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Jed Shugerman

*Fordham University School of Law*, [jshugerman@law.fordham.edu](mailto:jshugerman@law.fordham.edu)

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## COUNTERING GERRYMANDERED COURTS

*Jed Handelsman Shugerman\**

*The key insight in Professor Miriam Seifter’s outstanding article Countermajoritarian Legislatures is that state legislatures are usually antidemocratic due to partisan gerrymandering, whereas state governors and judiciaries are insulated from gerrymandering by statewide elections (or selection), and thus they should have a more prominent role in framing election law and in enforcing the separation of powers.*

*This Piece offers a friendly amendment: These observations are true, so long as states do not gerrymander their state supreme courts into anti-democratic districts. The problem is that historically, judicial elections emerged generally as districted elections, and often with regional and partisan politics shaping those districts. Many states still draw judicial districts with those considerations, and in our era of polarization, this problem is likely to get worse.*

*After some observations about the hypocrisies in the Supreme Court’s “independent state legislatures” precedents, this Piece offers some potential solutions: (1) extend the “one-person/one-vote” rule to judicial elections, ending the Baker v. Carr exception while retaining special due process rules for judicial elections; (2) adopt a special rule against partisan gerrymandering for judges; and/or (3) the most manageable solution, create a bright-line rule that all state judicial districts must be statewide.*

## INTRODUCTION

Professor Miriam Seifter’s *Countermajoritarian Legislatures* makes a series of important observations, providing a thoughtful synthesis with practical impact on constitutional doctrine.<sup>1</sup> Seifter builds on a well-known fact: Gerrymandering is especially antidemocratic in many state legislatures because state parties seize control of both houses of the legislature and use a mix of advanced computer programs and asymmetric hardball to draw favorable districts.<sup>2</sup> These partisan legislative leaders “pack” and

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\* Professor of Law, Fordham University School of Law. I would like to thank Miriam Seifter for an outstanding article sparking this friendly amendment, Anne Brodsky, Xinni Cai, and Chloe Rigogne for excellent research assistance, Sera Idoko for wise editing, and Danya Handelsman, for her generosity over our lifelong courtship.

1. See Miriam Seifter, *Countermajoritarian Legislatures*, 121 *Colum. L. Rev.* 1733 (2021).

2. See *id.* at 1762–68.

“crack” the opposing party’s voters to entrench their own party in power, regardless of public opinion. Seifter notes that major areas of federal and state constitutional law turn on a mistaken assumption that legislatures are more democratic than the courts. This assumption has been especially controversial in the recent litigation—and surely future contests—over presidential elections.<sup>3</sup>

Seifter then adds her key insight: State legislatures are usually anti-democratic due to districting and gerrymandering, whereas state governors and judiciaries are insulated from gerrymandering by statewide elections (or selection).<sup>4</sup> Governors and state supreme court judges (generally) are elected statewide, so their election more likely reflects the majority will of a state, especially in an era of asymmetric constitutional hardball/beanball and extreme partisan gerrymandering aided by computer programs.<sup>5</sup> While there are many problems with judicial elections, they usually do not have the democratic deficit problem of gerrymandering that plagues state legislatures. Seifter deserves special credit for foresight and efficiency in generating this article by early 2021, so soon after the November 2020 election decisions like *DNC v. Wisconsin State Legislature*.<sup>6</sup> Seifter identifies a number of implications for the nondelegation doctrine and other areas of constitutional law that are spot-on.<sup>7</sup> This is a novel and important synthesis—and a crucial legal and political insight for our increasingly partisan era.

This Piece offers a friendly amendment: These observations are true, so long as states do not gerrymander their state supreme courts into anti-democratic districts. The problem is that some states do use districts for their state judicial elections, and there are growing concerns about both parties using gerrymandering for their advantage.<sup>8</sup> As this Piece is being published, the Associated Press has just reported that Republican officials in many states—“[r]epeatedly stymied” by state courts blocking their partisan gerrymandering maps—“are trying to neutralize the ability of state

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3. See *id.* at 1743–46, 1752–53.

4. *Id.* at 1768.

5. See generally Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 *Colum. L. Rev.* 915 (2018) (examining the phenomenon of “asymmetric polarization” and its implications for American politics); Jed Handelsman Shugerman, *119 Hardball vs. Beanball: Identifying Fundamentally Antidemocratic Tactics*, 119 *Colum. L. Rev. Forum* 85 (2019) [hereinafter Shugerman, *Hardball*] (discussing examples of fundamentally antidemocratic tactics used by Republicans and the destructive impact of these tactics on American politics).

6. See generally *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (2020) (denying an application to stay a Seventh Circuit decision suspending a six-day extension of the absentee ballot receipt deadline in Wisconsin due to COVID-19).

7. See Seifter, *supra* note 1, at 1780–87 (offering two cases as examples of how alternative rationales for doctrines like nondelegation and major questions are weakened by majoritarian deficits).

8. See *infra* Part II.

supreme courts to interfere in the politically charged redistricting process.”<sup>9</sup> The risk is that the gerrymandered legislatures will try to gerrymander the state courts into acquiescence, with other collateral effects on the rule of law and due process.

Eight states elect judges by districts: Illinois, Kentucky, Louisiana, Maryland, Mississippi, Nebraska, Oklahoma, and South Dakota.<sup>10</sup> Most of these states use districts to protect rural areas. Judicial elections began with local districts as part of a shift to local popular control, in contrast to centralized and elite appointments.<sup>11</sup> Unfortunately, state court seats have become the new battleground of gerrymandering by both parties.<sup>12</sup>

This Piece begins with some observations about the hypocrisies in the Supreme Court’s recent reflections on state legislatures versus courts. Part II discusses the core problem of state judicial districting and gerrymandering in the nineteenth century and in the present. Part III identifies a problem: an ambivalent exception for state judicial districts not to follow the “one-person/one-vote” rule because judges are different from other elected officials. It then identifies a countervailing trend: Elected judges are similar enough to other elected officials for some election rules but are different enough to have special First and Fourteenth Amendment rules. Part IV picks up on those trends to suggest some possible solutions: end the *Baker v. Carr* exception, adopt a special rule against partisan gerrymandering for judges, and—the boldest and most manageable solution—create a bright-line rule against all state court districting, so that all state judicial districts must be statewide. At the risk of overextending the hardball/beanball metaphor I extended in another piece, such a bright-line rule makes it easier for the federal judge “umpires” to establish a clear rule, declare what is “foul” territory, and then stay out of the way.<sup>13</sup>

### I. JUDICIAL HYPOCRISIES IN *DNC v. WISCONSIN STATE LEGISLATURE*

Seifter’s observations are most salient in the aftermath of the 2020 election, the clash between courts and legislatures over pandemic accommodations, and the effort to have state legislatures override the voters.

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9. Associated Press, *As Maps Fall, GOP Tries to Neutralize State Supreme Courts*, Penn Live Patriot-News (Feb. 25, 2022), <https://www.pennlive.com/news/2022/02/as-maps-fall-gop-tries-to-neutralize-state-supreme-courts.html> [<https://perma.cc/99RW-8L76>].

10. *Methods of Judicial Selection*, Nat’l Ctr. for State Cts., [https://web.archive.org/web/20210301180738/http://www.%E2%80%8Bjudicialselection.%E2%80%8Bus/judicial\\_selection/methods/justices\\_of\\_the\\_supreme\\_court.cfm?state=](https://web.archive.org/web/20210301180738/http://www.%E2%80%8Bjudicialselection.%E2%80%8Bus/judicial_selection/methods/justices_of_the_supreme_court.cfm?state=) [<https://perma.cc/FZK7-VXUE>] (last visited Nov. 7, 2021).

11. See generally Jed Handelsman Shugerman, *The People’s Courts: Pursuing Judicial Independence in America* (2012) [hereinafter Shugerman, *People’s Courts*] (tracing this shift toward local popular control and how it contributed to the rise of local judicial elections).

12. See *infra* Part II (discussing gerrymandering in state court districting, especially in Illinois and Pennsylvania).

13. See Shugerman, *Hardball*, *supra* note 5, at 86–89.

These disputes generated a remarkable set of Supreme Court opinions offering disquisitions on the nature of democracy. Justice Neil Gorsuch's opinion in *DNC* confirms Seifter's concern that judges have romantic but naïve (or strategic, to take a cynical view) assumptions about legislatures.

In the summer before the 2020 election, during the COVID-19 pandemic, Wisconsin (and other states) adopted new ballot rules to accommodate mail-in and absentee ballots during a public health emergency. Justice Gorsuch's opinion on Wisconsin's mail-in ballot accommodations had ironic and inconsistent observations about legislative supremacy and judicial restraint for a Justice who otherwise has written widely in favor of judicial supremacy and judicial activism in cases such as *Gutierrez-Brizuela* on *Chevron*, *Gundy* on nondelegation, *Seila Law* and *Collins* on the unitary executive and nonseverability, *California v. Texas* on nonseverability, and *Brnovich* on the Voting Rights Act of 1965.<sup>14</sup> In *DNC*, Gorsuch celebrated legislative supremacy as a Founding principle,<sup>15</sup> praised legislators over judges for their fact-finding, judgment, and consensus,<sup>16</sup> and criticized judges who "sweep in" to address problems.<sup>17</sup>

All of these points were striking, especially in the domain of election law, where the Roberts Court has intervened to strike down major parts of the Voting Rights Act (or to minimize the Act's impact, despite the Act's purpose).<sup>18</sup> Gorsuch did not cite a single historical source for these claims.

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14. See *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring); *California v. Texas*, 141 S. Ct. 2104, 2123 (2021) (Alito, J., dissenting, joined by Gorsuch, J.); *Collins v. Yellen*, 141 S. Ct. 1761, 1797–98 (2021) (Gorsuch, J., concurring in part) ("This Court possesses no authority to substitute its own judgment about *which* legislative solution Congress might have adopted had it considered a problem never put to it."); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211–12 (2020) (Thomas, J., concurring in part and dissenting in part, joined by Gorsuch, J.); *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) ("[W]hen the separation of powers is at stake, we [the judiciary] don't just throw up our hands. In all these areas, we recognize that abdication is 'not part of the constitutional design.' And abdication here would be no more appropriate." (quoting *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring))); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) ("[W]here in all this does a court *interpret* the law and say what it *is*? When does a court independently decide what the statute means and whether it has or has not vested a legal right in a person? Where *Chevron* applies that job seems to have gone extinct.").

15. *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay) ("Nothing in our founding document contemplates the kind of judicial intervention that took place here, nor is there precedent for it in 230 years of this Court's decisions.").

16. *Id.* (suggesting that legislators can be held accountable for the rules they write and the policy actions they take while judges typically cannot).

17. *Id.* (observing that "[t]he clamor for judges to sweep in and address emergent problems, and the temptation for individual judges to fill the void of perceived inaction, can be great," but democratic processes are "a means of ensuring that any changes to the status quo will not be made hastily").

18. See, e.g., *Brnovich*, 141 S. Ct. at 2338–40 (weakening the applicability of section 2 of the Voting Rights Act by introducing different ways to review challenges under section

He apparently grounded these claims in one clause of the Constitution: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”<sup>19</sup>

Chief Justice John Roberts distinguished a federal judge’s impermissible ruling in Wisconsin based on the U.S. Constitution from a Pennsylvania case permissibly turning on the state’s own constitution.<sup>20</sup> But neither he nor Justice Gorsuch nor Justice Brett Kavanaugh explained how the clause delegating a power to “state legislatures” exempts those state legislatures from adhering to other clauses of the U.S. Constitution, such as the Due Process Clause invoked by the federal district court in *Bostelmann*.<sup>21</sup> Constitutional clauses delegate powers to Congress, but federal legislation still must comply with the Bill of Rights and other clauses. Federal courts, like district courts, enforce such clauses. Justice Elena Kagan also identified voting rights and equal protection precedents on voting, like *Reynolds v. Sims*, that should be taken into consideration as limits on state legislative powers.<sup>22</sup>

Justice Gorsuch was not alone in revealing problematic assumptions in *Brnovich*. Justice Kavanaugh wrote of his concern about absentee ballots: “Those States want to avoid the chaos and suspicions of impropriety that can ensue if thousands of absentee ballots flow in after election day and potentially flip the results of an election.”<sup>23</sup> Justice Kagan called out Kavanaugh in her dissent:

But there are no results to “flip” until all valid votes are counted. And nothing could be more “suspicio[us]” or “improp[er]” than refusing to tally votes once the clock strikes 12 on election night. To suggest otherwise, especially in these fractious times, is to disserve the electoral process.<sup>24</sup>

Justice Kavanaugh was parroting the Trump party line that absentee ballots arriving after election day are inherently suspicious. Trump sought to create an illusion that votes on election day are reliable but absentee

2); *Shelby County v. Holder*, 570 U.S. 529, 556–57 (2013) (striking section 4(b) of the Voting Rights Act as unconstitutional and therefore effectively striking section 5 as well).

19. U.S. Const. art. I, § 4. Justice Gorsuch relies on this clause in *DNC*. See *DNC*, 141 S. Ct. at 29–30 (Gorsuch, J., concurring). Kavanaugh focuses on this clause. *Id.* at 33 (Kavanaugh, J., concurring).

20. *DNC*, 141 S. Ct. at 28.

21. *Id.*; *Democratic Nat’l Comm. v. Bostelmann*, 488 F. Supp. 3d 776, 796 (W.D. Wis. 2020).

22. *DNC*, 141 S. Ct. at 43 (Kagan, J., dissenting).

23. *Id.* at 33 (Kavanaugh, J., concurring in denial of application to vacate stay) (“Those States want to avoid the chaos and suspicions of impropriety that can ensue if thousands of absentee ballots flow in after election day and potentially flip the results of an election.”).

24. *Id.* at 42 (Kagan, J., dissenting in denial of application to vacate stay).

votes are not, and Kavanaugh adopted this message uncritically. His concurrence seems to reflect a deep partisan bias.

## II. THE HISTORY: THE RISE OF STATE COURT DISTRICTS AND GERRYMANDERING

Seifter rightly emphasizes the democratic advantages of state judicial elections relative to state legislative elections and gerrymandered districts. As a general matter, there are significant questions as to the democratic deficits in state judicial elections. In particular, there are questions about voters' ability to assess legal questions and about countermajoritarian individual rights protections as part of an informed vote for judges—relative to the popular policy and cultural questions salient in legislative races.<sup>25</sup>

Seifter is mostly right—and right in a deeply important way—that state supreme court elections are usually statewide and are structurally and historically more amenable to statewide elections than legislatures, for which the Anglo-American world has used districts or ridings for centuries.<sup>26</sup> Unfortunately, the assertion that judicial elections are more majoritarian is not entirely true. State supreme courts have become a new battleground of partisan districting.<sup>27</sup> States have been using districts for both geographic and partisan advantage from the beginning of the nineteenth century.<sup>28</sup> It seems there was a pause or a reversal in this practice, likely with the shift from partisan elections to the merit plan (also known as the “Missouri Plan”) of mixed appointments (by a “merit commission” composed of state bar leaders, state legislators, governors' appointees, and sometimes sitting judges) and “yes-or-no” retention elections in the mid-twentieth century.<sup>29</sup> But gerrymandering is back in the twenty-first century, and the problem is likely to get worse.<sup>30</sup>

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25. See generally Dmitry Bam, *Voter Ignorance and Judicial Elections*, 102 Ky. L.J. 553 (2013–2014) (explaining how voter ignorance when it comes to judicial elections can undermine judicial independence and accountability). See also Shugerman, *People's Courts*, supra note 11, at 112–13, 150 (“[C]ritics of statewide judicial elections feared that voters would know less about the candidates outside their district, and the voters' lack of familiarity would make the party machines more powerful.”); David E. Pozen, *The Irony of Judicial Elections*, 108 Colum. L. Rev. 265, 293–94, 301 n.152, 309–11 (2008) (“Because it requires specialized legal knowledge and familiarity with the facts to evaluate a judge's work in any given case, much less several years' worth of cases, citizens cannot monitor judicial performance in any rational or robust way.”).

26. See Seifter, supra note 1, at 1771.

27. See Pozen, supra note 25, at 322–23; see also Alec Webley, *Judges Are (Not?) Politicians: Williams-Yulee v. The Florida Bar and the Constitutional Law of Redistricting of Judicial Election Districts*, 19 N.Y.U. J. Legis. & Pub. Pol'y 851, 862 (2016).

28. See infra notes 44–54 and accompanying text.

29. Shugerman, *People's Courts*, supra note 11, at 177–240.

30. See Marie Albiges, *This Bill Has Experts Worried the Pennsylvania GOP Could Gerrymander Judicial Districts*, Slate (Feb. 1, 2021), <https://slate.com/news-and-politics/2021/02/pennsylvania-judicial-gerrymander-bill.html> [https://perma.cc/9G27-J9M8]; Michael C. Li, *The Redistricting Landscape, 2021–22*, Brennan Ctr. for Just. 20–22 (2021),

At the Founding, state courts were similar to federal courts. Governors appointed Supreme Court judges on a statewide basis.<sup>31</sup> Soon states shortened judges' terms, and thus judges needed to satisfy the governor, legislative leaders, and powerful party insiders in order to win reappointment.<sup>32</sup> But from Jacksonian democracy of the 1830s through the Civil War, states shifted to popular election of judges and more local districts.<sup>33</sup>

The overall goal of these democratic and populist reformers was to make judges more accountable to the grassroots, to facilitate more direct contact between judges and voters, and to make judges more independent from centralized control of governors, insiders, and commercial elites who tended to be in the state's urban center or capital.<sup>34</sup> The first experiments with judicial elections were all with local districts.<sup>35</sup> In 1812, Georgia adopted a new judiciary with no state supreme court but with districted circuit courts that were popularly elected.<sup>36</sup> Georgians were reacting to the land speculation scandal known as the "Yazoo Land Fraud," in which a corrupt legislature sold land as part of a corrupt deal with insiders, and when the next legislature tried to undo these deals, the Marshall Court famously adopted the "vested rights" doctrine against legislative power in *Fletcher v. Peck*.<sup>37</sup> They wanted to bring power back to people against commercial corruption, and they used a mix of elections and local districts to advance this objective.<sup>38</sup> The elimination of a statewide supreme court gave more finality to their efforts to localize justice.<sup>39</sup> A similar story motivated Indiana to adopt judicial elections for its intermediate appellate judges as it became a state in 1816.<sup>40</sup> A group known as the "Poor Frontiersman" took power away from Indiana's "Aristocrats," and one such populist drew his own district so that he could become a judge.<sup>41</sup> In 1832, Mississippi was the first state to adopt judicial elections for its supreme court.<sup>42</sup> Mississippi had been dominated by the commercial elite based in Natchez, the state's commercial center. They were also known as

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[https://www.brennancenter.org/sites/default/files/2021-02/2021\\_2\\_11\\_State%20of%20Redistricting.pdf](https://www.brennancenter.org/sites/default/files/2021-02/2021_2_11_State%20of%20Redistricting.pdf) [<https://perma.cc/XR8U-7GRA>].

31. Shugerman, *People's Courts*, supra note 11, at 27–29.

32. Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 *Harv. L. Rev.* 1061, 1070–75 (2010) [hereinafter Shugerman, *Economic Crisis*].

33. *Id.*; see also Shugerman, *People's Courts*, supra note 11, at 57–83.

34. Shugerman, *Economic Crisis*, supra note 32, at 1097.

35. Shugerman, *People's Courts*, supra note 11, at 57–60.

36. *Id.* at 60.

37. 10 U.S. (6 Cranch) 87, 136–39 (1810); Shugerman, *Economic Crisis*, supra note 32, at 1072.

38. Shugerman, *People's Courts*, supra note 11, at 60–62.

39. *Id.*

40. *Id.*

41. *Id.* at 63–64.

42. *Id.*



the “Natchez Junto” or the “Aristocrats.”<sup>43</sup> The populists, known as the “Whole Hogs,” used districts to give Natchez just one district and to give the rural parts of the state two districts.<sup>44</sup> The Whole Hogs were angry about the Natchez elite’s procreditor rulings, which were insufficiently proslavery for backwoods farmers, and about pro-Cherokee rulings like *Worcester v. Georgia* by the elite Marshall Court (about which President Andrew Jackson said, apocryphally, “Mr. Marshall has made his ruling. Now let him enforce it!”).<sup>45</sup> Mississippi’s district lines were contiguous, but the goal was similar to gerrymandering: Put all of Natchez in one district to limit its power.<sup>46</sup>

The turning point in the national movement to elect judges was New York’s Constitutional Convention in 1846, a reaction to a national economic depression, state overspending, and insider corruption.<sup>47</sup> In previous decades, the state’s Whig Party had already pushed for more districting, knowing that they had lost ground to the Democrats statewide.<sup>48</sup> By the 1850s, the populist wing of the state Democratic Party, known as the “Barnburners,” formed a coalition with the Whigs in favor of local districts.<sup>49</sup> Between 1846 and the Civil War, nearly two-thirds of the states followed New York toward electing supreme court judges and most other judges.<sup>50</sup> In the first five years, seven states drew local districts for

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43. *Id.*

44. Miss. Const. of 1832, art. IV, § 2 (“The high court of errors and appeals shall consist of three judges, any two of whom shall form a quorum. The legislature shall divide the state into three districts, and the qualified electors of each district shall elect one of said judges for the term of six years.”); see also Sid Salter, Opinion, Sid Salter: Judicial Elections Are Inherently Partisan, *Clarion Ledger* (Dec. 4, 2016), <https://www.clarionledger.com/story/opinion/columnists/2016/12/04/sid-salter-judicial-elections-inherently-partisan/94824802/> (on file with the *Columbia Law Review*) (describing the debate surrounding judicial elections during the drafting of Mississippi’s 1832 constitution).

45. 31 U.S. (6 Pet.) 515 (1832), abrogated by *Nevada v. Hicks*, 533 U.S. 353 (2001); Paul F. Boller, Jr. & John George, *They Never Said It: A Book of False Quotes, Misquotes, & Misleading Attributions* 53 (1989).

46. See Shugerman, *People’s Courts*, *supra* note 11, at 66 (“[T]he ‘Whole Hogs,’ who fought for . . . judicial independence from Natchez . . . turned to judicial elections as one way to limit the Natchez Aristocrats.”).

47. *Id.* at 84–102.

48. Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830*, at 259–73 (2005); see also S. Croswell & R. Sutton, *Debates and Proceedings in the New-York State Convention for the Revision of the Constitution* 546 (1846) (recording a debate regarding districting for judicial elections).

49. See Shugerman, *People’s Courts*, *supra* note 11, at 84–100 (“In the 1850s, the Barnburners and Whigs disappeared and re-emerged together in the Republican coalition.”); Shugerman, *Economic Crisis*, *supra* note 32, at 1081–89 (discussing the “People’s Constitution” developed by the Barnburners and Whigs, which incorporated judicial elections as a way to “provide a necessary check on legislative excess, party patronage, and corrupt monopolies,” and “create a modern and responsive court system”).

50. Shugerman, *People’s Courts*, *supra* note 11, at 105; Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 *Am. J. Legal Hist.* 190, 190 (1993).

their supreme courts: New York in 1846, Illinois in 1848, Kentucky in 1849, Michigan and Virginia in 1850, and Maryland and Indiana in 1851.<sup>51</sup>

One surprising result of these changes was a boom of judicial review. Even more counterintuitive was how elected judges were some of the first expositors of *countermajoritarian* constitutional theory: that it was the judiciary's role in a democracy to stop or curtail present majorities when they overstep the constitutional limits as a matter of written law and the fundamental commitments of past majorities.<sup>52</sup> Among the judges who explicitly criticized the excesses of majoritarian rule as a defense of judicial review (often with rationales based on the importance of protecting local communities), most were elected to districts, and not statewide courts.<sup>53</sup> It is possible that districts helped judges see the merits in their countermajoritarian design, as a flip of Seifter's thesis: Even if a statewide majority had endorsed new legislation, local districts allowed judges to stop a majority if it did not have sufficient geographic breadth. This is a rationalization for gerrymandering that benefits rural populations, but it became a foundation for modern constitutional theory—which is more about discrete local minorities than *Carolene Products*' "discrete and insular minorities."<sup>54</sup>

In addition to protecting local interests and rural communities, adoptions of judicial elections and judicial redistricting were a pretext for eliminating some or all of the Supreme Court's judges, who were unpopular with a political party, which I have called "Bench Clearing Brawls."<sup>55</sup>

Today's judicial districting reflects the same political interests. Illinois's supreme court districts are a classic example: one district for Chicago (Cook County) with three justices, then the remaining four from districts spread out over the rest of the state.<sup>56</sup> Illinois had an infamous class action case against State Farm, in which State Farm was challenging a \$1 billion jury verdict.<sup>57</sup> The Illinois Supreme Court held off making a

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51. Ill. Const. of 1848, art. V, § 3, reprinted in 1 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* 459 (Ben Perley Poore ed., 1877) [hereinafter 1 *Federal and State Constitutions*]; Ind. Const. of 1851, art. VII, §§ 2, 3, reprinted in 1 *Federal and State Constitutions*, supra, at 520; Ky. Const. of 1850, art. IV, § 4, reprinted in 1 *Federal and State Constitutions*, supra, at 675; Md. Const. of 1851, art. IV, §§ 4, 9, reprinted in 1 *Federal and State Constitutions*, supra, at 848–50; Mich. Const. of 1850, art. VI, § 2, reprinted in 1 *Federal and State Constitutions*, supra, at 1001; N.Y. Const. of 1846, art. VI, § 4, reprinted in 2 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* 1358–59 (Ben Perley Poore ed., 1877) [hereinafter 2 *Federal and State Constitutions*]; Va. Const. of 1850, art. VI, § 10, reprinted in 2 *Federal and State Constitutions*, supra, at 1933.

52. See Shugerman, *Economic Crisis*, supra note 32, at 1124–32.

53. *Id.* at 1138–39; Shugerman, *People's Courts*, supra note 11, at 138 n.81.

54. *United States v. Carolene Products Co.*, 304 U.S. 144, 152–54 n.4 (1938).

55. Shugerman, *People's Courts*, supra note 11, at 66–77, 86–100.

56. See *Map of the Five Illinois Appellate Judicial Districts*, Nw. Pritzker Sch. of L., <http://illinoisjudges.law.northwestern.edu/map-districts.html> [<https://perma.cc/BQU9-PX97>] (last visited Nov. 7, 2021).

57. Shugerman, *People's Courts*, supra note 11, at 2–3.

decision for a year and a half until the next election for the swing seat in a 4–3 court. The two sides spent \$7 million—not for a statewide seat with Chicago media market rates but for a rural district. State Farm’s candidate won, and State Farm won the appeal by a 4–3 vote.<sup>58</sup> Now, Illinois Democrats have recently proposed to redistrict and gerrymander their supreme court districts in their favor.<sup>59</sup> Pennsylvania Republicans have their own proposal to make Pennsylvania’s seats districted and gerrymandered too.<sup>60</sup>

The other states with districts also give more weight to rural areas. Kentucky puts Louisville and Lexington in their own districts, and the rest are more rural.<sup>61</sup> Louisiana has seven districts; the first and seventh are for New Orleans, and the other five are larger and rural.<sup>62</sup> Nebraska has three geographically tight urban and suburban districts and three rural districts, plus a chief judge who serves statewide.<sup>63</sup> South Dakota also has a rural advantage with its five districts. It has one geographically small district for the state’s most populous county while the rest are rural.<sup>64</sup> Maryland’s districting works in the other direction: The first and third districts are rural and the other five are urban and suburban.<sup>65</sup> Mississippi seems to have no urban/rural divide but instead has three regional bands: north, south, and central.<sup>66</sup> Oklahoma had districts with a rural tilt, but a redistricting fight from 2019 to 2020 shifted the balance toward urban areas.<sup>67</sup>

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58. *Id.*

59. Richard Pildes, *IL Democrats Redraw State Supreme Court Districts for First Time in 60 Years to Keep Control*, Election L. Blog (May 31, 2021), <https://electionlawblog.org/?p=122384> [<https://perma.cc/QVJ8-HUEA>].

60. Paul Muschick, *Opinion, The Newest Assault on Your Voting Rights: Pennsylvania Judicial Gerrymandering Scheme*, Morning Call (Jan. 22, 2021), <https://www.mcall.com/opinion/mc-opi-judicial-gerrymandering-pennsylvania-muschick-20210122-ydzmvmknavdyppqkxw3euph56m-story.html> (on file with the *Columbia Law Review*).

61. Michael Stevens, *Map of the Kentucky Supreme Court and Court of Appeals Regions (Counties Covered)*, Ky. Ct. Rep. (Dec. 8, 2012), <https://kycourtreport.com/map-of-the-kentucky-supreme-court-and-court-of-appeals-regions-counties-covered/> [<https://perma.cc/4TAG-GWCH>].

62. Louisiana District Courts Judicial Districts, La. Sup. Ct., <https://www.lasc.org/About/MapsofJudicialDistricts> [<https://perma.cc/D8K5-D5J5>] (last visited Feb. 19, 2022).

63. Supreme Court, Neb. Jud. Branch, <https://supremecourt.nebraska.gov/courts/supreme-court> [<https://perma.cc/J8E9-9A94>] (last visited Feb. 19, 2022).

64. South Dakota Supreme Court Appointment Districts, S.D. Unified Jud. Sys., [https://ujs.sd.gov/uploads/sc/SC\\_Appt\\_Districts.pdf](https://ujs.sd.gov/uploads/sc/SC_Appt_Districts.pdf) [<https://perma.cc/SN4A-AVW2>] (last visited Feb. 19, 2022).

65. Directory of Appellate, Circuit, District and Orphans’ Courts, Md. Cts., <https://mdcourts.gov/courtsdirectory> [<https://perma.cc/C4FK-L2FL>] (last visited Dec. 29, 2021).

66. Mississippi Supreme Court Judicial Map, Miss. Jud., <https://courts.ms.gov/appellate/courts/sc/scdistricts.php> [<https://perma.cc/586C-LYGB>] (last visited Nov. 6, 2021).

67. See Caroline Halter, *Lawmakers Reconfigure Oklahoma’s Judicial Districts*, KGOU (Apr. 18, 2019), <https://www.kgou.org/oklahoma-news/2019-04-18/lawmakers-reconfigure-oklahomas-judicial-districts> [<https://perma.cc/396H-TT8B>].

## III. ELECTED JUDGES ARE ELECTED . . . AND THEY ARE JUDGES

A. *The “One-Person/One-Vote” Exception*

The Supreme Court recognizes that judges are different from other kinds of officials, but it applies this distinction in contradictory ways. Sometimes the Court gives elected judges extra insulation from base politics and corruption, as shown in cases like *Caperton* and *Williams-Yulee*.<sup>68</sup> When it comes to districting, however, the oddity is that the Court gives judges *less* protection than legislators from the corrupt base politics of disproportionate counting and gerrymandering.

Imbalanced districts giving more representation to fewer people were once called “rotten boroughs” or “pocket boroughs” in the English tradition. In the American tradition, such districts often benefited the white, the wealthy, and the rural. They were abolished for Congress and legislatures in *Baker v. Carr*<sup>69</sup> and *Reynolds v. Sims*<sup>70</sup> with the equal protection rule of “one-person/one-vote.” The Supreme Court, however, exempted judicial electoral districts from the “one-person/one-vote” rule.<sup>71</sup>

In 1973, the Supreme Court affirmed (without issuing an opinion) a district court’s ruling in *Wells v. Edwards* that “the concept of one-man, one-vote apportionment does not apply to the judicial branch of the government.”<sup>72</sup> As a result, state judges can be elected from districts that differ significantly in size.<sup>73</sup> *Wells* was just a three-page district court opinion by a three-judge panel (a standard panel for districting cases). The panel acknowledged that in a follow-up case after *Baker v. Carr*, the Court extended the “one-person/one-vote” rule to the districting of junior college trustee seats, due to the power of the trustees to tax, make contracts, and remove teachers, among other powers.<sup>74</sup> But the district court panel focused on this case’s limited holding:

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68. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433 (2015); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

69. 369 U.S. 186 (1962).

70. 377 U.S. 533 (1964).

71. See *Reynolds*, 377 U.S. at 577 (“We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters.”); *Baker*, 369 U.S. at 265 (Stewart, J., concurring) (“The Court does not say or imply that there is anything in the Federal Constitution ‘to prevent a State, acting not irrationally, from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of its people.’”).

72. 347 F. Supp. 453, 454 (M.D. La. 1972), *aff’d mem.*, 409 U.S. 1095, 1095 (1973).

73. See *id.* at 455 (holding that the main “purpose of one-man, one-vote apportionment is to make sure that each official member of an elected body speaks for approximately the same number of constituents,” and since “judges do not represent people, they serve” them, the rationale behind one-man, one-vote is irrelevant to the judiciary); see also Andrew S. Marovitz, *Casting a Meaningful Ballot: Applying One-Person, One-Vote to Judicial Elections Involving Racial Discrimination*, 98 *Yale L.J.* 1193, 1194 (1989).

74. *Hadley v. Junior College Dist.*, 397 U.S. 50, 53–54 (1970).

We therefore hold today that as a general rule, whenever a State or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and . . . as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.<sup>75</sup>

The *Wells* panel then explained:

‘[G]overnmental functions’ involved related to such things as making laws, levying and collecting taxes, issuing bonds, hiring and firing personnel, making contracts, collecting fees, operating schools, and generally managing and governing people. In other words, apportionment cases have always dealt with elected officials who performed legislative or executive type duties, and in no case has the one-man, one-vote principle been extended to the judiciary.<sup>76</sup>

The panel quoted two other cases with the same conclusion: “Judges do not represent people, they serve people.”<sup>77</sup> “The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government.”<sup>78</sup>

These distinctions are facile, and they no longer hold up in light of other Supreme Court decisions ruling that judges *do represent* the people they serve or the Ely-ian *Democracy and Distrust* perspective that Seifter offers (explaining that the state judiciary is the organ responsible for protecting representative government from itself).<sup>79</sup>

#### B. *Elected Judges Are Elected (So They Are Representatives)*

If judges are less “representative” than legislators, there is even less of an excuse to draw districts so focused on local sets of interests or geographic interests that they override equal counting. But it turns out that the Supreme Court has recognized both the representativeness of elected judges and their special status requiring the extra protection of due process.

Federal courts have raised questions about the assumptions in *Wells v. Edwards*, suggesting that judicial elections have the same problems as any

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75. *Wells*, 347 F. Supp. at 455 (citing *Hadley*, 397 U.S. at 795).

76. *Id.* *Wells* cited other district court cases that had held that “one-person/one-vote” cases do not apply to the judiciary. See *Holshouser v. Scott*, 335 F. Supp. 928, 930–32 (M.D.N.C. 1971); *N.Y. State Ass’n of Trial Laws v. Rockefeller*, 267 F. Supp. 148, 153–54 (S.D.N.Y. 1967); *Stokes v. Fortson*, 234 F. Supp. 575 (N.D. Ga. 1964); *Buchanan v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio 1960), appeal dismissed, 385 U.S. 3 (1966).

77. *Wells*, 347 F. Supp. at 455 (citing *Buchanan*, 249 F. Supp. at 860).

78. *Id.* at 456 (citing *N.Y. State Ass’n of Trial Laws*, 267 F. Supp. at 153).

79. See *Chisom v. Roemer*, 501 U.S. 380, 401 (1991); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 8–9 (1980) (“The people have chosen the principle that the statute or practice violated, have designated it as fundamental, and have written it down in the text of the Constitution for the judges to interpret and apply.”).

other election, and perhaps more as there are additional due process concerns in judicial elections. In *Chisom v. Roemer* in 1991, the Court decided that section 2 of the Voting Rights Act applies to judicial elections, but declined to revisit the “one-person/one-vote” question as a matter of equal protection.<sup>80</sup> It did, however, engage the status of judicial elections as a statutory matter under the Voting Rights Act.<sup>81</sup> The Court addressed an argument that judges are different: One should not worry about electoral politics impermissibly influencing elected judges because the job description of judges is to ignore or overcome popular sentiment.<sup>82</sup> The Supreme Court rejected this argument, observing that once a state has “decided to elect its judges and to compel judicial candidates to vie for popular support just as other political candidates do,” it has opted to remove judges from the shelter provided by appointment.<sup>83</sup> The Court in *Chisom* concluded:

If executive officers, such as prosecutors, sheriffs, state attorneys general, and state treasurers, can be considered “representatives” simply because they are chosen by popular election, then the same reasoning should apply to elected judges . . . .<sup>84</sup>

The fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office. When each of several members of a court must be a resident of a separate district and must be elected by the voters of that district, it seems both reasonable and realistic to characterize the winners as representatives of that district.<sup>85</sup>

This logic suggests that equal protection and “one-person/one-vote” ought to apply, except for the problem of *stare decisis*, though the deference here is not toward a Supreme Court decision but merely a summary affirmance of a three-judge *district court* panel opinion and no separate decision. Other recent cases are consistent with *Chisom*. In 1992, the Fourth Circuit ruled that even if “one-person/one-vote” did not apply to judicial elections, the Fourteenth Amendment separately prohibited a “vote dilution” scheme because “the election of superior court judges in North Carolina implicates the goal of equal protection and issues of fair and effective representation.”<sup>86</sup>

Intriguingly, Justice Antonin Scalia offered a similar argument in *Republican Party of Minnesota v. White*.<sup>87</sup> There the Court struck down the

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80. See *Chisom*, 501 U.S. at 401–03.

81. *Id.* at 404.

82. *Id.* at 400.

83. *Id.*

84. *Id.* at 399.

85. *Id.* at 399–401.

86. *Republican Party of N.C. v. Martin*, 980 F.2d 943, 953 (4th Cir. 1992).

87. See 536 U.S. 765, 774 (2002).

Minnesota code of judicial ethics “announce clause,” which prohibited judicial candidates from declaring their positions on contested legal or political issues. Scalia acknowledged that impartiality is a relevant interest for judges, but “it is not a *compelling* state interest, as strict scrutiny requires.”<sup>88</sup> Then Scalia rejected Justice Ruth Bader Ginsburg’s argument that judges were “different,” arguing that they are so similar to legislators that they should have the same political speech rights.<sup>89</sup>

Not only did Scalia argue that judges are “representative” (undercutting the earlier cases distinguishing judges and exempting them from *Baker v. Carr*), but he also avoided the question of whether a state ethics code could prohibit “pledges or promises.”<sup>90</sup> Justice Sandra Day O’Connor wrote separately “to express [her] concerns about judicial elections generally” in that they undermine “impartiality.”<sup>91</sup> Consistent with the notion that judicial elections are like other representative elections, she concluded, “If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.”<sup>92</sup> Justice Anthony Kennedy similarly observed, “The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech.”<sup>93</sup> Thus, the Court has clarified that judicial elections are like other elections. But Kennedy also concluded by pivoting to how judges are different:

Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen’s respect for judgments depends in turn upon the issuing court’s absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.<sup>94</sup>

C. *Indeed, Elected Judges Are Judges (Requiring More Constitutional Protections)*

Picking up from Kennedy’s concurrence in *White* and “judicial integrity,” the Court has also held that judicial elections also implicate due process rights that require limits on the First Amendment and campaign finance. There is already a long line of cases establishing recusal rules to

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88. Id. at 777.

89. Id. at 784 (citation omitted) (“This complete separation of the judiciary from the enterprise of ‘representative government’ . . . is not a true picture of the American system. Not only do state-court judges possess the power to ‘make’ common law, but they have the immense power to shape the States’ constitutions as well.”).

90. Id. at 770.

91. Id. at 789 (O’Connor, J., concurring).

92. Id. at 792.

93. Id. at 795 (Kennedy, J., concurring).

94. Id. at 793.

protect impartiality,<sup>95</sup> and they were recently extended to major campaign contributors. In *Caperton*, Justice Kennedy, writing for a 5–4 majority, found that due process required a recusal rule for major donors and campaign spenders in judicial elections.<sup>96</sup> Not only did Kennedy hold that due process requires recusals in “extreme” cases on a “probability of bias” standard, but he also approved of the stricter recusal rules in many state judicial conduct codes: “Almost every State . . . has adopted the American Bar Association’s objective standard: ‘A judge shall avoid impropriety and the appearance of impropriety.’”<sup>97</sup> Kennedy emphasized the special role of judges:

These codes of conduct serve to maintain the integrity of the judiciary and the rule of law. The Conference of the Chief Justices has underscored that the codes are “[t]he principal safeguard against judicial campaign abuses” that threaten to imperil “public confidence in the fairness and integrity of the nation’s elected judges.” . . . This is a vital state interest.<sup>98</sup>

Then Kennedy quoted his *White* concurrence at length on “judicial integrity.” I have argued that Kennedy’s standard in *Caperton* ought to have been “the appearance of bias” and not a more permissive and less manageable standard of “probability of bias.”<sup>99</sup> Nevertheless, Kennedy’s point is salutary for judicial districting: Gerrymandering undermines the integrity of the courts, and considering the courts’ role in policing democratic excesses, gerrymandering undermines the integrity of American democracy.

Then, in 2015, Chief Justice Roberts and Justice Kennedy switched sides. In *Williams-Yulee*, Chief Justice Roberts, for a new 5–4 majority, applied an exception to the First Amendment in campaigns, allowing states to prohibit state judicial candidates from asking for campaign donations (a core kind of political speech). The Court adopted what is colloquially

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95. See, e.g., *Bracy v. Gramley*, 520 U.S. 899, 905 (1997) (finding that due process was violated when a judge was covering up a bribery pattern by ruling against defendants who had not given a bribe); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822–25 (1986) (finding that due process requires recusal when a judge has a financial interest to find against one of the parties); *Ward v. Village of Monroeville*, 409 U.S. 57, 58–62 (1972) (same); *Johnson v. Mississippi*, 403 U.S. 212, 215–16 (1971) (per curiam) (holding that due process requires recusal if one of the parties previously litigated successfully against that judge); *In re Murchison*, 349 U.S. 133, 137–39 (1955) (holding that defendant’s due process rights were violated when the judge was also the indicting prosecutor); *Tumey v. Ohio*, 273 U.S. 510, 523, 531–34 (1927) (holding that due process requires recusal when a judge has a financial interest to find against one of the parties).

96. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884–87 (2009).

97. *Id.* at 888 (quoting Model Code of Jud. Conduct Canon 2 (Am. Bar Ass’n 2004)).

98. *Id.* at 889 (internal citation omitted).

99. See Jed Handelsman Shugerman, In Defense of Appearances: What *Caperton v. Massey* Should Have Said, 59 DePaul L. Rev. 529, 530–31 (2010).



known as the “thank you, but not please” rule for judicial campaigns, because they can send a “thank you” note, even if they cannot ask for the donation first.<sup>100</sup>

Roberts’s opinion quoted both Justice Kennedy and Alexander Hamilton on the specialness of judges:

We have recognized the “vital state interest” in safeguarding “public confidence in the fairness and integrity of the nation’s elected judges.” . . . The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government. Unlike the executive or the legislature, the judiciary “has no influence over either the sword or the purse; . . . neither force nor will but merely judgment.” . . . The judiciary’s authority therefore depends in large measure on the public’s willingness to respect and follow its decisions . . . . It follows that public perception of judicial integrity is “a state interest of the highest order.”<sup>101</sup>

The bottom line is that the line of cases from *Chisom* hold that elected judges are similar enough to other elected officials as representatives to follow the same Voting Rights Act rules in their elections, but in a longer line of Anglo-American cases, judges are so fundamentally different that special due process rules apply. It would be consistent with such precedents to end the *Baker v. Carr* exception and also establish special rules for judicial elections to protect due process. Below are three possible solutions to avoid the looming hardball/beanball politics of judicial gerrymandering.

#### IV. THREE CONSTITUTIONAL SOLUTIONS

Seifter is right about the advantages of statewide nongerrymandered judicial offices.<sup>102</sup> Given that gerrymandering judicial districts would exacerbate the problems she has wisely identified, this Piece proposes three constitutional solutions: (1) Apply the “one-person/one-vote” rule to state judicial court districts; (2) prohibit partisan gerrymandering for state judicial districts; and (3) prohibit state judicial districting entirely, a bolder but also more workable and manageable rule.

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100. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 445 (2015); Mark Walsh, Judges May Not Seek Campaign Cash, but They May Express Their Gratitude, SCOTUS Determines, ABA J. (July 1, 2015), [https://www.abajournal.com/magazine/article/judges\\_may\\_not\\_seek\\_campaign\\_cash\\_but\\_they\\_may\\_express\\_their\\_gratitude/](https://www.abajournal.com/magazine/article/judges_may_not_seek_campaign_cash_but_they_may_express_their_gratitude/) [https://perma.cc/7CXA-L6T2].

101. *Williams-Yulee*, 575 U.S. at 433–34 (citations omitted) (first quoting *Caperton*, 556 U.S. at 889; then quoting The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961); and then quoting *Caperton*, 556 U.S. at 889).

102. See Seifter, *supra* note 1, at 1771–74 (explaining how judicial elections can foster majoritarianism).

A. *Apply the “One-Person/One-Vote” Rule to State Judicial Court Districts*

This change is simple enough, for the reasons given above in Part III. But this rule is not enough, as the past few years of extreme partisan gerrymandering have demonstrated.<sup>103</sup>

B. *Create an Antipartisan Gerrymandering Exception for Judicial Districts*

In *Rucho v. Common Cause*, the Supreme Court declined, in a 5–4 vote, to place limits on partisan gerrymandering.<sup>104</sup> The courts should recognize that judicial districting is different, for the same reasons indicated in Kennedy’s *White* concurrence, in *Caperton*, and in *Williams-Yulee*: the protection of “judicial integrity” and “the rule of law.” The Court was narrowly divided on whether to apply Equal Protection limits (or the First Amendment notion of “freedom of association”) to excessively partisan *legislative* gerrymandering.<sup>105</sup> If the Court saw this question as a close call for legislators, it should see additional reasons to protect judicial integrity to tip this close balance.

If the Court was willing to extend the Fifth and Fourteenth Amendments to establish a functional indirect limit on First Amendment campaign finance issues in *Caperton* and more directly limit judges’ First Amendment rights in *Williams-Yulee*, then surely the Court can entertain a Fourteenth and/or First Amendment limit on partisan districting when there is no similar individual right or equality concern on the other side.<sup>106</sup> The problem is manageability. Once districting is allowed, how partisan is

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103. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting) (noting how extreme partisan gerrymandering has “debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people”); Reid J. Epstein & Nick Corasaniti, Republicans Gain Heavy House Edge in 2022 as Gerrymandered Maps Emerge, *N.Y. Times* (Nov. 15, 2021), <https://www.nytimes.com/2021/11/15/us/politics/republicans-2022-redistricting-maps.html> (on file with the *Columbia Law Review*) (last updated Nov. 17, 2021) (observing that “[t]he rapidly forming congressional map . . . represents an even more extreme warping of American political architecture” only exacerbated by the fact that “the legal landscape has shifted since the last redistricting cycle”); Michael Li & Tim Lau, The Emerging Fight over Gerrymandering, *Brennan Ctr. for Just.* (Mar. 16, 2021), <https://www.brennancenter.org/our-work/research-reports/emerging-fight-over-gerrymandering> [<https://perma.cc/5P3X-56UC>]; David A. Lieb & Nicholas Riccardi, Gerrymandering Surges as States Redraw Maps for House Seats, *AP News* (Nov. 10, 2021), <https://apnews.com/article/redistricting-gerrymandering-46cea13fb90a4ce3b2fc026c7c18e747> (on file with the *Columbia Law Review*) (noting a “cycle of supercharged gerrymandering” attributable in part to the fact that “[t]he legal landscape has changed since 2010 to make it harder to challenge gerrymanders.”); Ashlyn Still, Harry Stevens & Kevin Uhrmacher, Competitive House Districts are Getting Wiped off the Map, *Wash. Post* (Nov. 23, 2021), <https://www.washingtonpost.com/politics/2021/11/23/gerrymandering-redistricting-competitive-house-districts> [<https://perma.cc/ZG77-GEGB>] (explaining how extreme partisan gerrymandering is wiping competitive congressional districts off the map).

104. 139 S. Ct. at 2507–08.

105. *Id.*

106. See *Williams-Yulee*, 575 U.S. at 445; *Caperton*, 556 U.S. at 884–87.

“too partisan”? This line-drawing problem is likely a major reason why the Supreme Court got cold feet about finding extreme partisan gerrymandering justiciable, and instead found it to be a “political question.”

C. *Bright-Line Rule: Prohibit Supreme Court Districting Entirely*

As Justice Felix Frankfurter wrote of the districting problem years before *Baker v. Carr*, “Courts ought not to enter this political thicket.”<sup>107</sup> There is an obvious solution to this thicket and the line-drawing problem: a bright-line rule against all state supreme court districting. If a state chooses judicial elections, all seats must be statewide.

This bright-line rule would be the boldest but also the most workable and manageable of all these proposals: All state supreme court judicial elections must be statewide. This prophylactic rule may go far beyond judicial minimalism, but the problem of federal judges deciding which districts are too partisan implicates the partisan bias (or appearance of partisan bias) among a federal judiciary increasingly perceived as partisan itself. The problem of an imbalanced district in *Baker v. Carr* was originally called a “thicket.” A bright-line rule is the best preventative prophylactic so federal judges can avoid this “thicket” entirely. Constitutional law has many prophylactic rules: *Miranda* warnings; the exclusionary rule; and even the legislative districting rules of contiguity as a prophylactic against impermissible racial gerrymandering.<sup>108</sup> Daryl Levinson finds modern defamation law as a prophylactic rule to protect the First Amendment. He notes, “[C]onstitutional rights so routinely include prophylactic components that attempting to distinguish the ‘real’ right from its ‘remedial’ ingredients is both hopeless and pointless.”<sup>109</sup> David Strauss has called prophylactic rules “ubiquitous” and as incorporating the “strict scrutiny” test itself:

Strict scrutiny therefore goes beyond the “real” equal protection clause. But the Court has determined that it is worth paying this price in order to avoid both the costs of a case-by-case approach and the risk that such an approach would lead to erroneous decisions upholding classifications based on prejudice.<sup>110</sup>

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107. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

108. See *United States v. Herrera*, 444 F.3d 1238, 1255 (10th Cir. 2006) (“[T]he exclusionary rule is a prophylactic doctrine designed to modify police conduct that is not objectively reasonable.”); Melissa L. Saunders, *Reconsidering Shaw: The Miranda of Race-Conscious Districting*, 109 *Yale L.J.* 1603, 1606 (2000) (“[L]imitations on race-conscious districting . . . are a ‘prophylactic measure’ that overprotects constitutional rights . . .”).

109. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 *Colum. L. Rev.* 857, 899–904, 902 n.186 (1999).

110. David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 *U. Chi. L. Rev.* 190, 205 (1988); see also Stephen J. Schulhofer, *Reconsidering Miranda*, 54 *U. Chi. L. Rev.* 435, 448–53 (1987) (arguing that prophylactic rules are an appropriate judicial response to the difficulties of adjudication in certain complex or fact-intensive situations).

Thus, prophylactic rules play a crucial role in allowing judges to guard constitutional rights manageably because otherwise, they could not realistically protect rights at all. Without a bright-line prophylactic rule against judicial districts, courts would not have a manageable rule to differentiate between permissible and impermissible districting. Indeed, Samuel Issacharoff and Sanford Levinson have suggested that the *Baker/Reynolds* “one-person/one-vote” rule itself is a simpler prophylactic rule to protect equality more robustly and more manageably than the core but amorphous question of equal protection.<sup>111</sup> A no-judicial-districts rule would simply replace one prophylactic bright-line rule with another.

And what about the political question doctrine ruling in *Rucho*? Judges are easily distinguishable. Judges and judicial integrity are not mere political questions committed to the political branches. And to the extent that the political question doctrine turns on judicially manageable standards, the bright-line rule eliminates this concern.

#### CONCLUSION

In this era of asymmetric hyperpartisanship and antidemocratic hardball and beanball, when partisans are openly calling for state courts and state legislatures to overturn the will of voters and our democracy faces the worst abuses imagined by readers of *Democracy and Distrust*, it seems necessary for judicial intervention to save democracy with bright-line rules.<sup>112</sup> The metaphor from John Hart Ely is that the courts need to play umpire among various parties and interest groups to protect a fair game. “Constitutional hardball” is playing by the rules, but playing aggressively. We are in an era of “constitutional beanball”: breaking the rules by trying to injure the opponent and disable democracy. In America’s game of increasingly aggressive beanball, we need a bright-line judicial hardball rule. Considering our increasingly partisan judiciary, perhaps we should not rely so much on federal judges to have to call subjective balls and strikes every day for a full season. By playing hardball against judicial-gerrymandered beanball, a bright-line rule against judicial districts would allow federal judges to stay off the field and, as a result, state judges might be slightly more reliable umpires.

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111. Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 *Tex. L. Rev.* 1643, 1657 (1993); Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 *N.C. L. Rev.* 1269, 1281 n.40 (2002).

112. See generally Ely, *supra* note 79 (explaining the importance of the courts in protecting both majority governance and minority rights).