

ARTICLES

The Antidomination Model and the Judicial Oversight of Democracy

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The judicial oversight of democracy has posed intractable problems for constitutional law. Nowhere is this challenge more evident than in the Supreme Court's ongoing attempts to develop a coherent approach to the adjudication of partisan gerrymandering claims. This Article therefore proposes a new framework—the antidomination model—which sheds fresh light on the judicial supervision of democracy. I argue that a critical aspect of the problem, but one that is under-theorized and often overlooked, is that many of the pathologies that affect the democratic process are best conceptualized as instances of domination; that is, they have at their core an illegitimate exercise of public power. The problem posed by the abuse of power, however, has not been directly addressed in a sustained way by courts and commentators. This Article therefore advances a normative and institutional theory of antidomination that would allow courts to minimize the illegitimate exercise of power by public officials in the design of democratic institutions, without also involving courts too deeply in determining what that design should be. Under the antidomination model, the principal role of the courts is to minimize domination and the appearance of domination in the processes through which democratic institutions are designed. The antidomination model offers a new approach for conceptualizing and resolving partisan gerrymandering claims.

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The essence of Government is power; and power, lodged as it must be in human hands, will ever be liable to abuse.

James Madison¹

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INTRODUCTION

The enduring challenge of democratic government is preventing the abuse of public power. Despite their profound disagreements during the ratification of the Constitution, Federalists and Antifederalists alike did agree on one critical point: that the abuse of power posed a constant and inevitable threat to the sustainability of republican government.² James Madison thus posited that in “framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”³ For Madison, the principal objective of the proposed Constitution was to resolve this great difficulty.⁴

Despite the myriad safeguards against the abuse of power that are to be found in the Constitution, the task of obliging the government to control itself continues to pose vexing challenges for democratic governance. Nowhere is this challenge more evident than in the Supreme Court’s failure to articulate a

2. See JACK N. RAKOVE, *ORIGINAL MEANINGS* 151–52 (1996); see also Yasmin Dawood, *The New Inequality: Constitutional Democracy and the Problem of Wealth*, 67 MD. L. REV. 123, 129–30 (2007) (describing how at the time of the framing, the sustainability of republican government was seen to be highly threatened by corruption). Madison proclaimed at the Constitutional Convention of 1787 that the “truth was that all men having power ought to be distrusted to a certain degree.” James Madison, Speech at the Constitutional Convention (July 11, 1787), in 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 578, 584 (Max Farrand ed., 1966). Brutus, a leading Antifederalist, argued that “[i]n so extensive a republic, the great officers of government would soon become above the controul of the people, and abuse their power to the purpose of aggrandizing themselves, and oppressing them.” Brutus I, *If You Adopt It . . . Posterity Will Execrate Your Memory* (Oct. 18, 1787), in *THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION* 164, 174 (Bernard Bailyn ed., 1993). This pessimism about power had impeccable antecedents; it was, after all, Montesquieu who declared that it “has been eternally observed that any man who has power is led to abuse it.” CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF THE LAWS* 155 (Anne M. Cohler et al. eds., Cambridge Univ. Press 1989) (1748).

3. *THE FEDERALIST* No. 51, at 290 (James Madison) (Clinton Rossiter ed., 1999).

4. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 60–64 (2005); JAMES McCLELLAN, *LIBERTY, ORDER, AND JUSTICE* 327–35 (2000). *But see* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2313 (2006) (arguing that the actual functioning of the separation of powers diverged from the expectation that the branches would check one another).

coherent framework for its oversight of partisan gerrymandering.⁵ Partisan gerrymandering—the deliberate manipulation of electoral district lines by elected officials for political gain—has proved to be a particularly intractable problem for constitutional law.⁶ After several decisions over a span of thirty years, the Court has been unable to reach agreement on the most basic questions, including the nature of the harm at stake, the appropriate judicial standard to be applied, and whether, if at all, partisan gerrymandering claims are even justiciable.⁷ The Court’s recent effort, *Vieth v. Jubelirer*,⁸ has done little to settle any of these questions; if anything, the Court plurality’s refusal in *Vieth* to entertain such claims infused the already uncertain constitutional status of political gerrymandering with even greater ambiguity.⁹

In addition, there is considerable dispute among legal scholars, particularly between the political markets theorists¹⁰ and the equal protection theorists,¹¹ about the appropriate judicial remedy, if any, to partisan gerrymandering. Political markets theorists argue that courts should implement structural solutions to enhance partisan competition.¹² Samuel Issacharoff contends, for example, that redistricting conducted by elected officials should be treated by courts as “presumptively unconstitutional.”¹³ In addition, political markets theorists claim that the equal protection approach cannot reach the structural

5. See Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 602 (2007); Michael S. Kang, *When Courts Won't Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 OHIO ST. L.J. 1097, 1097–98 (2007). As scholars have acknowledged, the Supreme Court has not articulated a coherent theory for its supervision of democracy in general. See Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—And Be Thankful for Small Favors*, in THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 245, 262 (David K. Ryden ed., 2000); Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411, 1413–14 (2002).

6. Partisan gerrymandering, also referred to as political gerrymandering, is defined as “[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.” BLACK’S LAW DICTIONARY 696 (7th ed. 1999). The term “gerrymandering” was coined by political commentators when the party of Massachusetts Governor Elbridge Gerry (1810–1812) drew a district that resembled a salamander. See GARY COX & JONATHAN N. KATZ, *ELBRIDGE GERRY’S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* 3 (2002).

7. See *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Davis v. Bandemer*, 478 U.S. 109 (1986); *Karcher v. Daggett*, 462 U.S. 725 (1983); *Gaffney v. Cummings*, 412 U.S. 735 (1973).

8. 541 U.S. 267 (2004). The *Vieth* decision was highly fractured: Justice Scalia announced the plurality decision, which included Justices Rehnquist, O’Connor, and Thomas; Justice Kennedy wrote a separate opinion concurring in the judgment; Justices Stevens, Souter, and Breyer each filed separate dissenting opinions; and Justice Ginsburg joined Justice Souter’s dissent. See *id.* at 270.

9. See *id.* at 281.

10. See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 594 (2002); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004).

11. See RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 138–56 (2003).

12. See Issacharoff & Pildes, *supra* note 10, at 646.

13. Issacharoff, *supra* note 10, at 644–48.

harms at stake in partisan gerrymandering.¹⁴ By contrast, supporters of the equal protection approach argue that courts are not suited to resolving structural questions, in large part because of the difficulty in establishing such baselines as the appropriate degree of competition in elections.¹⁵ On this view, the Supreme Court should not entertain partisan gerrymandering claims.¹⁶ Richard Hasen has argued, for instance, that the Supreme Court's refusal to intervene in *Vieth* was entirely defensible.¹⁷

This Article therefore proposes a new framework—the antidomination model—which sheds fresh light on the judicial oversight of democratic politics. I argue that a critical aspect of the problem, but one that is under-theorized and often overlooked, is that many of the pathologies that affect the democratic process are best conceptualized as instances of domination; that is, they have at their root an illegitimate exercise of public power. The problem posed by the abuse of power, however, has not been directly addressed in a sustained way by courts and commentators. This Article therefore advances a normative and institutional theory of antidomination that would allow courts to minimize the illegitimate exercise of power by public officials in democratic design, without also involving courts too deeply in determining what that design should be.

The role of courts under the antidomination model is to ensure that the procedures by which the ground rules of democracy are determined, and the rules themselves, are not distorted by domination and the appearance of domination. In general, I argue that courts should adopt a “minimizing-democratic-harms” approach in which the judicial task is to prevent or minimize the democratic harm of domination. By contrast, standard accounts at times follow what I shall call a “maximizing-democratic-goods” approach under which one democratic ideal—participation, competition, or equality—is presented as the objective to be achieved by judicial intervention.¹⁸ Maximizing-democratic-goods approaches have provided critical insights on the challenges raised by the judicial oversight of democracy, in addition to providing practical solutions for a wide range of problems.¹⁹ One shortcoming of a maximizing-democratic-goods approach, however, is that it is difficult for courts to judge when an

14. See Issacharoff & Pildes, *supra* note 10, at 645.

15. See HASEN, *supra* note 11, at 138–56.

16. See *id.* at 152–53; see also Larry Alexander, *Lost in the Political Thicket*, 41 FLA. L. REV. 563, 575–78 (1989) (claiming that partisan gerrymandering does not result in any “demonstrable harm”); Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1330 (1987) (arguing that courts should avoid partisan gerrymandering claims because of evidentiary concerns).

17. See Richard L. Hasen, *The Supreme Court and Election Law: A Reply to Three Commentators*, 31 J. LEGIS. 1, 9 (2005).

18. See *infra* Part I and section III.A.3 for a detailed discussion.

19. The political markets approach, for example, has directed our attention to the critical importance of electoral competition and to the ways in which legal rules are manipulated to lockup political institutions, thereby ensuring partisan and incumbent self-entrenchment. See Issacharoff & Pildes, *supra* note 10, at 645; Pildes, *supra* note 10, at 154.

optimal or sufficient level of the good has been achieved.²⁰ While courts are not particularly well-suited as an institutional matter to maximize a particular democratic ideal,²¹ I shall suggest that they are better suited to minimizing or stopping particular actions that lead to democratic harms.

The antidomination model thus reconceptualizes the judicial role in the supervision of democratic politics in three crucial respects. First, a primary objective of judicial intervention is to correct the negative institutional incentives of politicians to manipulate the rules of the game in order to forward their personal or partisan ambitions. Rather than deciding *how* electoral districts should be drawn, I argue that courts should assess instead the *process* by which the electoral redistricting map was created, and the substance of the map itself, by reference to the antidomination factors described in Part II. Once the court finds that the legislature's actions were distorted by a certain threshold of domination, the burden would then shift to the legislature. Under this institutional division of labor, elected officials would be charged with demonstrating that the process by which a new map was adopted did not involve the illegitimate exercise of public power.²² Thus the role of the courts under the antidomination model is to structure the incentives of elected officials so that they engage in legitimate and principled decisionmaking.

Despite the emphasis on process, it is important to note that the antidomination model has both a procedural aspect and a substantive aspect. The procedural aspect refers to the procedures by which the ground rules of democracy are determined, while the substantive aspect refers to the dominating effects of the rules themselves. Of course, there is a significant overlap between the substantive and procedural aspects: rules that are devised through dominating procedures often have dominating effects. For the sake of simplicity, I will at times refer only to the process by which the rules of democracy are determined, but by process I mean a kind of complex proceduralism that comprises both procedural and substantive elements.

Second, the antidomination model, and the institutional division of labor it envisions, spares courts from having to design remedies for democratic pathologies. In the case of partisan gerrymandering, for instance, courts would not be responsible for devising the standards by which every electoral district in the country is to be drawn—a task for which courts are generally unsuited.²³

20. See *infra* Part I.

21. See generally ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006) (describing the institutional limitations of courts).

22. See Yasmin Dawood, *Democracy, Power, and the Supreme Court: Campaign Finance Reform in Comparative Context*, 4 INT'L J. CONST. L. 269, 290–93 (2006) (arguing for a similar institutional division of labor for campaign finance cases).

23. Conventional accounts, by contrast, expect courts to devise a remedy, or at the very least, to announce the standards by which redistricting should be conducted. See *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004). This does not mean that under the antidomination model the Court does not use any standards at all, only that the standards are not the equivalent of a standard like the one-person, one-vote principle that serves as the rule for all redistricting. Instead, the standards used by the Court

Instead, courts would be making determinations about the validity and legitimacy of a decisionmaking process, which is an undertaking that falls within their usual capacities.²⁴

Third, the antidomination model recasts the decision of whether or not judicial intervention is even warranted in the first instance. Specifically, I argue that a decision by courts to intervene in the political process should be reconceptualized as a domination-minimizing institutional tradeoff. The basic idea behind this institutional tradeoff is to prevent the *most* dominating legislative action with judicial intervention that is the *least* dominating. This tradeoff is based in part on the recognition that court intervention *itself* can raise the risk of domination. Not only does this tradeoff result in an overall net minimization of domination, it also constrains judicial intervention to the most serious instances of domination. In this way, the antidomination model guards against the danger of judicial overreaching.²⁵

At a broader level, this Article seeks to develop a conceptual vocabulary that can be used to identify and analyze a particular subset of pathologies that affect the democratic process. The focus here is on the theoretical and normative dimensions of power and domination, and the institutional implications of these concepts for democratic processes and practices. One objective of the antidomination framework is to locate the harm of partisan gerrymandering in the actions of political elites in their exercise of public power, rather than focusing exclusively on the deleterious consequences of partisan gerrymandering for such democratic goods as participation, representation, competition, and the like. This Article takes preliminary steps in thinking about how courts can develop legal tools to address the problem of the abuse of power in the design of democratic institutions.

Although the antidomination model model has yet to be theorized in the literature, I argue that it identifies and builds upon longstanding, though at times unacknowledged, themes in judicial doctrine, legal scholarship, and constitutional history. First, a domination-minimizing approach brings to the fore a number of considerations that play an important, yet largely unrecognized, role in the Supreme Court's election law cases.²⁶ Second, legal scholars have

would assess whether or not the legislature had engaged in dominating behavior. For a discussion, see *infra* section III.A.2.

24. See Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003).

25. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 192–93 (1991); ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 18–19 (2001); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 45 (2004).

26. See *infra* section IV.F; see also Dawood, *supra* note 22, at 271–72, 277–82 (arguing that cases involving the ground rules of democracy are at base conflicts over the organization and exercise of power in a democratic polity); Yasmin Dawood, *Minority Representation, the Supreme Court, and the Politics of Democracy*, 28 STUD. L. POL. & SOC'Y 33, 34–38, 44–50 (2003) (showing that disagreements between majority and dissenting opinions are often rooted in deeper, foundational debates over the fair distribution of power in a democracy).

focused for many years on the need for structural solutions, yet less attention has been paid to what such solutions should entail.²⁷ The antidomination model provides a preliminary sketch of a structural approach that takes into account systemic considerations concerning the organization and exercise of power.²⁸ Finally, the antidomination model revives the founding era's preoccupation with the dangers posed by tyranny.²⁹ A central purpose of the Constitution is to minimize the abuse of power;³⁰ indeed, I claim that many constitutional provisions are animated by what I refer to as an antidomination principle. The antidomination principle stands for the idea that the Constitution has established a democracy in which relations of power are organized and exercised in such a way as to minimize domination.³¹ The antidomination model elaborates these contemporary and historic themes to shed new light on the judicial oversight of democratic politics.

This Article proceeds in four parts. In order to provide a context for the proposed model's reformulation, Part I briefly describes the traditional approaches within election law scholarship. These approaches at times follow a maximizing-democratic-goods approach under which one democratic ideal—participation, competition, or equality—is presented as the objective to be achieved by judicial intervention. This Part discusses the benefits and limitations posed by maximizing-democratic-goods approaches.

Part II develops the normative dimension of the antidomination model. It begins with a discussion of the concept of domination, and its relation to the democratic process. Because the relationship between law, power, and domination has not received a sustained treatment in the literature, the analysis engages

27. See *infra* section I.B.

28. See, e.g., Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1606 (1999) (arguing that political rights cases are “best analyzed in terms of more comprehensive structural perspectives on democratic politics”).

29. See HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 48 (1981); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 37–38, 598–99 (1998).

30. For arguments supporting the view that the Constitution was designed to prevent the abuse of power, see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 55–62 (1992); SCOTT GORDON, *CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY* 300 (1999); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1569 (1988).

31. Although it is beyond the scope of this Article to provide a detailed defense of the constitutional grounding for the antidomination principle, it is important to gesture towards the general outlines of such a defense. Without assuming an originalist position, I claim that the antidomination principle is consistent with the structure and fundamental aspirations of the Constitution. A central objective for the Framers was designing a democracy in which the abuse of power, and the resulting risk of tyranny, would be minimized as much as possible. A close study of the Framers' vision shows that the prevention of domination depends upon the control of power. The antidomination principle thus contains within it two sub-principles: the disentanglement principle and the deployment principle. The disentanglement principle stands for the idea that power should be *organized* in such a way as to minimize the likelihood of domination, while the deployment principle stands for the idea that power should be *exercised* in such a way as to minimize domination. For a more detailed argument about the constitutional grounding of the antidomination model, see Yasmin Dawood, *Judicializing Democracy: Power, Politics and Constitutional Design* (Aug. 2007) (unpublished Ph.D. dissertation, University of Chicago) (on file with the University of Chicago Library).

extensively with democratic and liberal theory, in addition to showing that these ideas resonate in important ways with the political theory of the Constitution. This Part also describes four antidomination factors that can be used to determine whether or not an institution's actions amount to domination.

Part III turns to the institutional portion of the model, and shows how a domination-minimizing approach *both* accommodates the institutional limitations of courts *and* corrects the negative institutional incentives of legislators. The discussion describes how courts would apply the antidomination model and what standards would be used by courts to assess the actions of legislators. This Part also discusses the domination-minimizing institutional tradeoffs between courts and legislatures. In addition, Part III shows how the antidomination model provides diagnostic tools for evaluating the structural impact of judicial decisions on the organization and exercise of power.

Part IV offers an extended application of the proposed framework by focusing on the Supreme Court's decision in *Vieth v. Jubelirer*.³² The discussion describes how the antidomination model offers a new method for resolving partisan gerrymandering claims, one that takes preliminary steps in articulating what a structural approach to resolving partisan gerrymandering claims would entail. The key point here is that both the harm at stake in partisan gerrymandering, and the judicial response to that harm, should be reconceptualized from a domination-minimizing perspective. In addition, Part IV shows that many of the concepts in the antidomination model are already present in the Supreme Court's election law jurisprudence. The main implication of this observation is that the standard equal protection approach can be reoriented in such a way as to provide courts with more sophisticated tools to manage the abuse of power by public officials in the design of democratic institutions.

I. TRADITIONAL APPROACHES

Although a comprehensive survey of the scholarship on the law of democracy is beyond the scope of this Article, this Part briefly examines three traditional approaches in the literature. I shall call these approaches the participation model, the competition model, and the equality model, respectively. The participation, competition, and equality models are powerful and influential approaches for understanding and analyzing the judicial supervision of democratic politics. Although these models differ in many respects, this Part argues that they at times follow a maximizing-democratic-goods approach.³³ Under such an approach, one democratic ideal—participation, competition, or equality—is

32. 54 U.S. 267 (2004).

33. It is important to note that the participation, competition, and equality models do not always follow a maximizing-democratic-goods approach; indeed, as described in this Part, these models are at times described in minimizing-democratic-harms terms.

presented as the objective to be achieved by judicial intervention.³⁴

The benefit of a maximizing-democratic-goods approach is that it can be applied to a wide variety of procedural, substantive, and institutional problems facing democratic politics. In addition, as described in Part II, these approaches provide useful theoretical insights on the pathologies that beset the democratic process. One shortcoming of a maximizing-democratic-goods approach, however, is that it is difficult for courts to judge when an optimal or sufficient level of the good has been reached.

A. THE PARTICIPATION MODEL

The legitimacy of the Supreme Court's practice of judicial review received its most celebrated defense in John Hart Ely's monumental work *Democracy and Distrust*.³⁵ Ely argued that judicial review was justified to the extent that it enhanced participation by ridding the democratic process of stoppages, such as the denial of the vote.³⁶ On this view, the role of the Court is to broaden access to representative government and thereby ensure participation on an equal footing.³⁷ Ely based this "participation-oriented, representation-reinforcing"³⁸ theory of judicial review in a process-based interpretation of the Constitution.³⁹ In addition, he claimed that in footnote four of *United States v. Carolene Products Co.*,⁴⁰ the Supreme Court recognized that its role was primarily concerned with ensuring participation in political processes.⁴¹ In the same way, Ely interpreted the Warren Court's commitment to eradicating racial discrimination as falling within a larger dedication to protecting the participational goal of broadening access to democratic processes.⁴²

Ely's general argument that courts should intervene to enhance democratic participation continues to exert considerable influence.⁴³ The main shortcoming,

34. I do not mean to suggest that the Supreme Court should not be involved in the supervision of democratic politics on the basis that such supervision is inevitably tied to a particular theory of politics. Daniel Ortiz refers to the proposition that "the Court must defer to the political branches in these political cases to avoid freezing one particular theory of politics into the structure of governance" as the "got theory" argument. See Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459, 460 (2004). According to the got theory argument, "no matter how certain the Court is that a particular theory of equality, representation or political behavior is right . . . it should nonetheless refrain from striking down conflicting arrangements, because doing so would displace the state's own choice among competing and acceptable political theories." *Id.* Professor Ortiz argues that the got theory argument is unhelpful because it entrenches the status quo. See *id.* at 475. In addition, it is very hard to show that a state was trying to bring about a particular democratic theory through the electoral rules it enacted. See *id.* at 471.

35. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

36. See *id.* at 103.

37. See *id.*

38. *Id.* at 87.

39. See *id.* at 92.

40. 304 U.S. 144, 152–53 n.4 (1938).

41. See ELY, *supra* note 35, at 77.

42. See *id.* at 74–75.

43. A common criticism of Ely's theory is that much of the Constitution is devoted to substantive concerns. See Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*,

however, of a maximizing-democratic-goods approach is that it is difficult to tell when an optimal or sufficient level of the good has been reached. The participation model, for instance, does not provide guidance about when an appropriate level of participation has been achieved.⁴⁴ In a multi-ethnic democracy, there may be tradeoffs when promoting participation: enhancing the participation of one group may be done at the expense of impairing the participation of another.⁴⁵ In addition, Ely's theory appears to apply to only the participation of citizens. It is not clear, though, whether courts should also employ a participation rationale to protect interest groups, elite interests, or political parties.

Because the participation model does not identify when an optimal or sufficient level of participation has been achieved, the model cannot provide guidelines for the *extent* of judicial intervention in political cases. The idea that courts should intervene to reinforce participation provides little constraint on the scope of judicial review. The participation model is most helpful for cases involving a "quintessential stoppage,"⁴⁶ such as the denial of the vote. Even with the malapportionment cases, which are perhaps the best example of process theory at work, Ely readily admitted that the one-person, one-vote standard does not inevitably derive from the idea of equal political participation.⁴⁷

The participation model provides less guidance, however, for more complex cases such as those involving partisan gerrymandering. It is not evident, for example, that the harm suffered by voters in gerrymandered districts amounts to a loss of participation; after all, every voter is permitted to cast a ballot and have his or her vote counted. That is, voters in a gerrymandered district are not denied the opportunity to participate in electoral politics. Instead, they are arguably denied the equal influence of their voting power. The participation model, however, does not provide much guidance to courts as to when such a dilution of voting power violates the Constitution. Despite its considerable appeal and influence, the participation model does not provide a workable judicial solution for partisan gerrymandering claims. At the same time, it is important to emphasize that the participation model sheds helpful light on the reasons why judicial intervention might be required in the first instance. As discussed further in Part II, the participation model identifies key harms that afflict the political process, such as the denial of the right to vote.⁴⁸ Although the participation model is often described in terms that suggest it follows a

89 YALE L.J. 1063, 1067-77 (1980); *see also* CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 143-44 (1993) (noting that "Ely's choice of democracy as the source of interpretive principles is itself a substantive value").

44. *See* HASEN, *supra* note 11, at 5-6.

45. *See* *United Jewish Org. of Amsburgh v. Carey*, 430 U.S. 144 (1977) (upholding a racial redistricting scheme that split and arguably disenfranchised a Hasidic Jewish community).

46. *See* ELY, *supra* note 35, at 117.

47. *See id.* at 121.

48. *See infra* section II.B.

maximizing-democratic-goods approach, it also has elements that are better described as falling within a minimizing-democratic-harms approach.

B. THE COMPETITION MODEL

The political markets approach, or competition model, is the dominant paradigm in the election law literature. In their landmark article *Politics as Markets*, Samuel Issacharoff and Richard Pildes advanced the view that politics should be viewed as a market whose vitality depends on robust competition.⁴⁹ Partisan competition is essential to achieve governmental accountability and responsiveness.⁵⁰ The major political parties, however, use legal rules to lockup political institutions, thereby providing permanent political advantage to one political party.⁵¹ As Professor Issacharoff observes, the protection of partisan gerrymandering results in a “cartelized political market,” in which the competitiveness of the political process is undermined by the ability of elected officials to draw safe districts.⁵² According to Professor Pildes, courts must constrain “partisan or incumbent self-entrenchment that inappropriately manipulates the ground rules of democracy.”⁵³ Under the competition model, the role of the Supreme Court is to promote partisan competition in the political arena in order to ensure a more accountable representation.⁵⁴

In addition, political markets theorists argue that courts should be attentive to the *structural* nature of partisan competition.⁵⁵ On this view, the traditional equal protection approach used by courts is ill-equipped to address the structural aspect of most election law cases. Indeed, the equal protection approach can damage and distort the political process because individual rights doctrines cannot remedy threats to the competitive legitimacy of the system.⁵⁶ Political markets theorists argue that courts should focus on developing structural solutions rather than applying balancing tests that weigh individual rights against countervailing state interests.⁵⁷ Indeed, by ensuring that the “second-order conditions” of electoral competition are achieved, there is less need for judicial action to protect “first-order issues” of individual equality.⁵⁸

One limitation of the competition model, common to maximizing-democratic-goods approaches, is that it is difficult to ascertain when the right level of partisan competition has been achieved.⁵⁹ In lockup theory in corporate law,

49. See Issacharoff & Pildes, *supra* note 10, at 646.

50. See *id.*

51. See *id.*

52. See Issacharoff, *supra* note 10, at 600.

53. Pildes, *supra* note 10, at 154.

54. See Issacharoff & Pildes, *supra* note 10, at 644.

55. See *id.* at 646; Issacharoff, *supra* note 10, at 645.

56. See Issacharoff, *supra* note 10, at 600, 645; Pildes, *supra* note 10, at 40.

57. See Pildes, *supra* note 10, at 41.

58. Pildes, *supra* note 28, at 1619.

59. See Richard L. Hasen, *The “Political Market” Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719, 724 (1998).

upon which political markets theorists rely, the goal is maximizing shareholder wealth.⁶⁰ In politics, however, there is no equivalent goal that is being maximized. The argument that politics is geared towards maximizing competition is unsatisfactory because there is no natural baseline against which we can measure when an appropriate level of competition has been reached. As Professor Issacharoff has explained, it is difficult to articulate “a benchmark against which to measure the distortive effects of improper manipulation of the political process.”⁶¹ Indeed, the Court’s decision in *Vieth* was implicitly based on the fact that there is no established baseline for the fair distribution of political representation.⁶² Not only is it difficult to determine the point at which competition is maximized, it is also not a task that courts can ultimately perform.

Relatedly, the competition model does not provide much guidance on how it would be operationalized in practice. What exactly would courts do in their opinions were they to implement a structural solution, and which standards would they employ? Presumably structural solutions come in all shapes and types, and it would be important to know which of these solutions are preferable and why.

There are also serious empirical questions about whether the competition model has accurately described the harm caused by partisan gerrymandering.⁶³ Nathaniel Persily argues that the political markets approach underestimates the amount of partisan competition that already exists, particularly at the level of legislatures as a whole.⁶⁴ In addition, the evidence does not conclusively show that lockup mechanisms, such as partisan gerrymandering, are the cause of the high rates of incumbent re-election.⁶⁵ Incumbents typically do well in statewide races, such as those for the U.S. Senate, which are not based on districts.⁶⁶ This empirical uncertainty creates further challenges for courts when attempting to determine when the right level of competition has been met.

The political markets theorists have applied the competition model to cases that involve obstacles faced by minor political parties.⁶⁷ Political scientists have

60. See *id.* at 721; Issacharoff & Pildes, *supra* note 10, at 647.

61. See Issacharoff, *supra* note 10, at 596.

62. See Pildes, *supra* note 10, at 58–59.

63. See Nathaniel Persily, *Reply: In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 654 (2002).

64. See *id.*

65. See Stephen Ansolabehere & James Snyder, Jr., *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942–2000*, 1 ELECTION L.J. 315 (2002).

66. See Persily, *supra* note 63, at 665.

67. For example, Samuel Issacharoff and Richard Pildes have argued that antifusion laws, which were upheld by the Supreme Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), raise barriers to third parties. See Issacharoff & Pildes, *supra* note 10, at 683–84. In *California Democratic Party v. Jones*, 530 U.S. 567 (2000), the Supreme Court struck down California’s blanket primary because the state had violated the First Amendment associational rights of the political party. Under a blanket primary, voters not registered with a party are permitted to vote for that party’s candidates. Professor Issacharoff concluded, however, that the structural model did not work as expected because of the absence of empirical evidence against blanket primaries. See Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 308 (2001).

shown, however, that a host of structural features, such as single-member districts, presidential elections, and the direct primary, are the main reasons a two-party system has proved to be so strong in the United States.⁶⁸ If maximizing political competition is the real objective, critics contend, then political markets theorists should be advocating for fundamental changes to the design of elections. According to Bruce Cain, the real implication of the political markets approach is that all single-member, winner-take-all systems should be abolished.⁶⁹ Critics have thus claimed that the political markets theory is either momentous (because its logical implications lead to such sweeping changes) or inconsequential (because its proposed remedies cannot fix the lack of partisan competition).⁷⁰

The political markets theorists might respond, however, that the competition model is not a maximizing-democratic-goods approach, but an optimizing-democratic-goods approach in which the objective of judicial intervention is to optimize, not maximize, partisan competition. In addition, they may argue that the competition model can be described as a minimizing-democratic-harms approach. Richard Pildes asserts, for instance, that the competition model seeks to “eliminate partisan-driven anticompetitive political practices, not to enshrine some ideal level of political competition.”⁷¹ In addition, Professor Pildes argues that in “theory and in doctrine, we can often identify what is troublingly unfair, unequal or wrong without a precise standard of what is optimally fair, equal or right.”⁷² In those instances when the function of courts under the competition model is to eliminate anticompetitive practices, the model could be described as following a minimizing-democratic-harms approach. As discussed in Part III, the difference between a maximizing/optimizing-democratic-goods approach and a minimizing-democratic-harms approach is not a purely semantic one.⁷³ In other words, there is an important difference between conceptualizing the competition model as a maximizing-democratic-goods approach (under which the objective of judicial intervention is to enhance partisan competition) and conceptualizing it as a minimizing-democratic-harms approach (under which the objective of judicial intervention is to reduce partisan entrenchment).

The political markets theorists, however, tend to treat concerns about competition and concerns about entrenchment interchangeably. I argue, though, that this conflation obscures an important distinction between these two sets of concerns. Specifically, I claim that the self-entrenching actions of political elites may be normatively and democratically troubling even if such actions do not lead to a reduction in the level of partisan competition. I suggest that it is conceptually

68. See HASEN, *supra* note 11, at 145–46.

69. See Bruce E. Cain, *Garrett's Temptation*, 85 VA. L. REV. 1589, 1601 (1999).

70. See HASEN, *supra* note 11, at 146. *But see* Pildes, *supra* note 28, at 1615–18 (arguing that the political markets theory is neither radical nor banal).

71. See Pildes, *supra* note 28, at 1612.

72. *Id.*

73. See *infra* section III.A.3.

useful to disaggregate entrenchment and competition in order to address the former issue without having to make claims about redressing the latter. A critically important contribution of the competition model is its insight into how tactics such as lockup mechanisms constitute partisan entrenchment, and this insight, I suggest, has important implications for how we judge the actions of political elites even in the absence of any demonstrated effects on the levels of electoral competition. One implication of this position is that the competition model could be reconceptualized as a minimizing-democratic-harms approach under which judicial intervention to reduce partisan entrenchment is not justified on a competition rationale.

C. THE EQUALITY MODEL

The equality model is the traditional equal protection approach used by courts. Under this approach, courts employ a balancing test in which an individual's right to equal protection under the law is weighed against the interests of the state. Many controversies in election law cases concern the degree to which courts should protect equality. The equality model, however, does not tell us *how* equality should be protected. For instance, there are at least three possibilities: political equality could mean (1) the right to formal access to the vote;⁷⁴ (2) the right to select a candidate of one's choice;⁷⁵ or (3) the right to influence the course of public policy.⁷⁶ The equality model does not provide any guidance, however, about which of these three possibilities courts are to implement.

In *The Supreme Court and Election Law*, Richard Hasen, a prominent election law scholar, defends a modified version of the equal protection approach, which incorporates Cass Sunstein's theory of judicial minimalism.⁷⁷ Professor Hasen's main argument is that courts should follow a minimalist approach when deciding election law cases.⁷⁸ Under this approach, the Supreme Court should distinguish between core and contested equality rights when

74. See, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (holding that poll taxes for voting are unconstitutional); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (holding that literacy tests for voting are unconstitutional).

75. In *White v. Regester*, 412 U.S. 755 (1973), and *Whitcomb v. Chavis*, 403 U.S. 124 (1971), the Supreme Court recognized the claim of minority vote dilution, which is triggered when an identifiable racial group does not have a sufficient chance to elect a representative of its choice.

76. In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), a five-to-four majority of the Supreme Court upheld a redistricting plan that reduced black populations in majority-minority districts in order to increase black populations in surrounding districts (known as influence districts) so that these districts would be more likely to elect Democrats. In its decision, the majority allowed the state to engage in a trade-off between African-American representation and Democratic representation. Influence districts were devised to address the problem that the creation of traditional majority-minority districts often produces a net increase in Republican seats. See DAVID LUBLIN, *THE REPUBLICAN SOUTH: DEMOCRATIZATION AND PARTISAN CHANGE* 23 (2004).

77. See HASEN, *supra* note 11, at 48–49; see also CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 10 (1999) (arguing that minimalist judges resolve the particular dispute before them rather than setting down broad rules).

78. See HASEN, *supra* note 11, at 48–49.

deciding election law cases.⁷⁹ The Court should protect the core of the three political-equality rights by using a bright-line rule.⁸⁰ By contrast, if the right is a contested equality right, the Court should defer to legislatures by using a vague standard.⁸¹

Professor Hasen's equality model provides a compelling and comprehensive approach for the judicial supervision of democratic politics, one that builds upon existing jurisprudence while at the same time rethinking the Court's role in protecting equality rights. Despite its minimalist leanings, however, Hasen's equality model also creates some difficulties for ascertaining how and when a court should intervene to protect equality rights. Hasen contends that the Supreme Court could distinguish between core and contested equality rights on the basis of social consensus about those rights.⁸² It may be difficult, however, to distinguish between core and contested equality rights solely by examining social consensus.⁸³ Hasen notes, for instance, that the right to an equally weighted vote is now a core right, but was not a core right when the Supreme Court decided *Baker v. Carr*.⁸⁴ Does this mean that the Court should not have decided *Baker* as it did? Should the Court not have articulated the bright-line one-person, one-vote rule in *Reynolds v. Sims*⁸⁵ if the right to an equally weighted vote was still a contested right?⁸⁶ In addition, courts can change the social consensus through their rulings.⁸⁷ A court could issue a bright-line rule to recognize a (new) contested equality right, which over time would transform into a core right because the court's decision shaped public opinion.⁸⁸ The evolutionary connection between contested and core rights, and the Supreme Court's own role in producing these shifts, make it difficult to readily distinguish between Hasen's two equality rights. This difficulty in distinguishing

79. *See id.* at 11, 81–92.

80. *See id.* at 7–8.

81. *See id.*

82. *See id.* at 11, 80–81.

83. A further complication is that there are different kinds of core rights. Some core rights such as “nondiscrimination in voting on the basis of race or ethnicity” should be simply accepted by the Court regardless of prevailing social views. Most core rights, however are “the product of *social consensus*, or at least near-consensus.” *Id.* at 7.

84. *See id.* at 7; *see also* *Baker v. Carr*, 369 U.S. 186 (1962).

85. 377 U.S. 533 (1964).

86. Professor Hasen observes that there was no social consensus for the one-person, one-vote rule when the Court decided *Reynolds*, and that when the Court “fails to defer to social consensus, it runs the risk of *forming* it.” *See* HASEN, *supra* note 11, at 81. It is not clear whether the implication is that the Court should have used a vague standard instead of crafting the one-person, one-vote principle, or whether in the end the one-person, one-vote principle is properly a core right now that it has become “synonymous with basic political equality rights.” *Id.*

87. Professor Hasen notes that most core rights are socially constructed, and furthermore, that “the Court itself can shape the social consensus with the rulings it makes.” *Id.* at 7.

88. Many of our core rights were not originally thought to be core rights (consider the history of minority voting rights, for example), but instead were highly contested rights that eventually garnered widespread public approval—approval that may have been generated in part by judicial decisions recognizing and upholding these fundamental rights.

between the two equality rights has important consequences: a central feature of Hasen's theory is that courts should choose between a bright-line rule and a vague standard depending on whether the right at stake is a core right or a contested right.⁸⁹ Despite its important contributions, the equality model, even in its minimalist incarnation, raises some difficulties for determining the extent of judicial intervention in politics.

As mentioned earlier, a central debate in election law scholarship is between the equal protection approach and the political markets approach. Recall the argument advanced by the political markets theorists that courts should attend to the structural nature of such problems as partisan gerrymandering. By contrast, Professor Hasen argues that the structural approach is fundamentally mistaken.⁹⁰ According to Hasen, structural approaches are "misguided and potentially dangerous" because "[t]hey evince judicial hubris, a belief that judges appropriately should be cast in the role of supreme political regulators."⁹¹ Even though Hasen focuses his attention on the issue of *structure*, his critique of the structural approach seems to be as concerned with the *extent and scope* of judicial intervention recommended by the political markets theorists. After all, Hasen's own equal protection approach has distinct structural elements: his collective action principle, for example, is indistinguishable from the political markets theorists' structural concerns about political competition.⁹² Indeed, there is increasing recognition that many of the problems afflicting the democratic process, and their proposed solutions, are better described as containing both equality elements and structural elements.⁹³ The concept of equal protection is, at a deeper level, about the equal distribution of power among citizens—a classic structural concern. Likewise, the assumption behind the structure of partisan competition is that the opportunity to succeed in an election ought to be equally available to all contenders—a classic equality concern.

II. DOMINATION AND DEMOCRACY

The conventional approaches in election law scholarship at times follow a maximizing-democratic-goods approach in which one ideal—participation, competition, or equality—is treated as the objective to be achieved by judicial

89. See HASEN, *supra* note 11, at 7–8.

90. See *id.* at 138–56.

91. *Id.* at 13.

92. Professor Hasen's collective action principle addresses those situations in which elected officials act in their own self-interest in order to forestall political competition. See *id.* at 89.

93. As various commentators have noted, the judicial regulation of politics is better conceptualized as involving problems that require both individual rights and structural approaches. See Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 507 (2004). Guy-Uriel Charles argues for the concept of "election law dualism," which stands for the idea that to "effectively address most cases of political rights, particularly partisan gerrymandering, courts must be willing to explicitly deploy a rights-based framework that focuses on the individual while also employing a structural account that seeks to understand the pathologies of the political process in institutional terms." Charles, *supra* note 5, at 657.

intervention. As shown in Part I, one drawback of a maximizing-democratic-goods approach is that courts have difficulty determining when a sufficient level of the good has been reached.

The antidomination model, by contrast, adopts a minimizing-democratic-harms approach in which the role of courts is to minimize domination and the appearance of domination in the rules of democracy and in the procedures by which such rules are determined. In this Part, I describe the theoretical concepts that undergird the antidomination model. Section II.A provides a definition of the concept of domination, while section II.B describes the relationship between domination and the political process. Section II.C discusses the factors by which dominating legislative actions can be identified.

A. THE CONCEPT OF DOMINATION

The concept of domination has at its core the illegitimate exercise of power.⁹⁴ As Philip Pettit explained in his landmark work *Republicanism: A Theory of Freedom and Government*, an individual has dominating power over another person to the extent that she has the capacity to interfere on an arbitrary basis in certain choices that the other person is in a position to make.⁹⁵ What makes an exercise of power illegitimate is the *arbitrariness* of the interference by the dominating agent. According to Pettit, arbitrariness occurs when an agent's actions are subject only to the *arbitrium*—the will or judgment—of the agent; that is, the actions are chosen without reference to the opinions or interests of those affected by the acts.⁹⁶ Specifically, an action is arbitrary when the interfering agent is not “forced to track the interests and ideas of the person suffering the interference.”⁹⁷ This understanding of domination descends from a

94. See IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 4 (2003).

95. See PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 52 (1997). Pettit contrasts his republican theory of freedom with the liberal understanding of freedom. As described by Isaiah Berlin, liberal freedom can be understood in two senses: negative liberty (or “freedom from”) and positive liberty (or “freedom to”). Negative liberty is freedom from actual interference. Positive liberty is understood as the freedom that accompanies self-mastery and robust participation in political life. See ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 121–24, 131–34 (1969). For Pettit, freedom as non-domination can be distinguished from freedom as non-interference in two important ways. First, under the republican theory, a deprivation of freedom can exist even in the absence of any actual interference: domination requires only that the dominating agent have the capacity to interfere in the actions of another, not that she actually interfere in those actions. A person's liberty is compromised if she must anticipate the interference of powerful others and take steps to ensure their goodwill. Second, unlike the liberal view, interference does not on its own amount to a loss of freedom. Indeed, interference in the form of laws can protect us from the arbitrary acts of others, thereby securing our freedom. For Pettit, agents, principally the state, can interfere in a non-dominating way in the actions of others when and only when such interference is non-arbitrary. See PETTIT, *supra*, at 22–23.

96. See PETTIT, *supra* note 95, at 55.

97. *Id.* A surprising implication of Pettit's position is that an act can be arbitrary even if the interference is not to the detriment of the dominated agent. What makes an act of interference arbitrary is not the effect of the act, but the basis upon which the interference occurs. For Pettit, an arbitrary act is arbitrary in a procedural sense; that is, it is arbitrary because it is not subject to certain controls when it materializes. An act may be procedurally arbitrary in this way, but not substantively arbitrary, in the

long tradition of republican thought, which includes such figures as Madison, Montesquieu, and Rousseau.⁹⁸

In the republican tradition, argues Pettit, freedom can only exist under a system of law. Good laws can protect people from domination by others (*dominium*) without also subjecting them to domination by the state (*imperium*).⁹⁹ The laws create freedom so long as they protect the people's common interests and are not the instruments of anyone's arbitrary will. Although the law involves interference, even coercion, such interference is not arbitrary and hence nondominating.¹⁰⁰ The idea that the law does not arbitrarily interfere with those subject to its rule contrasts starkly with Hobbes' claim that all laws, regardless of the type of regime under which they exist, are coercive because they interfere with one's freedom of action.¹⁰¹ Under the republican tradition, by contrast, law is seen as the source of liberty.

In order for state action to be non-arbitrary, Pettit argues that power must be exercised in "a way that tracks, not the power-holder's personal welfare or world-view, but rather the welfare and world-view of the public."¹⁰² Pettit claims that state interference would involve little or no arbitrariness if two constraints are in place. The first constraint is constitutionalist and it comprises three conditions—the empire of laws, the dispersion of powers, and anti-majoritarianism.¹⁰³ The empire-of-laws condition consists of two aspects. The first is that the laws should satisfy the requirements of contemporary rule-of-law theorists, such as Lon Fuller. This means that the laws should be general, promulgated, intelligible, and consistent. If the laws do not satisfy these constraints, then the law can be used arbitrarily by power-holders. The second aspect of the empire-of-laws condition is that when the government has a choice

sense of actually going against the interests or judgments of those affected. On Pettit's view, an act of interference is arbitrary to the extent that the dominating agent is not forced to track the avowable or relevant interests of the victim but instead can interfere as her will or judgment dictates. *See id.* An act may be arbitrary, therefore, even if it is done for the good of the victim and even if it achieves that good. *Id.* For an insightful analysis of Pettit's definition of arbitrariness, see Patchen Markell, *The Insufficiency of Non-Domination*, 36 POL. THEORY 9, 13–19 (2008).

98. *See* PETTIT, *supra* note 95, at 19–20.

99. *See id.* at 36.

100. *Id.*

101. *Id.* at 38, 41. Pettit observes that the

republican conception of liberty is akin to the negative one in maintaining that what liberty requires is the absence of something, not necessarily the presence. It is akin to the positive conception, however, in holding that that which must be absent has to do with mastery rather than interference. Freedom consists, not in the presence of self-mastery, and not in the absence of interference by others, but rather in the absence of mastery by others: in the absence, as I prefer to put it, of domination.

Philip Pettit, *Republican Freedom and Contestatory Democratization*, in *DEMOCRACY'S VALUE* 163, 165 (Ian Shapiro & Casiano Hacker-Cordon eds., 1999).

102. PETTIT, *supra* note 95, at 56. Pettit observes, however, that even if government agents protected the people's common interests, the fact that they had the ability not to do so would mean that they have dominated the citizens. *Id.* at 171–72.

103. *Id.* at 171.

between acting on a legal, principled basis, and acting in a particularistic way, it should always prefer the former.¹⁰⁴ The second condition is the dispersion of powers. Pettit points to Montesquieu's division of governmental functions into legislative, executive, and judicial.¹⁰⁵ Other arrangements, such as bicameralism and federalism, also serve to disperse governmental power.¹⁰⁶ The third condition is the counter-majoritarian principle. This condition holds that the laws should not be too easy to change by majority will.¹⁰⁷

Because these three constitutionalist conditions cannot perfectly guarantee the promotion of freedom as non-domination, Pettit claims that the non-arbitrariness of public decisions depends in part on the ability of citizens to contest them. Thus Pettit's second constraint is democratic contestability. Pettit argues that public institutions must be structured in such a way as to allow for citizens to contest public decisions that conflict with the public good. Contestability, rather than consensus, is for Pettit an essential guarantee for freedom as non-domination.¹⁰⁸

Domination can also occur as a result of systemic malfunctions that are by their nature the product of a wide range of actions, both in the past and in the present, and that cannot always be reliably tied to the decisions of specific individuals.¹⁰⁹ In this respect, domination can be understood as systemic asymmetries in people's capacity to act and their capacity to participate in determining the rules that govern them.¹¹⁰ Domination occurs when power is illegitimately and systemically abused, leading to structural inequities or injustices.¹¹¹

B. DOMINATION AND THE POLITICAL PROCESS

In general, I argue that many of the pathologies that affect the democratic process have at their root an illegitimate exercise of public power. Reconceiving the harm of these pathologies as one that involves domination sheds fresh light on the judicial oversight of politics. This reconceptualization also derives fruitful insights from the participation and competition models.¹¹² Increasing participation and competition are vital objectives in any democracy, and these models provide important concepts for thinking about election law and institutional design. Yet what is most helpful in these models are the claims about *why* court action might be required in the first place (as opposed to the arguments about *what* courts should do once they decide to intervene, for instance,

104. *Id.* at 174–75.

105. *Id.* at 177.

106. *Id.* at 178–79.

107. *Id.* at 180–81.

108. *Id.* at 172, 185.

109. See JEFFREY C. ISAAC, *POWER AND MARXIST THEORY: A REALIST VIEW* 84 (1987).

110. See THOMAS E. WARTENBERG, *THE FORMS OF POWER: FROM DOMINATION TO TRANSFORMATION* 92, 117 (1990).

111. See IRIS M. YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 38 (1990).

112. I should note that this reconceptualization does not draw any particular insights from the equality model.

enhance competition). These explanations about why court action is required are fundamentally concerned with domination, and it is here, I suggest, that we should focus our attention.

In the participation model, for instance, Ely asserts that the Supreme Court should intervene only when the political market is malfunctioning in a systematic way.¹¹³ Ely defines systemic malfunction narrowly as involving two situations: first, when a majority systematically disadvantages a minority and thereby deprives that minority of protection from the representative system; and second, when power-holders use their position to thwart change to ensure that “they will stay in and the outs will stay out.”¹¹⁴ Michael Klarman refers to the latter behavior as legislative entrenchment.¹¹⁵ Legislative entrenchment occurs through such practices as incumbency protection, restrictive ballot access laws, and malapportionment.¹¹⁶ The competition model unites Ely’s concerns about systemic malfunctions and Klarman’s concerns about legislative entrenchment. Under the competition model, the major political parties use legal rules to “lockup” political institutions in order to undermine partisan competition.¹¹⁷ Such tactics lead to the self-entrenchment of politicians and political parties.¹¹⁸

I argue that this set of concerns—malfunctions, stoppages, self-entrenching tactics, majorities disadvantaging minorities—falls within a larger set of harms that are best conceptualized as instances of domination. Under the proposed framework’s reformulation, the underlying commonality of all these problems is to be found in the *actions of political elites*. Traditional approaches, however, tend to locate the harm of such problems as political gerrymandering in their *effects*, whether those effects are described in terms of the reduced opportunity of citizens to participate in elections¹¹⁹ or in terms of the impairments to equality, representation, competition, accountability, or democracy.¹²⁰ Nor is the problem necessarily one about legislative *intent*, which is a highly subjective inquiry.¹²¹ Instead, what defines and unites these pathologies is that they involve dominating actions by public officials, understood from an objective

113. See ELY, *supra* note 35, at 102–03.

114. *Id.* at 103.

115. See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 498 (1997).

116. See *id.* at 502. Professor Klarman notes that he is not claiming “to be the first to have discovered that the various issues canvassed herein raise entrenchment concerns. Indeed, the Supreme Court has, on occasion, identified entrenchment problems.” *Id.*

117. See Issacharoff & Pildes, *supra* note 10, at 646–47.

118. See *id.* at 644–46.

119. *Davis v. Bandemer*, 478 U.S. 109, 124 (1986). The anti-subordination principle in equal protection doctrine is likewise focused on the subordination of *groups in society*, rather than on the actions of power-holders. See Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007–09 (1986).

120. See *supra* section I.B.

121. See, e.g., Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 846 (arguing that bad legislative intent, such as anticompetitive behavior, should not be required for an election law claim to succeed).

perspective.

In addition, there is an important connection between domination and democracy. The term “democracy” has its roots in the Greek words *demos* (people) and *kratos* (rule); at a minimum, democracy means rule by the people.¹²² Yet this basic definition leaves a host of issues unsettled. People have variously described democracy in terms of its commitment to deliberation,¹²³ popular participation,¹²⁴ liberty,¹²⁵ justice,¹²⁶ or individual rights.¹²⁷ Others have treated democracy as a means to determine common interests¹²⁸ or as a means to choose and control decision-makers.¹²⁹ Another prominent understanding, one which has strong links to the political thought of the founding era, views democracy as “a means of managing power relations so as to minimize domination.”¹³⁰ The antidomination model falls within this conception of democracy because its primary emphasis is on minimizing domination through the organization and exercise of power.

C. IDENTIFYING DOMINATION

In general, the antidomination model adopts a minimizing-democratic-harms approach under which the judicial task is to prevent or minimize the democratic harm of domination. Courts would be charged under the antidomination model with ensuring that the rules of democracy and the processes by which such rules are decided upon are free from domination and the appearance of domination.

It is necessary, therefore, to provide specific indicia by which we can recognize when the actions of political elites amount to domination. While it is true that domination can emerge from both the abusive *organization* of power and the abusive *exercise* of power,¹³¹ it is possible to identify with more precision when domination has occurred. I claim that there are four main factors by which we can determine whether legislative action gives rise to domination or the threat of domination.¹³² Under the antidomination model, domination has

122. See DAVID HELD, *MODELS OF DEMOCRACY* 1 (2d ed. 1996).

123. See JAMES BOHMAN, *PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY* 4–5 (1996); CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 6–8 (2001).

124. See BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 173–74 (1984); CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 42–44 (1970).

125. See JOHN STUART MILL, *Considerations on Representative Government*, in *ON LIBERTY AND OTHER ESSAYS* 205, 244–47 (John Gray ed., Oxford Univ. Press 1991) (1859).

126. See IRIS M. YOUNG, *INCLUSION AND DEMOCRACY* 5 (2000).

127. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 12 (1985).

128. See JEAN-JACQUES ROUSSEAU, *Of the Social Contract*, in *THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* 39, 59–60 (Victor Gourevitch ed., 1997).

129. See ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 3 (1956); JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 250 (1962).

130. See SHAPIRO, *supra* note 94, at 3.

131. See PETTIT, *supra* note 95, at 171–80.

132. There are more robust conceptions of state arbitrariness, which can be derived from substantive conceptions of the rule of law. For some theorists, most notably Ronald Dworkin and John Rawls, the rule of law is substantively concerned with the moral content of the rules, and not simply with the

occurred, or is more likely to occur, when a legislature's actions amount to (1) an entrenchment of power; (2) a procedural abuse of power; (3) a substantive abuse of power; and (4) an appearance of domination.¹³³ (I take up the question of how courts could employ these factors in Part III.)

One critical point with respect to these four factors is that they are all based upon traditional understandings of constitutionalism and the rule of law. Indeed, the basic idea behind constitutionalism is preventing the abuse of state power. Constitutionalism is defined as a "determination to bring . . . government under control and to place limits on the exercise of its power."¹³⁴ In a similar way, a primary objective of the rule of law is to provide protection against domination by the state.¹³⁵ As described below, each factor is derived from key concepts in rule-of-law and constitutionalist theories.

1. The Entrenchment of Power

The first issue is the relationship between domination and the organization of power. Certain configurations and patterns of power distribution increase the likelihood that conditions leading to domination will arise.¹³⁶ I use the term "entrenchment" to describe the concentration and consolidation of power in the hands of a single agent or an institution. The concentration of power is one form of the abuse of power, but it is a particularly dangerous form in a democracy because it leads to domination.

The Framers were particularly attuned to the connection between tyranny and the organization of power; indeed, as Madison declared, the "accumulation of

procedures by which the rules are articulated and enforced. Under Dworkin's conception of the rule of law, individuals have moral and political rights that are to be recognized by the law and enforced by the courts. *See* DWORKIN, *supra* note 127, at 11–12. The substantive approach does not treat the rule of law and justice as separate ideals; instead, as Rawls contends, there is a direct link between the two. Rawls writes that "the conception of formal justice, the regular and impartial administration of public rules, becomes the rule of law when applied to the legal system." *See* JOHN RAWLS, *A THEORY OF JUSTICE* 206 (rev. ed. 1999). State arbitrariness under this conception of the rule of law would encompass a wide range of unjust and oppressive actions. In this Article, however, I adopt a narrower account of arbitrary action, in part because the concept of arbitrariness loses its analytic bite once it becomes synonymous with every violation of justice. This is particularly true given the deep disagreements among reasonable people about what justice demands.

133. It should be noted that this four-factor test diverges from Philip Pettit's understanding of domination in one important respect. Recall that for Pettit, domination exists when an agent has the *capacity* to interfere arbitrarily with the choices of another. *See* PETTIT, *supra* note 95, at 52. The implication is that domination can occur even in the absence of actual interference; that is, for Pettit, a state is a dominating force even if it has an unexercised capacity to interfere arbitrarily. The four factors described here, however, are designed to identify *actual* interference that is dominating (and not the capacity of arbitrary interference). The main reason is that it is not feasible to conceive of domination in terms of a capacity to act when setting forth the indicia by which courts can assess legislative conduct, particularly in the context of actual litigation. For this reason, the scope of dominating action under the antidomination model is narrower than Pettit's understanding of domination.

134. M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 2 (Liberty Fund, Inc., 2d ed. 1998) (1967).

135. *See* PETTIT, *supra* note 95, at 36.

136. *See id.* at 177.

all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”¹³⁷ The Constitution provided the solution to the problem of tyranny by establishing institutions and processes that have as their organizing theme the disentanglement of power. A host of mechanisms, including the separation of powers, bicameralism, and federalism serve to disperse and disentrench governmental power.¹³⁸

2. The Procedural Abuse of Power

The procedural abuse of power is concerned with procedural arbitrariness, which is defined here as law that does not meet Lon Fuller’s rule-of-law requirements.¹³⁹ According to Fuller, the rule of law is achieved when eight conditions are met: (1) there are general rules, rather than ad hoc decisions; (2) the rules are promulgated and publicized; (3) the rules are prospective, rather than retroactive; (4) the rules are clear and understandable; (5) the rules are not contradictory; (6) the rules do not command the impossible; (7) the rules are not changed too frequently; and (8) there exists a congruence between the rules and their actual administration.¹⁴⁰

Fuller’s account of the rule of law has been described as “perhaps the most influential of the past half-century.”¹⁴¹ Although it is often said that the rule of law is a highly contested concept,¹⁴² most contemporary discussions of the rule of law are similar to Fuller’s account. Lawrence Solum, for instance, offers seven requirements for the rule of law, five of which resemble elements of Fuller’s list.¹⁴³ Margaret Radin condenses Fuller’s list into two main principles: first, that rules exist, and second, that these rules can be followed.¹⁴⁴ On a similar note, Ignacio Sanchez-Cuenca defines the rule of law as compliance with law that is public, stable, clear, consistent, general, prospective, and performable.¹⁴⁵ For William Eskridge and John Ferejohn, the rule of law is satisfied if the commands of the legal system are

137. THE FEDERALIST NO. 47, at 269 (James Madison) (Clinton Rossiter ed., 1999).

138. See GORDON, *supra* note 30, at 15. As discussed above, I argue that the political theory of the Constitution is animated by what I call the disentanglement principle. The disentanglement principle stands for the idea that power should be *organized* in such a way as to minimize the risk of domination. The disentanglement principle falls within the Constitution’s general commitment to antidomination. See Dawood, *supra* note 31.

139. See LON L. FULLER, THE MORALITY OF LAW 38–39, 46–81 (1969).

140. See *id.*

141. Richard H. Fallon, ‘The Rule of Law’ as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 2 (1997).

142. See BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 3 (2004).

143. Lawrence B. Solum, *Equity and the Rule of Law*, in THE RULE OF LAW 120, 122 (Ian Shapiro ed., 1994).

144. Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 785 (1989).

145. Ignacio Sanchez-Cuenca, *Power, Rules, and Compliance*, in DEMOCRACY AND THE RULE OF LAW 62, 69 (Jose Maria Maravall & Adam Przeworski eds., 2003).

general, knowable, and performable.¹⁴⁶

As formulated, Fuller's list of requirements applies to the creation of law by *legislatures*. But the rule of law is also understood to apply to the interpretation of law by *courts*.¹⁴⁷ In a system governed by the rule of law, courts must decide cases on the basis of reasoned and consistent rules; that is, they must display fidelity to law.¹⁴⁸ The purpose of the rule of law is to provide predictability in public rules so that people can coordinate their activities and make plans for the future.¹⁴⁹ The idea that the rule of law is primarily concerned with procedural predictability is widely accepted in the legal academy.¹⁵⁰

The procedural abuse of power is a matter of degree; indeed, it is best conceived as existing along a spectrum. At one end of the spectrum is state action without any law whatsoever. A unilateral decree or non-law-bound action by an office-holder, for instance, would constitute a procedural abuse of power. At the other end of the spectrum is government action that violates only one of Fuller's requirements. Between the two end points of the spectrum are governmental actions that violate more than one of Fuller's procedural requirements. Even among Fuller's requirements, a hierarchy exists: laws that are confusing do not constitute as great an abuse of power as laws that are retroactive, for instance. The main point is that the severity of a procedural abuse of power depends on the importance of the procedural principle at stake. In sum, the procedural abuse of power occurs when legislatures or courts announce law that violates one or more of Fuller's rule-of-law requirements.

3. The Substantive Abuse of Power

The substantive abuse of power refers to the exercise of power by public officials for private or political gain, which I shall also refer to as self-dealing. Such actions amount to corruption, which is understood here in its broader

146. William N. Eskridge & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, in *THE RULE OF LAW*, *supra* note 143, at 265.

147. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989); see also ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 22, 25 (Amy Guttmann ed., 1997) (arguing that the "rule of law is about form"). For an argument about the rule of law and impartiality with respect to administrative agencies, see Lorne Sossin, *Speaking Truth to Power? The Search for Bureaucratic Independence in Canada*, 55 U. TORONTO L.J. 1, 43–50 (2005).

148. See ROBIN WEST, *RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW* 13 (2003). See also RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 5 (2001).

149. See Fallon, *supra* note 141, at 15.

150. See, e.g., RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 90 (1998) (arguing that general rules announced in advance allow people to coordinate their behavior); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 95 (1991) (arguing that rules "serve the goals of certainty, reliance, and predictability"); CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 114 (1996) (arguing that rules promote predictability); TAMANAHA, *supra* note 142, at 119 (arguing that the rule of law "[a]bove all else . . . is about predictability").

historic sense rather than in its narrower contemporary sense as an exchange of money for political favors.¹⁵¹ The Framers understood corruption as occurring when government officials behaved in self-serving ways to benefit themselves and their friends at the expense of the public good.¹⁵² For the Framers, corruption enabled the executive to manipulate factions, protect itself from the electorate, and undermine the Constitution by redistributing wealth, power and social standing.¹⁵³ Corruption was thus a force that could undermine the body politic as a whole. At the time of the framing, the rule of law was broadly construed as providing the best defense against the abusive exercise of power by state actors, in particular those abusive acts that amounted to corruption.

This expansive view of corruption, and its prevention by the rule of law, has a long tradition that includes Thucydides, Plato, Aristotle, Machiavelli and Rousseau.¹⁵⁴ Corruption for these philosophers meant the moral incapacity of rulers to make reasonably disinterested commitments that would benefit the common welfare.¹⁵⁵ John Locke's *Second Treatise of Government*, which had a formative influence on the theories of the founding period, likewise warned of the dangers of self-serving actions on the part of a ruler.¹⁵⁶ For Locke, tyranny involves the "use of the Power any one has in his hands; not for the good of those, who are under it, but for his own private separate Advantage."¹⁵⁷ Power is abused when the ruler's "Commands and Actions are not directed to the preservation of the Properties of his People, but the satisfaction of his own Ambition, Revenge, Covetousness, or any other irregular Passion."¹⁵⁸ The substantive abuse of power refers to self-dealing; that is, an illegitimate exercise of power that benefits the private interests of public officials at the expense of the public good.

4. The Appearance of Domination

Not only are acts of domination troubling in a democracy, but the *appearance* of domination is also a matter of concern.¹⁵⁹ Democratic legitimacy and integ-

151. See JOHN P. REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 111–15 (1989).

152. See THE FEDERALIST NO. 10, at 50–51 (James Madison) (Clinton Rossiter ed., 1999).

153. See Robert J. Morgan, *Madison's Theory of Representation in the Tenth Federalist*, 36 J. POL. 852, 868 (1974).

154. See J. Patrick Doherty, *The Corruption of a State*, 72 AM. POL. SCI. REV. 959, 959–60 (1978).

155. See *id.*

156. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 284 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690). See also Yasmin Dawood, *Reconsidering the Rule of Law: Reflections on Power, Politics, and Partisan Gerrymandering*, 13 GOOD SOC'Y 31, 33 (2004) (arguing that "for Locke the primary purpose of the rule of law is to prevent tyranny").

157. LOCKE, *supra* note 156, at 398–99.

158. *Id.* at 417. For Locke, the rule of law provided the greatest security against the oppression of arbitrary state action. He stated that "*Freedom of Men under Government*, is, to have a standing Rule to live by, common to every one of that Society . . . and not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man." *Id.* at 284.

159. The Court has recognized that the appearance of corruption can be a constitutional harm in its campaign finance decisions. See *McConnell v. FEC*, 540 U.S. 93, 143 (2003); *Buckley v. Valeo*, 424 U.S. 1, 27, 29 (1976).

rity depend upon the political process *appearing* to be free of domination, and not simply being free of such domination. A legitimate political process is necessary for public confidence in government, and by extension, for the sense of belonging to a common political body.¹⁶⁰ In the *Federalist Papers*, Madison was acutely aware that the continued stability of the republic rested upon public confidence in the structures of government.¹⁶¹ The appearance of domination, even in the absence of actual domination, diminishes democratic legitimacy and integrity, and hence public confidence in governing institutions and actors. Minimizing the appearance of domination will also reduce the likelihood of actual impropriety because it will signal a commitment to a norm of antidomination.¹⁶²

The appearance of domination is a particular concern when the dominating agent is the *state* and the dominated agents are citizens who are in a position of limited knowledge. Because citizens gain information about the state at a distance, the appearance of the state's actions is at times the only information that citizens can obtain. From their observations, the citizens then come to reasonable judgments about whether or not the state has the capacity for arbitrary interference in their affairs. If the state's actions create the appearance that the state has the capacity to interfere arbitrarily, then the citizen has no way of verifying whether or not her perception is accurate. In other words, for the citizen, the appearance of state domination amounts to actual domination. The state must take into account the fact that citizens cannot make the distinction, and must not act in such a way that could be reasonably construed to amount to

160. See ANDREW REHFELD, *THE CONCEPT OF CONSTITUENCY: POLITICAL REPRESENTATION, DEMOCRATIC LEGITIMACY, AND INSTITUTIONAL DESIGN* 16–19 (2005).

161. As has been documented by Douglass Adair, Madison was influenced by the political thought of David Hume. See Douglass Adair, “*That Politics May Be Reduced to a Science*”: *David Hume, James Madison, and the Tenth Federalist*, 20 HUNTINGTON LIBR. Q. 343, 348–49 (1957). Hume asked why it was that the many are governed by the few; that is, why “men resign their own sentiments and passions to those of their rulers” with such apparent ease and submission. See David Hume, *On the First Principles of Government*, in *POLITICAL ESSAYS* 16 (Knud Haakonssen ed., 1994). The answer, claimed Hume, is the power of opinion:

When we enquire by what means this wonder is effected, we shall find, that, as FORCE is always on the side of the governed, the governors have nothing to support them but opinion. It is therefore, on opinion only that government is founded; and this maxim extends to the most despotic and most military governments; as well as to the most free and most popular.

See *id.* In *Federalist No. 49*, Madison echoed Hume's conclusions when he rejected Jefferson's proposal that popularly elected conventions could be employed to correct breaches of the state constitutions. Madison stated that “[i]f it be true that all governments rest on opinion, it is no less true that the strength of opinion in each individual, and its practical influence on his conduct, depend much on the number which he supposes to have entertained the same opinion.” THE FEDERALIST NO. 49, at 283 (James Madison) (Clinton Rossiter ed., 1999). The general point is that trust and public confidence in government is critical for the ongoing stability of the republic.

162. See, e.g., Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506–07 (1993) (describing expressive harms as those that result from the ideas expressed through state action); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2045 (1996) (arguing that expressive harms are relevant for the consequences they produce).

domination. To minimize domination, therefore, the state must also minimize the appearance of domination.¹⁶³

5. Summary—Antidomination Factors

To summarize, the normative dimension of the antidomination model has argued that the pathologies that affect the democratic system are best described as instances of domination; that is, they have at their core an illegitimate exercise of public power. We can determine whether legislative action amounts to domination or the threat of domination by considering the following four factors: (1) the entrenchment of power, which occurs when power is concentrated in a single agent or institution; (2) the procedural abuse of power, which occurs when the law violates Fuller's rule-of-law requirements; (3) the substantive abuse of power, which occurs when elected officials engage in self-dealing and corruption broadly construed; and (4) the appearance of domination, which not only undermines democratic legitimacy and integrity, but can also at times amount to domination itself. One key point is that all of these factors are derived from central concepts in constitutionalist and rule-of-law theories. I now turn to the institutional dimension of the antidomination model.

III. THE ANTIDOMINATION MODEL

This Part unpacks the various components of the antidomination model; Part IV provides a more detailed explanation of how all the components work together. Section III.A describes the institutional division of labor under the antidomination model, and shows how the model takes judicial capacities and legislative incentives into account. It also discusses the issue of baselines in a minimizing-democratic-harms approach. In addition, section III.A describes how courts would apply the antidomination model, with a particular focus on the judicial standards that courts would use to assess legislative actions. Section III.B analyzes the domination-minimizing institutional tradeoffs between courts and legislatures. Section III.C proposes a diagnostic framework by which the structural impact of a court's election law decision on the organization and exercise of power can be evaluated.

A. INSTITUTIONAL ROLES, INCENTIVES, AND CAPACITIES

The antidomination model follows a minimizing-democratic-harms approach to the judicial supervision of democracy. Under such an approach, the role of the courts is to minimize domination and the appearance of domination in the procedures by which the rules of democracy are decided upon, and in the rules themselves. The antidomination model has both a procedural and a substantive

163. Pettit's assumption that all parties are in a position of perfect knowledge with respect to the existence of domination should not hold, I claim, when the state is the dominating actor. *See* PETTIT, *supra* note 95, at 60.

aspect. The procedural aspect is concerned with the processes through which the rules are created, while the substantive aspect is concerned with the dominating effects of those rules. In addition, the criteria by which such processes, and the resulting rules, are evaluated have procedural and substantive dimensions. For the sake of simplicity, I shall at times refer to the court's role as one that is concerned with process, but by process I am referring to a modified or complex proceduralism which incorporates both procedural and substantive elements.

1. Legislative Incentives

The antidomination model reconceptualizes the judicial role in the supervision of democracy. The objective of judicial intervention is to create an incentive structure that would foster legitimate and principled decisionmaking by political actors when they formulate the rules of democracy. A central challenge in election law is that politicians have the power to determine many of the rules that govern the democratic process. There are powerful incentives for political elites to manipulate the rules of the game in order to forward their personal or partisan ambitions at the expense of the public interest.¹⁶⁴

The antidomination model serves to correct the negative incentives of legislators to engage in self-dealing when devising the rules of democracy. As Cass Sunstein observes, the protection of democracy at times requires judicial decisions that "impose[] good incentives on elected officials, incentives to which they are likely to be responsive."¹⁶⁵ Under a domination-minimizing approach, the judicial task is not to decide *what* the rules of democracy will be; instead, courts should focus on the processes by which the rules were created and the dominating effects, if any, of those rules. Courts would evaluate the legislature's adoption of a new rule on the basis of the four antidomination factors described above.¹⁶⁶ In the event that a certain threshold of domination has been reached, the court would intervene. Instead of providing detailed guidelines on what the rule should be, however, the court would return the issue to the legislature for

164. Heather Gerken observes that "the self-interest of elected state legislators can undermine democratic values." Gerken, *supra* note 93, at 519.

165. See SUNSTEIN, *supra* note 77, at 57. For the sake of clarity, it is important to identify the context in which Professor Sunstein makes this observation. He argues that maximalist decisions (or broad and deep solutions) are worthwhile in four instances. One such instance occurs "when a maximalist approach will promote democratic goals either by creating the preconditions for democracy or by imposing good incentives on elected officials, incentives to which they are likely to be responsive." *Id.* The antidomination model is in some respects a maximalist approach because it envisions broad decisions when the preconditions for democracy are deeply threatened; in other respects, however, the antidomination model is a minimalist approach, not only because of the stated goal of minimizing domination, but also because of its commitment that courts should not intervene automatically to resolve conflicts over the basic ground rules of democracy, but should only do so when the risk of domination resulting from judicial intervention is greatly outweighed by the risk of domination resulting from legislative action in the design of democratic institutions. See *infra* section III.B.

166. See *supra* section II.C.

resolution.¹⁶⁷

The burden would then be on the legislature to produce a new rule and to demonstrate that the process by which the new rule was created, and the rule itself, was domination-minimizing. This demonstration could be met in a number of ways. For example, legislatures could show that the redistricting map follows neutral criteria such as contiguity and compactness; that it protects communities of interest; that citizen groups were involved in the redistricting process; that independent advisors were called in for their opinions and input; that the new map results in more competitive races, and the like. Politicians would thus be under pressure to show that the processes by which they decided on the rules, and the rules themselves, were not distorted by domination.¹⁶⁸ Thus, the task of the courts would be to assess the process by which the redistricting map was created, and the task of the legislature would be to produce a new map and to demonstrate that the procedures by which the new map was created were legitimate and principled. It would be for the legislature to decide how best to demonstrate the nondominating nature of its decisionmaking processes.

In addition to correcting legislative incentives, another advantage to this approach is that the rules of democracy would be decided within a democratically accountable forum. Legislatures are also better equipped to balance all the competing considerations that are at stake in redistricting than are other institutions such as courts. In addition, by placing certain constraints on the legislative decision-making process, the expectation is that the resulting redistricting map will be less distorted by partisan considerations.

Like any new proposal, the antidomination model raises questions about how it would operate in practice. I will identify (though not resolve) some of those questions here; this brief discussion cannot, however, do justice to the complexity of these issues. One question is whether the antidomination proposal is similar to the “hard look” doctrine in the arbitrariness review of agency decisions by courts, and whether it is vulnerable to some of the same criticisms that are made within the administrative law context.¹⁶⁹ In addition, we might

167. See generally Dawood, *supra* note 22, at 290–93 (arguing for a similar institutional division of labor for the adjudication of campaign finance cases).

168. See *id.*

169. Although it is beyond the scope of this Article to explore the conceptual parallels between the antidomination model and the judicial review of agency decisions, a few words on this topic may be helpful. The Administrative Procedure Act provides that federal courts must invalidate agency decisions that are “arbitrary” or “capricious.” 5 U.S.C. § 706(2)(A) (2000). In *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Insurance Co.*, 463 U.S. 29 (1983), the Supreme Court held that arbitrariness review requires courts to take a “hard look” at the decisions made by administrative agencies. The Court’s decision in *State Farm* is viewed as having endorsed the hard look doctrine. See Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 178. In *State Farm*, the Court held that an agency decision was arbitrary in the event that

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that

ask whether the judicial review of the legislative record is problematic from a separation of powers perspective.¹⁷⁰ One possible response is to say that the judicial review of a legislative record is desirable, or at least tolerable, in a few limited situations, one of which occurs when legislatures are undermining the basic preconditions of democracy. Another question concerns what would happen if a legislature was simply unable or unwilling to reach agreement on a redistricting map.¹⁷¹ On a slightly different note, there is the question of how standing rules would work under the antidomination model.¹⁷² We might also ask why the antidomination model is anchored to a constitutional harm instead of a statutory violation.¹⁷³ Although these questions cannot be fully resolved in

runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

463 U.S. at 43. Agencies are required to investigate alternatives, consider counter-arguments, and provide a detailed account of their actions. *Id.* at 48–51. The purpose of hard look review is to constrain the illegitimate exercise of agency discretion. There are conceptual parallels with the antidomination model, although it is important to note that under the antidomination model, the court is reviewing legislative, and not administrative, decisionmaking. The purpose of judicial review under the antidomination model is to minimize the illegitimate exercise of state power in the processes by which the rules of democracy are created. In theory, the Court could require a “hard look” review of partisan redistricting maps, in addition to defining what would amount to arbitrary state action (or the illegitimate exercise of public power) much as it did in *State Farm*. This brief discussion cannot do justice to the many issues and distinctions that are relevant here; its purpose is simply to acknowledge that there are conceptual parallels between the antidomination model and the judicial review of agency decisions.

170. See William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001). Professors Buzbee and Schapiro raise a host of concerns about the Supreme Court’s recent and increased scrutiny of the underlying legislative record. They argue that legislative record review is problematic because, among other things, legislative records do not even exist as described by the Court. See *id.* at 91–97. In addition, legislative record review is not consistent with separation of powers doctrine because it requires an even more rigorous scrutiny by courts than “hard look” review in the administrative context. See *id.* at 119–31.

171. Given the constitutional requirement of redistricting after each census, a new map would have to be produced. In the event that a legislature is unable or unwilling to agree on a redistricting map, then a court would impose a solution. My thanks to Ronald Levin for raising this issue.

172. There are two possible options with respect to the question of standing under the antidomination model. The first option is the traditional approach under the Equal Protection Clause. See, e.g., John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576, 580 (1997); Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2292 (1998). As a matter of standing, the Supreme Court held that plaintiffs stating equal protection claims must actually reside in the districts they are challenging. See *United States v. Hays*, 515 U.S. 737, 745 (1995). The second option is to refashion standing requirements. Because the antidomination model is a structural approach, this suggests either that it may not be necessary to identify a specific individual whose rights have been infringed, or that the pool of possible plaintiffs would be more broadly drawn to encompass all residents of the state whose choices have been arbitrarily interfered with (for example, all members of the political party that has been disfavored by the redistricting statute). Given the complexity of this issue, however, it is not possible to fully elaborate the possible solutions in the available space.

173. One possible objection is that the antidomination model should not be based on a constitutional harm, but instead should have a statutory basis. For instance, Congress could specify the general procedures by which electoral redistricting is to be conducted under a provision akin to Section 5 of the Voting Rights Act. Section 5 requires covered jurisdictions to receive preclearance from the Attorney General or the U.S. District Court for the District of Columbia for any changes in “any voting

the space available here, some preliminary thoughts about how they could be addressed are offered in the notes.

A final question, one that can be addressed in greater detail, is whether the legislature will simply produce a record in order to meet the court's standards without making any real changes to the redistricting process. This is an important issue, and there are a few possible responses. First, the court's review of the resulting redistricting map would need to be sufficiently skeptical so that the legislature would not simply be able to create a paper record in order to meet the requirements. Second, a court would engage in its own assessment of the redistricting process (which, among other things, would draw upon the findings of critics of the redistricting process at issue), and therefore would not need to rely solely on the legislative majority's version of the events. Third, even if the legislature engages in a certain amount of strategic paper-trail construction (as we would reasonably expect a legislature to do), the very process of having to produce the paper trail will mean that the legislature has engaged in certain actions, such as consulting citizens groups and other interested parties, paying attention to neutral redistricting criteria, justifying why it rejected alternative proposals, and so forth. The legislature will also have to justify why it rejected alternative proposals. These activities may serve to minimize the extent of partisan manipulation. In addition, increased transparency in the process by which the map is created may help to diminish this kind of empty-gesture strategic action because the legislature would have to publicly justify its choices with respect to redistricting. The idea here is that the very task of having to make this demonstration will mean that it is less likely for the legislature to engage in excessive partisan gerrymandering.

2. Judicial Capacities and Judicial Standards

Another important feature of the antidomination model is the institutional division of labor between courts and legislatures. This institutional division of labor spares courts from having to devise the standards by which every electoral district is to be drawn. Such a complex and extensive undertaking does not fit easily within judicial capacities, which is perhaps why courts have struggled for so many years with the problem of partisan gerrymandering. As Michael Kang observes:

Courts, designed as they are to be politically insensitive and unaccountable, are inept at weighing the complex political considerations that should influence the redistricting process. It is an immense legislative challenge for the [J]udicial [B]ranch to muster the necessary expertise and skill to supervise the redrawing of district maps, much less ultimately produce a redistricting map

qualification or prerequisite to voting, or standard, practice or procedure with respect to voting." Covered jurisdictions were defined in Section 4 of the Voting Rights Act so as to target those southern states with the worst records in racially discriminatory election procedures. A statutory approach to antidomination, however, would apply to all the states rather than to a specific subset. This is certainly a possible approach to take. My thanks to Jordan Steiker for this point.

that adequately considers and integrates the many political concerns that redistricting inevitably raises Redistricting is simply a legislative task for which courts lack the necessary democratic pedigree and institutional resources.¹⁷⁴

Under the antidomination model, by contrast, courts would not be devising substantive standards, such as the one-person, one-vote principle, by which legislatures would have to redistrict; instead, courts would have to determine whether the process by which a rule was decided upon was free of domination. Making determinations about the validity of a process falls within a court's general capacity.

Although courts would not be devising traditional standards under an antidomination approach, this does not mean that the model does not rely on any standards at all. In deciding whether a legislature has engaged in domination, courts would have to rely on standards to assess legislative conduct. These standards are not the traditional standards under the Equal Protection Clause; instead, a court would rely on the four factors described in section II.C above when deciding whether a certain threshold of domination has been reached. These antidomination factors do not set forth the equivalent of a one-person, one-vote principle, but instead provide guidelines for identifying and assessing arbitrary state action. A related question is whether there are any standards by which the legislature has to demonstrate the non-arbitrariness of its redistricting process. The court would not specify the exact steps by which a legislature would make such a showing, but it could identify a number of actions that would help to make such a showing.¹⁷⁵ In addition, the legislature could rely on the four antidomination factors to ensure that the process, and the resulting map, do not amount to excessive partisanship. Another issue is the standard of review that the court would use. An intermediate level of scrutiny, which is appropriately skeptical about legislative action, would likely work best under the antidomination model.¹⁷⁶

Even though courts could not be devising standards in the traditional sense, it is important to determine whether the factors under the antidomination model are judicially manageable. I shall consider three of the four antidomination factors: (1) the entrenchment of power; (2) the substantive abuse of power; and (3) the appearance of domination. The procedural abuse of power factor is not discussed here because it consists of a familiar rule-of-law inquiry that should not pose manageability concerns.

174. See Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 691 (2006).

175. For examples of such actions, see *supra* section III.A.1.

176. A relatively robust standard of review is particularly important in the partisan redistricting context because current legislative majorities may themselves be the product of historical gerrymanders. Even if current majorities simply reinstate the same map without obviously engaging in arbitrary state action, the courts would have to assess the map with a skeptical eye in order to take account of this historical dimension.

a. The Entrenchment of Power. The first factor is the entrenchment of power. To be sure, the antidomination model places demands on the ability of courts to determine the likely consequences of the rules of democracy on the distribution and exercise of power. As an institution, courts are not particularly well-suited to make widescale determinations about the empirical effects of electoral rules. Although some questions concerning the distribution and exercise of power could be answered with reasonable confidence, other questions would amount to what Adrian Vermeule refers to as a “trans-scientific” endeavor—that is, an empirical question that cannot be resolved at a reasonable cost within a reasonable amount of time.¹⁷⁷ Of course, the Executive and Legislative Branches may be similarly lacking in expertise.

In addition, courts may also have difficulty determining whether a rule is in the public interest or solely in the personal or political interest of the power-holders.¹⁷⁸ Under an antidomination approach, however, judicial intervention is recommended only in the event that there is a reasonable confidence that the domination prevented by intervention decisively outweighs the domination caused by the intervention.¹⁷⁹ In cases that involve a great deal of uncertainty about the likely effects of a rule, or about the likely effects of the court’s decision, there would not be a reasonable confidence that the tradeoff favors judicial intervention.

At the same time, it is vital to acknowledge that whether or not courts engage in a systematic inquiry about the effect of legal rules on the exercise and organization of power within democratic institutions, their decisions nonetheless have a structural impact. Even if a decision is announced under the Equal Protection Clause, it will have a decided, and at times dramatic, impact on the organization, exercise, and abuse of power. Yet courts routinely issue these decisions without first examining the likely consequences of their decisions.

b. The Substantive Abuse of Power. The substantive-abuse-of-power factor raises manageability concerns. In a democratic context, it can be difficult to determine when a substantive abuse of power has occurred. The pursuit of political gain is not always an abuse of power. Politicians are charged with representing their constituents’ interests, and when they have done so, they are rewarded with reelection. The inquiry thus requires distinguishing between behavior that is proper in a democracy, such as representing constituents’ interests, and behavior that is improper, such as self-dealing.

One possibility is to say that when it comes to the design of democratic institutions, we can assume that the public interest is to ensure that elected officials are accountable and responsive to their constituents. Consider the

177. See VERMEULE, *supra* note 21, at 149.

178. The judicial inquiry would not look into legislative intent, which is usually highly subjective. Instead, the Court would employ a reasonable person standard to determine if the legislature acted in the public interest.

179. See *infra* section III.B for a discussion of the domination-minimizing institutional tradeoffs under the antidomination model.

following definition of the purpose of elections: “Prospectively, voters try to choose an acceptable representative from among the competing candidates, and retrospectively they try to hold the successful candidates and parties accountable in subsequent elections.”¹⁸⁰ Laws that undermine either the prospective choice of voters or the retrospective accountability of elected officials can be presumed to run counter to the public interest.

To be sure, an individual voter may prefer the election outcome in a gerrymandered system if she is a member of the winning political party. A better measure, therefore, is to ask whether the average voter would prefer a heavily gerrymandered redistricting map or a mildly gerrymandered map (assuming that all redistricting has some gerrymandering¹⁸¹) without giving the voter any information about which party drew the map. Although it is an empirical question as to which option most voters would choose, it is reasonable to conclude that an average voter, from behind a veil of ignorance, would pick the system that has less gerrymandering.

Although we may be able to identify those situations in which the public interest has clearly been served, a more difficult case arises when a particular legislative action serves *both* the public interest and the narrow self-interest of politicians. This is an important issue given the fact that, as discussed above, the logic of democratic accountability is based on the self-interest of politicians to seek re-election. How then would courts distinguish between degrees of the substantive abuse of power? Here is one way to think about the problem: imagine a spectrum of legislative action. One endpoint represents legislative action that is purely driven by naked political ambition and the other endpoint represents action that sets out solely to achieve the public interest.¹⁸² All legislative actions, including redistricting, fall at some point along this spectrum. The closer the redistricting map is to the purely partisan endpoint, the greater the substantive abuse of power. As the legislative action moves closer to the public interest endpoint, the risk of a substantive abuse of power decreases. For this reason, it would be important for courts to distinguish between those redistricting maps that are drawn *solely* to advance partisan interests, and those redistricting maps that are drawn to achieve a *mix* of public and partisan objectives. A finding of a substantive abuse of power is less significant if there are mitigating factors; that is, if there are other neutral criteria that were used to draw the district lines. To be sure, these distinctions involve judgments that cannot be mathematically precise.

c. The Appearance of Domination. The final factor, the appearance of domination, also raises manageability concerns. Courts could use a reasonable person

180. See DENNIS F. THOMPSON, JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES 1 (2002).

181. As long as elected officials are in charge of redistricting, some consideration of voters' partisan affiliation is inevitable. See ROBERT G. DIXON, DEMOCRATIC REPRESENTATION 462 (1968).

182. See *supra* sections II.B and II.C.3 for the discussion of the relationship between domination and the public interest.

standard in order to assess the appearance of domination from an objective perspective. There are three main advantages to a reasonable person standard.¹⁸³ The first is that courts are familiar with its application. The second is that a reasonable person standard spares courts from having to gather information on the subjective states of mind or perceptions of individual observers. Not only is it impractical for courts to inquire into subjective states of mind, but such a standard may include appearances that the average person would not consider to be dominating. Third, the appearance of domination is a greater concern in those situations in which there exists an objective agreement that a given appearance gives rise to an apprehension of state domination. It must be noted, however, that a reasonable person standard has one significant disadvantage.¹⁸⁴ An objective standard when interpreted and applied by a court may reflect only the individual judge's subjective understanding of the meaning of a particular appearance of domination, and not an objective assessment of the meaning of such an appearance. Relatedly, we may be legitimately concerned that what appears to be dominating to one person may not appear to be dominating to another. For this reason, the appearance of domination factor would likely have a greater weight in cases involving excessive, as opposed to mild, partisan gerrymandering.

3. Minimizing Democratic Harms

The role of courts under the antidomination model is to minimize a defined and particularized democratic harm rather than to maximize a democratic ideal. As shown in Part I, maximizing-democratic-goods approaches can at times make great demands on judicial capacities. It is difficult for courts to judge when a particular good has been maximized or optimized.¹⁸⁵ As Cass Sunstein and Adrian Vermeule have argued with respect to institutional capacities, debates over constitutional interpretation should begin by asking “how should certain institutions with their distinctive abilities and limitations, interpret texts?”¹⁸⁶ The antidomination model adopts a minimizing-democratic-harms approach that takes into account the institutional capacities of courts. Courts are institutionally better suited to preventing or minimizing domination than they are to maximizing or optimizing democratic goods that lack clearly identifiable

183. For a helpful discussion of the usefulness of the reasonable person standard when courts are making determinations about the meaning of appearances, see Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 23 (2000). For detailed discussion of the reasonable person standard in tort law, see MAYO MORAN, *RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD* (2003).

184. As Sherrilyn Ifill has argued, the Justices of the Supreme Court have not properly applied the “appearance of impartiality” standard when deciding whether or not they should recuse themselves from hearing a case. This finding suggests that a reasonable person standard raises important risks. See Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in Bush v. Gore*, 61 MD. L. REV. 606, 649–50 (2002).

185. See *supra* Part I.

186. Sunstein & Vermeule, *supra* note 24, at 886.

baselines.¹⁸⁷

One question that arises, however, is how the antidomination model avoids the problem of establishing baselines.¹⁸⁸ In other words, why don't we need a baseline of non-domination in order to recognize when domination exists or when domination has been minimized? In some sense, the antidomination model does rely implicitly on a baseline of non-domination. This baseline, however, is relatively easier to identify because non-domination is narrowly defined as occurring when power is exercised in a non-arbitrary fashion. That is, a baseline of non-domination is less demanding and easier to identify because it consists of a reachable floor. By contrast, it is difficult to identify a baseline for enhancing competition because the target is a ceiling. This ceiling is difficult or even impossible to reach because it is hard to know when competition is fully implemented. In other words, while commentators are right to point out that it is difficult to establish a baseline against which a given level of partisan competition can be measured,¹⁸⁹ the real difficulty lies in the fact that the baseline is described as a ceiling. To the extent that the competition model can redefine its baseline as a floor (absence of anticompetitive practices) instead of as a ceiling (ideal level of partisan competition), it would seem that the difficulty of identifying the baseline would diminish considerably.

In addition, it is easier for courts as an institutional matter to minimize or prevent the democratic harm of arbitrary state action than it is to enhance or promote democratic goods. Courts routinely issue injunctions or injunction-style orders that are geared toward preventing certain harmful actions from continuing. One counter-argument is that the antidomination model is also maximizing a good, and the good in question is non-domination. Although it is true that minimizing domination is conceptually linked to maximizing non-domination, it is also the case that maximizing the *absence* of arbitrary state action is different from, and likely easier than, maximizing the *presence* of a democratic good. In addition, as Philip Pettit observes, non-domination is satiable, in the sense that it can be achieved through a limited set of interventions, because all that is required is for the resources of the weaker party to be brought to a point where its countervailing power is sufficient to discourage

187. Granted, the reduction of certain harms will inevitably lead to the amelioration of certain goods; the point here, though, is that the courts' focus should remain on minimizing a particular harm rather than maximizing the good that results from the removal of that harm.

188. I am greatly indebted to Philip Pettit for very helpful comments on this issue.

189. See *supra* text accompanying notes 59–62. Political markets theorists have argued, however, that even if we cannot establish what is fair in redistricting, we can still identify what is unfair. See Pildes, *supra* note 28, at 1611–13. Mitchell Berman advances yet another way to determine the baseline against which partisanship in redistricting can be measured. Instead of opting for a normative baseline (what the legislators ought to have done ideally), Professor Berman claims that an alternative approach is to compare the redistricting plan against a positive baseline. He argues further that the “most sensible positive baseline is counterfactual—what the actual redistricters would have done had they not been motivated at all to achieve partisan outcomes.” See Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 818–19 (2005).

interference by the stronger party.¹⁹⁰ By contrast, a good such as enhancing competition is arguably insatiable because it would demand repeated interventions to ensure its achievement. In any event, it is anticipated under the antidomination model that the minimization of domination will have positive consequences for such democratic goods as participation, competition and equality. The issue is not whether such democratic goods should be maximized, but whether the courts are the best institutions to do so.

In sum, the antidomination model provides the twin advantages of saving courts from having to make determinations about democratic rules that exceed their institutional capacities and of correcting the negative incentives for politicians to engage in unbridled self-dealing at the expense of the public interest. By directly addressing and countering the negative incentives of legislators to engage in self-dealing, the antidomination model allows for a solution to such problems as partisan gerrymandering that is not dependent on highly intrusive court action. This institutional division of labor between courts and legislatures not only respects the institutional limitations of courts, but also corrects the negative incentives of politicians to engage in self-dealing and other dominating behavior.

B. DOMINATION-MINIMIZING INSTITUTIONAL TRADEOFFS

At the same time, the antidomination model recognizes that court intervention *itself* can raise the risk of domination. In a domination-minimizing approach, the Judicial Branch performs a necessary, required, and even democratic function in a representative democracy.¹⁹¹ Courts are essential to control the power of other governmental agents; indeed, the central purpose of the Judicial Branch is to prevent the abuse of governmental power.¹⁹²

There are no institutional guarantees, however, that courts will not abuse their *own* power.¹⁹³ Reliance upon judicial power to prevent domination inevitably involves the dilemma that judicial power may itself be abused. The challenge, then, is controlling the power of the judiciary so as to enable courts to play an important role in democratic politics without also enabling them to impose their supremacy on the system as a whole. Because courts are one of the institutions

190. See JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* 60–80 (1992). My thanks to Philip Pettit for his helpful comments on the satiability of non-domination.

191. See CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 3 (2001).

192. See PAUL O. CARRESE, *THE CLOAKING OF POWER: MONTESQUIEU, BLACKSTONE, AND THE RISE OF JUDICIAL ACTIVISM 199–200* (2003); TERRI J. PERETTI, *IN DEFENSE OF A POLITICAL COURT* 240 (1999). According to Alexander Hamilton, the principal role of the courts is to act as a check on the legislature by ensuring that it remains within the limits of its powers. As such, the courts are “to be considered as the bulwarks of a limited Constitution against legislative encroachments.” *THE FEDERALIST* No. 78, at 438 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

193. See *supra* text accompanying note 25. Another concern is that the Justices’ personal preferences, including partisan preferences, can affect their rulings. See *generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993) (using empirical methods to demonstrate a correlation between the Justices’ personal preferences and their decisions). This concern is particularly relevant when the Supreme Court is deciding cases that have partisan implications, such as *Bush v. Gore*, 531 U.S. 98 (2000).

that interpret the ground rules of democracy, they too must be subject to the antidomination approach. In other words, *judicial* procedures in interpreting and applying the rules of democracy must likewise be free of domination.

As a start, a domination-minimizing approach constrains judicial action because courts would be limited to assessing the procedures by which legislatures determined the ground rules of democracy. Yet this limitation, while helpful, is not sufficient. Not every instance of dominating behavior by the legislature warrants judicial intervention. That is, courts should not intervene each and every time the legislature engages in an illegitimate exercise of public power.

For this reason, I claim that the decision by courts to intervene should be reconceptualized as a domination-minimizing institutional tradeoff. Under the antidomination model, the basic tradeoff is as follows: judicial action is warranted only if the actual and apparent domination that would result from judicial intervention is decisively outweighed by the actual and apparent domination that would result from the legislative action at issue. Not only does this tradeoff result in a net minimization of domination, it also constrains judicial intervention to serious instances of domination.

Consider Table 1 below, which describes four possible tradeoffs and the desirability of judicial intervention within each. Table 1 is concerned with the likelihood of domination (high or low) that would result from legislative and judicial action. The term “legislative” is shorthand for any governmental action that is not judicial action. This Table applies to actions taken by the Executive Branch, by political parties, by independent commissions, and the like.

The basic idea behind the institutional tradeoff is to prevent the *most* dominating legislative action with judicial intervention that is the *least* dominating. Judicial intervention is thus most preferred in cell *C* because such an intervention would prevent a high level of legislative domination with a relatively low

Table 1. Domination-Minimizing Institutional Tradeoffs

	Legislative Domination High	Legislative Domination Low
Judicial Domination High	A Judicial action not recommended unless tradeoff decisively domination-minimizing and no other feasible institution exists.	B Judicial action not recommended.
Judicial Domination Low	C Judicial action recommended.	D Judicial action not recommended unless tradeoff decisively domination-minimizing.

cost of judicial domination. Judicial domination is more likely to occur when the courts strike down a statute. In an antidomination approach, state actors including courts must also minimize the *appearance* of domination.¹⁹⁴

Judicial intervention is not recommended for those cases that fall into cell *B*. In this option, the prevention of a low likelihood of legislative domination comes with a high price in terms of judicial domination. Cells *A* and *D* are intermediate. Judicial intervention might be more pressing in cell *A* than in cell *D* because legislative domination is high in cell *A*. But in cell *A* the likelihood of judicial domination is also high; judicial intervention should therefore occur only if there are no other feasible or desirable institutional solutions. Judicial action in cell *D*, where both the likelihood of legislative domination and judicial domination are low, would be recommended only in the event that the tradeoff is decisively domination-minimizing.

To determine whether the processes by which a legislature adopted a rule are dominating, the court would need to consider the antidomination factors discussed above,¹⁹⁵ namely whether: (1) the statute has entrenching effects in terms of the organization of power; (2) the statute was created through a procedural abuse of power; (3) the statute embodies a substantive abuse of power; and (4) the statute creates an appearance of domination. To determine whether legislative action creates the appearance of domination, the court could rely on a reasonable person standard.¹⁹⁶

At the same time, if the court intervened for every instance of legislative domination, however slight, the court would run the risk of abusing its own power. To minimize the likelihood of judicial domination, the following judicial factors should be considered: (1) whether court action results in a procedural abuse of power; (2) whether court action would minimize domination and/or the appearance of domination; and (3) whether any other feasible or desirable institutional solution exists.¹⁹⁷

194. Depending on the circumstances, both judicial validation and judicial invalidation may have the appearance of domination. Judicial invalidation runs a higher risk of appearing dominating because the court is overturning a statute. If courts uphold statutes that are seen to be dominating, however, then they too appear to be allowing or condoning legislative domination. It is also necessary to focus on judicial reasoning, and not just the narrow holding of a case, because the kinds of reasons provided by courts will have an impact on the appearance of domination. In *Bush v. Gore*, 531 U.S. 98 (2000), for example, the Supreme Court's decision gave rise to the appearance of domination in part because the reasons given tracked the Justices' partisan affiliations. See, e.g., Cass R. Sunstein, *Order Without Law*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* 205, 206–07, 221 (Cass R. Sunstein & Richard A. Epstein eds., 2001) (arguing that while the Court's decision in *Bush v. Gore* put a decisive end to what might have become a constitutional crisis, the ruling itself did not give the appearance that the Justices were speaking for the law, in large part because the decision was neither unanimous nor grounded in precedent).

195. See *supra* section II.C.

196. For a discussion of the benefits and disadvantages of the reasonable person standard, see *supra* section III.A.2.

197. The legislative and judicial factors are not completely parallel because different risk factors apply to each institution. With judges, there is less concern that they will engage in self-dealing because of the nature of their institutional function. With legislators, by contrast, the substantive abuse of power is a major concern. The second judicial factor—minimizing domination and the appearance of

The institutional tradeoff would require an assessment of the legislative and judicial factors. If all the legislative factors are present, then the risk of legislative domination is likely high. If all the judicial factors are present, then the risk of judicial domination is likely low. This combination would result in a domination-minimizing institutional tradeoff because a high risk of legislative domination would be prevented by a low cost of judicial domination. In other words, if all the legislative and judicial factors are present, the tradeoff would point towards judicial intervention, depending, however, on whether the case falls into cell A, C, or D in Table 1 above. The basic point is that judicial action is warranted only if the legislative domination prevented outweighs the judicial domination that may occur in the act of prevention.

The antidomination model provides an alternative methodology to the current equal protection paradigm. The idea that the equal protection approach should be modified or even replaced is by no means unprecedented; indeed, a central tenet of the political markets approach is that courts should replace the equal protection approach with structural solutions for anticompetitive practices and rules.¹⁹⁸ While the political markets proposal is attractive for many reasons, one difficulty is that it increases the risk of judicial domination because the court would be in the position of fashioning structural solutions without being anchored to an existing doctrinal tradition.

This difficulty applies as well to the antidomination model. One mitigating factor is that under the antidomination model the court's general role of minimizing domination would apply equally to its own activities. In addition, as discussed in more detail in Part IV, courts can incorporate certain domination-minimizing factors into their decisions without disrupting the equal protection approach. The possibility of incorporating antidomination themes into equal protection doctrine is based to some extent on the argument that the distinction between equal protection balancing approaches and structural approaches tends to be overstated.¹⁹⁹ If these antidomination concepts are introduced over a sizeable period of time, allowing for constitutional dialogue among the branches, between levels of courts, and within the larger public, then the risk of the actuality and appearance of judicial abuse of power is minimized. A long-term view allows for evolution, experimentation, modification, and retreat.

domination—refers to the court's role in its supervisory capacity, and there is no reciprocal legislative equivalent. One factor that applies to courts, but not to legislatures, is the inquiry about whether there are any other feasible or desirable institutional solutions. Here, once again, this factor relates specifically to judicial intervention, and not to legislative decisionmaking, because the most domination-minimizing solution might not be court intervention at all, but some other kind of remedy. This factor thus places emphasis on the idea that judicial intervention should be employed only in the event that the democratic pathology at issue cannot be resolved by other means.

198. See Pildes, *supra* note 10, at 44–46.

199. See *supra* text accompanying notes 92–93.

C. EVALUATING THE STRUCTURAL IMPACT OF ELECTION LAW DECISIONS

In addition to reconceptualizing the judicial role within a specific subset of cases, the antidomination model supplies a preliminary framework for evaluating that role. As such, the antidomination model has two modes: a prescriptive mode and an interpretive mode. The prescriptive mode operates *ex ante*: it provides a method for determining the outcome of a case itself. The interpretive mode, by contrast, provides a methodology and a conceptual framework for assessing judicial decisions from a structural perspective. The interpretive mode is *post hoc*: it can be used analytically to evaluate whether or not a court should have intervened in a given conflict and whether its decision is domination-minimizing. It also provides diagnostic tools to assess a court's decisions in terms of their likely effects on the organization and exercise of power (as described below in Tables 2 and 3). The interpretive mode does not speak to how courts *should actually decide* election law cases; thus, it is perfectly compatible with the Supreme Court's current doctrinal approaches. In essence, this proposed framework enables us to evaluate the structural impact of the Supreme Court's election law decisions on the entrenchment of power and the procedural and substantive abuse of power.

1. The Entrenchment of Power

Do the Supreme Court's election law decisions tend to prevent the entrenchment of power? Table 2 below can be used to assess and rank the Supreme Court's election law decisions on the basis of their impact on the entrenchment of power.²⁰⁰ In Table 2, four possible tradeoffs are described, and for each, it is possible to assess the desirability of judicial action.

From the perspective of minimizing domination, cell *A* is the best option. Cell *A* represents a situation in which the Court has validated a statute, and its decision leads to the disentanglement of power. For example, in *South Carolina v. Katzenbach*,²⁰¹ the Supreme Court upheld the constitutionality of the Voting Rights Act of 1965. The Court's decision led to the disentanglement of power

Table 2. The Entrenchment of Power

	Disentanglement of Power	Entrenchment of Power
Judicial Validation	A <i>South Carolina v. Katzenbach</i>	B <i>Gaffney v. Cummings</i>
Judicial Invalidation	C <i>Baker v. Carr</i>	D <i>Shaw v. Reno</i>

200. I am indebted to Cass Sunstein for very helpful suggestions on this Table.

201. 383 U.S. 301 (1966).

because obstacles to voting were eliminated. By upholding legislative action (as opposed to striking it down), the Court has minimized any likelihood of judicial domination or the appearance of judicial domination.

The next best option is cell *C*. Cell *C* represents a situation in which the Court has invalidated a statute, and its decision leads to the disentanglement of power. Although the Court runs a higher risk of actual or apparent judicial domination by invalidating legislation, it has also minimized legislative domination by invalidating a statute that entrenched power. For example, in *Baker v. Carr*, the Court struck down the constitutionality of a redistricting plan in order to address the problem of malapportioned districts,²⁰² thereby disentangling the control of legislators who benefited from the malapportionment.

Cell *D* is the least attractive option. Cell *D* represents a situation in which the Court has invalidated a statute and its decision has led to the entrenchment of power. For example, in *Shaw v. Reno*, the Court struck down a redistricting plan that had created two African-American majority-minority districts that enabled North Carolina to send its first African-American representative to Congress since Reconstruction.²⁰³ Not only has the Court increased the likelihood of actual or apparent judicial domination, it has also struck down a disentangling statute. Cell *B* is not as problematic as cell *D*. Cell *B* represents a situation where the Court has validated a statute and its decision has led to the entrenchment of power. For instance, in *Gaffney v. Cummings*, the Court upheld a bipartisan gerrymandering scheme.²⁰⁴ Although the *Gaffney* decision may appear to be unproblematic because the weaker political party was not excluded from power, the state passed a law that entrenched power by insulating the political parties from challenges from the citizenry.²⁰⁵

2. The Procedural and Substantive Abuse of Power

Do the Supreme Court's election law decisions tend to prevent procedural and substantive abuses of power? Table 3 below describes four possible tradeoffs between legislative and judicial action. The analysis is very similar to that of Table 2 above. From the perspective of minimizing domination, the best option is cell *A*. Cell *A* represents cases in which the Court upholds a statute and its decision promotes the legitimate use of public power. For example, in *McConnell v. FEC*,²⁰⁶ the Supreme Court upheld campaign finance restrictions. These restrictions help to prevent abusive exercises of state power in which politicians

202. 369 U.S. 186 (1962).

203. 509 U.S. 630 (1993).

204. *Gaffney v. Cummings*, 412 U.S. 735 (1973).

205. Bipartisan gerrymandering occurs when both political parties agree to a redistricting scheme that provides roughly proportionate representation of the political strength of each party within the state. See BRUCE E. CAIN, *THE REAPPORTIONMENT PUZZLE* 159–66 (1984).

206. 540 U.S. 93 (2003). It could be argued, though, that the *McConnell* case is more complex from an abuse of power standpoint because campaign finance regulations protect incumbents. See, e.g., Dawood, *supra* note 22, at 290–91 (arguing that campaign finance regulations present a dilemma between entrenching the wealthy and entrenching the powerful).

Table 3. The Procedural and Substantive Abuse of Power

	Legitimate Exercise of Power	Illegitimate Exercise of Power
Judicial Validation	A <i>McConnell v. FEC</i>	B <i>Gaffney v. Cummings</i>
Judicial Invalidation	C <i>Baker v. Carr</i>	D <i>United States v. Reese</i>

accept donations in return for political influence.

The next best option is cell *C*. In cell *C*, the Court invalidates a statute and its decision leads to the legitimate exercise of power. In *Baker v. Carr*,²⁰⁷ legislators used public power for political gain in such a way that undermined the public interest. By invalidating the malapportioned districts, the Court's decision reduced the abusive exercise of state power. At the same time, there is a risk that the Court's intervention itself is dominating or appears to be dominating because its ruling affected every redistricting map in the country.

The cases that fall in cell *B* are interesting. In these cases, the Court validates a statute that was created through an abusive exercise of power. The Court avoids the reality and appearance of judicial domination because it has chosen not to overturn the legislature. But by not acting to prevent an evident abuse of power, the Court could also appear to be condoning domination. In *Gaffney v. Cummings*,²⁰⁸ for example, the Court's decision was arguably domination-reinforcing because the Court did not prevent the abuse of power that occurred when the major political parties implemented a self-interested bipartisan gerrymander. The Court went so far as to say that "judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so."²⁰⁹ From an antidomination perspective, however, the Court should have been particularly alert to the potential that the government was acting in a self-interested, power-enhancing manner.

Cell *D* is the least attractive option, and also the most difficult for which to find a contemporary example. In *United States v. Reese*,²¹⁰ the Supreme Court struck down sections of congressional statutes that prohibited interference with the vote in state and municipal elections. The Court's decision led to grievous abuses of power in the South. As a result of this decision, Southern states were able to employ various methods, including literacy and character tests, to disenfranchise African-Americans.

The antidomination model thus proposes an evaluative framework by which

207. 369 U.S. 186 (1962).

208. 412 U.S. at 754.

209. 92 U.S. 214 (1875).

210. *Id.*

the Supreme Court's election law decisions can be ranked and compared in terms of their structural impact on the organization and exercise of power.

IV. RETHINKING PARTISAN GERRYMANDERING

This Part applies the antidomination model to the Supreme Court's treatment of partisan gerrymandering in *Vieth v. Jubelirer*.²¹¹ As with any proposal that departs from the conventional route, a description of how the antidomination model would work in practice is inevitably speculative to some degree. One objective of this Part is to articulate in more detail what a structural solution to partisan gerrymandering claims might require. Since this is a preliminary sketch of a structural approach, it is only one interpretation, and by no means a definitive interpretation, of how courts could take questions concerning the organization and exercise of power into account in their election law decisions. Another objective is to show how the antidomination model would prevent the most obvious instances of the abuse of power by public officials without also involving courts too deeply or too often in supervision of the political process. Finally, this Part aims to uncover the dominating-minimizing themes that are present, yet often unacknowledged, in judicial doctrine. The existence of these themes suggests that the equal protection approach could be reoriented so as to provide courts with more effective tools to manage the inevitable structural dimension that arises in cases concerning the ground rules of democracy.

Section IV.A briefly describes the Supreme Court's treatment of partisan gerrymandering. Section IV.B focuses in detail on the Court's decision in the *Vieth* case. Section IV.C analyzes the *Vieth* case in light of the antidomination model, while section IV.D analyzes the institutional tradeoffs at stake. Section IV.E compares the antidomination model to the standard approaches in the literature, and describes how the antidomination model seeks to circumnavigate some of the pitfalls of these approaches while retaining their benefits. Finally, section IV.F demonstrates that there are significant domination-minimizing themes in the Supreme Court's election law jurisprudence.

A. THE SUPREME COURT AND PARTISAN GERRYMANDERING

The Supreme Court has defined partisan gerrymandering as "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes."²¹² Its decisions on partisan gerrymandering have centered on two interrelated issues: the constitutional harm of partisan gerrymandering, and the judicial standards that can identify the constitutional harm at stake.²¹³ The harm is not entirely obvious. After all, in a gerrymandered system, no one is denied the right to cast a ballot. Nor is anyone denied the right to have his or her vote counted. Furthermore, politically gerrymandered districts do not

211. *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (1969) (Fortas, J., concurring).

212. 541 U.S. 267 (2004).

213. 377 U.S. 533, 568 (1964).

violate the one-person, one-vote principle announced by the Supreme Court in *Reynolds v. Sims*.²¹⁴

1. Partisan-Free Redistricting?

One possible standard is that *any* consideration of political affiliation is constitutionally suspect. In its first foray into political gerrymandering, the Supreme Court rejected this approach, and concluded instead that some consideration of voters' partisan affiliation was inevitable in redistricting. At issue in *Gaffney v. Cummings*²¹⁵ was the constitutionality of bipartisan gerrymandering. Bipartisan gerrymandering occurs when both political parties agree to a redistricting scheme that provides roughly proportionate representation of the political strength of each party within the state.²¹⁶ In a six-to-three decision, the Court upheld the reapportionment plan, noting that:

The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but, when overlaid on a census map, it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area The reality is that districting inevitably has and is intended to have substantial political consequences.²¹⁷

According to the Court, “[p]olitics and political considerations are inseparable from districting and apportionment.”²¹⁸ In a similar vein, Robert Dixon, a prominent scholar of apportionment, has observed that *all* districting is gerrymandering.²¹⁹

2. Proportional Representation?

If the consideration of political affiliation is inevitable in redistricting, the question then becomes: at what point does the use of partisan identification violate the Equal Protection Clause of the Constitution? One possible answer is to use proportional representation as the yardstick: if the likely election results exceed strict proportional representation, then there has been “too much” consideration of political affiliation. By the same token, if the likely election results come close to being proportionately representative, then the Constitution has not been offended. An obvious problem with this position is that the

214. For an overview of the Supreme Court's partisan gerrymandering cases, see Berman, *supra* note 189, at 785–809; Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1647–60 (1993).

215. 412 U.S. 735 (1973).

216. See CAIN, *supra* note 205, at 159–60.

217. *Gaffney*, 412 U.S. at 753.

218. *Id.*

219. See DIXON, *supra* note 181, at 462.

composition of the legislature rarely reflects the popular vote. Because there is always some discrepancy between votes and seats in a winner-take-all electoral system, proportional representation is not a reliable standard against which to measure the constitutionality of partisan gerrymandering. In any event, the Supreme Court has repeatedly held that the Constitution does not guarantee proportional representation to groups.²²⁰ Another difficulty with using proportional representation as the yardstick is that it effectively insulates bipartisan gerrymandering from constitutional scrutiny.

3. One-Person, One-Vote?

In its next partisan gerrymandering case, *Karcher v. Daggett*, the Supreme Court used a completely different standard—the one-person, one-vote principle—in an effort to identify unconstitutional redistricting.²²¹ At issue in *Karcher* was whether New Jersey's congressional redistricting plan violated Article I, Section 2 of the Constitution.²²² The redistricting plan had been implemented by the Democratic Party, which had control of both houses of the state legislature as well as the Governor's office.²²³ Democratic legislators did not provide the criteria by which the district lines were being drawn, nor did they provide an adequate explanation for why other redistricting plans that had more equipopulous and compact districts had been rejected.²²⁴ The redistricting plan was signed into law the day before a new Republican Governor was inaugurated.²²⁵

A closely divided Supreme Court struck down the redistricting statute as a violation of Article I, Section 2.²²⁶ The Court's rationale was unexpected. A four-member plurality led by Justice Brennan simply dodged the issue of

220. See Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. REV. 257, 270 (1985).

221. 462 U.S. 725 (1983).

222. Article I, § 2 provides in part:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

U.S. CONST. art. 1, § 2, cl. 3. Article I, § 2 has been interpreted by the Supreme Court as requiring "equal representation for equal numbers of people" for congressional apportionment. See *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964). The Court in *Wesberry* held that congressional districts are created to achieve population equality "as nearly as practicable." *Id.* at 7–8. In *Kirkpatrick v. Preisler*, the Court held that the "as nearly as practicable" standard means that states must make a good-faith effort to avoid population variances among congressional districts. 394 U.S. 526, 530–31 (1969).

223. *Daggett v. Kimmelman*, 535 F. Supp. 978, 980 (D.N.J. 1982).

224. *Id.* at 982.

225. See *id.* at 980.

226. Justice Brennan wrote the opinion for the majority and was joined by Justices Marshall, Blackmun, Stevens, and O'Connor. See *Karcher*, 462 U.S. at 727. In a concurring opinion, Justice Stevens argued that the redistricting plan amounted to political gerrymandering in violation of the Equal Protection Clause. See *id.* at 748 (Stevens, J., concurring).

partisan gerrymandering altogether.²²⁷ The Court found that the population variations among districts, although minor, “were not the result of a good-faith effort to achieve population equality.”²²⁸ The deviation from population equality, however, was trivial; indeed the population disparities were less than the margin of error for the census data.²²⁹

The *Karcher* case demonstrated that the one-person, one-vote principle provided scant guidance for how courts should treat partisan gerrymandering. Indeed, this principle has had unexpected, and even unfortunate, consequences for partisan gerrymandering.²³⁰ Although the one-person, one-vote principle does impose certain constraints on redistricting, it also frees legislators from abiding by others. Justice White noted that an equipopulation standard enables legislators to segment city, county, and township lines in order to create equipopulous districts.²³¹ Once legislators are free to ignore pre-existing political boundaries, they are also free to draw lines in such a way as to maximize partisan strength.²³² As Justice Harlan observed, a standard “of absolute equality is perfectly compatible with ‘gerrymandering’ of the worst sort.”²³³ Because the one-person, one-vote standard must be met after each decennial census, redistricting (and hence partisan gerrymandering) have become routine occurrences. Far from constraining partisan gerrymandering, the one-person, one-vote standard may even encourage it.

4. Vote Dilution

It was not until 1986 that a six-to-three majority of the Supreme Court held that partisan gerrymandering could violate the Constitution. In *Davis v. Bandemer*,²³⁴ the constitutionality of Indiana’s reapportionment plan was challenged on partisan gerrymandering grounds. The reapportionment of Indiana’s General Assembly was done at a time when the Republican Party controlled the House and the Senate, as well as the Governor’s office.²³⁵ The redistricting plan was revealed two days before the end of the legislative session, at which point it passed in both Houses and was signed into law by the Governor.²³⁶ Republican leaders made statements admitting that the sole purpose of the plan was to disadvantage the Democrats; in the words of one Republican House Member, “[The] name of the game is to keep us in power.”²³⁷

227. *Id.* at 727 (majority opinion).

228. *Id.*

229. *See id.* at 769–70 (White, J., dissenting).

230. *See* Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 112–13 (2000).

231. *Karcher*, 462 U.S. at 774 (White, J., dissenting).

232. *Id.* at 776 n.12.

233. *Kirkpatrick v. Preisler*, 394 U.S. 542, 551 (1969) (Harlan, J., dissenting).

234. 478 U.S. 109 (1986).

235. *See id.* at 113–14.

236. *See id.* at 163–64 (Powell, J., dissenting).

237. *Id.* at 177–78.

A six-member majority, in an opinion by Justice White, held in *Bandemer* that partisan gerrymandering claims were justiciable.²³⁸ Justice White likened the harm of partisan gerrymandering to the harm of racial gerrymandering. In *White v. Regester*²³⁹ and *Whitcomb v. Chavis*,²⁴⁰ the Supreme Court had recognized the claim that “an identifiable racial or ethnic group had an insufficient chance to elect a representative of its choice.”²⁴¹ In the same way, partisan gerrymandering violated the principle that “each political group in a State should have the same chance to elect representatives of its choice as any other political group.”²⁴² Justice White argued that even though there was no obvious arithmetic standard like one-person, one-vote, this did not mean that partisan gerrymandering was not justiciable.²⁴³

As for the relevant standard, Justice White held that a political gerrymandering claim required that plaintiffs show “both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.”²⁴⁴ The majority agreed that the intent prong would be easy to satisfy provided the redistricting was done by a legislature.²⁴⁵ The majority disagreed, however, about how to measure discriminatory effect. On behalf of a four-member plurality, Justice White held that, to satisfy the effects prong, an equal protection violation must “be supported by evidence 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.”²⁴⁶ *Bandemer* stands for the proposition that partisan gerrymandering is unconstitutional “only when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.”²⁴⁷ In practice, the *Bandemer* standard has proved to be insuperable—since the case was decided, no federal court has struck down a redistricting plan on the basis

238. *See id.* at 123. Justice White’s plurality opinion was joined by Justices Brennan, Marshall, and Blackmun. Although the plurality opinion held that partisan gerrymandering claims were justiciable, it reversed the District Court’s finding that redistricting plan at issue was unconstitutional, and it did so on the basis that the standard used by the District Court in finding unconstitutional vote dilution was not sufficiently demanding. *See id.* at 13, 127–43. In a separate opinion, Justice O’Connor, Chief Justice Burger, and Justice Rehnquist concurred in the judgment to reverse the District Court, but, unlike the majority, held that partisan gerrymandering claims by major political parties were nonjusticiable. *See id.* at 144. Justice Powell, joined by Justice Stevens, concurred with the plurality’s holding that partisan gerrymandering claims were justiciable, but dissented from the plurality’s decision to reverse the District Court’s holding that the redistricting plan was unconstitutional. *See id.* at 161–62.

239. 412 U.S. 755 (1973).

240. 403 U.S. 124 (1971).

241. *Davis v. Bandemer*, 478 U.S. 109, 124 (1986).

242. *Id.*

243. *See id.* at 123.

244. *Id.* at 127.

245. *See id.* at 129.

246. *Id.* at 133. Justice Powell, joined by Justice Stevens, rejected the plurality’s approach to measuring discriminatory effect and found the redistricting plan unconstitutional. *See id.* at 161–62, 166–73 (Powell, J., concurring in part and dissenting in part).

247. *Id.* at 132.

of unconstitutional partisan gerrymandering.

B. *VIETH V. JUBELIRER* AND THE QUEST FOR STANDARDS

The Supreme Court's recent partisan gerrymandering case, *Vieth v. Jubelirer*,²⁴⁸ arose after Pennsylvania engaged in redistricting. After the 2000 census, Pennsylvania's congressional delegation was reduced from twenty-one to nineteen representatives.²⁴⁹ As a result of the loss of these two seats and various shifts in population, Pennsylvania's General Assembly was required to adopt a new redistricting plan. At that time, voters in Pennsylvania were fairly evenly split between the two major parties, with Democrats enjoying a slight majority—of registered voters, 53.6% were registered Democrats while 46.4% were registered Republicans.²⁵⁰

It so happened that during the redistricting process the Republican Party controlled both houses of the state legislature and the Office of the Governor. After receiving advice from national leaders,²⁵¹ Republican legislators in the General Assembly designed a redistricting plan that would enable Republican candidates to win at least two-thirds of the congressional seats in future elections.²⁵² This projected outcome differed significantly not only from the voters' partisan affiliation but also from the election results of 2000 in which ten Democrats and eleven Republicans were elected (with the Democratic candidates receiving the highest number of total votes).²⁵³ In 2002, the redistricting plan was passed by Republican majorities in the state legislature and signed into law by the Republican Governor. In addition to heavily skewing the state's representation in favor of the Republican Party, the redistricting map also reduced the number of truly competitive districts by creating safe seats for incumbents.

In *Vieth*, a five-member majority of the Court held that partisan gerrymandering was not a justiciable issue.²⁵⁴ Although a majority of the Court agreed on the final result in *Vieth*, the Justices did not agree on the rationale. A four-

248. 541 U.S. 267 (2004). The Supreme Court has decided two other partisan gerrymandering cases: *Cox v. Larios*, 542 U.S. 267 (2004), and *League of United Latin American Citizens (LULAC) v. Perry*, 126 S. Ct. 2594 (2006). In *Cox v. Larios*, the Court summarily affirmed a district court's determination that a partisan gerrymander orchestrated by the Democratic Party in Georgia violated one-person, one-vote. For a discussion of *Cox* and its implications, see Samuel Issacharoff & Pamela Karlan, *Where to Draw the Line? Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 565–76 (2004) (arguing that *Larios* allowed for a "second-order judicial review" of political gerrymandering on the basis of one-person, one-vote in the wake of the *Vieth* decision, which prevented first-order claims that a plan constituted excessive partisan gerrymandering).

249. See *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 674 (M.D. Pa. 2002).

250. See *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 536 (M.D. Pa. 2002).

251. According to plaintiffs, Dennis Hastert, Rick Santorum, and Karl Rove, among others, pressured state Republicans to reach an agreement on a pro-Republican plan. See *id.* at 535.

252. See *id.* at 536. In the 2004 election, twelve Republicans and seven Democrats were elected.

253. See *id.* In those congressional races, Democrats received 50.1% of the votes while Republican candidates received 49.9%. *Id.*

254. 541 U.S. 267, 281 (2004).

member plurality, led by Justice Scalia, held that there was a lack of “judicially discernible and manageable standards” for deciding whether Pennsylvania’s redistricting map violated the Constitution.²⁵⁵ For this reason, argued the plurality, partisan gerrymandering constituted a non-justiciable “political question” and therefore fell outside the purview of the courts. Justice Kennedy, who provided the fifth vote for the majority, agreed that a constitutionally appropriate standard was not available in *this* case, but disagreed with the plurality’s judgment that such a standard would never be found.²⁵⁶ Four dissenting Justices argued that constitutionally acceptable standards were available for adjudicating partisan gerrymandering claims.²⁵⁷ In effect, the *Vieth* decision proclaimed that federal courts could not provide relief for partisan redistricting, however extreme it may be, thereby giving, as one commentator put it, a “green light” for partisan gerrymandering to continue apace.²⁵⁸

1. The Plurality Opinion: No Standards Are Available

The plurality in *Vieth v. Jubelirer* gave a domination-minimizing rationale for why it would not intervene in the case. In his decision, Justice Scalia endorsed Chief Justice Marshall’s memorable phrase in *Marbury v. Madison* that “[i]t is emphatically the province and duty of the Judicial Branch to say what the law is.”²⁵⁹ Justice Scalia went on to say that “[s]ometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness.”²⁶⁰ In reaching this determination, Justice Scalia relied upon the Supreme Court’s “political question” doctrine. Political questions are those issues that are not appropriate for the Judicial Branch to decide; that is, they are non-justiciable. In *Baker v. Carr*,²⁶¹ the Supreme Court identified six conditions by which a political question could be identified.²⁶² In *Vieth*, Justice Scalia relied primarily upon the second factor of the *Baker* test, under which an issue is a political question if there is “a lack of judicially discoverable and manageable standards for resolving it.”²⁶³ Justice Scalia concluded that because there are no judicially discoverable and manageable standards available, partisan gerrymandering falls outside the purview of the courts.²⁶⁴

Justice Scalia’s claim about the unavailability of constitutional standards is

255. *Id.*

256. *See id.* at 307–09 (Kennedy, J., concurring).

257. *See id.* at 317–19 (Stevens, J., dissenting); *id.* at 343–45 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 355 (Breyer, J., dissenting).

258. *See* Michael C. Dorf, *The Supreme Court Gives Partisan Gerrymandering the Green Light—or at Least a Yellow Light*, FINDLAW’S WRIT, May 12, 2004, available at <http://writ.news.findlaw.com/dorf/20040512.html>.

259. *Vieth*, 541 U.S. at 277 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

260. *Id.*

261. 369 U.S. 186 (1962).

262. *See id.* at 217.

263. *Vieth*, 541 U.S. at 281.

264. *Id.*

based in large part on his assessment of how the lower courts have interpreted *Davis v. Bandemer*.²⁶⁵ As he put it, “Eighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application.”²⁶⁶ The standards announced in *Bandemer*, however, were unworkable and unmanageable.²⁶⁷ They provided scant guidance on the kind of proof that would be sufficient to uphold a claim of political gerrymandering.²⁶⁸ More importantly, Justice Scalia left out the crucial fact that lower courts had been interpreting *Bandemer* to require the finding that the political group in question “had essentially been shut out of the political process.”²⁶⁹ Given the impossibility of showing that a major political party has been “shut out” of politics entirely, it is hardly surprising that the lower courts did not uphold any political gerrymandering claims.

2. The Appellants’ Standard

The appellants in *Vieth* argued that a modified version of the racial redistricting standards would work in the partisan gerrymandering context.²⁷⁰ Under their proposed standard, plaintiffs alleging an unconstitutional partisan gerrymander must satisfy both an intent prong and an effects prong. First, plaintiffs must show that “the mapmakers acted with a *predominant intent* to achieve partisan advantage.”²⁷¹ Predominant intent can be shown by evidence that “other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage.”²⁷² Second, under the effects prong, plaintiffs would need to show that the challenged plan systematically packs and cracks the other party’s voters and that the “map can thwart the plaintiff’s ability to translate a majority of votes into a majority of seats.”²⁷³

Justice Scalia voiced a number of objections against the appellants’ standard. He found the effects prong to be unmanageable because it evaluated partisan

265. 478 U.S. 109 (1986). In *Bandemer*, Justice White, in an opinion for the plurality, likened the harm of partisan gerrymandering to the harm of racial vote dilution. *See id.* at 124.

266. *Vieth*, 541 U.S. at 281.

267. *See* Daniel H. Lowenstein, *Bandemer’s Gap: Gerrymandering and Equal Protection*, in *POLITICAL GERRYMANDERING AND THE COURTS* 65–66 (Bernard Grofman ed., 1990); Issacharoff, *supra* note 214, at 1643; Edward Still, *Hunting of the Gerrymander*, 38 *UCLA L. REV.* 1019, 1020 (1991).

268. The *Bandemer* Court held that the lack of proportionate results in a single election was not sufficient evidence to show the effects of partisan gerrymandering. 478 U.S. at 129–30. In addition, it was not possible to demonstrate the “consistent” degradation of the party’s political strength over time, particularly because district lines had to be redrawn every ten years, and there was no finding “that the Democrats would have no hope of doing any better in the reapportionment that would occur after the 1990 census.” *Id.* at 135–36.

269. *Id.* at 139.

270. *See Vieth v. Jubelirer*, 541 U.S. 267, 284–85 (2004). In *Shaw v. Reno*, 509 U.S. 630 (1993), and in *Miller v. Johnson*, 515 U.S. 900 (1995), almost the same majority of the Court devised new standards for deciding when racial redistricting violates the Equal Protection Clause. The appellants in the *Vieth* case relied on the *Shaw* and *Miller* standards to propose judicial standards for the partisan gerrymandering context. *See Vieth*, 541 U.S. at 284–85.

271. *Vieth*, 541 U.S. at 284.

272. *Id.*

273. *Id.* at 286–87.

gerrymandering on a statewide basis;²⁷⁴ it required a determination about a party's majority status;²⁷⁵ it assumed that a person's political affiliation could be identified even though it is not as permanently discernible as race;²⁷⁶ and it implicitly relied on proportional representation.²⁷⁷

Justice Scalia's main critique, however, was that the intent prong, which was based upon standards developed in the racial redistricting context, could not be applied to partisan gerrymandering cases.²⁷⁸ The reason did not seem to be that the predominant intent standard was unworkable in the partisan redistricting context. Instead, the reason given by Justice Scalia was that racial redistricting and partisan redistricting are fundamentally different: "[S]etting out to segregate voters by race is unlawful and hence rare, and setting out to segregate them by political affiliation is (so long as one doesn't go too far) lawful and hence ordinary."²⁷⁹

Racial and partisan redistricting, however, are not nearly as distinctive as the plurality suggests. When African-Americans overwhelmingly vote for the Democratic Party, as they do in many jurisdictions, then it is often difficult to tell whether a particular district has been drawn to include African-Americans (who happen to vote for Democrats) or to include Democrats (who happen to be African-American). In *Easley v. Cromartie*,²⁸⁰ the Supreme Court wrestled with precisely this problem. Justice Breyer, who authored the Court's opinion, acknowledged the difficulty in distinguishing between racial and partisan considerations, particularly when voting preferences are strongly correlated with race.²⁸¹ If racial and partisan redistricting are difficult to distinguish in practice, this suggests that similar standards could be used to adjudicate both kinds of cases.

3. The Dissenting Opinions' Standards

Justices Stevens, Souter, and Breyer each filed dissenting opinions in which they presented different standards. Justice Stevens argued that the racial redistricting standards could be used in the partisan gerrymandering context.²⁸² For Justice Stevens, the standard asks "whether the legislature allowed partisan

274. *See id.* at 285. As a matter of standing, the Supreme Court held that plaintiffs stating race-based equal protection claims must actually reside in the districts they are challenging. *See United States v. Hays*, 515 U.S. 737, 745 (1995).

275. *Vieth*, 541 U.S. at 288.

276. *Id.* at 287. It does not follow that reliable information about political affiliation would be impossible to gather. Legislators would not be spending countless resources on gerrymandering if political affiliation were as transient as the plurality suggested. The very success of gerrymandering shows that it is possible to determine political affiliation with some accuracy.

277. *Id.* at 288. The Constitution does not guarantee "equal representation in government to equivalently sized groups." *Id.*

278. *Id.* at 285.

279. *Id.* at 293.

280. 532 U.S. 234 (2001).

281. *See id.* at 243.

282. *See Vieth*, 541 U.S. at 326–30 (Stevens, J., dissenting).

gerrymandering considerations to dominate and control the lines drawn forsaking all neutral principles.”²⁸³ Unlike the appellants, Justice Stevens thought the predominant intent standard should be applied at the district level and not at the statewide level.²⁸⁴ Justice Souter, who was joined by Justice Ginsburg, developed a five-part vote dilution test.²⁸⁵ The test would be satisfied if a voter in a district could show that the state “intentionally acted to dilute his vote, having ignored reasonable alternatives consistent with traditional districting principles.”²⁸⁶ Like Justice Stevens, and unlike the appellants, Justice Souter applied his test to individual districts.²⁸⁷ Justice Breyer’s statewide vote dilution test was designed to address “unjustified entrenchment,” which is defined as those instances in which a minority takes and holds onto majority power by virtue of partisan districting.²⁸⁸

The Court plurality rejected all three versions as vague and lacking in guidance.²⁸⁹ Justice Stevens’s predominant intent standard was rejected as unmanageable in the partisan gerrymandering context; Justice Souter’s test, while manageable, was rejected for failing to specify with sufficient precision the constitutional harm being addressed; and Justice Breyer’s test was rejected for being overly vague.²⁹⁰ In addition, the plurality asserted that the very fact that the dissenting Justices proposed different standards showed that there was no constitutionally discernible standard.²⁹¹ But, the fact that there is more than one available standard arguably demonstrates that partisan gerrymandering *is* justiciable because courts can adjudicate the issue by rule.²⁹²

283. *Id.* at 339.

284. *See id.* at 328.

285. *See id.* at 347–50 (Souter, J., dissenting). Justice Souter, who proposed that the Court make a “fresh start,” devised a five-part test to determine whether an individual district was politically gerrymandered in violation of the Constitution. His purpose was to identify objective factors that would indicate when “partisan competition has reached an extremity of unfairness.” *Id.* at 345. First, the resident plaintiff would need to show that she belonged to a cohesive political group. Second, the plaintiff would need to show that traditional districting principles were disregarded. Third, the plaintiff would need to establish “specific correlations between the district’s deviations from traditional districting principles and the distribution of the population of [her] group.” Fourth, the plaintiff would need to provide a hypothetical district that would not either crack or pack her group’s membership, and that would be more faithful to traditional districting principles. Finally, the plaintiff would need to show intentionality, which should not be difficult, given that legislatures consciously adopt certain districting plans and not others. At this point, the burden would shift to the defendants to show that the redistricting plan was not motivated solely by naked partisan advantage. Souter emphasized that these are issues that judges already handle in their cases. *Id.* at 347–50.

286. *Id.* at 351.

287. *See id.* at 346.

288. *See id.* at 360–61 (Breyer, J., dissenting).

289. *See id.* at 292–301 (plurality opinion).

290. *See id.*

291. *See id.* at 292.

292. According to Richard Hasen, the *Vieth* plurality’s arguments about the lack of standards amounted to a “judicial sleight of hand.” Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims After Vieth*, 3 *ELECTION L.J.* 626, 637 (2004). Luis Fuentes-Rohwer advances the argument that it was not an absence of standards that accounts for the *Vieth*

In 2006, the Supreme Court decided another partisan gerrymandering case, *League of United Latin American Cities (LULAC) v. Perry*,²⁹³ which concerned the constitutionality of partisan-motivated mid-decade redistricting. After the 2000 census, the Texas legislature was unable to agree on a redistricting plan, and, as a result, a court-ordered redistricting plan was implemented for Texas's delegation to the U.S. House of Representatives. In 2003, the Republicans gained control of the Texas legislature and implemented a new redistricting map. The appellants in *LULAC* argued that the new redistricting plan was invalid because, among other things, Texas could not lawfully redistrict mid-decade solely to enhance partisan advantage; the redistricting map violated Section 2 of the Voting Rights Act; and the plan amounted to an unconstitutional partisan gerrymander.²⁹⁴ Seven members of the Supreme Court dismissed the partisan gerrymandering claims in *LULAC*, thereby leaving the holding in *Vieth v. Jubelirer* essentially unchanged.²⁹⁵

C. LEGISLATIVE REDISTRICTING AND THE ANTIDOMINATION MODEL

Under the antidomination model, the role of courts is to assess the procedures by which a redistricting plan was adopted. In the event that the process was distorted by a certain threshold of domination, the court would return the redistricting plan for resolution by the legislature. The legislature would then be under the obligation of producing a new map, and of showing that the process by which the new map was created was free of domination.

How might the antidomination model work in practice? Sections IV.C and IV.D present a hypothetical analysis of a partisan gerrymandering claim by using the *Vieth v. Jubelirer* case as an example. This analysis is akin to a thought-experiment, and is thus speculative, but its purpose is to identify the kinds of inquiry that would be possible under an antidomination approach.

Under the antidomination model, courts must assess the process by which the redistricting map was created. Thus, the first question raised is: did the process by which Pennsylvania's legislature created the redistricting plan give rise to domination or the threat of domination? There are four factors to consider: (1) whether the statute has entrenching effects; (2) whether the statute embodies a procedural abuse of power; (3) whether the statute embodies a substantive abuse

plurality's position, but an absence of judicial will to remain engaged in the political thicket, at least with respect to partisan gerrymandering claims. See Luis Fuentes-Rohwer, *Reconsidering the Law of Democracy: Of Political Questions, Prudence, and the Judicial Role*, 47 WM. & MARY L. REV. 1899, 1950–52 (2006).

293. 126 S. Ct. 2594 (2006).

294. See *id.* at 2605; see also Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751 (2004) (arguing for a procedural rule that would limit the frequency of redistricting in order to lessen the effects of partisan gerrymandering).

295. See *id.* at 2613. Five members of the Court (Justices Kennedy, Stevens, Souter, Ginsburg, and Breyer) held that Section 2 of the Voting Rights Act was violated by the redrawing of a formerly majority-Latino district. See *id.* at 2623.

of power; and (4) whether the statute creates an appearance of domination.²⁹⁶ Judicial intervention is more likely to be domination-minimizing when these four legislative factors are present. Each factor is considered in turn.

1. The Entrenchment of Power

Recall the facts of *Vieth v. Jubelirer*. Pennsylvania lost two seats after the 2000 census, reducing its congressional delegation from twenty-one to nineteen representatives.²⁹⁷ At the time of the redistricting, Democratic voters enjoyed a slight majority—of registered voters, 53.6% were registered Democrats while 46.4% were registered Republicans.²⁹⁸ As a direct result of the redistricting map, Republican candidates could win at least two-thirds of the congressional seats, and in the 2004 election, twelve Republicans and seven Democrats were elected. This result differed not only from the voters' partisan affiliation but also from the election results of 2000 in which ten Democrats and eleven Republicans were elected.²⁹⁹ Thus, in Pennsylvania, Republican voters made up slightly *less than half* of the voting population, yet as a result of the redistricting plan Republican candidates gained *two-thirds* of the seats. It is reasonable to conclude that the redistricting plan entrenched power in the hands of the Republican Party.

A finding of entrenchment, however, is not a sufficient reason for the Court to have intervened in *Vieth*. Despite the fact that Pennsylvania's redistricting plan entrenches power, this factor alone does not warrant judicial intervention. There is some genuine empirical uncertainty about the effect of gerrymandering on the distribution of power.³⁰⁰ For example, partisan gerrymandering has not been shown to be the main cause of the unfair advantages that incumbents enjoy over challengers.³⁰¹ Because the evidence on the actual effect of partisan gerrymandering on the organization of power is inconclusive, concerns about the entrenchment of power are not on their own sufficient to justify court intervention.

2. The Procedural Abuse of Power

A procedural abuse of power results when the law does not meet one or more of Fuller's rule-of-law requirements.³⁰² In terms of the legislative action that led to the adoption of the redistricting statute in Pennsylvania, most of the evidence shows that there was no procedural abuse of power. The redistricting legislation at issue in *Vieth* was not the result of an arbitrary exercise of power; instead, it was a product of law. The redistricting statute was passed by both houses of the

296. See *supra* section II.C.

297. See *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 674 (M.D. Pa. 2002).

298. See *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 536 (M.D. Pa. 2002).

299. See *id.*

300. See *supra* text accompanying notes 59–62.

301. See Persily, *supra* note 63, at 664–65. In statewide races, such as those for the U.S. Senate, which are by definition unaffected by redistricting, incumbents enjoyed high re-election rates. See *id.*

302. See FULLER, *supra* note 139, at 46–81.

state legislature and signed into law by the Governor. The redistricting of the state was rule-based: it was implemented through a statute that was promulgated, prospective, and predictable. One argument that could be made, however, is that the redistricting statute was not general; that is, it did not apply equally to all persons who resided in the state of Pennsylvania. Instead, the state diluted the voting power of a specific subset of citizens on the basis of their partisan affiliation. Judicial intervention, though, cannot be justified on the basis of a single procedural abuse of power.

3. The Substantive Abuse of Power

A substantive abuse of power occurs when public officials use their office for private or political gain. Substantive abuses of power include narrower cases such as bribery and corruption, but they also encompass a broader set of actions in which public officials engage in self-dealing to benefit themselves at the expense of the public interest.

In terms of the *Vieth* case, there is evidence of a substantive abuse of power. Republican legislators engaged in self-dealing in order to benefit their personal and partisan interests at the expense of the public interest. The redistricting map allocated two-thirds of the federal districts to Republican candidates even though voters in Pennsylvania were fairly evenly split between the major parties.³⁰³ The public interest was undermined because the statute manipulated electoral processes in order to under-represent individuals belonging to a particular political party. The redistricting map could not be explained *in any other way* than as an effort to maximize partisan strength; in other words, the map was not drawn in accordance with neutral criteria. Thus, on the spectrum of legislative action,³⁰⁴ the redistricting in *Vieth* would fall closest to the endpoint that represents naked partisan ambition. The public interest was further undermined because the Republican Party eliminated critical limitations on governmental power. By reducing the strength of the opposing party, the redistricting map lessened the overall accountability of government. The redistricting statute reduced voters' prospective choice of selecting from a range of genuinely competitive candidates and all but nullified the retrospective accountability of elected officials.

This lack of control and accountability extends into the future: under Pennsylvania's politically gerrymandered system, the normal democratic avenues for redress—elections—are no longer equipped to allow for accountability and change. Electoral results under Pennsylvania's redistricting map will simply be reproduced at each election. This problem is exacerbated by the fact that redistricting technology has become increasingly sophisticated with the result

303. See *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 536 (M.D. Pa. 2002).

304. See *supra* section III.A.2.b.

that maps are drawn with ever greater precision.³⁰⁵ In addition, mid-census redistricting allows political parties to make further adjustments to maximize incumbent and partisan advantage.³⁰⁶ Furthermore, the distorting effects of gerrymandering do not remain in the legislature—gerrymandering could bias all three branches of government once the legislative power in the state is translated into executive and judicial power.³⁰⁷ A substantive abuse of power causes particular damage to the process by which the rules of democracy are created precisely because the abuse is perpetuated into the future, and the potential remedies are nullified.

4. The Appearance of Domination

Minimizing the appearance of domination is an important objective in a democracy because citizens often lack the knowledge to distinguish between actual and apparent instances of domination. The *Vieth* case raises concerns about the appearance of domination. The redistricting statute was formulated and enacted by slim Republican majorities that had received advice from the national party.³⁰⁸ At the time the statute was passed, the Republicans had majorities in both houses of the legislature and the Office of the Governor. The statute was very beneficial to them, and visibly damaging to their political opponents. As a direct result of the redistricting plan, a minority of the state's population was able to vote two-thirds of the representatives into office.³⁰⁹ The consequences of these actions would extend forward in time because the Republican legislators would have complete control over the shape of future redistricting maps.

To the average voter, it would seem as though politicians had used public power in a self-interested manner to perpetuate their hold on office and insulate themselves from the demands of accountability and responsiveness.³¹⁰ When a redistricting map is described as “egregious,”³¹¹ the appearance of domination is a concern. To determine whether a legislative action creates the appearance of domination, courts could use a reasonable voter (or a reasonable person) standard.³¹² It is likely that a reasonable person would conclude that the

305. See Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 736 (1998); Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2553–54 (1997).

306. See *League of Latin American Cities (LULAC) v. Perry*, 126 S. Ct. 2594 (2006).

307. See Schuck, *supra* note 16, at 1329 (describing, but not entirely endorsing, this critique of partisan gerrymandering).

308. See *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 535–36 (M.D. Pa. 2002).

309. See *id.*

310. Guy-Uriel Charles advances the argument that the harm of political gerrymandering is the “loss of legitimacy” that arises from the “intentional manipulation of democratic institutions by state actors.” See Charles, *supra* note 5, at 607–08. In a like manner, the appearance of domination is concerned with legitimacy. See *supra* section II.C.4.

311. Fuentes-Rohwer, *supra* note 292, at 1901; Jeff Jacoby, *The Gerrymandering Scandal*, BOSTON GLOBE, Aug. 5, 2004, at A17.

312. For a discussion, see *supra* section III.A.2.c.

politicians' self-serving actions in the *Vieth* case gave rise to the appearance of domination.

5. Assessing Legislative Domination

On balance, the various factors in the antidomination approach suggest that legislative domination in the *Vieth* case was high. The main factors pointing to high legislative domination are first, the substantive abuse of power (or self-dealing); second, the appearance of domination; third (but less strongly), the entrenchment of power; and fourth (even less strongly), the procedural abuse of power.

To summarize, let us briefly consider each factor in turn. First, the way in which the redistricting statute was formulated and passed into law, and the effects of that statute in terms of creating Republican safe seats, strongly suggest a finding of a substantive abuse of power.³¹³ Second, there is a strong likelihood that under a reasonable person standard, the facts in the *Vieth* case would give rise to a finding of an appearance of domination on the part of the legislature. Third, in terms of the entrenchment of power, partisan gerrymandering entrenches power in the hands of one party at the expense of another and protects individual legislators from the threat of being removed from office in the next election. This kind of entrenchment runs counter to the constitutional protections against the abuse of governmental power. At the same time, the evidence on the effects of partisan gerrymandering on the organization of power is inconclusive,³¹⁴ suggesting that judicial intervention should not be done on the entrenchment issue alone. Fourth, and finally, there is some evidence of a procedural abuse of power because the redistricting statute did not apply generally, but had negative consequences for certain residents based on their partisan affiliation.

D. COURTS, LEGISLATURES, AND INSTITUTIONAL TRADEOFFS

Courts are essential to prevent the abuse of power by governmental agents.³¹⁵ At the same time, however, courts could abuse their own power.³¹⁶ Because courts are one of the institutions that interpret the ground rules of democracy, they too must be subject to the antidomination approach. For this reason, *judicial* procedures in interpreting and applying the rules of democracy must likewise be free of domination.

Under the antidomination model, the decision to intervene is treated as an institutional tradeoff. The basic idea is that the *most* dominating legislative action should be prevented by judicial action that is the *least* dominating. Had the Supreme Court intervened in *Vieth*, would this have amounted to domina-

313. See *supra* section IV.B.3.

314. See *supra* text accompanying notes 59–62.

315. See PERETTI, *supra* note 192, at 240.

316. See KRAMER, *supra* note 25, at 25–53.

tion? There are three factors to consider: (1) judicial action would not amount to a procedural abuse of power; (2) judicial action would minimize domination and/or the appearance of domination; and (3) no other feasible or desirable institutional solutions exist.³¹⁷ Judicial intervention is less likely to be dominating when these three judicial factors are present.

1. The Procedural Abuse of Power

If a court decides a case in the absence of procedural standards, this action may lead to domination and/or the appearance of domination. On the other hand, if standards to decide the case *do* exist, then the court's refusal to intervene would not be domination-minimizing, but domination-reinforcing. On behalf of the *Vieth* plurality, Justice Scalia concluded that there were no judicially discoverable and manageable standards available, and therefore that partisan gerrymandering was a nonjusticiable political question.³¹⁸

It is likely that a precise standard, like one-person, one-vote, is not available for resolving partisan gerrymandering claims. Indeed, the only precise standard is to say that elected officials should not be drawing district lines, but that decision likely exceeds the Court's authority. On the other hand, if the objective is minimizing domination, then a standard that addresses the most severe forms of partisan gerrymandering would serve this purpose. The predominant intent standard from the racial redistricting context³¹⁹ is perhaps the best option in this regard. This standard could identify the most severe forms of partisan gerrymandering; that is, when the redistricting map cannot be explained by any other neutral factors.

Racial redistricting and partisan gerrymandering are conceptually similar because the same issue is at stake in both kinds of cases: whether a non-neutral factor (racial identity or partisan affiliation) dominated the redistricting process to such a degree that all neutral considerations were outweighed. Concerns about the vagueness of the standards used to determine when the use of partisan identification is "too much" are valid and important. But, in the racial redistricting context, vague standards that addressed the problem of "too much" race were surprisingly successful in practice. *Shaw v. Reno*'s theory of "too much" race originally came under criticism by scholars,³²⁰ but it has since been praised as workable.³²¹ Richard Pildes observed, for instance, that vague constitutional constraints can produce stable political practices.³²² Although Professor Pildes

317. See *supra* section III.B.

318. *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004).

319. See *Shaw v. Reno*, 509 U.S. 630 (1993); see also *Miller v. Johnson*, 515 U.S. 900 (1995).

320. See Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 624 (1993); Pamela Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 91; Pildes & Niemi, *supra* note 162, at 485.

321. See Pildes, *supra* note 10, at 66–70; HASEN, *supra* note 11, at 47–50.

322. See Pildes, *supra* note 10, at 67–68.

did not specify a remedy for partisan gerrymandering, he noted that constraints on severe gerrymandering might be “politically manageable even if not judicially manageable.”³²³ In a similar way, Richard Hasen calls for judicial unmanageability—the idea that courts should use vague and unclear standards for articulating new equality rights. This minimalist strategy allows courts to proceed cautiously in new territory and enables courts to gain information before fully articulating a new equality rule.³²⁴ Under the antidomination model, however, a procedural abuse of power by courts is a real concern, as is the appearance of domination that would result from a court reaching a decision in the absence of precise standards.

The analysis above has proceeded on the basis that courts would be relying on the traditional equal protection approach. Another possibility, though one that is more speculative, is for courts to employ the standards of the antidomination model itself. The relevant standards would be the four antidomination factors described above; the court would consider whether the legislative action gave rise to an entrenchment of power, a procedural abuse of power, a substantive abuse of power, and an appearance of domination. Although these domination-minimizing factors may appear to be wholly unfamiliar, I shall show that many of the ideas underlying these factors already exist in the Supreme Court’s jurisprudence.³²⁵

2. Minimize Domination and the Appearance of Domination

If a court intervened to adjudicate partisan gerrymandering claims, it would minimize both the appearance and reality of domination caused by partisan gerrymandering. Under a vote dilution standard, the court would be able to target those severe gerrymanders in which all neutral redistricting criteria were ignored. Although the vote dilution standard would likely only reach the most obvious cases of partisan gerrymandering, it would nonetheless place some constraints on legislators when drawing district lines. The court would not be able to eliminate entirely the substantive abuse of power in partisan redistricting, but even eliminating the most obvious examples would be beneficial in terms of minimizing domination and the appearance of domination.

The theory of the antidomination model, however, can be used to reach not only examples of excessive partisan gerrymandering, but also run-of-the-mill gerrymandering. The reason I have focused on the most obvious examples of partisan gerrymandering, however, is that such a course appears to be the most feasible given the contemporary political climate. Preventing excessive gerrymandering is likely to garner more support than a course of action that would reach all forms of partisan redistricting.

323. *See id.* at 70.

324. *See* HASEN, *supra* note 11, at 48–49.

325. *See infra* section IV.F.

3. No Other Feasible or Desirable Institutional Solutions Exist

The availability of other institutional solutions is an important consideration in the antidomination approach. In the case of partisan gerrymandering, there are few alternate institutional solutions. The political route is unlikely to be feasible. Politicians have no incentives to change the way in which redistricting occurs. Nonpartisan redistricting commissions are a possibility.³²⁶ The adoption of such commissions, however, would require either legislative agreement or a citizen referendum. As a political matter, it is unlikely that this option will be adopted by all fifty states, particularly because the process by which such commissions are established may be skewed by partisan gerrymandering.

In terms of desirability, redistricting commissions suffer from one significant disadvantage. The characteristic that makes nonpartisan commissions appealing—their insulation from ordinary politics—is also a deficit from a democratic standpoint. Generally speaking, it is better if the rules of democracy are themselves determined through democratic processes.³²⁷

4. Assessing Judicial Domination

The main judicial conditions that point to court intervention are first, that the court's action would minimize domination and the appearance of domination, and second, that there are no other feasible or desirable institutional solutions.

There is greater uncertainty on the issue of whether judicial intervention would amount to a procedural abuse of power. On one hand, if the court decided the case in the absence of standards, then the risk of judicial domination is high. On the other hand, if standards *were* available, judicial invalidation of the redistricting statute would minimize legislative domination and the appearance of legislative domination. By the same token, if standards were available and the court refused to intercede, the court would run the risk of appearing to allow or condone legislative domination.

On balance, standards for distinguishing permissible and impermissible uses of partisan identity in all instances of redistricting are not yet available, and may never be. But standards for identifying the most obvious instances of partisan gerrymandering in all likelihood do exist.³²⁸ The predominant intent standard

326. Five states—Arizona, Hawaii, Idaho, New Jersey and Washington—currently employ nonpartisan redistricting commissions. See Redistricting Reform Watch, Fair Vote, <http://www.fairvote.org/?page=1428> (last visited Feb. 14, 2008). In Arizona, a citizen initiative in 2000 led to the creation of a nonpartisan redistricting commission. Although the use of independent redistricting commissions is not mandated by the Constitution, and should not therefore be ordered by courts, it is a viable solution for the problem of partisan gerrymandering, provided however, that the citizen initiative supporting its creation is successful. At the same time, independent redistricting commissions have been criticized for not increasing competitiveness in elections. See Reforms to Enhance Independent Redistricting Proposals, Fair Vote, www.fairvote.org/?page=1587 (last visited Feb. 14, 2008).

327. See Kang, *supra* note 174, at 669; see generally JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., Beacon Press 1984) (1981) (arguing that all persons affected by a rule should have a say in determining the rule).

328. See *supra* section IV.D.1.

developed in the racial redistricting cases is probably the best candidate to identify the most obvious examples of partisan gerrymandering.³²⁹ These standards have been tested in an analogous arena and have exceeded expectations in terms of their workability.³³⁰ To minimize the risk of judicial domination, the standard should be narrowly directed to the facts of *Vieth* and similar instances of severe gerrymandering.

5. Institutional Tradeoffs

As described in section III.B, the antidomination model proposes that the decision to intervene by courts should be reconceptualized as an institutional tradeoff. Under this proposal, the most domination-minimizing tradeoff occurs when a high risk of legislative domination is prevented by court action that presents a low risk of judicial domination. Table 1 in section III.B presents four possible tradeoffs, each of which is represented by a cell. In which cell does the *Vieth* case fall? Let's first consider the risk of legislative domination. It is reasonable to conclude that the risk of legislative domination is high because all four legislative factors are satisfied (as described in the discussion above). The next step is to consider the risk of judicial domination. Based on the discussion above, it is reasonable to conclude that the risk of judicial domination is low. All three judicial factors are satisfied, which suggests that court intervention would not raise a high risk of judicial domination. The *Vieth* case arguably fits best into cell *C* of Table 1: a high risk of legislative domination is prevented by a low risk of judicial domination. Given that cell *C* is the best tradeoff from a domination-minimizing perspective, this suggests that the Supreme Court should have intervened in the *Vieth* case.

For the sake of argument, though, let us assume that the risk of judicial domination is high because of the absence of precise standards. In this case, we would be in cell *D*, which represents a tradeoff between a high risk of legislative domination and a high risk of judicial domination. In cell *D*, judicial action is not recommended unless the tradeoff is decisively domination-minimizing and no other feasible institutional solution exists.³³¹ With respect to *Vieth*, we have already established that no other feasible or desirable solution exists. In terms of whether the tradeoff is decisively domination-minimizing, the first consideration is that even a slight reduction in the extent of partisan gerrymandering would greatly minimize the appearance, if not the actuality, of domination. The second consideration is that the predominant intent standard at issue has been used successfully by courts for many years in an analogous context. The legislative domination prevented by placing a curb on the extent of partisan gerrymandering would likely outweigh the judicial domination caused by the use of this standard. Thus, even if judicial domination is high because of the

329. *See id.*

330. *See supra* note 321.

331. *See supra* section III.B.

absence of precise standards, the tradeoff still points to judicial intervention. In sum, the institutional tradeoffs under the antidomination model support intervention by the Supreme Court in *Vieth*.

At this point, once the Court has decided to intervene, there are two options. Under the antidomination model, the Court would assess the decisionmaking procedures that led to the redistricting plan, and if a certain threshold showing of domination is reached, the Court would return the plan for resolution by the legislature. The legislature would then be under the burden of showing that the processes by which the new plan was created were legitimate and principled. Alternatively, the Court could resolve the partisan gerrymandering claim under the traditional equal protection approach, and it would be secure in the knowledge that judicial intervention would result in a net minimization of domination.

E. CHARTING A NEW COURSE

The antidomination approach charts a new course for the adjudication of partisan gerrymandering, one that seeks to circumnavigate both the Court's holding in *Vieth* that partisan gerrymandering is not justiciable and the political markets approach that urges robust court intervention to remedy partisan redistricting.

In *Vieth*, Justice Scalia asserted that the issue "is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and design a remedy."³³² Under the antidomination model, by contrast, the role of courts *is* to say when a violation has occurred, provided that a number of factors are present. At the same time, under the antidomination model the role of courts is *not* to design a remedy (at least not in the traditional sense); instead, the burden shifts to the legislature to formulate a new plan and demonstrate that the processes by which the plan was adopted were not distorted by domination. Counterintuitively, the antidomination model envisions a *more* restrained role for the courts than does the equal protection approach.³³³ Under the antidomination model, there is no assumption, as there is under the equal protection approach, that courts are in the business of designing a remedy in the traditional sense of crafting a standard like the one-person, one-vote principle.

The antidomination approach also departs from the route recommended by the political markets theorists. Political markets theorists have argued that robust judicial action is required to prevent politicians from insulating themselves from electoral competition.³³⁴ Indeed, Samuel Issacharoff has argued that all districting conducted by partisan officials is by definition unconstitutional.³³⁵ All future redistricting, according to Issacharoff, should be in the hands of

332. *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004).

333. My thanks to Jacob Levy for this observation.

334. See Issacharoff & Pildes, *supra* note 10, at 646.

335. See Issacharoff, *supra* note 10, at 644–48. *But see* Pildes, *supra* note 28, at 1616 (arguing for a moderated form of the competition model that takes other factors into account).

independent nonpartisan commissions.³³⁶ As discussed above, however, the empirical data raises serious questions about whether the competition model has accurately described the harm at stake in partisan gerrymandering.³³⁷ In response, Professor Issacharoff has argued that the competition model does not “rise or fall on the narrow empirical question whether gerrymandering is the predominant cause of the increase in uncontested or uncompetitive elections.”³³⁸ It would seem, though, that the empirical data on electoral competition is important if the harm of partisan gerrymandering is construed in terms of its effects on competition.

The antidomination model differs in two main respects. First, under the antidomination model, the concepts of entrenchment and competition are disaggregated; that is, the self-entrenching actions of political elites may be troubling even if such actions do lead to a reduction in the level of partisan competition. Thus, the strongest factors that point to judicial intervention are first, the substantive abuse of power and, second, the appearance of domination that is created by a severe partisan gerrymander. Under the antidomination model, the harm of partisan gerrymandering (at least under the facts of *Vieth*) resides not only (and not especially) in its entrenching effects, but also (and more particularly) in the abusive exercise of power and appearance of domination.

The second difference is that court intervention is not automatic under the antidomination model. In a domination-minimizing approach, the idea is to prevent the *most* dominating legislative action with judicial intervention that is the *least* dominating. Evidence of legislative domination—even a finding of a high level of legislative domination—does not mean that courts should automatically intervene. Under the antidomination model, the decision to intervene is treated as a domination-minimizing institutional tradeoff.

In addition, the antidomination model also departs from Richard Hasen’s position with respect to partisan gerrymandering that there is “nothing normatively improper (much less constitutionally improper) about a practice that causes no harm to individuals or groups of individuals.”³³⁹ Although Professor Hasen supports the enhancement of competition in some domains, he argues that the empirical evidence suggests that partisan gerrymandering does not cause the kinds of harms to the political process that would warrant judicial intrusion.³⁴⁰ Under the antidomination model, however, the harm of partisan gerrymandering does not rest solely on its effects on competition. Partisan gerrymandering, at least of the excessive variety in which no neutral criteria are taken into account, constitutes a substantive abuse of power by elected officials. In addition, partisan gerrymandering gives rise to the appearance of domination.

336. See Issacharoff, *supra* note 10, at 645–48.

337. See *supra* text accompanying notes 57–60.

338. Issacharoff, *supra* note 10, at 626.

339. HASEN, *supra* note 11, at 152.

340. See *id.* at 152–53.

Unlike the political markets theorists, Professor Hasen found the Court's recent decision in *Vieth v. Jubelirer* defensible.³⁴¹ He argued that no social consensus exists today on the extent to which political parties can take voter identification into account when drawing district lines.³⁴² The fact that various elites, such as newspaper editors, criticize partisan gerrymandering does not provide any standards for deciding these cases.³⁴³ Professor Hasen's requirement of social consensus, however, is not pitched at a high enough degree of generality. Courts should not have to find social consensus on the appropriate *legal standards* that apply to a case; surely, all that is required is that the *practice* at issue is seen to be undemocratic. Hasen argues that, in any event, there does not seem to be a social consensus against partisan gerrymandering because there is little political mobilization against the issue.³⁴⁴ One response is that while there may not be any social consensus about partisan gerrymandering per se, there may be considerable social consensus that politicians should not use their power to forward their own ends at the expense of the public interest. In other words, there may be social consensus at a higher level of abstraction.

In addition, the requirement of social consensus places too great a restraint on judicial intervention. Under certain circumstances, the protection of democracy may require judicial maximalism. As Cass Sunstein has argued, nonminimalist rulings, such as *Reynolds v. Sims*,³⁴⁵ are acceptable when they protect the preconditions of democratic government.³⁴⁶ It is unlikely, however, that there will always be wide social agreement in such situations. Social consensus, in other words, does not provide an adequate safeguard against the abuse of power.

In sum, the antidomination model offers a new approach to resolving partisan gerrymandering claims. This approach would prevent the most obvious instances of the abuse of power by public officials without also involving courts too deeply or too often in supervising the political process. The antidomination model seeks to circumnavigate some of the pitfalls of both the structural and equal protection approaches while retaining the benefits of each. In contrast to the equal protection approach, the antidomination model offers a solution to partisan gerrymandering but still attends to the concerns of equal protection

341. See Hasen, *supra* note 17, at 9. Michael Kang argues that “*Vieth* is not all bad as a policy outcome” because by declining to prevent offensive gerrymandering, the Supreme Court indirectly reduced defensive gerrymandering. Professor Kang distinguishes between offensive gerrymandering, in which the majority party seeks to weaken the incumbents of the minority party, and defensive gerrymandering, in which the majority party seeks to strengthen the posture of its own incumbents. See Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL’Y 443, 444–45 (2005).

342. See Hasen, *supra* note 17, at 9.

343. See *id.* at 9–10.

344. See *id.* at 10. The requirement of political mobilization to show social consensus raises the bar fairly high. A better source of social consensus may be found in public opinion surveys.

345. 377 U.S. 533 (1964).

346. See SUNSTEIN, *supra* note 77, at 57.

theorists to prevent judicial overreaching. In comparison to the political markets approach, the antidomination model incorporates structural factors, but, at the same time, it resists granting the Judicial Branch a robust role in its supervision of the democratic process.

F. ANTIDOMINATION THEMES IN EXISTING JURISPRUDENCE

Although the antidomination model provides a fresh perspective on the judicial role in monitoring the design of democratic institutions, I argue that the model also reflects elements of current court doctrine and practice. The Supreme Court has already incorporated certain domination-minimizing themes into its equal protection approach (and its First Amendment jurisprudence in the campaign finance context), but this incorporation has gone largely unrecognized. As discussed in this Part, the dissenting opinions in recent cases have also interpreted the Equal Protection Clause to include elements that closely resemble the factors under the antidomination model.

This incorporation by both majority and dissenting opinions has important implications. First, it suggests that the various factors under the antidomination model could be folded into the Supreme Court's equal protection approach. Second, it suggests that the Court's approach could gradually evolve in the direction of the antidomination model. The point here is not that the equal protection approach, in its current form, is sufficient or adequate to address the challenges posed by the judicial supervision of democracy. Instead, the argument is that the equal protection approach could be reoriented so as to furnish courts with more sophisticated legal tools to respond to the abuse of power by public officials. This reorientation could occur in a non-disruptive way if the domination-minimizing themes latent in judicial doctrine could be brought to the fore. Five domination-minimizing themes are discussed below.

1. Corruption and the Appearance of Corruption

In *Buckley v. Valeo*,³⁴⁷ the Supreme Court upheld the constitutionality of contribution limits for donations to political campaigns, even though such limits did impose restrictions on speech.³⁴⁸ Contribution limits were justified by the government's interest in preventing corruption and the appearance of corruption.³⁴⁹ Unlimited contributions raise the specter of corruption when they "are given to secure a political quid pro quo from current and potential officeholders."³⁵⁰

Corruption in the campaign finance context is more narrowly defined than self-dealing under the antidomination model. With respect to campaign contributions, corruption arises when politicians provide political favors in exchange for

347. 424 U.S. 1 (1976).

348. *See id.* at 14–15.

349. *See id.* at 26–27.

350. *Id.* at 26.

money.³⁵¹ Political favors include legislative votes or influence exerted on other policy matters.³⁵² Self-dealing in the antidomination model occurs when political elites act to benefit their private or partisan interests at the expense of the public interest.

Despite the differences between corruption and self-dealing, both understandings are concerned with state action that is not impartial. With respect to the campaign finance context, elected officials accept cash so that they can remain in office longer by winning the next election. With respect to partisan gerrymandering, elected officials draw district lines in a certain way with the same objective in mind—to remain in office longer by winning the next election. Trying to stay in office longer is not necessarily a problem; after all, democratic accountability is premised on the idea that elected officials will respond to their constituents because they wish to be re-elected. The difficulty arises when elected officials act in a manner that seems to advantage a personal interest (for example, securing re-election) *without* a public interest also being served.

The Supreme Court has also expressed concern about the appearance of corruption. In *McConnell v. FEC*,³⁵³ the Court asserted that the “cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.”³⁵⁴ Citizens are adversely affected by the appearance of corruption that results from large soft money donations to politicians. The appearance of corruption is almost as damaging as corruption itself because it undermines the integrity of the electoral process and erodes public confidence in democracy.³⁵⁵ In the same way, the appearance of domination that results from egregious partisan gerrymandering should be viewed as part of the harm it causes.

2. The Substantive Abuse of Power

In his dissenting opinion in *Vieth*, Justice Stevens offered an argument that evokes concerns about the substantive abuse of power.³⁵⁶ In a significant move, Justice Stevens rooted this concern about the abuse of power in an interpretation of the Equal Protection Clause. Stevens stated that the “concept of equal justice under law requires the State to govern impartially.”³⁵⁷ Citing *Romer v. Evans*, Stevens asserted that the “Constitution enforces a ‘commitment to the law’s

351. See Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1395 (1994).

352. See Bradley A. Smith, *Money Talks: Speech, Corruption, Equality and Campaign Finance*, 86 GEO. L.J. 45, 55 (1997).

353. 540 U.S. 93 (2003).

354. *Id.* at 144.

355. See *id.* at 137.

356. *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Stevens, J., dissenting).

357. *Id.* at 318; see also Victoria F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. (forthcoming 2008) (arguing for a “governance” model of equal protection that treats unequal laws as violating fundamental democratic principles).

neutrality where the rights of persons are at stake.”³⁵⁸ Neutrality and impartiality impose constraints on state action: “[T]he Equal Protection Clause implements a duty to govern impartially that requires, at the very least, that any decision by the sovereign serve some nonpartisan public purpose.”³⁵⁹

The idea that the state’s action must serve “some nonpartisan public interest” is closely connected to the definition of the substantive abuse of power under the antidomination model. A substantive abuse of power occurs when public officials use power to forward their own personal or partisan interests at the expense of the public interest. Likewise, Justice Stevens stated that government decisions must be “rational” in that they “satisfy a standard of legitimacy and neutrality; an acceptable rational basis can be neither purely personal nor purely partisan.”³⁶⁰

In *Vieth*, Justice Stevens argued that the partisan gerrymander was “devoid of any rational justification,” and therefore the state violated its duty to remain impartial.³⁶¹ In other words, once partisanship becomes “the legislature’s sole motivation—when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage—the governing body cannot be said to have acted impartially.”³⁶² The key issue in *Vieth* is that there was “no neutral criterion” to justify the redistricting.³⁶³ In a later case involving mid-census redistricting, Justice Stevens stated that by “taking an action for the sole purpose of advantaging Republicans and disadvantaging Democrats, the State of Texas violated its constitutional obligation to govern impartially.”³⁶⁴ In a similar fashion, under the antidomination model, a substantive abuse of power is most dominating when the actions serve no public interest.³⁶⁵

Justice Stevens concluded that it was not the absence of judicially manageable standards that led to the decision in *Vieth*, but it was instead “a failure of judicial will to condemn even the most blatant violations of a state legislature’s fundamental duty to govern impartially.”³⁶⁶ In a similar way, the role of courts under the antidomination model is to intervene when the legislature’s decisions do not serve any nonpartisan public purpose. Concerns about the substantive abuse of power could be folded into the obligation of the state under the Equal Protection Clause to remain impartial in its treatment of citizens.

358. *Id.* at 333 (citing *Romer v. Evans*, 517 U.S. 620, 623 (1996)).

359. *Id.* at 333.

360. *Id.* at 337–38.

361. *See id.* at 318.

362. *Id.*

363. *Id.* at 339.

364. *League of United Latin American Citizens (LULAC) v. Perry*, 126 S. Ct. 2594, 2635 (2006) (Stevens, J., dissenting).

365. *See supra* sections II.C.3. & III.D.2.b.

366. 541 U.S. at 341 (Stevens, J., dissenting).

3. The Entrenchment of Power

Justice Breyer noted that partisan gerrymandering will at times “fail to advance any plausible democratic objective while simultaneously threatening serious democratic harm.”³⁶⁷ In his dissenting opinion in *Vieth v. Jubelirer*, Justice Breyer focused in particular on the danger posed by the entrenchment of power.³⁶⁸ Entrenchment is defined as “a situation in which a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power.”³⁶⁹ Justice Breyer proposed a standard for identifying those instances of partisan gerrymandering that amount to “unjustified entrenchment.” Unjustified entrenchment occurs when a minority’s “hold on power is purely the result of partisan manipulation and no other factors.”³⁷⁰ Justice Breyer noted that the “democratic harm of unjustified entrenchment is obvious.”³⁷¹ Citing from the Court’s decision in *Reynolds*, he observed that a basic principle of democratic government is that a majority of citizens in a state have the ability to elect a majority of the legislators.³⁷²

With respect to the *Vieth* case, Justice Breyer stated that “gerrymandering that leads to entrenchment amounts to an abuse that violates the Constitution’s Equal Protection Clause.”³⁷³ Similar to the antidomination model, Justice Breyer was concerned about the organization and exercise of power. In addition, Justice Breyer argued that a severely gerrymandered legislature cannot always be expected to implement a remedy.³⁷⁴ A party could retain its hold on power indefinitely, despite population increases, because of the availability of highly sophisticated redistricting software that draws district lines with great precision.³⁷⁵ A partisan gerrymander could therefore be “virtually impossible to dislodge”³⁷⁶ without judicial intervention.

For Justice Breyer, the role of the court is to check the abuse of legislative power. In *Vieth*, Breyer also discussed in more general terms how courts could identify abuses of power that required judicial intervention, and he did so in a way that mirrors the approach of the antidomination model. He stated that “courts can identify a number of strong indicia of abuse.”³⁷⁷ One such indication is the “presence of actual entrenchment.”³⁷⁸ This is particularly the case when entrenchment is “accompanied by the use of partisan boundary-drawing criteria . . . that both departs from traditional criteria and cannot be explained

367. *Id.* at 355 (Breyer, J., dissenting).

368. *Id.*

369. *Id.* at 360.

370. *Id.*

371. *Id.* at 361.

372. *Id.* (citing *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)).

373. *Id.* at 362.

374. *See id.* at 363.

375. *See id.* at 364.

376. *Id.*

377. *Id.* at 365.

378. *Id.*

other than by efforts to achieve partisan advantage.”³⁷⁹ Recall that the discussion of the substantive abuse of power follows a similar line of argument.³⁸⁰ A finding of a substantive abuse of power is much stronger when there are no public objectives and only partisan objectives that are being achieved by the redistricting.³⁸¹

In a later case, involving mid-census redistricting in Texas, Justice Breyer reiterated his concerns about the entrenchment of power.³⁸² In his dissenting opinion, Justice Breyer pointed to three factors that invalidated the plan on equal protection grounds: first, that the redistricting plan entrenched the Republican Party; second, that traditional districting criteria were ignored; and third, that there was no justification for the redistricting other than partisan advantage.³⁸³ These three factors replicate the entrenchment of power and substantive abuse of power elements of the antidomination model.

4. Domination-Minimizing Institutional Tradeoffs

Although Justice Kennedy’s concurring opinion in *Vieth* was focused on the issue of standards, it also discussed the respective institutional roles of courts and legislatures in a democracy. With respect to the institutional role of legislatures, Justice Kennedy wrote:

The ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government, and in the citizenry itself. Here, one has the sense that legislative restraint was abandoned. That should not be thought to serve the interest of the political order. Nor should it be thought to serve our interest in demonstrating to the world how democracy works.³⁸⁴

At the same time, Justice Kennedy declared that a “decision ordering the correction of all election district lines drawn for partisan reasons” would amount to an “unprecedented intervention in the American political process” by courts.³⁸⁵ But such an intervention is not completely prohibited. Justice Kennedy stated that “the Court’s own responsibilities require that we refrain from intervention in this instance”³⁸⁶ because of the lack of neutral principles for redistricting. At the same time, Justice Kennedy did say that if workable standards could be discovered, then courts should give relief.³⁸⁷ For Kennedy, the neutral

379. *Id.*

380. *See supra* sections III.D.2 & IV.C.3.

381. *See id.*

382. *See* League of United Latin American Citizens (LULAC) v. Perry, 126 S. Ct. 2594, 2652 (2006) (Breyer, J., concurring in part and dissenting in part).

383. *Id.* at 2652.

384. 541 U.S. at 316–17 (Kennedy, J., concurring).

385. *Id.* at 306.

386. *Id.* at 317.

387. *See id.* at 317.

principles are needed not only to draw electoral districts, but also to “limit and confine judicial intervention.”³⁸⁸

A similar institutional tradeoff occurs under the antidomination model: courts play a critical domination-minimizing role by preventing the legislative abuse of power, yet judicial action itself could be dominating if not properly contained. Justice Kennedy also pointed the way to another route: he hinted that the Supreme Court needed to hear “statements of principled, well-accepted rules of fairness that should govern districting, or . . . helpful formulations of the legislator’s duty in drawing district lines.”³⁸⁹ Under the antidomination model, elected officials have a duty to exercise their authority in a way that also serves the public interest, rather than exclusively serving their private or partisan interests.³⁹⁰

5. Federal Courts and the Abuse of State Power

Under the antidomination approach, federal courts are viewed as being, at times, the only institutions that are positioned to prevent the abuse of state power. Indeed, there are important precedents for an intervention by the Supreme Court in the event that state legislatures abuse their power. The Court’s reapportionment decisions provide a helpful comparison to the partisan gerrymandering context. As with partisan gerrymandering, legislators from malapportioned districts had a vested interest in maintaining their power base, and were therefore unwilling to distribute representation in a fair manner. It was for these reasons that the Supreme Court intervened in its landmark decision *Baker v. Carr*.³⁹¹ In *Baker*, the Supreme Court cast aside its practice of avoiding “political questions” when it held that legislative malapportionment was a justiciable issue.³⁹² In essence, the Court struck down a reapportionment plan in order to address the problem of legislative self-entrenchment, thereby triggering the reapportionment revolution. The important point here is that the Supreme Court recognized in *Baker* that the Judicial Branch can play an indispensable role in preventing the abuse of state power.

As a result of the reapportionment revolution, electoral districts across the country were divided along the one-person, one-vote principle announced by the Supreme Court in *Reynolds v. Sims*.³⁹³ In *Reynolds*, the Court stated that in a representative government, “the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.”³⁹⁴ According to the Court, this principle is rooted in the rule of law itself—it is “an essential part of the

388. *See id.* at 306–07.

389. *Id.* at 308.

390. *See supra* section II.C.3.

391. 369 U.S. 186 (1962).

392. *Id.* at 209.

393. 377 U.S. 533 (1964).

394. *Id.* at 562.

concept of a government of laws and not men.”³⁹⁵ In addition, the Court observed that in a society based upon representative government, it would be reasonable for a majority of citizens to elect a majority of the legislature.³⁹⁶ Were the Court to permit minority control of state legislatures by refusing to intervene, majority rights would be completely denied. The Court concluded that because legislatures enact laws that apply to all citizens, they should be “bodies which are collectively responsive to the popular will.”³⁹⁷

Taken together, these trends and themes within the Supreme Court’s jurisprudence point toward the possibility of courts developing legal tools to address the problem posed by the abuse of power. This implies that it would be possible for courts to incorporate the factors of the antidomination model into the traditional equal protection approach, and thereby reorient the equal protection approach so that courts can respond more effectively to the structural dimension of the law of democracy.

CONCLUSION

Madison once observed that “[n]o form of government . . . can be a perfect guard against the abuse of power. The recommendation of the republican form is, that the danger of abuse is less than in any other.”³⁹⁸ For Madison, *the* foremost protection against such abuse was the mechanism of elections.³⁹⁹ The most effective constraint on power is that legislators “will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed and when they must descend to the level from which they were raised.”⁴⁰⁰ To the extent that partisan gerrymandering dampens the legislators’ fear that they will be removed from power, a critical democratic safeguard is deeply compromised.

In this Article, I have advanced a normative and institutional theory of antidomination that takes preliminary steps in thinking about how courts should address this significant problem. In general, I argue that courts need to develop more sophisticated tools that would allow them to minimize the illegitimate exercise of power by public officials in the design of democratic institutions without involving courts too deeply in determining what that design should be. A domination-minimizing conception of the judicial role, and the institutional division of labor it presupposes, would enable courts to create incentive structures to encourage political actors to engage in legitimate and principled decisionmaking while simultaneously discouraging courts from adopting too robust a role in supervising the democratic process. Under the antidomination

395. *Id.* at 568.

396. *See id.* at 565.

397. *Id.*

398. Letter from James Madison to Thomas Ritchie (1825), in *THE FORGING OF AMERICAN FEDERALISM: SELECTED WRITINGS OF JAMES MADISON* 46, 46 (Saul K. Padover ed., 1953).

399. *See* *THE FEDERALIST* No. 52, at 295 (James Madison) (Clinton Rossiter ed., 1999).

400. *Id.*

model, the principal role of the courts is to minimize domination and the appearance of domination in the processes through which democracy is designed.

Although this Article has focused on the issue of partisan gerrymandering, the antidomination approach could be applied more generally to other concrete problems in the judicial oversight of democratic politics. In general, whenever the integrity of the legislative decisionmaking process is compromised, the antidomination model furnishes courts with adjudicative tools that allow for limited but targeted intervention. Given the urgent concerns about the democratic deficit, it is essential that the processes by which the rules of democracy are formulated are free of both the actuality and appearance of domination. The legitimacy of democratic institutions depends in no small part on the impartial exercise of public power in the processes by which such institutions are designed.