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Cover Page Footnote

Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School. Co-Director, Stanford Law School Supreme Court Litigation Clinic. I thank Tommy Goldstein and Viola Canales for helpful suggestions

THE PARTISAN OF NONPARTISANSHIP: JUSTICE STEVENS AND THE LAW OF DEMOCRACY

*Pamela S. Karlan**

At the turn of the last century, the fictional Chicago bartender Mr. Dooley uttered perhaps the most widely quoted remark ever made about the relationship between constitutional adjudication and politics. In the course of a conversation with his friend Hennessey about the *Insular Cases*—a series of decisions concerning the application of the Constitution to territories the United States had annexed or occupied after the Spanish-American War¹—Mr. Dooley observed,

“An’ there ye have th’ decision, Hinnissy, that’s shaken th’ intellects iv th’ nation to their very foundations, or will if they thry to read it. . . . Some say it laves th’ flag up in th’ air an’ some say that’s where it laves th’ constitution. Annyhow, something’s in th’ air. But there’s wan thing I’m sure about.”

“What’s that?” asked Mr. Hennessy.

“That is,” said Mr. Dooley, “no matter whether th’ constitution follows th’ flag or not, th’ supreme coort follows th’ iliction returns.”²

A century later, *Rasul v. Bush*³ shows that it still matters whether the Constitution applies to the part of Cuba we occupy. And in *Bush v. Gore*,⁴ we saw Mr. Dooley’s aphorism turned on its head: This time, the election returns followed the Supreme Court.

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1. The Supreme Court later explained that the *Insular Cases* stood for the proposition that “not every constitutional provision applies to governmental activity even where the United States has sovereign power.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990); see, e.g., *Neely v. Henkel*, 180 U.S. 109, 119, 123 (1901) (holding that despite U.S. military occupation, Cuba remained a foreign country that “cannot be regarded, in any constitutional, legal or international sense, a part of the territory of the United States” and therefore that the appellant could be extradited to Cuba and tried there without receiving U.S. constitutional protections).

2. Finley Peter Dunne, Mr. Dooley’s Opinions 26 (1901). The particular case Mr. Dooley was trying to explain was *Downes v. Bidwell*, 182 U.S. 244 (1901), which concerned the question whether Article I permitted the government to impose tariffs on goods entering the United States from Puerto Rico.

3. 542 U.S. 466 (2004).

4. 531 U.S. 98 (2000).

In recent years, the relationship between elections and politics seems to have been turned on its head more generally. Rather than elections determining who will govern, the government determines who will be elected. The relationship among the voters, the government, and the courts has become increasingly complicated. On a variety of issues, Alexander Bickel's counter-majoritarian difficulty⁵ and John Hart Ely's representation-reinforcing judicial review⁶ have fought each other to a stalemate. Should courts defer to or distrust campaign finance legislation? Do initiatives imposing term limits promote democracy or undermine it? As for the Reapportionment Revolution, was Robert Frost right that "[t]he trouble with a total revolution . . . [i]s that it brings the same class up on top"?⁷ While Justice John Paul Stevens has insisted that it is not the Supreme Court's "constitutional function to choose between the competing visions of what makes democracy work,"⁸ every Justice must make that choice unless he or she is prepared to declare questions about politics to be nonjusticiable political questions, a stance that Justice Oliver Wendell Holmes long ago termed "little more than a play upon words."⁹ Last Term, for example, in *Clingman v. Beaver*,¹⁰ the Court upheld Oklahoma's semi-closed primary system, which permits only party members and independents to vote in a party's primary. The majority credited the state's policy with advancing a number of "important" democracy-enhancing interests—in particular, preserving the identifiability of political parties and the ideological cue that party nomination provides to voters in the general election.¹¹ By contrast, Justice Stevens's dissent argued that rather than enhancing democracy, Oklahoma's law impaired it, insulating the major parties from competition and exacerbating the pathologies of safe districting.¹² The previous Term, in *McConnell v. Federal Election Commission*,¹³ Justice Stevens and Justice Sandra Day O'Connor jointly delivered an opinion for the Court upholding key sections of the Bipartisan Campaign Reform Act of 2002. They explained that the Act's contribution limits protected the integrity of "the electoral process . . . through which a free society democratically translates political speech into concrete governmental action,"¹⁴ and that "[j]ust as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their

5. See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).

6. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

7. Robert Frost, *A Semi-Revolution*, in *The Poetry of Robert Frost* 363, 363 (Edward Connery Lathem ed., 1979).

8. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 598 (2000) (Stevens, J., dissenting).

9. *Nixon v. Herndon*, 273 U.S. 536, 540 (1927).

10. 125 S. Ct. 2029 (2005).

11. See *id.* at 2039.

12. See *id.* at 2054 (Stevens, J., dissenting).

13. 540 U.S. 93 (2003).

14. *Id.* at 137 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 401 (2000)) (Breyer, J., concurring).

constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder.”¹⁵ By contrast, Justice Antonin Scalia in dissent argued that the Act’s restrictions undermined the democratic process because they “prohibit[ed] the criticism of Members of Congress by those entities most capable of giving such criticism loud voice: national political parties and corporations, both of the commercial and the not-for-profit sort” and further entrenched incumbents.¹⁶ Cases like *Clingman*, *McConnell*, and *Vieth v. Jubelirer*¹⁷ almost inevitably force the Justices to choose between the litigants’ competing visions of what makes democracy work.

To say that there are competing visions is not necessarily to say that individual Justices themselves invariably hew to a particular one. My longtime coauthor Rick Pildes has perceptively argued that the Justices of the later Rehnquist Court could be divided into two camps based on their “images of democracy.”¹⁸ On one side were Justices who thought “democracy requires order, stability, and channeled, constrained forms of engagement”¹⁹—the five Justices in the *Bush v. Gore* majority plus, sometimes, Justice Stephen Breyer. On the other side were Justices who thought democracy “requires and even celebrates relatively wide-open competition that may appear tumultuous, partisan, or worse.”²⁰ The exemplar of this latter camp, Professor Pildes suggested, was Justice Stevens.

In the years since *Bush v. Gore*, however, the picture has grown somewhat more complicated. Consider, for example, the lineup in *Republican Party of Minnesota v. White*.²¹ The Court, in an opinion by Justice Scalia joined by the other members of the *Bush v. Gore* majority, struck down on First Amendment grounds a Minnesota canon of judicial conduct prohibiting candidates for judicial office from announcing their views on disputed legal issues. Once a state decides to elect its judges, the Court held, it cannot “prevent[] candidates from discussing what the elections are about.”²² Thus, “[i]f the State chooses to tap the energy and the legitimizing power of the democratic process” for selecting judges,²³ it must accept the robust and sometimes strident discussion of issues in which candidates for office often engage. By contrast, Justice Stevens, joined by the other three *Bush v. Gore* dissenters, would have upheld the “channeled,

15. *Id.* at 153.

16. *Id.* at 248 (Scalia, J., dissenting).

17. 541 U.S. 267 (2004) (involving the question whether the Constitution constrains partisan gerrymandering); see also *infra* notes 53-62 and accompanying text (discussing *Vieth*).

18. Richard H. Pildes, *Democracy and Disorder*, in *The Vote: Bush, Gore, and the Supreme Court* 140, 148 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

19. *Id.* at 160.

20. *Id.*

21. 536 U.S. 765 (2002).

22. *Id.* at 788.

23. *Id.* (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

constrained forms of engagement” created by the Minnesota canon because he saw judicial elections as a distinct arena in which “electioneering” could “compromise” the “judicial reputation for impartiality and openmindedness.”²⁴

Or consider redistricting. The political gerrymandering cases essentially pit partisanship and competition against one another, at least when it comes to elections themselves. Unless redistricting is channeled and constrained, political competition is unlikely to be wide open, at least within individual districts.²⁵ In *Vieth*,²⁶ four Justices—Chief Justice William Rehnquist and Justices O’Connor, Scalia, and Clarence Thomas—took an entirely hands-off position, viewing constitutional challenges to political gerrymanders as nonjusticiable.²⁷ Four other Justices—Justices Stevens, David Souter, Ruth Bader Ginsburg, and Breyer—offered three separate standards for adjudicating such cases and concluded that the plaintiffs challenging Pennsylvania’s Republican-controlled gerrymander had stated a claim.²⁸ Finally, Justice Anthony Kennedy, in an example of what Justice Scalia elsewhere colorfully described as “Never Say Never Jurisprudence,”²⁹ left open the possibility that a justiciable standard for adjudicating such cases would someday emerge, but refused to entertain such challenges until it did.³⁰ Thus, the recent cases make it impossible to align the Justices along an interventionist/anti-interventionist axis and suggest that each of the Justices sometimes prefers tumultuous politics to constrained forms of engagement . . . and sometimes does not.

One reason it may be hard to capture the Justices’ visions along a single axis may be the fact that the political process itself involves multiple occasions for legal regulation and judicial review. I have argued elsewhere that the right to vote actually embodies a constellation of concepts: participation, aggregation, and governance.³¹ With respect to participation, a key legal question concerns who is entitled to cast a ballot and have it counted.³² With respect to aggregation, a great deal of contemporary

24. *Id.* at 802 (Stevens, J., dissenting).

25. See Samuel Issacharoff & Pamela S. Karlan, *Where To Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541, 557-74 (2004) (discussing the prevalence of gerrymanders that create noncompetitive districts).

26. 541 U.S. 267 (2004).

27. *Id.* at 281 (plurality opinion).

28. For a summary of their various proposals, see Issacharoff & Karlan, *supra* note 25, at 561-62.

29. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 750 (2004) (Scalia, J., concurring in part and concurring in the judgment).

30. See *Vieth*, 541 U.S. at 309-17 (Kennedy, J., concurring).

31. See Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 Tex. L. Rev. 1705 (1993).

32. *Cf.* 42 U.S.C. § 19731(c)(1) (2000) (providing for purposes of the Voting Rights Act, that “[t]he terms ‘vote’ and ‘voting’ shall include ‘all action necessary to make a vote effective . . . including, but not limited to, registration, . . . casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast’”). That the right to have one’s ballot counted does not follow ineluctably from the right to receive and cast a ballot is one of the central lessons of the litigation surrounding provisional ballots under the

litigation concerns the sorts of electoral districts that are used and how voters are assigned to them. And with respect to governance, cases may turn on the extent to which rules governing the electoral process affect whether and how a voter's policy preferences are translated into law.

Interventions at different stages of this electoral process, in service of a variety of substantive values, may raise distinct problems. For example, once the process is underway, the probable beneficiaries of judicial intervention are far more identifiable, thus posing a more serious risk that courts will be viewed as partisan actors. With the notorious exception of *Bush v. Gore*, the Supreme Court has generally focused on prospective, structural questions—for example, whether particular districts or campaign finance regimes should be used for future elections—rather than retrospective review of particular elections. And the Court overall has been far more willing to intervene when racial discrimination or free speech are at stake than when other claims—such as economic or social equality—are being advanced.

In this Essay, I suggest that one pervasive theme running through Justice Stevens's jurisprudence is a commitment to nonpartisanship. In some important ways, Justice Stevens's commitment to nonpartisanship is an offshoot of a more general feature of his jurisprudence: the "one Equal Protection Clause" perspective.³³ That perspective explains why, relative to the Burger and Rehnquist Courts as institutions, Justice Stevens was both more open to claims of political gerrymandering and less open to claims of racial vote dilution or gerrymandering, at least as a constitutional matter. In the end, he has viewed all gerrymanders, regardless of the demographic characteristics that were used to allocate voters among districts, as essentially political, and thus properly subject to the same constraints.³⁴ At the same time, Justice Stevens has also treated discrimination on the basis of politics as subject to the same constraints regardless of the form of state action involved. If the state cannot "base a decision to hire, promote, transfer, recall, discharge, or retaliate against an employee, or to terminate a contract, on the individual's partisan affiliation or speech," then it should follow that "political affiliation is not an appropriate standard for excluding voters from a congressional district" either.³⁵ For Justice Stevens, the "concept of equal justice under law [that] requires the State to govern

ironically titled Help America Vote Act. See Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 Geo. Wash. L. Rev. 1193 (2005); Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 Geo. Wash. L. Rev. 1206 (2005).

33. See *Karcher v. Daggett*, 462 U.S. 725, 749 (1983) (Stevens, J., concurring). See generally Pamela S. Karlan, *Cousins' Kin: Justice Stevens and Voting Rights*, 27 Rutgers L.J. 521 (1996); Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 Harv. L. Rev. 1146 (1987).

34. See Karlan, *supra* note 33.

35. *Vieth*, 541 U.S. at 324-25 (Stevens, J., dissenting) (citing *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716-17 (1996); *Bd. of Comm'rs v. Umbehr*, 518 U.S. 668, 674-75 (1996); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64-65 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347, 355-63 (1976)).

impartially”³⁶ applies with at least the same strength to the state’s decision on how to select its officials as to what those officials do once they are in office.

To understand this commitment to nonpartisanship, I discuss Justice Stevens’s opinions regarding the last two rounds of legislative reapportionment.³⁷ In the 1990’s round of redistricting, the central constitutional issue before the Supreme Court was the extent to which states could take race into account in drawing district lines. In the post-2000 round, it has been the extent to which states can take political considerations into account. The poet Audre Lorde famously claimed that the master’s tools will never dismantle the master’s house,³⁸ but that seems to be precisely Justice Stevens’s plan, at least with respect to using the ideas developed in the racial redistricting cases to attack what he sees, rightly, as the far greater threat to democratic self-government posed by the varieties of partisan redistricting.

* * *

Prior to the Supreme Court’s 1993 decision in *Shaw v. Reno*,³⁹ there were two major types of voting rights injuries: disenfranchisement and dilution. *Shaw* identified a new, “analytically distinct”⁴⁰ form of equal protection claim:

[A] plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, cannot rationally be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.⁴¹

A plaintiff who established that race had played a predominant role in the redistricting process would thereby trigger strict scrutiny of the state’s plan: Only if the plan was narrowly tailored to serve a compelling governmental interest would it survive.

By contrast to plaintiffs in conventional voting rights cases that claimed either disenfranchisement or dilution, plaintiffs in *Shaw* cases were not required to show anything more than that they lived in the challenged

36. *Id.* at 317.

37. I do so with a certain amount of hesitation, given that the Supreme Court has recently announced its intention to revisit the question with respect to the “reredistricting” of Texas’s congressional delegation. See *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 827 (2005) (noting probable jurisdiction over four appeals involving the Texas plan). The cases before the Court raise the entire range of districting-related cases, from one-person, one-vote claims, to racial and political gerrymandering challenges, to claims based on the Voting Rights Act and the First Amendment.

38. See Audre Lorde, *The Master’s Tools Will Never Dismantle the Master’s House*, in *Audre Lorde, Sister Outsider: Essays and Speeches* 114-23 (1984).

39. 509 U.S. 630 (1993).

40. *Id.* at 652.

41. *Id.* at 649.

district and that race had played an impermissibly large role in the redistricting process.

Over the remainder of the decade, the Court fleshed out the contours of a *Shaw* claim. After nearly a decade's worth of confused and confusing case law,⁴² the Court announced in *Easley v. Cromartie*⁴³ that a state's consideration of race would not trigger strict scrutiny if partisan political considerations played an equally important role in the configuration of the challenged districts.⁴⁴

But as Justice Stevens recognized early on, regardless of whether race or partisan politics provided the best explanation for the configuration of a challenged district, *Shaw* claims were less "a tool for protecting against racial discrimination than . . . a means by which state residents may second-guess legislative districting in federal court for partisan ends."⁴⁵ The inescapable partisan consequence of *Shaw* claims stems from the relationship between racial identity and political affiliation. In most of the states where *Shaw* challenges arose, the Democrats were in control of the redistricting process. They faced the following quandary. On the one hand, the Voting Rights Act and pressures within the party required the creation of majority-nonwhite congressional or legislative districts. On the other hand, minority voters were the party's most loyal supporters⁴⁶ and it was virtually impossible in large parts of the South for a white Democratic candidate to win unless his district contained substantial numbers of minority voters. Thus, Democratic map drawers had to carefully allocate minority voters between newly created majority-nonwhite districts and the districts occupied by white Democratic incumbents. In several states, the Democratic vote share was sufficiently low that the task required almost surgical precision.⁴⁷ The upshot was that many districts had rather irregular boundaries. The *Shaw* majority treated those irregular boundaries as a product of excessive race consciousness, although they were in fact more the product of political imperatives.⁴⁸ By contrast, pro-Republican

42. See *Easley v. Cromartie*, 532 U.S. 234 (2001); *Sinkfield v. Kelley*, 531 U.S. 28 (2000) (per curiam); *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt (Shaw II)*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *United States v. Hays*, 515 U.S. 737 (1995). For an extensive discussion of the *Shaw* cases and the legal and social science scholarship evidence surrounding them, see Samuel Issacharoff, Pamela S. Karlan & Rick Pildes, *The Law of Democracy: Legal Structure of the Political Process* 904-45, 952-58 (rev. 2d ed. 2002).

43. 532 U.S. 234 (2001).

44. *Id.* at 241-42.

45. *Shaw II*, 517 U.S. at 920 (Stevens, J., dissenting).

46. Indeed, race was often a better predictor of which party a voter would support than the voter's actual party registration. See *Easley*, 532 U.S. at 245 (explaining how registration inaccurately predicted actual voter behavior).

47. See, e.g., *Vera*, 517 U.S. at 1005 (Stevens, J., dissenting) (discussing this dynamic with respect to the post-1990 Texas congressional redistricting).

48. This point is clearly illustrated by California's experience. California's post-1990 congressional and state legislative plans were drawn by a panel of special masters after the legislature failed to redraw the district lines. Because the special masters "first constructed Latino and African-American" districts and then drew the remaining majority-white districts

gerrymanders could generally avoid creating irregularly shaped majority-nonwhite districts, since Republican plans could cheerfully waste minority votes. Indeed, the more minority voters assigned to majority-nonwhite districts the better: This would "bleach" the remaining districts, leaving them relatively more Republican. In short, *Shaw* litigation had an inevitable partisan consequence of constraining pro-Democratic gerrymanders while leaving pro-Republican gerrymanders relatively untouched.

In his dissent in *Bush v. Vera*, Justice Stevens warned that the problem with the Court's *Shaw* jurisprudence was not only that it undercut efforts "by the majority to share political power with the victims of past discriminatory practices,"⁴⁹ but that it also deflected attention from a more serious pathology than race-consciousness: excessive partisanship.

The real problem is the politically motivated gerrymandering that occurred in Texas. Many of the oddest twists and turns of the Texas districts would never have been created if the legislature had not been so intent on protecting party and incumbents. . . .

By minimizing the critical role that political motives played in the creation of these districts, I fear that the Court may inadvertently encourage this more objectionable use of power in the redistricting process. Legislatures and elected representatives have a responsibility to behave in a way that incorporates the "elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially." That responsibility is not discharged when legislatures permit and even encourage incumbents to use their positions as public servants to protect themselves and their parties rather than the interests of their constituents. If any lines in Texas are worth straightening, it is those that were twisted to exclude, not those altered to include.⁵⁰

In short, for Justice Stevens, as for Professor Ely, the fact that partisanship served as a defense to a *Shaw* challenge seemed perverse: "Why, indeed, should it not be a separate (and in my opinion more serious) count in the indictment?"⁵¹

"around the periphery," it was the majority-white districts that "became rather elongated." *Wilson v. Eu*, 823 P.2d 545, 579-80 (Cal. 1992); see also, e.g., *Vera*, 517 U.S. at 1014-19 (Stevens, J., dissenting) (describing the process that transformed a proposed majority-black congressional district in Texas from its initially relatively compact shape into an irregular one in order to protect white Democratic incumbents in adjacent districts).

49. *Vera*, 517 U.S. at 1038 (Stevens, J., dissenting).

50. *Id.* at 1039-40 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 452 (1985)).

51. John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 *Stan. L. Rev.* 607, 621 (1998).

* * *

To the surprise of many, *Shaw* played a relatively small role in the post-2000 redistricting litigation.⁵² This time around, the central constitutional issue the Court addressed was whether there were any judicially enforceable limits on the degree of partisanship. In 2004, the Court confronted two blatant political gerrymanders: a Republican congressional redistricting from Pennsylvania in *Vieth*,⁵³ and a Democratic state legislative redistricting from Georgia in *Cox v. Larios*.⁵⁴

In *Vieth*, a majority of the Court affirmed the district court's dismissal of the plaintiffs' complaint. Justice Scalia's plurality opinion would have overruled *Davis v. Bandemer*⁵⁵ and declared political gerrymandering claims non-justiciable altogether.⁵⁶ Justice Kennedy, who provided the critical fifth vote for the Court's judgment, condemned the Pennsylvania map,⁵⁷ floated the suggestion that "the First Amendment may offer a sounder and more prudential basis for intervention than does the Equal Protection Clause,"⁵⁸ but then voted to affirm the dismissal of the plaintiffs' complaint because no one had yet presented him with a workable test for adjudicating political gerrymandering claims.

Justice Stevens dissented. In 1986, during the Burger Court's foray into the tangled thicket of political gerrymandering, Justice Stevens had joined Justice Powell in arguing that constitutional challenges should be evaluated by considering the nature of the process that produced the challenged districts, examining the physical configuration of the districts, and asking whether the lines served any neutral purpose beyond curtailing a targeted group's political strength.⁵⁹ This time around, Justice Stevens refined that approach by arguing that the Court's *Shaw* jurisprudence had essentially adopted that standard.⁶⁰ And he used the *Shaw* cases, which had been joined by each of the four Justices who denied the justiciability of political gerrymandering claims, to criticize their failure to intervene.

52. For some discussion of why this is, see Issacharoff, Karlan & Pildes, *supra* note 42, at 187-88 (rev. 2d Supp. 2005); J. Morgan Kousser, Whatever Happened to *Shaw v. Reno?* (2003) (unpublished manuscript, on file with author).

53. 541 U.S. 267 (2004).

54. 542 U.S. 947 (2004).

55. 478 U.S. 109 (1986).

56. See *Vieth*, 541 U.S. at 316 ("Here, one has the sense that legislative restraint was abandoned.").

57. *Id.* at 316 (Kennedy, J., concurring in the judgment).

58. *Id.* at 315 (Kennedy, J., concurring in the judgment).

59. See *Davis v. Bandemer*, 478 U.S. 109, 165, 175-78 (1986) (Powell, J., concurring in part and dissenting in part). Justice Lewis Powell, in turn, based his analysis on Justice Stevens's earlier concurrence in *Karcher v. Daggett*, 462 U.S. 725 (1983), a case in which the Court struck down a fairly blatant partisan gerrymander of New Jersey's congressional redistricting on one-person, one-vote grounds, but in which Justice Stevens had argued that the plan was unconstitutional because of its political consequences. See *Bandemer*, 478 U.S. at 173; see also *infra* notes 78-83 and accompanying text (discussing Justice Stevens's approach).

60. See *Vieth*, 541 U.S. at 323 (Stevens, J., dissenting).

Justice Stevens's invocation of the *Shaw* cases to explain the nature of the constitutional injury was particularly significant. "Undergirding" the *Shaw* cases, he wrote, "is the premise that . . . gerrymanders effect a constitutional wrong when they disrupt the representational norms that ordinarily tether elected officials to their constituencies as a whole."⁶¹ The official elected from a gerrymandered district will attribute her victory "to the architect of the district rather than to a constituency defined by neutral principles."⁶² If anything, this problem is worse when the district is the product of a political gerrymander rather than a racial one, since at least in the latter case, the message sent by the district's configuration is that the representative is expected to champion the interests of an identifiable subset of her constituency. In the case of a partisan gerrymander, the message is that the representative is beholden to the party leaders who crafted her district—those who drew the map rather than those who cast the ballots.⁶³

The reason this focus matters is that it transfers the attention away from the question that seems to preoccupy the litigants—namely, the fairness of the redistricting to the two political parties—and centers it instead on the interests of voters. As I have explained elsewhere, the real pathology in contemporary political gerrymandering lies not so much in the way one of the two major political parties obtains an advantage over the other, but in the way that the redistricting process skews the overall distribution of districts, producing nothing but relatively safe districts, with the map-drawing party capturing most of those districts while conceding a smaller number to the out-party.⁶⁴

This skew has two consequences. First, because few if any of the districts are competitive, the allocation of political power is essentially frozen into place for a decade, regardless of shifts in voters' preferences. As Professor Daniel Ortiz has explained,

A national swing of five percent in voter opinion—a sea change in most elections—will change very few seats in the current House of Representatives. Gerrymandering thus creates a kind of inertia that arrests the House's dynamic process. It makes it less certain that votes in the chamber will reflect shifts in popular opinion, and thus frustrates change and creates undemocratic slippage between the people and their government.⁶⁵

Second, because the primary electorate in each party tends to be further from the center than either the party's membership as a whole or the entire electorate, representatives elected from safe seats tend to lie further from the middle of the political spectrum. The result is a more polarized legislative process in which the centrist representatives who often broker compromises are absent. As Justice Stevens noted this past Term, the

61. *Id.* at 329.

62. *Id.* at 330.

63. *See id.* at 331.

64. *See* Issacharoff & Karlan, *supra* note 25, at 570-74.

65. Daniel R. Ortiz, *Got Theory?*, 153 U. Pa. L. Rev. 459, 487 (2004).

Court's "refusal to intervene in political gerrymandering cases," means that "an increasing number of districts are becoming 'safe districts' in which one party effectively controls the outcome of the election."⁶⁶ In Justice Stevens's view, as in mine, the trend toward entirely safe districting, which both freezes into place the existing allocation of power and relieves representatives of the need to appeal to the median voter of even their distorted districts "can only increase the bitter partisanship that has already poisoned some of those bodies that once provided inspiring examples of courteous adversary debate and deliberation."⁶⁷

In his most recent opinion, a concurrence in the little-remarked summary disposition of *Cox*,⁶⁸ Justice Stevens gave yet another illustration of how he deploys a wide variety of doctrinal tools in pursuit of the nonpartisan. *Cox* concerned the post-2000 Georgia state legislative reapportionment.⁶⁹ The Democrats were in control of the process, and although the state's population had become increasingly Republican and suburban, the Democrats sought, by creative line drawing and exploitation of the so-called ten-percent safe harbor,⁷⁰ to preserve Democratic control of the legislature.⁷¹ A three-judge district court struck down the plan, not because it represented an impermissible political gerrymander, but because the population deviations among the districts—although they remained below ten percent—could not be justified with reference to any neutral factors.⁷²

The Supreme Court affirmed in a one-sentence per curiam opinion. Of the four Justices who earlier that Term in *Vieth* had argued that political gerrymanders were nonjusticiable, only Justice Scalia dissented, arguing that the case should be set for plenary consideration.⁷³

Justice Stevens, joined by Justice Breyer, filed a brief concurring opinion. After reviewing and condemning the variety of techniques the district creators had employed to protect Democratic incumbents while simultaneously undermining Republicans' seats, the Justice noted that "[a]fter our recent decision in *Vieth v. Jubelirer*, the equal-population

66. *Clingman v. Beaver*, 125 S. Ct. 2029, 2049 n.2 (2005) (Stevens, J., dissenting).

67. *Id.* at 2054.

68. 542 U.S. 947 (2004).

69. The background to the case is discussed more extensively in Issacharoff & Karlan, *supra* note 25, at 564-69.

70. In *Brown v. Thomson*, 462 U.S. 835, 842 (1983), the Court stated that, with respect to state and local redistricting (as opposed to congressional redistricting); "[o]ur decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations" that do not constitute a prima facie case of malapportionment. See Adam Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. Pa. J. Const. L. 1001, 1012 (2005) (discussing the evolution of the ten-percent rule).

71. Or so they thought. See Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 Election L.J. 21, 29 (2004) (discussing how several Democratic incumbents switched parties after the 2002 election thereby giving Republicans control over the state senate).

72. See *Larios v. Cox*, 300 F. Supp. 2d 1320, 1347, 1357-58 (N.D. Ga. 2004).

73. See *Cox*, 542 U.S. at 951-52 (Scalia, J., dissenting).

principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength."⁷⁴

In some ways, Justice Stevens's concurrence in *Cox* serves as a bookend to his concurrence in *Karcher v. Daggett*,⁷⁵ the case in which the Supreme Court rejected the idea of any safe harbor for population deviations in congressional redistricting. There, the Supreme Court had struck down a Democratic gerrymander of New Jersey's congressional seats in which the population deviation between the largest and smallest districts was less than one percent,⁷⁶ a difference entirely dwarfed by the statistical imprecision of the census itself. The Court rejected the argument that such essentially notional deviations were de minimis, holding that the state bore the burden of proving that any avoidable deviation from census-based equipopulosity, however small, was "necessary to achieve some legitimate goal."⁷⁷

Justice Stevens provided the decisive fifth vote for the Court's holding. But his concurrence made clear that the partisan nature of the process and the map it produced were crucial to his analysis.⁷⁸ In contrast to the Court, which relied on Article I, Section 2, for the source of the one-person, one-vote requirement in congressional elections,⁷⁹ Justice Stevens would have located the requirement within the Equal Protection Clause.⁸⁰ And for him, the central value of the Equal Protection Clause was nonpartisanship:

The Equal Protection Clause requires every State to govern impartially. When a State adopts rules governing its election machinery or defining electoral boundaries, those rules must serve the interests of the entire community. If they serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they violate the constitutional guarantee of equal protection.⁸¹

Thus, Justice Stevens was "convinced that judicial preoccupation with the goal of perfect population equality is an inadequate method of judging the constitutionality of an apportionment plan."⁸² The reason he found no "virtue" in relaxing the one-person, one-vote requirement was because "[l]ogic, as well as experience, tells us . . . that there can be no total sanctuaries in the political thicket, else unfairness will simply shift from

74. *Id.* at 949-50 (Stevens, J., concurring).

75. 462 U.S. 725 (1983).

76. *See id.* at 728.

77. *Id.* at 731.

78. *See id.* at 744, 761-65 (Stevens, J., concurring).

79. *See id.* at 730; *see also* *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) (holding that "construed in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's").

80. *See Karcher*, 462 U.S. at 747 (Stevens, J., concurring).

81. *Id.* at 748 (citation omitted).

82. *Id.* at 750.

one form to another.”⁸³ One-person, one-vote might be an incomplete tool for attacking partisan gerrymanders, but as long as it was the only tool that achieved a consensus within the Court, Justice Stevens was prepared to invoke it even when he recognized its artificiality.

To some extent, Justice Stevens has had the unfortunate luxury in the political gerrymandering cases of being in dissent. Thus, in *Vieth* he was not required to articulate remedial principles for courts to employ in curing constitutional violations. Indeed, just as Justice Stevens employed the *Shaw* cases to argue that there are judicially manageable standards for deciding when a political gerrymander has crossed the constitutional line by subordinating traditional neutral principles to pure partisanship, one might deploy Justice Stevens’s dissents in the *Shaw* cases to critique their extension to claims of unconstitutional partisan consciousness. As the Justice himself recognizes, partisanship has always played a role in districting decisions; their political consequences are never entirely accidental. Thus, determining when partisanship crosses the line cannot, I think, be answered by reference to purely objective factors. The reliance on objective factors—be they measures of compactness, seat/vote ratios, or factual accounts of the process by which a challenged plan was enacted—will never substitute for the reality that, in the end, judges must exercise judgment. And that judgment will inevitably be colored by their view of what democracy requires.

83. *Id.* at 751 (quoting Robert Dixon, *The Court, the People, and “One Man, One Vote,”* in *Reapportionment in the 1970s* 32, 32 (Nelson Polsby ed., 1971)).

Notes & Observations