any other respect. Indeed, the claim is not even that political harms are sufficiently like racial harms to fit into a well-established doctrinal path developed for race cases. See Charles, *supra* note 66, at 638; *infra* text accompanying note 252. Instead, I use the *Shaw/Gomillion* analogy to illustrate that the claim advanced here is one of invidious intent impermissible in any measure, rather than one of excessive deployment of a purpose otherwise permissible.

Before turning to that implementation, however, one related aspect of the distinctive nature of invidious intent is worth exploring. This Article has examined a claim premised on a public entity's intention to punish or subordinate citizens because of their affiliation with an opposition party. This sort of claim rests on a robust history of constitutional suspicion of public action to disfavor citizens on inappropriate grounds.<sup>173</sup>

In some circumstances, this intent to punish partisan foes will be indistinguishable from an intent to reward partisan allies.<sup>174</sup> For example, an intent to subordinate may be found in a specific attempt to depress the representation of an opposing party or parties, an attempt to relegate an opposing party to minority status, or an attempt to relegate an opposing party to representation below a vetoproof threshold. Any of those ends seems impossible to distinguish from an intent to durably entrench in power one's own aligned partisans. They are two sides of the same coin.

Short of entrenchment, it is less clear that there is no defensible normative, doctrinal, or evidentiary distinction between the intent to punish and an intent to promote on the basis of partisan affiliation. In other areas of the law, the intent to punish and the intent to promote are sometimes treated as equivalent<sup>175</sup>—but not always. Particularly when the preference is not merely a “naked preference”<sup>176</sup>—that is, when the legislature pursues some legitimate independent public policy alongside the intent to promote legislative allies—the specific intent to promote may be constitutionally acceptable, even where the specific intent to injure is not.<sup>177</sup> Legislation motivated by a desire to assist unpopular “hippies,” for example, may receive much different constitutional treatment than legislation motivated by a desire to punish them.<sup>178</sup>

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173. See, e.g., *supra* notes 80-89 and accompanying text.

174. And both are distinct from the intent to create districts reflecting rough statewide partisan proportion, see *supra* text accompanying notes 14-17 (reviewing *Gaffney*).

175. See, e.g., *Johnson v. California*, 543 U.S. 499, 505-06 (2005); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228-29 (1995).

176. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689-90, 1693-94 (1984).

177. See, e.g., *id.* at 1693-95.

178. See, e.g., *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973) (striking down a legislative provision premised on a desire to harm “hippies”); *id.* at 545-47 (Rehnquist, J., dissenting) (observing that the Court seemed to be applying something other than normal



I have decidedly mixed feelings about the constitutionality of a public entity's intent to promote or favor citizens in the electoral context specifically because of their partisan affiliation. On the one hand, the intent to favor citizens because of their partisanship, particularly when expressed as a "naked preference" otherwise unjustified, raises many of the same communicative and consequentialist concerns as the intent to injure, and may be similarly *ultra vires*.<sup>179</sup> And the related difficulties with incumbent self-dealing are both extensive and widely recognized.<sup>180</sup>

On the other, intent to favor is not identical to intent to harm, and even in the electoral arena, not all state action is zero-sum. For example, in the regulation of eligible voters' ability to cast valid ballots, consider a law that is hypothetically justifiable by interests other than party favoritism—say, a law allowing an extra day of early voting or supporting a mobile center where rural residents can cast ballots—but enacted specifically because legislators want to facilitate the exercise of the constitutional right to vote for eligible constituents of their own party. Such a law has a normative valence different from that of a law that is hypothetically justifiable by interests other than party enmity, but enacted specifically because legislators want to burden the exercise of the constitutional right to vote by eligible members of an opposing party.<sup>181</sup>

The fact that redistricting seems in many ways more inextricably zero-sum than laws concerning access to the ballot complicates that

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deference to hypothetically rational objectives).

The dichotomy may also be reflected in the doctrine through consideration of mixed motives and the crediting of hypothetical justifications. For example, if a statute's *only* justification is the intent to promote legislative allies, the enactment in question might well violate the Constitution's basic rationality guarantee. But any hypothetically plausible foundation in legitimate public policy rescues the enactment from constitutional disfavor based on illegitimate intent. (The fact that such cases never arise may be an indication of how many policies can be justified by hypothetically plausible public reasons.) In contrast, the bare intent to harm can infect a statute even with other plausible justifications, and a legislature will instead be asked to show that it would have—not hypothetically, but actually—passed the same statute in the absence of the invidious motive. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

179. *See supra* text accompanying notes 158-62.

180. *See, e.g.,* Issacharoff, *supra* note 70, at 595-96.

181. The scenario presented is primarily a theoretical thought exercise. In practice, claims of unconstitutional partisan intent would likely fail in both instances for want of proof. *See infra* Part II.C.3.

picture: the more truly a partisan effort is zero-sum, the more completely an intent to promote is indistinguishable from an intent to injure. But just as Republican is not the opposite of Democrat,<sup>182</sup> it is not self-evident that an intent to assist, even in the redistricting context, is precisely the obverse face of an intent to injure.<sup>183</sup>

Ultimately, a full examination of this thorny question, and the extent to which claims of invidious partisan punishment and claims of invidious partisan promotion are necessarily joined, is beyond the scope of this Article. One need not determine whether the *Heffernan* principle forbids partisan favoritism, or whether the *Gomillion* principle forbids racial favoritism, in order to recognize each claim against the invidious intent to disfavor. And so this Article need not, and does not, argue for a strictly reciprocal standard, even while recognizing that argument's potential (and perhaps inevitability). For present purposes, it suffices to note that the argument for a viable cause of action premised on the intent to punish or subordinate stands on its own merits, whatever the argument for or against exploration of further intent-based claims in the partisan sphere.<sup>184</sup>

## 2. *The Capacity of Courts*

Not only is invalidation of invidious partisanship consistent with retaining plentiful room for normal politics in the redistricting process, but courts have shown that they can tell the difference between the two. As an initial matter, the laundry list of constitutional doctrines dependent on intent shows that courts have ample experience testing whether the intent of a public actor was discern-

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182. Third parties are all too aware of this false but frequent equivalence.

183. It is also worth noting that neither intent implies a requirement to ignore partisanship entirely. For example, none of the concerns with invidious partisan intent—either consequentialist or communicative—afflict the drawing of districts with the particular desire to render them competitive. And though competitive districts could certainly run afoul of other affirmative constitutional or statutory rights, no doctrinal history suggests that an intent to craft competitive districts would draw any constitutional suspicion on its own. *Cf. Gaffney v. Cummings*, 412 U.S. 735, 754 (1973).

184. *Cf. supra* note 62 (explaining that courts often address the core of a constitutional violation without precisely tracing all of the bounds of the potential periphery). Such claims might include conceptions of “fair play,” *see generally* *Foley*, *supra* note 50, or more robust nonpartisan obligations of fiduciary theory applicable to bipartisan gerrymanders as well as partisan ones, *see generally* *Rave*, *supra* note 58.

ibly problematic, as distinct from all of the other permissible motivations for action.<sup>185</sup>

In redistricting specifically, courts have similarly been able to test for invidious partisanship in the process without overly disturbing the permissible status quo. *Larios* provides one example. Even though the case was brought in the context of population disparities, the legality of the plan turned on the absence or presence of invidious partisan motive.<sup>186</sup> The Court similarly examined the population disparities in a recent Arizona plan for evidence of illegitimate partisanship; the Court unanimously rejected the claim, without suggesting that the task exceeded judicial capacity.<sup>187</sup> Other courts have followed the Supreme Court's lead.<sup>188</sup> The Fourth Circuit, for example, recently found an invidious partisan motive behind a population deviation in the districts of Wake County, North Carolina.<sup>189</sup> In early 2017, a federal trial court in North Carolina did the same in the City of Greensboro.<sup>190</sup> In each case, the court felt able to distinguish invidious partisan intent from other permissible motivation.

*Gill v. Whitford*, the case before the Supreme Court in the October 2017 Term, provides another example.<sup>191</sup> The lower court carefully and methodically laid out a test involving both impermissible

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185. See *supra* notes 81-91 and accompanying text.

186. See *supra* text accompanying notes 132-38.

187. See *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1307, 1310 (2016). The *Harris* Court framed its inquiry as an inquiry into a claim that mapmakers attempted to “help” one political party, rather than to discriminate invidiously against another. For a discussion of the potential distinction and the complications it creates, see *supra* notes 174-84 and accompanying text. This framing may help to explain why the *Harris* Court seemed to assume that the plaintiffs in such a case must prove the “predominance” of partisan considerations, see *Harris*, 136 S. Ct. at 1307, departing from the usual doctrine in cases alleging invidious discrimination, see *supra* note 178 and accompanying text.

188. See, e.g., *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 345, 351 (4th Cir. 2016).

189. See *id.* Here, the Court framed the invidious motive both as an attempt to “punish” supporters of one political party, and as an attempt to guarantee the success of the opposing party. See *id.* at 346.

190. *City of Greensboro v. Guilford Cty. Bd. of Elections*, 251 F. Supp. 3d 935, 937 (M.D.N.C. 2017). As in *Raleigh Wake Citizens Ass'n*, the court framed the invidious motive as a partisan manipulation of material population disparities in order to maximize that party's electoral success. See *id.* at 937, 939, 943.

191. See *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (three-judge court), *argued*, No. 16-1161 (U.S. Oct. 3, 2017).

intent and—consistent with several of the Justices’ past statements, but as explained above, unnecessarily—a threshold of impermissible impact.<sup>192</sup> The court then carefully and methodically examined the evidence put forward to establish the intent in question.<sup>193</sup>

State law provides another reason to believe that courts can manage a prohibition on invidious partisan intent. Several states prohibit redistricting with the intent to favor or discriminate against a political party or candidate.<sup>194</sup> Most of these also assign the redistricting task to commissions with some measure of balanced bipartisanship and/or independence;<sup>195</sup> perhaps as a result, the question of judicial competence to evaluate invidious partisan intent rarely arises in these states. But a few states set rules regarding partisan intent for the *legislature* to follow—and for the courts to review.<sup>196</sup> In Florida, a prohibition on pursuing partisan favor or disfavor was established by voter initiative,<sup>197</sup> and the legislature apparently took to the idea only after enforcement by the courts. The state courts assessed whether the legislature complied with its obligation both in an initial, abbreviated, thirty-day review by the state supreme court,<sup>198</sup> and through the more regular course of litigation, accepting some evidence and rejecting others, accepting some claims and rejecting others.<sup>199</sup> The simple fact that the state

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192. *See id.* at 884.

193. *See id.* at 890-98.

194. *See* Justin Levitt, *Where the Lines Are Drawn—State Legislative Districts*, ALL ABOUT REDISTRICTING, <http://redistricting.lls.edu/where-tablestate.php> [<https://perma.cc/RLW7-VNEB>]. Each state provision is phrased slightly differently. *See id.*

195. *See supra* note 149.

196. Of these, only Florida’s rule is set in the state constitution. *See, e.g.*, FLA. CONST. art. III, §§ 20(a), 21(a) (prohibiting partisan intent); DEL. CODE ANN. tit. 29, § 804 (2017) (prohibiting districts drawn “so as to unduly favor any person or political party”); OR. REV. STAT. § 188.010(2) (2017) (prohibiting partisan intent); NEB. LEGIS. RES. 102, 102d Leg., 1st Sess. (2011) (prohibiting partisan intent).

197. *See Brown v. Sec’y of State*, 668 F.3d 1271, 1273 & n.1 (11th Cir. 2012). The Florida prohibition is phrased slightly differently than the invidious motive presented in this Article. *See* FLA. CONST. art. III, § 20(a) (“No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent.”); *id.* § 21(a) (same).

198. *See* FLA. CONST. art. III, § 16(c); *In re* Senate Joint Resolution of Legislative Apportionment 1176, 83 So. 3d 597, 598, 617-19, 641-45, 648-51, 654, 659-62, 669-73, 676-80 (Fla. 2012); *In re* Senate Joint Resolution of Legislative Apportionment 2-B, 89 So. 3d 872, 881-82, 887-91 (Fla. 2012) (*per curiam*).

199. *See* *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 271-74, 279-80, 284 (Fla. 2015); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 378, 391-93, 402-13 (Fla. 2015).

courts were able to assess—and ultimately correct—invidious partisan intent further demonstrates that tribunals can manage the effort when they are called upon to do so.

### 3. *The Gatekeeping Function of the Burden of Proof*

As described above, the Justices need not fret about their supposed inability to separate invidious partisan intent from the regular business of politics: unpacking the concepts reveals that the two are quite distinct, and that courts have the capacity to discern those distinctions. The Justices also need not fret about an endless stream of successful claims. A claim premised on invidious intent requires proof that the alleged invidious motive actually motivated the action in question.<sup>200</sup> That evidentiary threshold is—properly—exacting. Therein lies the gatekeeping function the Justices seem to be seeking.<sup>201</sup>

Like all statutes, redistricting plans delivered through lawful procedures arrive at the courthouse with a presumption of constitutionality.<sup>202</sup> To prevail on a claim of invidious intent, successful partisan gerrymandering plaintiffs would have to offer convincing proof meeting the standard articulated in *Personnel Administrator*

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200. *Cf., e.g.,* Ringhand, *supra* note 70, at 293 (“The vexing problem with a First Amendment-based, voter viewpoint discrimination challenge to voter participation restrictions is not one of law but of proof.”).

201. In Professor Berman’s helpful discussion of the issue, he makes clear that a “constitutional operative proposition” requires a “constitutional decision rule” for the determination of liability in concrete cases; it is insufficient to simply embrace total epistemic uncertainty regarding the application of constitutional meaning to particular facts. *See* Berman, *supra* note 24, at 830-32. The decision rule involves the adjudication of a claim, including the regulation of permissible evidence, the threshold of proof, and various rebuttable and non-rebuttable presumptions. *See id.* at 831-32. But while the operative proposition must be located in sound constitutional theory, the decision rule can be “instrumental and pragmatic,” and susceptible to adjustment depending on the Court’s taste for false negative and false positive errors in adjudication. *See id.* at 837.

With respect to partisan gerrymandering, Professor Berman suggests a number of objective and logically sophisticated quantifiable decision rules that the Court might adopt as evidentiary thresholds for ascribing liability based on unconstitutional partisan intent. *See id.* at 838-53. In contrast, and as explained below, I believe that the familiar evidentiary thresholds for proof of invidious constitutional intent supply an adequate decision rule that will leave only exceptional partisan gerrymanders meaningfully subject to liability.

202. *See* *Town of Lockport v. Citizens for Cmty. Action at the Local Level, Inc.*, 430 U.S. 259, 272 (1977).

of *Massachusetts v. Feeney*: that particular lines were drawn not merely with the knowledge of their partisan impact, or with use of partisan information, but that they were drawn “at least in part ‘because of,’ not merely ‘in spite of,’ [their] adverse effects” on a partisan group.<sup>203</sup> This is no modest requirement.<sup>204</sup>

In the context of the Equal Protection Clause, permissible statutes may be distinguished from those premised upon an invidious motive through “a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”<sup>205</sup> The same is true for First Amendment claims.<sup>206</sup> But despite the long-standing availability of such claims in other contexts, and the broad hypothetical array of different forms of evidentiary support for them, there has been no rash of successful invidious purpose claims. They exist, but they are rare—not only because intentional invidious action is relatively rare, but also because even when invidious intent exists, it is difficult to muster evidence sufficient to meet *Feeney*’s standard.<sup>207</sup>

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203. See 442 U.S. 256, 279 (1979) (emphasis added).

204. See, e.g., *Shapiro v. McManus*, 203 F. Supp. 3d 579, 597 (D. Md. 2016) (three-judge court) (recognizing the demanding nature of the evidentiary requirement for intent claims).

In *Davis v. Bandemer*, the plurality contended that “[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.” 478 U.S. 109, 129 (1986) (plurality opinion). To the extent this refers to specific partisan outcomes rather than the generic welter of political choices embodied in any plan, it is difficult to square this casual assessment with the *Feeney* evidentiary standard. It should not perhaps be difficult to assume that the likely partisan consequences were intended. But under *Feeney*, such an assumption does not suffice. Actually proving that the legislature enacted a redistricting plan not only because of its assorted political consequences but specifically because of the tribally partisan punishment it would inflict on voters of an opposing party is a different matter, and considerably more onerous.

205. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977).

206. See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 863-73 (2005); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534-40 (1993).

207. See, e.g., *McCreary County*, 545 U.S. at 863 (noting that the religious purpose test of the Establishment Clause “has not been fatal very often, presumably because government does not generally act unconstitutionally”); Derrick Darby & Richard E. Levy, *Postracial Remedies*, 50 U. MICH. J.L. REFORM 387, 437 (2017) (noting that “discriminatory intent is especially difficult to prove”).

There have been a series of recent Supreme Court cases concerning the alleged improper use of race in redistricting. See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 794 (2017); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1262 (2015). There is reason to believe that plaintiffs might well have been justified in litigating several of these cases, or similar cases in other jurisdictions, under a theory of invidious intent to injure. See Levitt, *supra* note 165, at 609-10. But perhaps because of the difficulty of that evidentiary threshold, these cases largely proceeded not under

The practical barriers to adequate proof are likely just as high in redistricting cases as they are elsewhere.

Direct evidence of tribal partisanship as the motivation for a public action will likely be hard to find, at least once the Court firmly establishes the constitutional standard. Certainly, individual legislators make all manner of statements denigrating opposing partisans and the parties to which they belong. And representatives' official appeals to voters' partisan instincts, and fomenting of the enmity that opposing partisan voters may have for each other, are legion.<sup>208</sup> But outside of the regulation of electoral rules, official expressions of invidious tribal partisanship as the rationale for state action—using the executive or legislative power in order to injure citizens because of their partisan affiliation—are quite rare. Consider what such a conversation might sound like: “Look. We won the election, and elections have consequences, so we decided to impose a 200,000 dollar tax on every Republican, purely because they’re Republicans.” Partisan disagreements over proper policy can and will persist. But even in the present hyper-polarized environment, it remains beyond the pale most of the time for public actors to make choices on taxes, health care, the environment, education, employment regulation, criminal justice, zoning, and a host of other issues, salient and less salient alike, on the basis that the preferred choice is the one that injures members of the opposing political party, specifically because they are members of the opposing political party. And if this is a rare sentiment for government officials to hold, it is rarer still for an official to profess such a sentiment. Commentators who have suggested that evidence of tribal partisanship would be legion because it is inherent in the normal legislative process must somehow account for its rarity in most legislative arenas.<sup>209</sup>

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a theory of invidious intent, but under the distinct claim developed in *Shaw I* and its successors. See *supra* text accompanying notes 164-68.

208. See, e.g., Cass R. Sunstein, *Partyism*, 2015 U. Chi. Legal F. 1, 3-8 (2015).

209. Previously, I have discussed the theory that the primary inhibition on such tribal partisanship is the potential for reprisal from the public, or from the opposition party if they are able to take power. See, e.g., Levitt, *supra* note 96, at 1841-42. But this form of raw cost-benefit calculation does not account for the absence of tribal partisanship in scenarios in which a tit-for-tat response is unlikely, nor does it seem to reflect the reasons that most legislators likely perceive themselves to be foregoing tribal partisanship. See *id.* at 1842-43. Instead, I believe that even if fear of reprisal plays a part in the calculation, most of the

Indeed, even in the field of electoral regulation, policies are—properly—subject to vigorous partisan disagreement, but it is strikingly rare to find public officials justifying their choices based on the raw desire to punish members of an opposing political party. Most officials do not explain that they support a particular electoral regulation because it will hurt voters with a different party affiliation.<sup>210</sup> Conversely, as polarized as the current environment may be, the rules of engagement in a polity in which tribal partisanship were truly legitimate would look very different than the status quo in any American jurisdiction.<sup>211</sup> There is a deep—and, hearteningly, abiding—norm in most public spheres against tribal partisanship as a motivating force for action.<sup>212</sup>

To date, redistricting has been a rare exception, where the norm has broken down. Tribal partisanship is neither inherent to the process nor universal; witness Iowa, in which a legislature has repeatedly declined to exercise partisan muscle over a process it ultimately controls, even when that process harms particular legislators.<sup>213</sup> But in redistricting, it has been oddly pervasive.<sup>214</sup> In the redistricting context, some legislators are willing to talk about punishing an opposing party as not only a legitimate objective,<sup>215</sup>

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absence of stark tribal partisanship in the legislative process is derived from the existence of a remarkably strong norm against such invidious motive. *See id.* at 1843-53.

210. *Cf. id.* at 1815-16, 1830-41, 1852. To say that such expressions of tribal partisanship are rare is not to say that they are unknown. *See, e.g.*, Letter from Jeff Essmann, Chair, Montana Republican Party, to Republican Friends (Feb. 21, 2017), <http://newstalkkgo.com/files/2017/02/ESSMAN-LETTER-TO-GOP.pdf> [<https://perma.cc/D7JE-626M>] (urging opposition to mail-ballot legislation otherwise justified by county budget relief, because Democrats cast more ballots by mail, and explaining that “this bill could be the death of our effort to make Montana a reliably Republican state”).

211. *See, e.g.*, Levitt, *supra* note 96, at 1830-41, 1853.

212. *See id.* at 1849-53.

213. *See id.* at 1837-38.

214. In *Vieth*, Justice Scalia stated that setting out to segregate voters by political affiliation—and perhaps by implication, setting out to injure voters based on their party—was “lawful and hence ordinary.” *See Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) (plurality opinion). I suspect that he had the causation precisely backward. Because he thought purely partisan action in redistricting to be ordinary, he and the other Justices in the plurality were more prepared to find it lawful.

215. *See, e.g.*, *Hulme v. Madison County*, 188 F. Supp. 2d 1041, 1050-51 (S.D. Ill. 2001) (quoting the chair of a redistricting committee as explaining that the apportionment process “is going to be partisan” and informing a Republican member of the committee that “[w]e are going to shove it [the map] up your f----- ass and you are going to like it, and I’ll f--- any Republican I can.” (alteration in original)).



but a deserved spoil of war,<sup>216</sup> in terms that are still hard to imagine in any other legislative arena.<sup>217</sup> And those who do not talk about it are likely thinking it.

Still, the fact that jaded political observers may understand the redistricting process at present to involve plentiful tribal partisanship does not mean that there is ample direct evidence available for plaintiffs to *prove* its existence. And perhaps more important, with an impending census and an impending redistricting cycle, even if there were ample direct evidence of invidious tribal partisanship from the redistricting of 2011, it would not mean that ample direct evidence would be plentiful if the law were clarified for the redistricting of 2021. The Supreme Court has a role in establishing not merely law, but political norms. In the wake of a Supreme Court decision confirming tribal partisanship to be constitutionally invalid, it is reasonable to expect that fewer redistricting bodies would actually make redistricting choices designed to punish partisan outsiders. Furthermore, even without the salutary substantive effect, it is entirely reasonable to expect that fewer members of redistricting bodies would *talk* about their decisions in invidious tribal partisan terms. There is no mechanism to peer directly into the heart of a legislator, and the courts need not invent one.<sup>218</sup>

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216. *Cf.* *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64 (1990) (“To the victor belong only those spoils that may be constitutionally obtained.”).

217. *See, e.g.,* Kang, *supra* note 70, at 352; Klain, *supra* note 70, at 87-88.

218. There are, of course, pitched battles over the extent of permissible discovery into legislative motive in any intent-based case, including fights over internal documents, fights over communications with third parties (including, in the context of a congressional redistricting conducted by state legislators, incumbent members of Congress with no formal role in the redistricting process), and fights over depositions. Courts have grappled with such discovery requests in all manner of intent-based claims, not limited to the redistricting context, but are also familiar with adjudicating discovery disputes in the context of existing redistricting claims dependent on motive. *See, e.g.,* *Benisek v. Lamone*, 241 F. Supp. 3d 566 (D. Md. 2017) (three-judge court) (legislators); *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323 (E.D. Va. 2015) (legislators); *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657 (E.D. Va. 2014) (redistricting consultant); *Harris v. Ariz. Indep. Redistricting Comm’n*, 993 F. Supp. 2d 1042, 1069-71 (D. Ariz. 2014) (three-judge court) (per curiam) (independent commissioners); *Hall v. Louisiana*, No. 12-657-BAJ-RLB, 2014 WL 1652791, at \*7-10 (M.D. La. Apr. 23, 2014) (legislators); *Perez v. Perry*, 2014 WL 106927 (W.D. Tex. Jan. 8, 2014) (legislators); *Favors v. Cuomo*, No. 11-CV-5632 (DL)(RR)(GEL), 2013 WL 11319831 (E.D.N.Y. Feb. 8, 2013) (legislators); *Favors v. Cuomo*, 285 F.R.D. 187 (E.D.N.Y. 2012) (legislators); *Baldus v. Members of Wis. Gov’t Accountability Bd.*, 843 F. Supp. 2d 955 (E.D. Wis. 2012) (redistricting consultant); *Baldus v. Brennan*, Nos. 11-CV-562-DPW-RMD & 11-CV-1011 JPS-DPW-RMD, 2011 WL 6385645 (E.D. Wis. Dec. 20, 2011) (redistricting consultant); *Comm. for*

Direct evidence sufficient to prove tribal partisan intent would likely be rare in all but a few cases.

Circumstantial evidence of invidious tribally partisan motive is also unlikely to be plentiful in most cases. Again, the constitutional impropriety is not merely activity with the demonstrated effect of favoring or disfavoring a partisan class, but activity undertaken with the specific intent to punish or subordinate members of a par-

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a Fair & Balanced Map v. Ill. State Bd. of Elections, No. 11C5065, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011) (legislators); Perez v. Perry, No. SA-11-CA-635-OLG-JES-XR, 2011 WL 13112115 (W.D. Tex. Aug. 11, 2011) (members of Congress); Edwards v. Vesilind, 790 S.E.2d 469 (Va. 2016) (privilege for legislators under state law); League of Women Voters of Fla. v. Fla. House of Representatives, 132 So. 3d 135 (Fla. 2013) (privilege for legislators under state law); Dickson v. Rucho, 737 S.E.2d 362 (N.C. 2013) (privilege for legislators under state law). These discovery requests are inevitably vigorously contested by legislative counsel, and trial courts have not shown themselves incapable of tailoring discovery to avoid undue burden. Cf. Crawford-El v. Britton, 523 U.S. 574, 593, 597-601 (1998) (“[V]arious procedural mechanisms already enable trial judges to weed out baseless claims that feature a subjective element....”).

In any event, while direct evidence is important, its role should not be overstated. First, “direct” evidence in the context of most legislators is really a misnomer; if the relevant inquiry is into group intent, then the only “direct” evidence is evidence produced by the group as a whole or by individuals with the legal agency to act on the group’s behalf. This does not mean that evidence from individual legislators is irrelevant; it means only that it may be more circumstantial.

More fundamentally, the true goal of a constitutional intent test is neither, as some would have it, to establish the sum of individual legislators’ subjective motives, see Fallon, *supra* note 70, at 538-40; Kenneth A. Shepsle, *Congress is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 249-50 (1992), nor to establish the sum of only the most relevant individual legislators’ subjective motives, see Fallon, *supra* note 70, at 540; cf. Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1423, 1436-42, 1450-51 (2003) (discussing the relevant drivers of intent in statutory interpretation). Various constitutional, statutory, and common law contexts call for the legal assessment of the motive of a group acting collectively—sometimes the group is private and sometimes the group is public, sometimes the context is criminal and sometimes it is civil. Here, as there, the inquiry essentially involves external observers’ assignment of anthropomorphized intent, based on the available evidence, to an entity without the capacity for motive. See Anderson & Pildes, *supra* note 105, at 1513, 1518, 1520-21, 1524-27; Fallon, *supra* note 70, at 541-42; cf. Kagan, *supra* note 72, at 415 (assigning intent in this fashion to the Court, in describing the Court’s development of doctrine assigning intent to other entities). Evidence of individual legislators’ mental state is relevant, but not dispositive, in this enterprise. See Anderson & Pildes, *supra* note 105, at 1508, 1512-13. This is a feature, not a bug: it is precisely in keeping with the roles that intent tests play in the law, which assigns consequences to actions based on the external evaluation of those actions. See, e.g., *id.* at 1513 (making this point); Kagan, *supra* note 72, at 439 (collapsing the search for intent into a test of but-for causation, evaluating whether the same statute would have been passed had the operative intent *not* been present). A forthcoming paper develops this argument in much more detail. See Levitt, *supra* note 105.

ticular partisan affiliation because of that affiliation. It will be rare that circumstantial evidence leaves this intent truly manifest. On occasion, there may be a set of facts too suggestive to ignore.<sup>219</sup> For example, the legislative process may be so thoroughly shot through with partisan subordination that it may contribute to inferences about the invidious intent to produce partisan subordination in the resulting map.<sup>220</sup> Neither party-line support nor the simple rejection of minority proposals, however, should suffice to show that the lines were drawn with the intent to punish voters of a particular party. The progress of maps from early drafts to later ones may also provide relevant evidence, but only if the “revealed preferences” of successive maps point in a sufficiently clear direction.<sup>221</sup> Many of the measures that scholars have proposed to measure the impact of partisan gerrymanders<sup>222</sup> are also likely to be evidentiary grist—not, in this context, in selecting a particular threshold of unconstitutional effect, but in flagging results sufficiently anomalous to signal the likelihood of troublesome intent.<sup>223</sup> However, only the truly anomalous results would stand out, and perhaps only the truly anomalous results would be sufficiently probative to help build a *prima facie* claim. Nor would the shape of most districts indicate invidious partisanship. There are so many legitimate reasons to draw a particu-

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219. See Kagan, *supra* note 72, at 442.

220. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (noting the historical background of the decision, the specific sequence of events leading to the decision, and the departures from the normal procedural sequence as potential indicators, in context, of invidious intent). Procedural anomalies are relevant evidence of invidious partisan intent. See also *Raleigh Wake Citizens Ass’n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 346 (4th Cir. 2016); *City of Greensboro v. Guilford Cty. Bd. of Elections*, 251 F. Supp. 3d 935, 944-46 (M.D.N.C. 2017); *Hulme v. Madison County*, 188 F. Supp. 2d 1041, 1049-51 (S.D. Ill. 2001); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 390-91 (Fla. 2015).

221. See, e.g., *Whitford v. Gill*, 218 F. Supp. 3d 837, 891-95 (W.D. Wis. 2016) (three-judge court) (identifying the progression from drafts to final, and the mapmakers’ comments on successive drafts), *argued*, No. 16-1161 (U.S. Oct. 3, 2017); *League of Women Voters*, 172 So. 3d at 380-86 (identifying the impact that consultants had on progressive versions of maps over time); Altman, *supra* note 58, at 33-36 (describing the method of revealed preferences).

222. See *supra* text accompanying notes 53-56.

223. Indeed, this accords with the way that simulations and comparative measures have been deployed in litigation to date. See, e.g., *Raleigh Wake Citizens Ass’n*, 827 F.3d at 344, 347; *City of Greensboro*, 251 F. Supp. 3d at 942-43; cf. *Whitford*, 218 F. Supp. 3d at 910 (noting that the anomalously extreme effects observed through one statistical calculation served as “corroborating evidence” of an extreme partisan gerrymander that was both intentional and durable).

lar line in a particular place that an inference of invidious partisan intent based on the shape of the lines themselves will seldom be proper.<sup>224</sup>

In the normal course, then, absent specific evidence of invidious misbehavior in the process, only partisan results that appear with ruthless and anomalous consistency, or the absence of any legitimate motive for a districting decision otherwise consistent with partisan ends, should support an inference that invidious tribal partisanship was in fact at play.<sup>225</sup> Moreover, such an inference could always be rebutted by a demonstration that an alternative, legitimate rationale actually drove the districting choice.<sup>226</sup> Or, rather than rebutting the presence of invidious intent, a redistricting body could also demonstrate that a coexisting legitimate rationale was a sufficiently strong impetus that the same decisions would have been made even in the absence of the invidious motive.<sup>227</sup> In this sense, the assessment of invidious tribal partisanship would likely function much like a version of the assessment of impermissible intent in *Batson v. Kentucky*.<sup>228</sup> Given the plethora of legitimate

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224. See *supra* text accompanying note 148.

225. On the rare occasions when a claim along these lines can be proven, it will almost invariably concern intent with respect to the jurisdiction as a whole: a legislative or congressional plan for an entire state or a municipal redistricting plan for an entire city or county or school board. (Many municipal elections are nonpartisan, and not readily susceptible to such a claim in the first instance.) It is theoretically conceivable that the evidence might establish invidious partisan intent with respect to a subjurisdiction—for example, evidence proving an intent to ensure that Democrats or Republicans were driven out of state legislative representation in a particular metro region, but not elsewhere. Such a scenario, however, seems unlikely.

226. The discussion here concerns actual intent and proximate cause, not potential plausible hypotheticals. Public action proven to be the product of invidious intent is not constitutionally rescued by the notion that a different public entity acting properly *might* have made the same choice for permissible reasons. This is easy to see in the context of the employment cases. Cf. *supra* notes 99-104 and accompanying text. Any given tangible employment action—like firing or demotion or transfer—could be justified in the abstract; employers take action against employees for all sorts of permissible reasons all the time. A rule insulating intent claims based on potential hypothetical alternative rationales would never result in liability.

227. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); cf. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008) (plurality opinion) (refusing to disregard legitimate reasons for passing a law “simply because partisan interests may have provided one motivation for the votes of individual legislators”); *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (citing *Mt. Healthy*, 429 U.S. at 287) (discussing a similar approach to claims of racial discrimination).

228. 476 U.S. 79, 96-97 (1986). *Batson* and its progeny concern improper intent in the is-

reasons to draw lines in particular places, in the absence of actual invidious intent, plausible inferences would be rarely provable and readily rebuttable.<sup>229</sup>

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suance of peremptory challenges excluding potential jurors from the venire. *See id.* (race); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (gender); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014) (sexual orientation). Litigants may establish a prima facie *Batson* claim by citing facts properly raising an inference that opposing counsel intentionally struck jurors on an impermissible basis; the subject of the *Batson* challenge may then respond with a legitimate explanation for the peremptory strikes, and the court examines the plausibility of the preferred reason to test for pretext. *See Miller-El v. Dretke*, 545 U.S. 231, 239, 251-52 (2005).

229. Professor Kang suggests that a norm against tribally partisan government action may help to explain a relatively recent wave of courts pushing back against changes in election administration. Kang, *supra* note 70, at 397-402. As a descriptive matter, it is entirely possible that judicial perception of improper legislative partisan intent may be playing a background role in these cases. But it is equally important to make clear—as Kang does, *see id.* at 401—that the courts thus far reviewing these laws have not cited invidious partisanship as the basis for their decisions. Furthermore, the theory explored in this Article would not support ready proof of such a claim in all but the most exceptional circumstances.

For example, Professor Kang draws our attention to the judicial approach to various voter identification laws. *See id.* at 393, 397-401. These laws are quite diverse: they vary widely in what a voter must supply in order to cast a ballot that will be counted. *See, e.g.*, Justin Levitt, *Voter ID Update: The Diversity in the Details*, NAT'L CONST. CTR.: CONST. DAILY (Oct. 30, 2013), <https://constitutioncenter.org/blog/voter-id-update-the-diversity-in-the-details/> [<https://perma.cc/GV49-Y8YL>]. Though I have been quite critical of the most restrictive laws, *see* Justin Levitt, *Election Deform: The Pursuit of Unwarranted Electoral Regulation*, 11 ELECTION L.J. 97, 102-17 (2012), “voter ID laws” do not share the same features, will not share the same effects, and are not all motivated by the same instincts any more than “tax laws” or “environmental laws.” It is, of course, possible for any individual law to be motivated by tribal partisanship. But even when true, proof will (and should) be rare. Even if an ID law with starkly disparate partisan effects is passed on a party-line vote indicating starkly distinct partisan priorities, *see Crawford*, 553 U.S. at 203, and even if similar laws were replicated across jurisdictions with similar partisan control, *see* Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1370-72 (2015), those facts alone will not show that the law was adopted *because* of the partisan impact on voters. And even if a concern about future fraud is unwarranted or disproportionate, that will not usually suffice on its own to prove that an articulated concern with fraud was insincere rather than misguided. To be clear, I am not offering a defense of laws—including but not limited to ID laws—that exact a burden unjustified by the purported state interests behind them, or laws in which particular legislative choices reveal racial discrimination as a motivating factor. *See, e.g.*, *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 216, 226-27, 229 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017). But it will often be quite difficult to gather sufficient evidence to *prove* that election administration laws with other plausible motivations were in fact driven by the intent to punish opposing partisan voters.

Even for those who passionately believe that they understand the “real” motivation behind various voter ID laws to be tribal partisanship, it is not a failing of a cause of action premised on invidious partisan intent that it will not often succeed. Suspicion should not suffice for proof of illegality. And as described in Part III below, articulating a viable cause of action has

## III. WHAT'S THE POINT?

The invocation of *Batson* may well raise eyebrows. The *Batson* test, governing discrimination in the use of peremptory strikes during jury selection, is sufficiently easy to satisfy that it is widely castigated as ineffective.<sup>230</sup> Still, without abolishing peremptory strikes as a whole, the relevant *Batson* question is whether its presence is superior to its absence.<sup>231</sup> It does not eliminate all disfavored discrimination.<sup>232</sup> But that need not be the goal of the doctrine.

As in most cases premised on unconstitutional intent, the standard of proof proposed here is demanding. And as with most other doctrines premised on unconstitutional intent, I expect that a plaintiff would succeed only in the most transparent or egregious of cases.<sup>233</sup> The cause of action operates by policing an outer boundary.

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plentiful value even when it is rarely deployed to overturn public action.

230. See, e.g., Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 459-61 (1996); Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of Batson*, 45 U.C. DAVIS L. REV. 1359, 1361-62 (2012).

231. Many expressing frustration with discrimination in the peremptory process despite *Batson* have called for abolishing the peremptory strike entirely, including Justice Thurgood Marshall in *Batson* itself. See *Batson*, 476 U.S. at 103 (Marshall, J., concurring). Similarly, those who wish to excise invidious partisan intent from the redistricting process have called for more wholesale structural reform, including fundamental re-examination of the role of legislators in that process. See, e.g., Issacharoff, *supra* note 70, at 601, 643-44; Rave, *supra* note 58, at 723-24. Without disagreeing with the premises of those calls, this Article presumes the continuing involvement of legislators in the process.

232. It is also likely that alternative tests of extreme discriminatory effect, and wholesale judicial abdication of a relevant policing role, would similarly fail to eliminate all disfavored discrimination.

233. Several Justices seem concerned with the specter of runaway litigation, and understandably so. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 286 (2004) (plurality opinion); *id.* at 306-07 (Kennedy, J., concurring in the judgment); *Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment).

The high standard of proof—and the possibilities of an adverse judgment, and the need to bear costs and fees—may deter the filing of a case unlikely to be meritorious, even if it does not preclude such a filing entirely. (No substantive judicial doctrine can adequately deter the filing of an entirely frivolous case; for that, at least in federal court, there is Rule 11 and the *Christiansburg Garment* potential to award fees to a prevailing defendant. See FED. R. CIV. P. 11; *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).)

But if the goal is to limit the number of redistricting cases *filed*, that horse is already well out of the barn, even without a particularly viable partisan gerrymandering claim. In the 2010 cycle alone, the congressional redistricting process or result went to court in twenty-six states,

It is not designed to drive all political considerations out of redistricting, and I am not sufficiently naïve to believe that it would, in practice, drive even all constitutionally impermissible tribal partisanship out of redistricting. Like any other legal claim, there will be circumstances in which invidious partisan intent exists in the world but cannot adequately be proven.<sup>234</sup>

But the inability to attain absolute purity is not a particularly compelling critique, for this cause of action any more than any other.<sup>235</sup> Policing extreme outliers may well be sufficient substantive justification for recognizing the claim. If invidious partisan intent is unconstitutional, then the ability to confront and reject extreme manifestations of invidious partisan intent is no small benefit to the rule of law.

Moreover, even beyond a substantive regulation of extreme partisan gerrymanders, a declaration that invidious tribal partisanship violates the Constitution—even given the likelihood of judicial underenforcement<sup>236</sup>—would likely have four salutary effects.

First, it would align salient constitutional norms in the redistricting process with norms across the rest of the political sphere. First Amendment protections for partisan affiliation do not currently leave legal or moral room for public officials to punish members of an opposing political party, expressly because of their partisan affiliation, in the vast majority of other public contexts.<sup>237</sup> Redistricting appears to be an anomaly, and that is perhaps because officials have heretofore conflated judicial reluctance to engage the topic with a grant of constitutional permission.<sup>238</sup> One need not assume that

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and the process or result for state legislative maps went to court in thirty-seven states, with at least 240 directly relevant cases filed. See Justin Levitt, *Litigation in the 2010 Cycle*, ALL ABOUT REDISTRICTING, <http://redistricting.lls.edu/cases.php> [<https://perma.cc/Q8YG-WX6K>].

234. Cf. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 863 (2005) (recognizing that some legitimate intent cases may founder on the absence of proof).

235. See, e.g., Charles, *supra* note 66, at 643 (arguing that to claim that partisan gerrymandering claims are futile just because they are unsuccessful, “one would have to assume that redistricters would behave exactly the same in a world in which the Constitution imposed no limitations on extreme political gerrymandering as they would in a world in which there were some vague limitations”); Foley, *supra* note 58, at 1760 (“But in constitutional law, like elsewhere in life, a partial loaf of bread is much better than none at all.”).

236. See, e.g., Sager, *supra* note 24, at 1214-15 (recognizing that constitutional norms may be regularly underenforced).

237. See *supra* text accompanying notes 95-117.

238. See Sager, *supra* note 24, at 1220-21.

every public official seeks to follow the Constitution all of the time to assume that at least some public officials take their oaths of office seriously,<sup>239</sup> and to assume that a Supreme Court opinion calling out invidious tribal partisanship as unconstitutional would deter at least the most egregious tribally partisan behavior, at least some of the time.

Second, apart from deterring tribally partisan behavior, recognizing the unconstitutionality of invidious partisanship would deter public expressions of tribal partisanship in the redistricting process. This, too, has an impact on the margin. The notion that public institutions may permissibly act to punish private individuals for their partisan choices cannot help but degrade partisan minorities' confidence in public institutions.<sup>240</sup> If a Democratic legislature is permitted to punish Republicans because they are Republicans, one should expect Republicans to lose confidence that their local legislators, much less the government exercising coercive authority, purport to represent their interests.<sup>241</sup> Allowing a Democratic legislature to say that it is punishing Republicans because they are Republicans should erode that confidence further still (and without meaningful possibility that the consequent transparency will facilitate political reprisal).<sup>242</sup> Conversely, though driving invidious partisan motives underground is unlikely to build affirmative support for public institutions, it may at least slow the rate of decline.<sup>243</sup>

Third, a viable cause of action for invidious partisan advantage might nudge a few incremental redistricting bodies toward a more regularized process, with more emphasis on legitimate redistricting principles. It is worth repeating that no single regular process, nor

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239. *See id.* at 1227.

240. *See, e.g.,* John Fritze, *Lawsuit Forces Maryland Democrats to Acknowledge the Obvious: Redistricting Was Motivated by Politics*, BALT. SUN (June 1, 2017, 6:48 AM), <http://www.baltimoresun.com/news/maryland/politics/bs-md-redistricting-case-20170601-story.html> [<https://perma.cc/ZT6F-CY38>] (describing a deposition in which a former Governor admitted the intent to draw districts to increase a partisan majority and suppress the electoral chances of a partisan opposition); *supra* note 163 and accompanying text.

241. *See supra* text accompanying note 163.

242. *See* Levitt, *supra* note 96, at 1812-16 (discussing how tribal partisanship in the electoral arena reduces the ability of voters disillusioned by the tribal partisanship to meaningfully express their displeasure).

243. *See* *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 863 (2005) (observing that an impermissible motive held secret may exact less expressive harm than an impermissible motive allowed to take wing out in the open).



any particular legitimate redistricting principle beyond equal population, is constitutionally required. And a claim for invidious motive that revealed no other indicia of invidious partisanship would provide no recourse for even the most erratic process or the most random lines. But the few successful partisan gerrymandering cases this cycle emphasized, in addition to direct evidence of partisan intent and dramatically skewed results wholly consistent with that motive, substantial deviations from normal process and lip service to ostensible redistricting principles revealed in practice to be clear pretext.<sup>244</sup> To the extent that redistricting bodies are inclined to limit their exposure to successful claims of invidious partisan intent, they might be amenable to proceeding with plans in a manner betraying a bit more order in both substance and process.

Fourth, recognizing the unconstitutionality of tribal partisanship would tend to remove a peculiar feature of current litigation based on the role of race in the political process.<sup>245</sup> At the moment, public actors frequently defend against claims based on the impermissible presence of race in the redistricting process by claiming that they were seeking not racial ends, but tribally partisan ends.<sup>246</sup> The defense is an assertion similar to: “We redrew this district not to ensure that Latinos would lose, but to ensure that Democrats would lose.”<sup>247</sup> When race and partisan affiliation are tightly aligned, as

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244. Procedural anomalies and pretextual purported adherence to legitimate principles are relevant evidence for claims of invidious partisan intent. *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 346, 349-50 (4th Cir. 2016); *City of Greensboro v. Guilford Cty. Bd. of Elections*, 251 F. Supp. 3d 935, 944-949 (M.D.N.C. 2017); *Whitford v. Gill*, 218 F. Supp. 3d 837, 891-94, 921-27 (W.D. Wis. 2016) (three-judge court), *argued*, No. 16-1161 (U.S. Oct. 3, 2017); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 384-85, 390-91, 402-13 (Fla. 2015).

245. *See, e.g.*, Kang, *supra* note 70, at 415-17.

246. *See, e.g.*, Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837 (2018); Persily, *supra* note 147, at 653. That this is true currently is not to say that it has only recently arisen. *See* Issacharoff & Karlan, *supra* note 60, at 547 (assessing this argument as deployed in the 1960s).

247. When it is clear that public actors have singled out racial minorities for targeting, no matter the “ultimate” reason, this is not actually a legally relevant defense. The intentional dilution of Latino votes as a goal in itself, and the intentional dilution of Latino votes as the means to achieve a distinct partisan end, both involve the intentional (and impermissible) dilution of Latino votes. *See* *Garza v. County of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part). Instead, the relevant defense mentioned in the text arises when it is not clear whether public officials have targeted, for example,

they are in portions of the country, it can be difficult to disentangle the twin claims.<sup>248</sup>

But if invidious partisan intent is indeed unconstitutional, the party-not-race claim is an odd defense, akin to defending against prosecution of one crime by admitting to another.<sup>249</sup> Recognizing a claim for partisan gerrymandering, even if no case of pure partisan gerrymandering ever succeeded, might incrementally deter the resort to impermissible tribal partisanship as an explanation for allegedly impermissible racial action. Instead, redistricting bodies would be forced to justify lines based on publicly permissible criteria—and, perhaps, even draw lines based on those criteria in the first instance.

Similarly, recognizing a viable cause of action for invidious partisan gerrymandering may take some unwarranted pressure off racial claims, at least on the margins. Just as some redistricting bodies may be abusing protections for racial justice to pursue partisan ends,<sup>250</sup> some partisan actors may be tempted to bring litigation using well-trod causes of action premised on racial harm when their true complaint—partisan misconduct—has no viable outlet.<sup>251</sup> Such

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Latinos who happen to be Democrats or Democrats who happen to be Latinos.

248. See Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867, 869, 876 (2016) (defining this phenomenon as “conjoined polarization”); Hasen, *supra* note 246, at 1864 (illustrating the particular difficulty some jurisdictions will have when the vast majority of minority voters have one partisan preference and the vast majority of nonminority voters have another). For example, in Mississippi in 2012, African American voters preferred Barack Obama about 96 percent to 4 percent, and Anglo voters preferred Mitt Romney about 89 percent to 10 percent. See *President: Mississippi*, CNN, <http://www.cnn.com/election/2012/results/state/MS/president/> [<https://perma.cc/KLE9-E9A3>] (racial breakdowns may be found under the “Exit Polls” tab). Polarization along racial lines may have been even more stark in individual counties. In such situations, it is difficult to distinguish invidious racial action from invidious partisan action.

In contrast, it may be relatively easy to distinguish partisan intent from racial intent where partisan support is more asymmetric: in a “Peripheral South” state like Florida, African American voters preferred Obama about 95 percent to 5 percent, but Anglo voters preferred Romney only about 61 percent to 39 percent. See *President: Florida*, CNN, <http://www.cnn.com/election/2012/results/state/FL/president/> [<https://perma.cc/T6BU-34RE>]. That distinction may allow more diagnostic precision: because of the substantial Anglo population preferring Obama, at least some distinctions based on party will likely include more Anglo voters than would distinctions that are actually based on race.

249. See Kang, *supra* note 70, at 357-58.

250. See Levitt, *supra* note 165, at 609.

251. See, e.g., Issacharoff, *supra* note 70, at 639-40; Persily, *supra* note 147, at 652. As explained above, this does not describe litigation to address the abuse of racial populations

litigation may attempt to squeeze an ill-fitting square peg into a round hole, with the risk of distorting legal doctrine in the racial arena in the process.<sup>252</sup> A viable claim for impermissible partisan gerrymandering will not wholly eliminate misuse of claims premised on racial harm: litigants zealously advocating on behalf of their clients will likely attempt to deploy all of the tools available. But to the extent that doctrines of invidious partisanship provide a path of lesser resistance for claims truly grounded in invidious partisanship, perhaps they will help courts channel the litigation path toward more fitting claims and away from those less applicable.

These benefits, along with the not insubstantial substantive benefit of rejecting truly exceptional outlier exemplars of provable invidious partisan intent, justify the recognition of a claim driven by impermissible motive. This is no denigration of the search for a due process-based threshold of unconstitutional effect: the Constitution does not force an either-or choice.<sup>253</sup> Effects tests may also be useful within the scope of an intent claim: seriously anomalous partisan effects may be empirically likely to occur only when invidious tribal partisanship is in fact a significant motivating factor behind a particular map, and the failure to rebut such circumstantial evidence may in some cases properly lead to liability. But these effects standards should not serve to *limit* claims in which plaintiffs have otherwise successfully proven that a map was designed to punish or subordinate voters because they share a particular partisan affiliation. Used as such, the effects standards are tests without a theory: essentially arbitrary devices serving no constitutional purpose beyond gatekeeping. Courts will likely find that the need to *prove* tribal partisan intent is itself a gatekeeping device sufficient for their purposes. Intent is enough.

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to serve partisan ends, which is a racial harm no matter the ultimate partisan impact.

252. Claims meant to address the misuse of race in the redistricting process are among the most frequently invoked claims currently wielded by partisan litigants, but they are far from the only constitutional or statutory provisions litigants have sought to repurpose in this fashion. As Professors Issacharoff and Karlan explain, the “first law of political thermodynamics” will continue to encourage both litigants and courts to find a way to twist other doctrine in an attempt to address partisan excess. *See* Issacharoff & Karlan, *supra* note 60, at 541-43, 569; *see also* Brief of Amici Curiae Law Professors in Support of Appellees at 3, Gill v. Whitford, *argued*, No. 16-1161 (U.S. Oct. 3, 2017).

253. *Cf.* Kagan, *supra* note 72, at 427 (making a similar point with respect to intent-based claims in the speech context).

