Cleveland State Law Review

Volume 72 | Issue 1 Article

12-4-2023

Methodological Gerrymandering

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ABSTRACT

The U.S. Supreme Court has come to decide many of the most consequential and contentious aspects of social policy via its interpretations of the U.S. Constitution. Institutional features of the Court create significant pressure on the Justices to justify their decisions as applications of "law" rather than the practice of "politics." Their perceived failure to do so calls forth criticism sounding in a variety of registers—ranging from allegations of a lack of neutrality, lack of impartiality, or lack of "principle," to allegations of opportunism, disingenuousness, and hypocrisy. Analyzing the Justices' choices in relation to interpretational "methodology"—choosing one lens through which to read the document versus another, prioritizing some kinds of arguments over others, etc.—is one important way in which we can locate their decisions on the spectrum from more to less problematic and choose the right register of critique and reaction. This Article lays out a framework for such an analysis anchored in the concept of "methodological gerrymandering." Grounded in a high-level analogy between electoral districting and constitutional interpretation, "methodological gerrymandering" is based on the idea that analogously to how legislators can "gerrymander" the boundaries of electoral districts to make it very likely that their ideologically-preferred candidates will win elections, Supreme Court Justices can "gerrymander" their interpretive methodology to make it very likely that constitutional doctrine implements their political or ideological preferences for how society should be organized. This Article lays out the key aspects of such "methodological gerrymandering," explains how these aspects clarify the many

* I want to extend my special thanks to the Cleveland State Law Review and Reggie Oh for kindly inviting me to participate in this Symposium and for organizing such a fantastic and generative event. For kind comments, insightful discussions, and reflections at different stages of this project that have significantly improved my thinking on the broader subject it discusses, I am deeply thankful to Mario Barnes, Devon Carbado, Richard Fallon, Jon Feingold, Kim Forde-Mazrui, Jeremia Ho, Beto Juarez, Bill LaPiana, Rick Marsico, Frank Munger, Cedric Powell, Ed Purcell, Russell Robinson, Becky Roiphe, Faraz Sanei, Michael Smith, Lee Strang, Marc Spindelman, Nicholas Stephanopoulos, Adam Winkler, and participants at the New York Law School Faculty Colloquium and the 2023 Law and Society Association Conference. I am also grateful to Ernie Oleksy, Mike Maloof, and the *Cleveland State Law Review* team in charge of editing this piece for their substantive rigor and personal generosity and kindness during what was a challenging time period to write this Article. All errors are mine.

critiques that are levied at the Court and show when each is more or less appropriate, and proposes a way to "measure" the phenomenon. It then applies the framework to recent developments at the Court in the context of constitutional equality rights and argues that a number of Justices are engaging in significant levels of methodological gerrymandering in an effort to reassert and bolster problematic social hierarchies along the lines of religion, race, and sex. That multiple members of an institution that is meant to ensure "equal justice under law" gerrymander their interpretations of constitutional equality rights in ways that reassert and bolster the very social hierarchies that have troubled American society since its founding needs to be critiqued in depth. This Article's discussion is one small part of this critique.

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I. INTRODUCTION

The *Cleveland State Law Review*'s 2022 Symposium took the U.S. Supreme Court's specific decision in *Dobbs v. Jackson Women's Health Organization* to overturn decades of its own precedent that had protected as a fundamental constitutional right a woman's decision to terminate a pregnancy[1] as a starting point for a broader discussion of the nature and current development of important aspects of constitutional law. As reflected in its expansive title, "The Future of the Fourteenth Amendment: Autonomy and Equality Post-Dobbs v. Jackson," the Symposium created a forum for discussing and critically evaluating the many connections between the "micro" of constitutional law—decisions in individual cases based on an interpretation of specific constitutional provisions—and the "macro" of constitutional law—the ways in which those decisions, especially in the aggregate, reflect, shape, and choose between broad social values and outcomes by determining the broad "rules of the game" that predictably benefit some and burden other members of society.

These connections call to mind Derrick Bell's powerful suggestion that "rather than a revered relic bequeathed by the Founding Fathers, to be kept under glass and occasionally dusted, the Constitution is a living document, one locus of battle over the shape of our society, where differing visions of what should be, compete to become what is, and what will be."[2] "Constitutional law," in other words, is not just the "law" of the specific document called the "Constitution," but also the "law" that "constitutes" American society in many important respects. The Symposium allowed for deep engagement of both dimensions.[3]

In my contribution to this engagement, I argue that the "methodological" choices that judges, and most notably the Justices of the U.S. Supreme Court, make in interpreting the Constitution—choosing one lens through which to read the document versus another, prioritizing some kinds of arguments over others, etc.—are an important theater in this "battle over the shape of our society." More specifically, I

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[1] Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2284 (2022).

[2] Derrick Bell, *Constitutional Conflicts: The Perils and Rewards of Pioneering in the Law School Classroom*, 21 SEATTLE U. L. REV. 1039, 1043 (1997); *see also* Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 24 (2003) ("Arguments about the nature of the Constitution serve as a medium in which Americans . . . debate questions of national identity and purpose."); *cf.* Robert L. Tsai, *Legacies of Pragmatism: Re-examining Pragmatism in Constitutional Interpretation*, 69 DRAKE L. REV. 879, 896 (2021) ("Although accounts of judicial review are but one aspect of constitutionalism, in the United States they offer windows into a variety of political commitments, visions of society, and theories of human behavior.").

[3] Responses to *Dobbs*, such as Professor Laurence Tribe's, who analyzed the case both in terms of its doctrinal intricacies about how to analyze rights not explicitly enumerated in the Constitution's sparse text (law of the Constitution) but also in terms of its broader implications "as a radical setback for the equal status of women in America" (law that constitutes American society), also reflect both of these dimensions of constitutional law. Laurence H. Tribe, *Deconstructing* Dobbs, THE N.Y. REV. OF BOOKS (Sept. 22, 2022), https://www.nybooks.com/articles/2022/09/22/deconstructing-dobbs-laurence-tribe/.

argue that those choices can be productively analyzed, discussed, critiqued, and responded to using a framework of what I call "methodological gerrymandering."

The concept of methodological gerrymandering is based on a high-level analogy between the process of electoral districting, from which the term "gerrymandering" originates, and the process of constitutional interpretation. I suggest that analogously to how legislators can "gerrymander" the geographical boundaries of electoral districts by drawing them in a way that makes it very likely that their ideologically-preferred candidates will win elections, Supreme Court Justices can "gerrymander" the legal boundaries of what the Constitution permits or prohibits by choosing their interpretive methodology in a way that makes it very likely that constitutional doctrine implements their political or ideological preferences for how society should be organized.[4]

In explicating the phenomenon of methodological gerrymandering in this Article, I make two main contributions—one theoretical, and one as-applied.

My theoretical contribution is to lay out an analytical framework that explains how Supreme Court Justices *can* gerrymander their approach to interpreting the Constitution and that provides concrete tools for "measuring" such gerrymandering. I believe that this framework can help generate a shared vocabulary and conceptual infrastructure for discussions of results-oriented constitutional interpretation that observers of all stripes may find useful for improving the quality of public debate about the Court's work. Supreme Court Justices are already frequently criticized from all sides of the political spectrum for engaging in ideologically-motivated decision-making. But these critiques sound in a variety of registers—ranging from allegations of a lack of neutrality, lack of impartiality, or lack of "principle," to allegations of opportunism, disingenuousness, and hypocrisy—and my perception is that frequently when these allegations are raised, people are not clear or consistent with each other about exactly what is critiqued and meant by each allegation. Thus, as Todd Pettys has noted, "participants in public discourse about the Court can easily find themselves talking past one another."[5] The methodological gerrymandering framework proposed in this Article explains how common critiques—say, that a decision demonstrates a lack of neutrality, or exhibits hypocrisy—in fact speak to specific sub-aspects of the broader phenomenon of methodological gerrymandering. As such, the framework can provide clearer guidance about what justifies each type of critique and what does not. Moreover, the framework productively shifts the focus away from arguing over whether there is ideologically-motivated decision-making as such—which I posit is inherent to some extent in constitutional interpretation—and toward arguing over "how much" and what kind there is and how we can tell. Both aspects of the framework, I believe, helpfully focus disagreement in the inevitably high-stakes and highly-contentious realm of constitutional interpretation.

My as-applied contribution is to provide examples of how various Justices *have* gerrymandered their interpretive methodologies in what I consider to be highly troubling ways in the context of one important subject of this Symposium—equality rights. I argue that a number of Justices in the Court's current conservative majority are engaging in significant levels of methodological gerrymandering in an effort to reassert and bolster problematic social hierarchies along the lines of religion, race, and sex that install white male Christians and their interests at the top, with everyone else's

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[4] *See generally infra* Part III.

[5] Todd E. Pettys, *Judging Hypocrisy*, 70 EMORY L.J. 251, 255 (2020).

interests subservient to them. This effort can be uncovered by applying the methodological gerrymandering framework to recent decisions interpreting the equal protection and due process clauses of the Fourteenth Amendment, including *Dobbs*, and the religion clauses of the First Amendment. From my point of view, the fact that multiple members of an institution that is meant to ensure "equal justice under law" gerrymander their interpretations of constitutional equality rights in ways that reassert and bolster the very social hierarchies that have troubled American society since its founding[6] needs to be called out and critiqued in depth. This Article's discussion is one small part of this critique.

The Article proceeds as follows: Part II provides important conceptual background on which my analysis of methodological gerrymandering builds. It summarizes how the Supreme Court's "democratic deficit" creates anxiety over the fact that the Court has come to decide many of the most important questions of social policy in American society; how this anxiety creates pressure on the Court to justify its decisions based on legal principle rather than political or ideological preferences; and how judicial "methodology" in interpreting the Constitution is an important measuring stick in evaluating the Court's success. Building on this foundation, Parts III and IV then lay out the Article's framework for evaluating Justices' methodological choices through the prism of "methodological gerrymandering." Part III explains why the analogy between constitutional interpretation and electoral districting is productive, lays out the conceptual components of electoral gerrymandering that are relevant for the analogy, and then adapts those components to the context of constitutional interpretation to define the key aspects of "methodological gerrymandering." Part IV then turns from the question of what methodological gerrymandering is to how we might be able to measure its relative extent. I propose that methodological gerrymandering can occur at different levels of generality and that, in general, the more specific the level, the more gerrymandering there is. Part V then applies the framework to a selection of equality rights issues to illustrate the operation of methodological gerrymandering in the context of the topic of this Symposium and to criticize various members of the current majority on the Court for using equality rights doctrine to reassert and bolster problematic social hierarchies along the axes of race, religion, and sex. Part VI briefly gestures at implications of the framework for broader questions such as Supreme Court institutional reform.

II. CONTROVERSIES OVER CONSTITUTIONAL INTERPRETATION AND JUDICIAL REVIEW: SOME BACKGROUND

The study and critique of judicial decision-making is deeply contested, especially in the highly charged context of the U.S. Supreme Court's interpretation of the U.S. Constitution. Antagonistic—and often irreconcilable—views and theories abound

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6 *Cf.* Michele Goodwin, *Opportunistic Originalism:* Dobbs v. Jackson Women's Health Organization, 2022 SUP. CT. REV. 111, 123 (2022) (arguing in relation to *Dobbs*, that originalism "has been retrofitted in the Roberts Court with dangerous consequences in the present, particularly for vulnerable communities that were divested from citizenship and meaningful political representation, participation, and power at the nation's Founding").

both in the descriptive sphere—what *is* the Supreme Court doing and why—as well as in the normative sphere—what *should* the Supreme Court be doing and why.[7]

This is not surprising: the stakes are high. Through its exercise of the power of judicial review, in which the Court claims the prerogative to declare invalid and refuse to enforce acts of the political branches of both the federal and state governments based on the Court's view that they are inconsistent with the Constitution,[8] the Supreme Court has come to decide many of the most controversial questions and issues in American society.[9]

Yet there is a constant anxiety about the fact that the Supreme Court has come to play this role. This anxiety is grounded (among other things) in the Supreme Court's democratic deficit—the Court is an institution of unelected, life-tenured, legal elites[10]—and has been crystallized in the idea of the "countermajoritarian difficulty" of judicial review.[11] Why, the question goes, should questions of policy and morality in a democracy be ultimately decided by a small, unelected, unrepresentative tribunal, rather than the people's elected representatives?[12]

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[7] As Larry Solum has recently noted, "[f]undamental questions regarding the constitutional order in the United States are much discussed and disputed . . . . Just mapping the landscape of contemporary normative constitutional theory is a daunting task. There are so many theories . . . ." Lawrence B. Solum, *Outcome Reasons and Process Reasons in Normative Constitutional Theory*, SSRN, Jan. 30, 2023, at 1.

[8] Bell, *supra* note 2, at 1039–40.

[9] *See generally, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (affirmative action in the context of race) [hereinafter SFFA]; Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2242 (2022) (abortion); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012) (structure of American health care system); Bush v. Gore, 531 U.S. 98 (2000) (winner of closely-contested presidential election).

[10] U.S. CONST. art. III, § 1.

[11] The analysis of this countermajoritarian difficulty has been described as "a 'central preoccupation' and a 'central obsession' of constitutional law scholarship." Franita Tolson, *Countering the Real Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2381, 2381 (2021).

[12] Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 335 (1998) ("The problem is this: to the extent that democracy entails responsiveness to popular will, how to explain a branch of government whose members are unaccountable to the people, yet have the power to overturn popular decisions?"). There are many possible answers to this question—both affirmative and negative—which have been analyzed at great depth elsewhere. *Compare, e.g.*, Richard H. Fallon Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2007), *with* Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 YALE L.J. 1346 (2006). In this Article, I provisionally take the existence of judicial review for granted, whatever its normative desirability, and develop a framework within which discussion of how it is exercised can be (hopefully) improved. However, I briefly return to what the implications of the application of this framework might be for debates around the desirability of judicial review in Part VI and hope to investigate the point in greater detail in future work. *See infra* Part VI, pp. 198–200.

One general answer from those defending judicial review, and certainly from various members of the Supreme Court,[13] has been to invoke some version of the "law / politics distinction."[14] In simplified form, this distinction maintains that while politics is, and can legitimately be, a space where partisan goals, values, and serving a particular constituency drive decision-making,[15] law in general, and judicial decision-making in particular, is "a space of 'principle and logic' from which all political considerations are rigorously excluded"[16] and of "impartiality" in which judges "are obliged to do their work above the political fray, without partisan loyalties or agendas and without regard to the identities of the parties who come before them."[17] While politics may well involve partisan "bias," judges and judicial decision-making are meant to be "neutral" in the principles they choose and how they apply them to resolve the cases before them.[18]

Invoking the law / politics distinction and locating judicial decision-making on the "law" side of the distinction is meant to help ease anxiety about judicial countermajoritarianism. It communicates that there are meaningful constraints on the power of the electorally-unaccountable judiciary to interfere with the choices made in

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[13] *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 278 (2004) ("'The judicial Power created by Article III, § 1, of the Constitution is not whatever judges choose to do . . . . Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.").

[14] Friedman, *supra* note 12, at 351 ("The more people accept judicial decisions as a legitimate interpretation of the Constitution as law, the less likely they are to criticize the Supreme Court in countermajoritarian terms.").

[15] Pettys, *supra* note 5, at 276 ("Elected officials might enjoy the support of their constituents precisely because of the partisan objectives they pledge to pursue.").

[16] Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R-C.L. L. REV. 373, 384 (2007).

[17] Pettys, *supra* note 5, at 276.

[18] *See, e.g.*, Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1716 (2021) (describing an account of thinking about the Supreme Court's role in which "partisanship" is something "from which the Supreme Court ought to remain entirely immune or more insulated" and noting that "[o]ne of the most influential assessments for why popular trust in the Supreme Court is falling . . . is that the Court is becoming a partisan institution"). Needless to say, not only is the meaning of "neutrality" highly contested, but the very possibility of neutrality has been strongly questioned. Modern debates around the question of "neutral principles" in judicial decision-making are usually traced back to a 1959 lecture by Herbert Wechsler and the vigorous critique it engendered, in large part because of Wechsler's criticism of the Court's approach to resolving *Brown v. Board of Education*, 347 U.S. 483 (1954). For Wechsler's lecture, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). For one summary of the controversy around and response to Wechsler's arguments, including claims by "neutrality skeptics" that neutrality is not, in fact, possible, see Dan M. Kahan, *The Supreme Court 2010 Term: Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 9–19 (2011).

the political branches of government,[19] i.e., that judges are not simply "politicians in robes."[20]

Judicial "methodology" in interpreting the Constitution, or "constitutional theory," plays a significant role in this context. This is because even though "a judge does not need a fully articulated theory in order to do her job. . . . For a judge as much as for anyone else, it is impossible to engage in constitutional argument without making at least implicit assumptions about appropriate methodology."[21] Accordingly, a significant part of the work of normative constitutional theory is to support the quest for principle over political preferences by proffering approaches to constitutional interpretation that, if consistently implemented, constrain adherents[22] and provide a standard for critiquing the work of the Court.[23]

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[19] David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 925 (1996) ("[A]ny approach to constitutional interpretation must explain how it restrains the officials responsible for implementing the Constitution and prevents them from imposing their own will. A theory of constitutional interpretation for our society also ought to be able to explain how the institution of judicial review—judicial enforcement of the Constitution against the acts of popularly elected bodies—can be reconciled with democracy."). While many formulations pose the problem to be solved as one of interference with the will of "democratic majorities," as opposed to with the will of the political branches, there are structural reasons to question that the political branches always, or even most of the time, truly reflect the will of democratic majorities. *See generally* Tolson, *supra* note 11.

[20] Pettys, *supra* note 5, at 276 (quoting now-Justice Neil Gorsuch in his confirmation hearing as rejecting this description of what judges do).

[21] Richard H. Fallon Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 575 (1999).

[22] Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1334 (2018) ("[A] sound constitutional theory should yield at least some surprises and disappointments, even to its proponents."); *see also* Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193, 209 (2015) ("[N]early everyone would agree that if an approach would license judges to invalidate legislation whenever they liked, it would be unacceptable for that reason."); David A. Strauss, *What is Constitutional Theory*, 87 CALIF. L. REV. 581, 588 (1999) ("A constitutional theory prescribes something about the results a legal system should reach in controversial cases. If that theory always produces the results in controversial cases that the theory's adherents would have favored anyway, we are entitled to suspect that the theory has been rigged."); Fallon Jr., *supra* note 21, at 539 ("[A] theory, once chosen, ought to bind any principled adherent to at least some results that she would otherwise reject."); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 784 (1982) ("Over time, however, it became clear—as a result, for example, of the first era of substantive due process and the legal realists' destructive rule skepticism—that judges no less than legislators were political actors, motivated primarily by their own interests and values. The Hobbesian problem was then seen to recur on a higher level. Its solution lay in the development of constitutional theory, which could serve as a constraint of judges by providing some standard, distinct from mere disapproval of results, by which their performance could be evaluated.").

[23] Tushnet, *supra* note 22, at 784 n.9 ("Our system . . . provides no way to enforce constitutional theory coercively; . . . [i]n consequence, constitutional theory can constrain judges only by creating standards for criticism and, to the extent that the standards are internalized by the judges, for self-criticism."). Of course, a different basis for criticism that can be grounded

The phrase "if consistently implemented" in the previous sentence is crucial, because the foregoing considerations make it such that "the Justices' commitment to the norm of impartiality is a matter on which they are especially vulnerable to skepticism."[24] Judicial methodological "inconsistency" in constitutional interpretation is an object of scorn for multiple reasons. For one, it is said to "affront[] the rule of law,"[25] both because it undermines the interrelated values that the rule of law is said to be based on—consistency, predictability, stability, evenhandedness, and certainty—and because it raises the specter of *un*constrained, and therefore potentially arbitrary, rule.[26] For another, and relatedly, judicial inconsistency "may breed a destructive, spiraling cynicism" about the work of the courts because it calls into question the applicability of the law / politics distinction.[27] Rather than providing, as the distinction requires, the "sense that reasons matter more than results," inconsistency creates the impression that judicial decision-making is more a matter of "counting votes and the exercise of raw power."[28] While this may be an appropriate (or, at least, begrudgingly accepted) task in a democracy for elected and democratically-accountable officials, it is not thought to be such for democratically-unaccountable judges. Judicial inconsistency, in other words, raises the concerns around the "countermajoritarian difficulty" in sharp form. Accordingly, "[t]he ideal of judicial reason, as distinct from power or will, implies an obligation of methodological integrity,"[29] and the Justices are properly criticized for lacking it.

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in constitutional theory is that the Court is reaching the "wrong" outcome in a given case or set of cases, as shown by application of the "appropriate" constitutional theory. Solum, *supra* note 7, at 2 ("Normative constitutional theory aims to provide reasons for making fundamental choices regarding the constitutional order. Such reasons include both outcome reasons and process reasons. Outcome reasons evaluate constitutional options by considering the goodness or badness of the outcomes they produce."); Fallon Jr., *supra* note 21, at 539 ("It would be naive and misguided to choose a constitutional theory without regard to whether it would be likely, on balance, to yield 'good' results.").

[24] Pettys, *supra* note 5, at 280.

[25] Fallon Jr., *supra* note 21.

[26] Solum, *supra* note 7, at 15.

[27] Fallon Jr., *supra* note 21.

[28] *Id.* (quoting EDWARD LAZARUS, CLOSED CHAMBERS 249 (1998)). As a result, inconsistency threatens the "sociological legitimacy" of judicial decision-making, which requires that "the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward." Richard H. Fallon Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2004). When judicial decision-making starts to look like the mere "exercise of raw power," this regard is likely to be lost.

[29] Fallon Jr., *supra* note 21, at 573.

Consequently, charges of "hypocrisy" (and related ones of "disingenuousness"[30] and "opportunism")[31] are also common in evaluations of the Court's work.[32] At a general level,[33] the concept of hypocrisy incorporates the very fears about self-servingness, inconsistency, lack of principle, and lack of neutrality that are at the core of the debates about the propriety of judicial review outlined above[34]—as encapsulated in the adage that if you are a hypocrite, you do not "[p]ractice what you preach."[35] To the extent that so much of the authority of the Court rides on it being able to justify to observers that its decisions are not just based on politics but are principled, and to the extent that a "hypocrite" is a "person[] who ha[s] undermined their claim to moral authority,"[36] a charge of Supreme Court (or a Justice's) hypocrisy is in some ways the ultimate attack on its work.

Thus, it is not surprising that as it pertains to the Supreme Court's practice of constitutional interpretation, allegations of inconsistency, hypocrisy, and lack of neutrality, principle, and impartiality are all among the key concepts used to critique

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30 Michael L. Smith, *Disingenuous Interpretation*, SSRN, Mar. 13, 2023, at 22 ("The disingenuous interpreter is a common character in discussions of constitutional law. This actor goes through the motions of interpreting the Constitution and reaching conclusions about its meaning. But all the while, the disingenuous interpreter only wishes to reach conclusions that comport with his political and moral goals . . . . The Justices on the Supreme Court certainly catch their fair share of criticism for deciding cases based on their political views.").

31 According to Larry Solum, the "core idea" of "constitutional opportunism" is to adopt a methodology that "best achieves . . . preferred outcomes in the short run but switch to another option" when it better suits the interpreter's preferences—in other words, it is an approach that "abandon[s] the effort to develop a consistent and principled approach" to constitutional interpretation. Solum, *supra* note 7, at 42 (describing this approach in relation to constitutional theorists). William Van Alstyne even broadly suggested that one of the "two main generic groups" of "constitutionalists" that exist in his view should be called "opportunists" (the other are "obligationists"), with such opportunists defined by Van Alstyne as "shar[ing] a common bond" of "find[ing] things in the Constitution that they want to find and ignor[ing] things that are inconvenient." William Van Alstyne, *Clashing Visions of a Living Constitution: Of Opportunists and Obligationists*, 2010 CATO SUP. CT. REV. 13, 16 (2010).

32 Pettys, *supra* note 5 (noting that "[t]he Justices . . . are often accused of hypocrisy when critics believe the Justices have behaved as political partisans, voting in service to their political loyalties rather than in service to impartial justice" and providing examples).

33 As I suspect is common with terms that are both powerful in meaning and in common use, it appears that there is no overarchingly accepted definition of "hypocrisy." *Id.* at 258 (noting that various scholars who have theorized hypocrisy "have not yet agreed upon hypocrisy's defining elements"). I do not mean to suggest that there is one in this Article, though below I attempt to be clear in what I mean by it and consistent in how I employ that meaning.

34 *Id.* at 260–61 (arguably incorporating each of these aspects into the three types of hypocrites proposed by the author—"the Faking Hypocrite, the Concealing Hypocrite, and the Gerrymandering Hypocrite").

35 *Id.* at 261.

36 Jessica Isserow & Colin Klein, *Hypocrisy and Moral Authority*, 12 J. ETHICS & SOC. PHIL. 191 (2017).

the work of the Court. Some of the reactions to *Dobbs* illustrate this point. Consider, for example, the following critique of the opinion by Dalia Lithwick and Neil Siegel:

> Why is Dobbs not just wrong, but lawless? Because it is utterly unprincipled. It articulates a reason for overruling Roe out of one side of its mouth, then repeatedly protests that it will not be bound by this reason out of the other side of its mouth. The court's opinion is now the law, but this is not legal reasoning that can or should be respected.[37]

In a similarly inflected statement, the dissenting Justices in *Dobbs* respond as follows to the majority's claim that its ruling will not affect fundamental rights other than abortion: "Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other."[38]

To summarize, the specific role of the Supreme Court in American democracy invites numerous types of critique from observers dissatisfied with its work—ranging from allegations of a lack of neutrality, lack of impartiality, or lack of "principle," to allegations of opportunism, disingenuousness, and hypocrisy. However, my perception is that frequently when these allegations are raised, people are not clear or consistent with each other about exactly what is critiqued and meant by each allegation. Thus, as Todd Pettys has noted, "participants in public discourse about the Court can easily find themselves talking past one another,"[39] and lose opportunities to persuade listeners who may not already be predisposed to agree with them. To the extent that one goal of public discourse is to improve our collective knowledge and mutual understanding,[40] this is not productive and may in fact undermine people's motivation to participate in this discourse. One of my goals in this Article is to begin to lay out a framework that can facilitate more substantive conversation and consistency in relation to different ways of critiquing the Supreme Court's constitutional interpretation activities by providing a shared vocabulary and conceptual infrastructure for the task. As laid out next, this framework centers on the concept of "methodological gerrymandering" and is based on a high-level analogy between the process of electoral districting and the process of constitutional interpretation.

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[37] Dahlia Lithwick & Neil S. Siegel, *The Lawlessness of the Dobbs Decision*, SLATE (June 27, 2022, 2:58 PM), https://slate.com/news-and-politics/2022/06/dobbs-decision-glucksberg-test-lawlessness.html. *See generally* Jessica Levinson, Opinion, *How Samuel Alito's Hypocrisy Is Fueling the Crisis at the Supreme Court*, MSNBC (Oct. 29, 2022, 6:00 AM), https://www.msnbc.com/opinion/msnbc-opinion/alito-s-abortion-decision-showed-total-lack-integrity-n1300368.

[38] Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2319 (2022) (Breyer, J., Sotomayor & Kagan, JJ., dissenting).

[39] Pettys, *supra* note 5.

[40] *See* Michael Hannon, *Public Discourse and Its Problems*, 22 POL. PHIL. & ECON. 336, 336–37 (2022).

III. METHODOLOGICAL GERRYMANDERING: A FRAMEWORK

A. Gerrymandering and Constitutional Interpretation: A Productive Analogy

I believe that the concept of "gerrymandering" from the electoral districting context, and in particular "partisan" gerrymandering,[41] provides a productive high-level analogy that can add both clarity and insight to analyses and critiques of methodological choices in constitutional interpretation.[42] I believe this for a number of interrelated reasons.

The first is based on existing literature. The term "gerrymandering" and its broad (and generally negative) connotation of an inappropriately politically or ideologically-motivated and results-driven activity[43] has intuitive appeal in discussions (and especially critiques) of constitutional interpretation, for many of the reasons discussed above. And indeed, some constitutional scholarship has used the term at a high level of generality in this context—though somewhat differently from how I do so in this Article.[44] That is to say, some constitutional scholars have recognized that

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[41] For simplicity, in the discussion below I use the unmodified term "gerrymandering."

[42] My thoughts on this analogy have gone over time through a form of the process described by Fredrick Schauer and Barbara Spellman in which an initial "perception of similarity" between gerrymandering in electoral districting and constitutional interpretation has gone through successive stages of refinement in which I have attempted to tease out the more specific considerations or "rule that explains the similarity," "going back and forth in a process that resembles, in a different context, Rawlsian reflective equilibrium." Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249, 258–59 (2017) (attributing this process of "abductive reasoning" to Professor Scott Brewer). This process is ongoing, and I welcome engagement on the benefits and drawbacks of the analogy. I recognize that the nature and details of gerrymandering in the election context are highly contested in a rich literature that spans decades. My point in this piece is not to take a position on highly specific disputes in that area or to suggest that there are exact equivalences to highly specific disputes about constitutional interpretation, which is the subject of a perhaps even more detailed and more longstanding literature. The point, rather, is to suggest that certain high-level debates around, as well as high-level conceptual aspects of, electoral gerrymandering can helpfully contribute to relevant high-level debates and analyses of constitutional interpretation. The description of relevant aspects of electoral gerrymandering below is offered in that spirit, though I hope to explore in future work whether more granular analogies—e.g., to common mechanisms of electoral gerrymandering such as "cracking" and "packing"—would also be productive. For an analysis that does employ those more granular concepts in the context of statutory interpretation, though not the intermediate-level concepts I employ in this Article, *see* William N. Eskridge Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1739–41 (2021).

[43] I unpack more detailed connotations of the term below.

[44] *See, e.g.*, Girardeau A. Spann, *Gerrymandering Justiciability*, 108 GEO. L.J. 981, 982–83 (2020) (arguing that the Court has "gerrymandered its justiciability doctrines" by using the "considerable discretion" that the "lack of doctrinal constraint" that constitutional justiciability rules impose on the Court "in a way that permits it to perform the social function of facilitating efforts by the white majority to preserve its existing political advantage over racial minorities"); Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering against Abortion Rights: NIFLA v. Becerra*, 94 N.Y.U. L. REV. 61, 66, 119 (2019) (analyzing what the authors call "constitutional gerrymandering against abortion rights," conceptualized as constitutional

gerrymandering is a concept that can appropriately and usefully be applied in analyzing (usually criticizing) the Court's constitutional interpretation activities. A recent article by Bill Eskridge and Victoria Nourse has also made a gerrymandering analogy in the statutory interpretation context.[45] Finally, the connection between gerrymandering and constitutional interpretation has been (much more briefly) made in at least one Supreme Court opinion (in dissent) as well.[46] I want to suggest that there is more depth to the connection between gerrymandering and constitutional interpretation than what is currently discussed in the literature and offer a framework on which this depth can be built out.[47]

My second reason for proposing the analogy is related but conceptual. I believe that gerrymandering as defined and discussed in the electoral districting context has certain conceptual attributes that sufficiently parallel relevant aspects of constitutional interpretation such that there are "structural and relational similarities" and not just "surface similarities."[48] Thus, the possibility for a productive and generative analogy exists that can help us better understand and conceptualize relevant aspects of constitutional interpretation.[49]

Third, and consequently, I similarly believe that certain debates over the (im)propriety of gerrymandering in the election context have relevant high-level parallels to debates about various aspects of judicial review (including its propriety) and constitutional interpretation such that those latter debates can be illuminated by the former.

Reasons two and three are connected in ways that my framework in this Article tries to capture. As discussed in more depth below, both electoral gerrymandering and constitutional interpretation by the Supreme Court are acknowledged to be potentially intractable subjects in part because they combine comparable substantive and institutional challenges of long standing. Substantively, both areas are (at least today)[50] in part thought of as processes in which some level of influence of politics

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interpretation that is meant to "ensure an outcome consistent with antiabortion ideological leanings of the majority" of the Court even if this "ultimately results in an opinion that is contrary to and conflicting with established law"—in other words, an approach that "manipulates the boundaries of constitutional jurisprudence to favor [the Court's majority's] distaste for reproductive rights").

[45] Eskridge & Nourse, *supra* note 42.

[46] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 826 (2015) (Roberts, C.J., dissenting) ("No matter how concerned we may be about partisanship in redistricting, this Court has no power to gerrymander the Constitution.").

[47] This Article is the first in a larger project in which I plan to expand on multiple strands of analysis that this Article can only briefly gesture at.

[48] Schauer & Spellman, *supra* note 42, at 261.

[49] *Cf.* Eskridge and Nourse, *supra* note 42, at 1718 (arguing that the authors' article, including its gerrymandering analogy, "provides conceptual tools that allow lawyers and students to understand the deep analytical problems faced and created by the new textualism advanced by Justice Scalia and his heirs").

[50] As Girardeau Spann has summarized, as it relates to constitutional interpretation at least, this was not the case under the "formalist view of law" that was more predominant in the

and ideology are inevitable.[51] At the same time, "too much" of such influence is thought of as, at the very least, undesirable and perhaps also inconsistent with the system of government set up by the Constitution.[52] The (or at least one) challenge, therefore, is how to distinguish "present but perhaps acceptable" from "too much." Institutionally, both areas involve disputes about the proper allocation of ultimate responsibility for, and power over, important substantive questions between the political branches and the federal courts (especially the Supreme Court)[53] in an American democracy that is continuously working through the tension caused by simultaneous sentiments that political majorities and their representatives neither can nor should always be trusted, but also that, as a general rule, the will of the majority should govern.[54] As I suggest below, I believe it is worthwhile to work through how comparable conceptual aspects as to the who, the why, and the how of gerrymandering and constitutional interpretation might underlie these similarities; and how those

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nineteenth century and treated legal interpretation as a form of scientific discovery. However, the legal realist movement firmly dislodged this view and its "rule skepticism and doctrinal indeterminacy insights . . . now seem to be both widely shared and widely regarded as preferable to the formalist account of law." Girardeau A. Spann, *Constitutionalization*, 49 ST. LOUIS U. L.J. 709, 711–13 (2005).

51 In the context of gerrymandering, see, e.g., Gaffney v. Cummings, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment."). In the context of constitutional interpretation, see, e.g., Spann, *supra* note 50, at 714 ("Stated more bluntly, there is nothing in the post-realist Constitution to prevent a judge from elevating that judge's own normative or political preferences to the level of constitutional law. And to make matters worse the problem does not stem merely from the danger of judicial abuse at the hands of judges who are unable to exercise judicial self-restraint. Rather, the problem stems from the fact that judicial discretion is a necessary incident of judicial interpretation."). *See also infra* Part IV.A, pp. 176–78.

52 In the context of gerrymandering, see, e.g., Vieth v. Jubelirer, 541 U.S. 267, 344 (2004) (Souter, J., dissenting) ("[T]he issue is one of how much is too much . . . ."). *Accord id.* at 298 (plurality opinion) ("Like us, Justice Souter acknowledges and accepts that 'some intent to gain political advantage is inescapable whenever political bodies devise a district plan, and some effect results from the intent.' Thus, again like us, he recognizes that 'the issue is one of how much is too much.'"). In the context of constitutional interpretation, see, e.g., Sunstein, *supra* note 22 ("[N]early everyone would agree that if an approach would license judges to invalidate legislation whenever they liked, it would be unacceptable for that reason."). *See generally supra* note 22.

53 In the context of gerrymandering, see, e.g., Gill v. Whitford, 138 S. Ct. 1916, 1926 (2018) (noting that prior cases "have generated conflicting views both of how to conceive of the injury arising from partisan gerrymandering and of the appropriate role for the Federal Judiciary in remedying that injury"). In the context of constitutional interpretation, see *supra* Part II, pp. 148–49.

54 *See, e.g.*, John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 486–87 (1977) (arguing that while, generally, "[i]n a representative democracy, value determinations are to be made by our elected representatives," the political process can "malfunction," such as when political insiders "are choking off the channels of political change" or when "an effective majority . . . is systematically advantaging itself at the expense of one or more minorities," and that elected representatives "are the last persons we should trust with identification" of these malfunctions).

similarities also make it such that discussions about both gerrymandering and constitutional interpretation call forward similar critiques sounding in opportunism, lack of neutrality and principle, inconsistency and the like, which the framework I offer in this Article aims to better situate.

Finally, both areas are ones in which "right" answers on how to think about the tasks at hand have been hard to come by and may, perhaps, be impossible to come by in a sufficiently complex and diverse democratic society such as the United States. To the extent that this is true, I believe that one helpful task for legal scholarship is to generate frameworks for thinking about such perennial questions to assist other scholars, judges, policymakers, commentators, and the general public in forming their own view on how to relate to these questions. This Article suggests that, and lays out how, an analogy between electoral gerrymandering and constitutional interpretation, oriented around the concept I call "methodological gerrymandering," may be instructive and helpful in this regard.[55]

The following Parts lay out the core structure of my proposed framework. I begin by describing general conceptual aspects of gerrymandering in the election context that I consider relevant for my analogy, which I then adapt to describe "methodological gerrymandering" in the constitutional interpretation context. In Part IV, I then further specify "methodological gerrymandering" by suggesting that the practice can occur at different "levels," each of which has slightly different implications. One way to think about these levels is that they provide a "measure" of the extent of methodological gerrymandering in a given context,[56] where methodological gerrymandering is thought of as existing on a spectrum, rather than simply being present or absent.[57]

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[55] In addition to my acknowledgment above about the limits to my analogy, see *supra* notes 46–47, I add another here: Parallel to what Stephanopoulos & McGhee have noted in relation to gerrymandering—that the concern about partisan fairness that is captured via analysis of alleged gerrymandering is only one, though a very significant, aspect of electoral districting—the concern about the operation of ideology in constitutional interpretation that is captured via analysis of methodological gerrymandering is also only one, though a significant, aspect of constitutional interpretation. Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 892 (2015). Thus, I do not mean to claim that one's conclusion about the level of methodological gerrymandering one may diagnose in a given context using my framework should completely determine one's views on constitutional interpretation and judicial review. But I do propose that it should help influence that view to some extent.

[56] *Cf.* Nicholas O. Stephanopoulos & Eric M. McGhee, Essay, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 STAN. L. REV. 1503, 1506 (2018) ("[T]here has been an explosion of judicial and academic interest in the measurement of partisan gerrymandering.").

[57] Based on this measure, one could then pick one's own point at which there is arguably "too much" methodological gerrymandering going on, in relation to whatever purpose one may be mobilizing the analysis for. For example, as I hint at in Part VI *infra* and plan to explore in greater detail in a future project, one could support arguments for various judicial reform measures based on a descriptive analysis of the extent of methodological gerrymandering that one observes in a given context or time period, with different reform measures more or less justified based on the existence of various levels of methodological gerrymandering. *Cf.* Stephanopoulos & McGhee, *supra* note 55, at 885–91 (proposing a threshold on the authors'

B. Relevant "Components" of Gerrymandering in the Elections Context

The term "gerrymandering" comes from the legislative apportionment context and the practice arises from the need to draw electoral districts based on which voters from different geographic areas elect their representatives.[58] Invoking the term "gerrymandering" in describing a particular line-drawing effort generally implies a sense of disapproval and impropriety. This sense is grounded in the various aspects of how gerrymandering has been defined.

At a very broad level, gerrymandering has been defined as "[t]he practice of drawing voting district lines for partisan political advantage."[59] Justice Powell called this understanding "gerrymandering in the 'loose' sense."[60] Beyond this general, or "loose," description, however, the precise boundaries of the concept have been deeply contested, as the Supreme Court has struggled for multiple decades with how to decide the two questions (one substantive, one institutional) noted above.[61] First, substantively, given that "some" level of partisanship in districting is considered inevitable and acceptable, is there a line at which "loose" gerrymandering becomes "too much," in the specific sense that it becomes *unconstitutional*?[62] Second,

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quantitative measure of gerrymandering that is meant to distinguish "some" from "too much" "partisan unfairness").

[58] For the federal government's House of Representatives in Congress, for example, such apportionment is mandated by Article I, Section 2 of the Constitution which ties the number of House representatives to which a State is entitled to the State's population, as determined by the Census. U.S. CONST. art. I, § 2. Since the Supreme Court's "one person, one vote" decisions in the 1960s which require minimal population deviations between districts, see generally Baker v. Carr, 369 U.S. 186 (1962); Wesberry v. Sanders, 376 U.S. 1 (1964), and which the Court has also applied to state legislative districts in somewhat modified form, see generally Reynolds v. Sims, 377 U.S. 533 (1964), redistricting is essentially required every ten years. *See also* Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459, 459 (2004) ("[I]n enforcing the Constitution, the Court has required decennial redistricting of all state legislatures and multimember congressional delegations under the rule of one person, one vote."). At the federal level, single-member districts, i.e., districts which elect a single representative, are required by statute. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2495 (2019); 2 U.S.C. § 2c. The term "gerrymandering" itself is usually traced back to Massachusetts Governor Elbridge Gerry's 1812 attempt "to favor Democratic-Republicans over Federalists in apportioning the state legislature" by creating a "salamander" shaped district—the term "gerrymander" representing a portmanteau of Gerry's name and the shape of the district. Spann, *supra* note 44, at 984.

[59] Spann, *supra* note 44, at 984.

[60] Davis v. Bandemer, 478 U.S. 109, 164 (1986) (Powell, J., concurring in part and dissenting in part) ("The term 'gerrymandering' . . . is . . . used loosely to describe the common practice of the party in power to choose the redistricting plan that gives it an advantage at the polls.").

[61] *See supra* notes 48–52 and accompanying text.

[62] *See, e.g.*, *supra* note 52; *see also Davis*, 478 U.S. at 165 (Powell, J., concurring in part and dissenting in part) ("[O]nly a sensitive and searching inquiry can distinguish gerrymandering in the 'loose' sense from gerrymandering that amounts to unconstitutional discrimination."). There has been debate about the potential unconstitutionality of partisan gerrymandering either as unconstitutional discrimination under the Equal Protection Clause of the Fourteenth

institutionally, even assuming that such a line does exist, is the Supreme Court (and are the federal courts generally) constitutionally authorized to police that line through judicial enforcement?[63] Answers of different majorities on the Court over time have ranged from "Yes" and "Yes"[64] to, most recently, "Maybe" and "No."[65]

While this suggests that there is no uncontestable definition of gerrymandering, the concept can be specified in greater detail in ways that are relevant for my high-level analogy to constitutional interpretation. Specifically, numerous definitions of gerrymandering incorporate the following three general components.

1. Party in Power

The first component is that the party engaging in gerrymandering is the party "in power," or "in control," of districting at a given time, i.e., the "dominant" party in relation to districting decisions.[66]

Amendment, or as unconstitutional burdens on rights of political speech and of association under the First Amendment. *See, e.g.*, *Rucho*, 139 S. Ct. at 2502–05 (discussing both theories).

[63] This debate has been had within the framework of whether partisan gerrymandering is "justiciable," and thus a matter that falls within the judicial power of the federal courts under Article III of the Constitution, or whether it is a "political question," the answer to which is constitutionally assigned to the political branches of the federal government (or to the States) instead. Still more specifically, the question has been mostly debated under one of the prongs that the relevant political question precedent *Baker v. Carr* set out, namely whether there are "judicially discoverable and manageable standards for resolving" a particular constitutional controversy. *Baker*, 369 U.S. at 217. *See generally Rucho*, 139 S. Ct. at 2496–2507.

[64] In *Davis v. Bandemer*, for example, there was a clear majority on the Court for the proposition that partisan gerrymandering cases are justiciable—Part II of Justice White's opinion that addressed this question was for a majority of the Court. 478 U.S. at 118–27. And while both the opinions of Justice White (speaking for a plurality of four Justices in this regard) and Justice Powell (speaking for two Justices) set out the points at which they, respectively, thought partisan gerrymandering had become "too much" such that it becomes unconstitutional, there was no majority on a single constitutional standard. *Id.* at 161 (Powell, J., dissenting).

[65] In *Rucho*, a majority of the Court held partisan gerrymandering cases to be nonjusticiable. 139 S. Ct. at 2506–07. And while the majority noted that it considers "excessive" partisan gerrymandering to be "incompatible with democratic principles" and "does not condone excessive partisan gerrymandering," it did not explicitly say that such gerrymandering would necessarily be unconstitutional. *Id.*

[66] *See, e.g.*, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 822 (2015) (describing gerrymandering as a process "by which the majority in the legislature draws district lines to their party's advantage"); Vieth v. Jubelirer, 541 U.S. 267, 335 (2004) (Stevens, J., dissenting) ("Gerrymandering always involves the drawing of district boundaries to maximize the voting strength of the dominant political faction and to minimize the strength of one or more groups of opponents."); *Davis*, 478 U.S. at 109, 164 (1986) (Powell, J., concurring in part and dissenting in part) ("The term 'gerrymandering' . . . is . . . used loosely to describe the common practice of the party in power to choose the redistricting plan that gives it an advantage at the polls."); Jacob Eisler, *Partisan Gerrymandering and the Constitutionalization of Statistics*, 68 EMORY L.J. 979, 987 (2019) (noting that gerrymandering "[i]n its most typical form, it is done to benefit the party that controls the legislature, and thus has the power to draw district lines"); Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 551 (2004) ("The point of

In the United States, state legislatures are usually in charge of electoral districting.[67] Thus, a party holding the majority in a state's legislature at the time redistricting occurs generally controls the redistricting process.[68]

Of particular relevance to my analogy to constitutional interpretation, this first aspect of gerrymandering means that redistricting is a potential occasion for "*opportunism*" by the party in power.[69]

2. Partisan Gain

The second component is that, the purpose[70] (and effect)[71] of the districting decisions in question is "partisan gain" for the party that controls the process.[72]

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gerrymandering is for the party controlling the process (the 'in-party') to distribute its own supporters efficiently-to win as many seats as possible-while wasting the votes of the 'out-party.'"); Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1326 (1987) (noting that gerrymandering "denotes a practice in which the party that controls a legislative districting plan's fate deliberately draws district boundaries to its own advantage").

67 For example, with respect to districting for the election of Representatives in the federal Congress, Article I, Section 4 specifies that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," though Congress has the power to "make or alter such Regulations." U.S. CONST. art. I, § 4, cl. 1. Under current precedent, at least, a State may also assign districting to an independent commission. *Ariz. Indep. Redistricting Com'n*, 576 U.S. at 814.

68 As the Court decided just this past term, however, in addition to Congress's supervisory authority noted *supra* in note 67, this control is also still subject to traditional constraints on a state's lawmaking process, such as judicial review. Moore v. Harper, 143 S. Ct. 2065, 2089–90 (2023).

69 *See, e.g.*, *Vieth*, 541 U.S. at 354 (Souter, J., dissenting) ("[T]he only way to prevent all opportunism would be to remove districting wholly from legislative control . . . .").

70 *See, e.g.*, *Davis*, 478 U.S. at 165 (Powell, J., concurring in part and dissenting in part) (endorsing a definition of gerrymandering that "properly focuses on whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends"); *see also* Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 815–16 (2005) ("Partisanship in redistricting refers, first and foremost, to partisan motivation."); Schuck, *supra* note 66 (noting that gerrymandering "denotes a practice in which the party that controls a legislative districting plan's fate deliberately draws district boundaries to its own advantage").

71 *See, e.g.*, *Davis*, 478 U.S. at 127 (plurality opinion) (requiring "an actual discriminatory effect on [an identifiable political] group" as part of its test for unconstitutional gerrymandering); *see also* Stephanopoulos & McGhee, *supra* note 55, at 859 ("[W]hen observers assert that a district plan is a gerrymander, they usually mean that it systematically benefits a party (and harms its opponent) in actual elections.").

72 *See, e.g.*, *Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 822 (describing gerrymandering as a process "by which the majority in the legislature draws district lines to their party's advantage"); *see also* Berman, *supra* note 70, at 816 n.215 ("A partisan purpose or partisan motivation is an 'intent to gain political advantage.'" (quoting *Vieth*, 124 S. Ct. at 1815 (Souter, J., dissenting))); Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1661 (1993) ("Intrinsic to the ordering of electoral

There are various ways in which the general idea of "partisan gain" can be and has been conceptualized—and indeed the challenge of uncontroversially conceptualizing and measuring it (particularly, if there is "too much" of it) has been one core part of the Court's struggle in whether and how to proceed in this area.[73] But for purposes of my analogy in this Article, I want to suggest that, at a higher level of abstraction, the key point underlying "partisan gain" is this: given a sufficient level of competitiveness between political parties in a given state or area with multiple districts,[74] the overarching goal of the party in control is to draw district lines such that, over a

configurations is the temptation for political insiders to manipulate the apportionment process for expected partisan gain.").

[73] For example, one conceptualization of partisan gain may be political power that is "disproportionate" to one's "true" electoral support. *See, e.g.*, Spann, *supra* note 44, at 984 (noting that gerrymandering is "a common technique for securing political power that exceeds one's numerical voting strength"); Eisler, *supra* note 66 (describing gerrymandering in terms of the "gerrymandering party receiving disproportionate representation"); Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1593 (1993) (noting that gerrymandering "results from the arbitrary allocation of disproportionate political power to one group"). The challenge with implementing such a conceptualization has been that the Court has made clear that the Constitution does not contain a norm of proportional representation and without such a baseline it is not clear how to define "disproportionate." *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2499 (2019); *Vieth*, 541 U.S. at 338 (Stevens, J., dissenting) ("The Constitution does not, of course, require proportional representation . . . . In that I agree with the plurality."). Another conceptualization may be "entrenchment" of a particular party. *See, e.g.*, *Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 791 (defining partisan gerrymandering as the "drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power"); *Rucho*, 139 S. Ct. at 2517 (Kagan, J., dissenting) ("[W]hen political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes too far."). The concern about entrenchment may be particularly strong if a party with only minority support in the actual population attempts to entrench itself in power. *See, e.g.*, *Vieth*, 541 U.S. at 360 (Breyer, J., dissenting) ("By entrenchment I mean a situation in which a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power."); Eisler, *supra* note 66 ("Parties often use partisan gerrymandering to seek prolonged entrenchment."). The challenge of implementing such a conceptualization is that it usually relies on predictions of future election results, which critics have said is overly speculative and not a task as to which the federal judiciary is competent. *See, e.g.*, *Rucho*, 139 S. Ct. at 2503–04 ("Experience proves that accurately predicting electoral outcomes is not so simple . . . . [A]sking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.").

[74] In other words, given the question of who should get how many seats if political sentiments in a given area are such that each party should get at least some seats.

number of separate individual contests,[75] the outcome is politically and ideologically aligned with the dominant party more often than under alternative district lines.[76]

Of particular relevance to my analogy to constitutional interpretation, this aspect of gerrymandering is grounded in concerns over a lack of sufficient "*neutrality*" and "*impartiality*"—in a context in which many people acknowledge that absolute neutrality is not possible.[77]

Different Justices have responded to these concerns in different ways: for some Justices, "neutrality" may still serve as a substantive standard for constitutionally excessive gerrymandering—based on the notion that while absolute neutrality may not be possible, at least *some* level of neutrality should still be required from the party in control of districting.[78] For others, the impossibility of neutrality in this context serves

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[75] *Vieth*, 541 U.S. at 289 ("There is no statewide vote in this country for the House of Representatives or the state legislature. Rather, there are separate elections between separate candidates in separate districts, and that is all there is . . . . Political parties do not compete for the highest statewide vote totals or the highest mean district vote percentages: They compete for specific seats." (quoting Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory*, 33 UCLA L. REV. 1, 59–60 (1985))).

[76] One way to make this general point in the more specific language of elections is that the party in control seeks to translate a given level of voter support into a greater number of individual district "wins" for its preferred candidates than if alternative district lines were used—or what scholars have called translating votes into seats more "efficiently." *See, e.g.*, Stephanopoulos & McGhee, *supra* note 56, at 1511 (noting the authors' understanding of "partisan gerrymandering as a practice aimed above all at enabling a party to convert its votes into seats more efficiently than its adversary"); Issacharoff & Karlan, *supra* note 66 ("The point of gerrymandering is for the party controlling the process (the 'in-party') to distribute its own supporters efficiently—to win as many seats as possible—while wasting the votes of the 'out-party.'"). But again, the key for my purposes is that lines are drawn such that the candidate (or "outcome") that best represents the party's political and ideological preferences under the circumstances wins in more contests than would otherwise be the case. *See also* Berman, *supra* note 70, at 816 n.215 ("To have a partisan purpose is to use, as a line-drawing 'consideration,' predictions regarding the expected electoral success of a party's candidates under different scenarios.").

[77] *Vieth*, 541 U.S. at 309 (Kennedy, J., concurring) (quoting with apparent agreement conclusion by law review article that "when district lines are drawn . . . there is no neutrality. There is only political contest"); *see also* Davis v. Bandemer, 478 U.S. 109, 129 n.10 (1986) (plurality opinion) (quoting with agreement reapportionment scholar's conclusion that "[t]he key concept to grasp is that there are no neutral lines for legislative districts . . . every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place"); Gaffney v. Cummings, 412 U.S. 735, 753 (1973) ("District lines are rarely neutral phenomena . . . . The reality is that districting inevitably has and is intended to have substantial political consequences.").

[78] *See, e.g.*, *Vieth*, 541 U.S. at 318 (Stevens, J., dissenting) (arguing that gerrymandering is subject to the government's general duty of impartiality and that "when partisanship is the legislature's sole motivation—when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage—the governing body cannot be said to have acted impartially"); *Davis*, 478 U.S. at 184 (Powell, J., concurring in part and dissenting in part) (arguing that if a districting plan has sufficient discriminatory impact, it must be justified as nevertheless having a "rational basis in permissible neutral criteria").

to answer—with "no" and based on the law / politics distinction[79]—the institutional question of whether the Supreme Court should adjudicate gerrymandering cases at all. Because "doing law" requires action that is "principled, rational, and based upon reasoned distinctions"[80] and thus requires "clear, manageable, and politically neutral" standards for courts to apply,[81] the fact that in this area courts would have to choose between inherently political alternatives means that the task of doing so "is not law."[82]

3. Manipulation or Distortion

The third component is that to accomplish such partisan gain, the relevant linedrawers employ some level of "manipulation" or "distortion" of the way in which the districting process should, to the observer in question, "really" function.[83]

This aspect of the debate has to a significant extent centered around the role of so-called "traditional districting criteria" (such as the preservation of existing political subdivisions or communities of interest, compactness and contiguity of the districts in question, and the like)[84] and whether sufficient disregard of these criteria suggests "excessive" pursuit of partisan gain (and thus calls the relevant districting decisions into question).[85]

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79 For a discussion of relevant aspects of the law / politics distinction, see *supra* Part II.

80 Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019).

81 *Id.* at 2498 (quoting *Vieth*, 541 U.S. at 307–08 (Kennedy, J., concurring)).

82 *Id.* at 2508.

83 *See, e.g.*, *id.* at 2521 (Kagan, J., dissenting) (arguing that a court's gerrymandering analysis should properly focus on "the extent to which the pursuit of partisan advantage . . . has distorted the State's districting decisions" and that a "problem arises only when legislators or mapmakers substantially deviate from the [appropriate] baseline distribution by manipulating district lines for partisan gain"); *Vieth*, 541 U.S. at 360 (Breyer, J., dissenting) (noting in defining "unjustified entrenchment" as one version of constitutionally problematic gerrymandering that "unjustified" means "that the minority's hold on power is purely the result of partisan manipulation and not other factors"); *Davis*, 478 U.S. at 164 (Powell, J., concurring in part and dissenting in part) ("Gerrymandering is 'the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes.'" (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 537–38 (1969) (Fortas, J., concurring))); *see also* Stephanopoulos & McGhee, *supra* note 56, at 1511 ("Partisan gerrymandering . . . is fundamentally about the relationship between popular support and legislative representation—and manipulating this relationship to benefit one party and handicap its rival."); Issacharoff, *supra* note 72 ("Intrinsic to the ordering of electoral configurations is the temptation for political insiders to manipulate the apportionment process for expected partisan gain.").

84 *See, e.g.*, *Rucho*, 139 S. Ct. at 2500 (discussing as examples maintaining political subdivisions, keeping communities of interest together, protecting incumbents, compactness, and contiguity).

85 *See, e.g.*, *id.* at 2518–20 (Kagan, J., dissenting) (discussing approvingly as one possible approach to judicial enforcement of gerrymandering claims an "extreme outlier" approach that aims to determine if a given district is an "extreme outlier" in a set of possible maps that could be generated using a state's "declared districting criteria," such as the "traditional criteria of contiguity and compactness," "except for partisan gain"); *Vieth*, 541 U.S. at 347–50 (Souter, J., dissenting) (discussing as aspects of proposed prima facie case for determining constitutionally

Of relevance to my analogy to constitutional interpretation, this aspect of gerrymandering, due to its connection with component 2 (partisan gain), also incorporates debates over neutrality.[86] Of additional, and perhaps greater, relevance, however, is that this component incorporates a dimension of *(in)consistency* as well, in the following sense: the worry about "manipulation" or "distortion" arises most strongly when linedrawers "depart" or "deviate" from traditional districting criteria (or from the linedrawer's stated selection from among those criteria for a given redistricting cycle)—that is, when their decisions are inconsistent with those criteria. This is because in the inherently political and competitive context of districting, a natural conclusion is that a desire for "partisan gain" (if not explicitly admitted) is what drove those departures or deviations.[87] In other words, such inconsistencies with

problematic gerrymandering whether a district "paid little or no heed to those traditional districting principles" such as "contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and mountains," whether there are "specific correlations between the district's deviations from traditional districting principles and the distribution of" the plaintiff's political group, and whether "defendants acted intentionally to manipulate the shape of the district in order to pack or crack [the plaintiff's] group"); *Davis*, 478 U.S. at 165 (Powell, J., concurring in part and dissenting in part) ("[T]he merits of a gerrymandering claim must be determined by reference to the configurations of the districts, the observance of political subdivision lines, and other criteria that have independent relevance to the fairness of redistricting."); *see also, e.g.*, Stephanopoulos & McGhee, *supra* note 55, at 891–95 (proposing doctrinal framework in which a sufficiently large amount of "partisan gain" as measured by so-called "efficiency gap" would lead to presumptive invalidity of a districting plan, which could be overcome if linedrawers could sufficiently justify their choices in relation to other districting values such as "compactness, respect for political subdivisions, respect for communities of interest, competitiveness, minority representation, and the like").

86 For example, one question has been whether traditional districting criteria can be part of a (sufficiently) neutral baseline against which to measure gerrymandering. Some Justices have argued yes. *See, e.g.*, *Vieth*, 541 U.S. at 321–22 (Stevens, J., dissenting) (arguing that considerations such as district shapes that "conspicuously ignored traditional districting principles," disregard for political subdivision lines, and the like "have supplied ready standards for testing the lawfulness of a gerrymander"). Others have argued that because traditional districting criteria are themselves not "politically neutral" either, they cannot supply the "politically neutral" judicial standards that these Justices think are required in order for the federal judiciary to appropriately adjudicate gerrymandering cases. *See, e.g.*, *id.* at 308–09 (Kennedy, J., concurring) ("[E]ven those criteria that might seem promising at the outset (e.g., contiguity and compactness) are not altogether sound as independent judicial standards" and "cannot promise political neutrality when used as the basis for relief" because "a decision under these standards would unavoidably have significant political effect, whether intended or not.").

87 *See, e.g.*, *Rucho*, 139 S. Ct. at 2521 (Kagan, J., dissenting) (endorsing lower court's approach that asked "[w]hat would have happened, given the State's natural political geography and chosen districting criteria, had officials not indulged in partisan manipulation" and suggesting that "[u]sing the criteria the State itself has chosen at the relevant time . . . enables a court to measure just what it should: the extent to which the pursuit of partisan advantage . . . has distorted the State's districting decisions").

traditional or stated criteria are "indicia"[88] or "clues"[89] that partisan gain played an outsized, and therefore potentially inappropriate, role in the linedrawing process—particularly if the departure or deviation is poorly explained or justified, or not explained or justified at all.[90]

4. Bringing Things Together

I conceptualize the relevance of these components as follows. Component 1 (party in power) generates the key "context" of gerrymandering and provides the opportunity for it. Component 2 (pursuit of partisan gain) captures the "end" or "motivation" behind gerrymandering and some degree of component 2 is conceptually necessary for calling a particular districting effort or proposal "gerrymandering."[91] Component 3 (manipulation or distortion) relates to the "means" of gerrymandering. The relative degree of component 3 (manipulation or distortion) is both an evidentiary tool for determining whether and how much of component 2 (pursuit of partisan gain) is present, as well as a significant driver of perceptions of how egregious and problematic a particular gerrymandering effort should be considered. That is to say, the greater the apparent "manipulation" or "distortion" involved, the more egregious and problematic people will generally perceive a gerrymandering effort to be.

Importantly, neither the pursuit of partisan gain (component 2) nor manipulation or distortion (component 3) are binary concepts that are either categorically present or categorically absent. Instead, each exists on a spectrum ranging from lower to higher levels of degree and importance in a given districting effort.[92] That is to say, each component can be more or less present and influential in different choices that

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88 *Vieth*, 541 U.S. at 365 (Breyer, J., dissenting) (arguing that "courts can identify a number of strong indicia of abuse" in the gerrymandering context and noting that these include "the use of partisan boundary-drawing criteria . . . , i.e., a use that both departs from traditional criteria and cannot be explained other than by efforts to achieve partisan advantage").

89 *Id.* at 344, 348 (Souter, J., dissenting) (suggesting that the task for the Court in gerrymandering cases is "to identify clues, as objective as we can make them, indicating that partisan competition has reached an extremity of unfairness" and listing "pa[ying] little or no heed" to traditional districting principles as one of those clues).

90 *See, e.g.*, *Rucho*, 139 S. Ct. at 2521–22 (Kagan, J., dissenting) (giving as an example for "too much" gerrymandering a districting "map that *without any evident non-partisan districting reason (to the contrary)* shifted the composition of a district from 47% Republicans and 36% Democrats to 33% Republicans and 42% Democrats") (emphasis added); *Vieth*, 541 U.S. at 366–67 (Breyer, J., dissenting) (listing as aspects of multiple hypothetical scenarios which, to Justice Breyer, indicate potentially unconstitutional gerrymandering whether the scenario "depart[s] radically from previous or traditional criteria" in a way that "cannot be justified or explained other than by reference to an effort to obtain partisan political advantage").

91 I believe that this is what Justice Stevens gets at when he notes that "purpose [is] the ultimate inquiry" in gerrymandering cases. *Vieth*, 541 U.S. at 321 (Stevens, J., dissenting); *see also* Berman, *supra* note 70 ("Partisanship in redistricting refers, first and foremost, to partisan motivation.").

92 In other words, they are "scalar" concepts. *See, e.g.*, Berman, *supra* note 70, at 815 (discussing the concept of partisanship in electoral gerrymandering as a scalar, rather than binary, concept).

linedrawers make: linedrawers can seek more or less partisan gain, and they can engage in more or less manipulation and distortion of the districting process to do so.[93]

Taken together, I believe that these aspects of gerrymandering underlie both the relatively widespread agreement that "too much" gerrymandering is improper, and yet the equally widespread disagreement on how to determine when the line of "too much" has been crossed. To the extent that gerrymandering is defined as an opportunistic, self-interested, and manipulative behavior that is engaged in by the very political representatives that, in a republican system of government, are meant to not just represent but also refine the views of "we the people" from whom their power ultimately stems,[94] it is unsurprising that most people agree that there comes a point at which this behavior is "too much" to be acceptable. At the same time, complexities and endless opportunities for disagreement are inherent, in general, in deciding "where to draw the line" beyond which one should condemn a given activity that exists on a spectrum from acceptable to disagreeable; and these complexities are further increased by the many conceptual and measurement difficulties that exist in the specific context of gerrymandering as described above. Thus, it should be equally unsurprising that there is widespread disagreement on when the relevant line has been crossed, and also who should decide.

A significant part of my argument in this Article is that important debates around the nature and propriety of constitutional interpretation by the Supreme Court have comparable dimensions and difficulties. Thus, I believe that it is productive and generative to analyze those debates within a framework that is informed by some of the high-level aspects of gerrymandering discussed above. I lay out one approach to such a framework next.

C. The High-Level Analogy in the Context of Constitutional Interpretation: Methodological Gerrymandering

One of my arguments in this Article is that introducing the concept of "*methodological* gerrymandering" can help inform debates over constitutional interpretation. The broad idea behind the term is to capture (1) that there are aspects of constitutional interpretation that elicit the same kind of intuitive sense of disapproval and impropriety that gerrymandering invokes in the electoral context (but which is equally difficult to pin down uncontroversially when diving into specifics); (2) that this intuitive sense is grounded in conceptual similarities between the two contexts and activities; and (3) that constitutional interpretation can be better understood in light of analyzing these similarities.

As I see it, the concept of methodological gerrymandering sits "on top of" more specific critiques of opportunism, lack of neutrality and impartiality, hypocrisy, and the like. I propose that understanding those critiques as relating to different aspects of

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93 *See, e.g.*, *id.* at 817 (describing two hypothetical districting attempts which illustrate, on the one hand, an effort to seek [in my terminology] comparatively great "partisan gain" and needing comparatively little "manipulation" to do so in the given political context; and, on the other hand, an effort to seek comparatively little "partisan gain" but needing comparatively a lot of "manipulation" to do so in the given political context).

94 *See, e.g.*, *id.* at 781 (discussing "republican" forms of government and the role the voters play in such a system).

a broader concept of methodological gerrymandering can clarify those more specific critiques and can help commentators invoke them more persuasively and consistently.

In laying out my understanding of methodological gerrymandering, I believe it is helpful to start with a broad and general conception, i.e., with an analogous idea to "gerrymandering in the 'loose' sense" described above.[95] If gerrymandering in the election context broadly denotes "[t]he practice of drawing voting district lines for partisan political advantage,"[96] the concept of "*methodological* gerrymandering" broadly denotes the "drawing" of a Justice's or set of Justices' "constitutional interpretation methodology lines" to implement those Justices' political or ideological preferences for how society should be organized.[97]

Moving to greater levels of specificity, the constitutional interpretation context, like the electoral districting context, is also one in which the two substantive and institutional questions discussed above have led to deep contestation around similar issues: substantively, because some level of influence by Justices' political or ideological value preferences on their interpretational choices is generally considered inevitable,[98] a significant question has been whether (and where) there is a point at which this influence becomes "too much"—so as to breach the law / politics distinction and call into question whether an interpretation is a proper exercise of the

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[95] *See supra* note 64 and accompanying text.

[96] *See supra* note 59 and accompanying text.

[97] *Cf.* Eskridge & Nourse, *supra* note 42, at 1722, 1732 (using as part of definition of "textual gerrymandering" the idea of "line drawing that purports to be neutral but risks partisanship" based on the analogy that "[i]n all cases of legislative redistricting, lines must always be drawn, just as lines in interpretive efforts must be drawn"); Chemerinsky & Goodwin, *supra* note 44, at 66 (using as authors' working definition of "constitutional gerrymandering against abortion rights" an approach to interpretation that "ensure[s] an outcome consistent with antiabortion ideological leanings" and noting that "[t]he problem is in and of the Court's line drawing, which colors the majority's holding and ultimately results in an opinion that is contrary to and conflicting with established law"); Spann, *supra* note 50, at 709 (arguing more generally that "the practice of constitutional law emerges as the practice of generating constitutional meaning from normative preferences," calling this practice "constitutionalization," and suggesting that it is "overseen primarily by the Supreme Court"). *See generally supra* note 2 and accompanying text (referencing Derrick Bell's observation that the Constitution is a "locus of battle over the shape of our society, where differing visions of what should be, compete to become what is, and what will be").

[98] *See, e.g.*, Doerfler & Moyn, *supra* note 18, at 1732 ("[F]ew if any would argue that the Supreme Court's legal analysis goes uninfluenced by willfulness or motivated reasoning. Especially in politically significant cases, the consensus among scholars and other legal observers is that Supreme Court decisions are, to the contrary, driven substantially by ideological commitment."); Sunstein, *supra* note 22, at 193 ("[I]n the legal context, there is nothing that interpretation 'just is.' Among the reasonable alternatives, no approach to constitutional interpretation is mandatory. Any approach must be defended on normative grounds—not asserted as part of what interpretation requires by its nature. Whatever their preferred approach, both judges and lawyers must rely on normative judgments of their own."). I discuss this point in greater detail below in my discussion of "Level 1" of methodological gerrymandering.

"judicial" power ascribed to the Supreme Court by the Constitution.[99] Institutionally, a significant question has been how to best police Justices to prevent them from reaching this point—with potential options for doing so ranging from encouraging and relying on Justices to make a "proper" choice of constitutional interpretational methodology (a form of self-restraint by the Justices),[100] all the way to proposals to abolish judicial review (in at least some circumstances).[101]

Similar to the electoral gerrymandering context also, the ways in which one could conceptualize and measure answers to these questions are deeply contested.[102] I believe that considering and adapting the three broad components laid out above in the context of electoral gerrymandering is useful in further defining methodological gerrymandering and gaining additional clarity in the constitutional interpretation context as well. Among other things, these components can help capture and explain why common types of criticisms of particular instances of constitutional interpretation (for example, charges of hypocrisy) are so rhetorically powerful and what precisely is at stake when they are made.

1. Party in Power

The American constitutional system is currently implemented in practice as a system of "judicial supremacy"[103] in which "judicial institutions have ultimate authority to determine the legal content of constitutional norms."[104] And in particular, it is the Supreme Court that has this ultimate authority, since lower courts are bound

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99 The concern would be that in such a circumstance, the relevant Justice(s) have turned themselves from their appropriate role as "judicial" officers into an inappropriate role as "politicians in robes." *See supra* note 15 and accompanying text.

100 *See, e.g.*, *supra* note 23 and accompanying text.

101 For a recent overview of the wide spectrum of Supreme Court reform possibilities, both in terms of changing the Court's personnel composition on the one hand and in terms of "disempowering" the Court, regardless of its composition, on the other, see Doerfler & Moyn, *supra* note 18. As the authors note, these possibilities include, on the far end of the spectrum, the proposal of "prohibiting courts from reviewing federal legislation for constitutionality at all," though the authors also note that "full negation of judicial review" is supported only by "a persistent but tiny minority." *Id.* at 1725, 1743.

102 Some of these contestations are part of the "too voluminous to summarize" literature on the countermajoritarian difficulty, for example. *See, e.g.*, Tolson, *supra* note 11, at 2381 n.1 (collecting some examples).

103 Solum, *supra* note 7, at 30 ("Judicial supremacy is the status quo."). This fact is often sourced to the famous, often-repeated, and usually honored, assertion of Chief Justice Marshall in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Judicial supremacy has not always been the prevalent approach throughout American constitutional history, as explored in depth, for example, in Friedman, *supra* note 12. I will return to this point briefly in Part VI *infra*.

104 Solum, *supra* note 7, at 22.

by the Supreme Court's interpretations of the Constitution.[105] Thus, the Supreme Court is the equivalent of the party "in power," or "in control," of constitutional interpretation, and it is the methodological choices made by its members that are the most significant and in need of deep scrutiny. Those choices not only control the outcome of individual cases, but they also provide the constitutional reasons that are given for those outcomes and that shape the constitutional doctrine which subsequently structures everyone else's available choices.

Similar to the first component of electoral gerrymandering, this component of methodological gerrymandering is meant to capture that, in the context of constitutional interpretation, the status of the Court and its members creates the possibility for *opportunism*—using one's control over constitutional interpretation as a vehicle to implement one's preferred societal outcomes and priorities, even if this may conflict with perceived role obligations of, for example, neutrality or consistency.[106]

2. Partisan Gain

Because of the countermajoritarian difficulty (itself, in part, a function of component 1 (judicial supremacy)[107]) and the significance of the law / politics distinction in ameliorating it, judicial decision-making (including, for purposes of this Article, constitutional interpretation) is particularly in need of questioning if it raises the suspicion that it is made to a significant extent based on (i.e., with the purpose and effect of implementing) the personal political or ideological preferences and values of

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[105] Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, SSRN, Feb. 6, 2023, at 40 ("As a matter of law, the lower courts are absolutely bound to apply Supreme Court precedents to all cases to which they apply.").

[106] *See, e.g.*, Doerfler & Moyn, *supra* note 18, at 1744–45 (describing how expansion of judicial authority in the mid-20th century led to "arguably, a Supreme Court in which both sides of a partisan split exercised judicial authority selectively and opportunistically" and that to the extent that "any bench will face the temptation to overstep," only "disempowering" judicial reforms "specifically deprive [the Court] of the temptation"); Solum, *supra* note 7, at 42 ("[C]onstitutional opportunism affirms outcomes reductionism, but something's got to give—and what gives is consistency."); *cf.* Spann, *supra* note 50, at 709 ("[T]he post-realist Constitution emerges as a metaphor for privileged normative values. And the practice of constitutional law emerges as the practice of generating constitutional meaning from normative preferences. The process of transforming normative preferences into constitutional law is overseen primarily by the Supreme Court, through the institution of judicial review.").

[107] Friedman, *supra* note 12, at 342 ("Without judicial supremacy, no countermajoritarian problem presents itself.").

a given Justice / set of Justices.[108] For purposes of this Article,[109] this is what I think of as the relevant constitutional interpretation equivalent of "partisan gain."[110]

Similar to the second component of electoral gerrymandering, this component of methodological gerrymandering is meant to capture that constitutional interpretation choices based on Justices' political or ideological preferences and values suggest a lack of the *neutrality* and *impartiality* that the Court's role in the constitutional system is thought (by many) to require.[111]

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[108] My use of the term *personal* preferences in this context should not be read as suggesting that these preferences are purely individualized or idiosyncratic. As social psychology research suggests, for example, one's personal preferences are very often "grounded, at least in part, in [one's] identification with various social groups" such that "[t]here often is little or no 'psychological separation' between one's perception of one's own welfare and one's perception of the welfare of groups in which a portion of one's identity is embedded." Pettys, *supra* note 5, at 264–65. In other work, for example, I have analyzed how considerations of racial hierarchy and dominance may play themselves out along those lines in the context of judicial decision-making in employment discrimination cases. David Simson, *Fool Me Once, Shame on You; Fool me Twice, Shame on You Again: How Disparate Treatment Doctrine Perpetuates Racial Hierarchy*, 56 HOUS. L. REV. 1033 (2019). When I use terms such as "personal political or ideological preferences," I use them in this broader sense.

[109] One could propose the analogy for this component in multiple ways to get at different aspects of, and debates around, constitutional interpretation. For example, one could also say that the analogous "partisan gain" is the amount of power that the Supreme Court has as a whole institution when it comes to constitutional interpretation, with the Court jockeying for power in this regard with the political branches just like the major parties jockey for political control over a legislature in districting. This would also be a sensible analogy in my view, though it goes to a different part of the debate over constitutional interpretation—the ins and outs, and pros and cons of judicial supremacy—rather than what I am concerned with in this Article: the choices by individual Justices (or majorities of Justices, see *infra* note 161 and accompanying text) with respect to their constitutional interpretation "methodology" across contexts. As noted above, see *supra* note 101, because judicial supremacy is the current "status quo," I take it as an assumed starting point for my analysis and discuss various issues that flow from this starting point. However, I take no position on the desirability of judicial supremacy, and to the extent that judicial supremacy was not always the status quo, *see supra* note 101, and is also being vigorously questioned by some at this time, see generally Doerfler & Moyn, *supra* note 18, an approach that employs the framework laid out here, but uses this alternative conception of "partisan gain" in an analysis of judicial supremacy, may well be fruitful also.

[110] *See, e.g.*, Eskridge & Nourse, *supra* note 42, at 1732, 1736 (analogizing, as part of the authors' definition of "textual gerrymandering," a legislator "achiev[ing] partisan results" with "an interpreter . . . sustain[ing] a preferred interpretation" and also arguing that textual gerrymandering involves the "power to look out over a crowd of texts and pick their ideological friends").

[111] *See supra* notes 15–17 and accompanying text; *see also, e.g.*, Doerfler & Moyn, *supra* note 18, at 1730 (describing, though not necessarily agreeing with, the common view in which "the normative ideal for the Supreme Court, and for courts generally, is to be a neutral arbiter of the law" and in which "the Supreme Court is supposed to be . . . an apolitical or nonpartisan institution"); *cf.* Eskridge & Nourse, *supra* note 42, at 1730 (arguing that because "new textualism's" "tools and sources" for statutory interpretation "invite judges to read statutes through their own perspectives," it "lures them from the impartiality demanded by the liberal as

3. Manipulation or Distortion

Constitutional interpretation choices are particularly in need of questioning if Justices seem to "manipulate" or "distort"[112] their approach to constitutional interpretation to accomplish such partisan gain.[113] As with electoral gerrymandering, the idea of "manipulation" or "distortion" involves a deviation from how the process, to many observers, is supposed to "really" function: namely, that constitutional interpretation is supposed to be based on "legal principles" that have some claim to being disinterested,[114] and that are applied in a manner that ties the Justice(s) to certain outcomes that they might not politically or ideologically prefer.[115]

Similar to the third component of electoral gerrymandering—but even more important in this context—this component of methodological gerrymandering is meant to capture why *inconsistency* in constitutional interpretation is considered so problematic. One reason is similar to what I note above regarding electoral gerrymandering: inconsistency is an "indicia" or "clue" for the presence of the pursuit of partisan gain.[116] Because the constitutional interpretation context is also acknowledged to be political to some inherent extent, and because its great stakes also make it highly competitive, inconsistencies in constitutional interpretation again suggest that a desire for "partisan gain" is what drove those inconsistencies.[117] This

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well as republican rule of law" and that "[t]his is where the idea of textual gerrymandering comes into play").

112 My use of both "manipulate" as well as "distort" is meant to capture that a Justice could engage in methodological gerrymandering consciously and deliberately—which "manipulate" mostly implies to me—but also subconsciously—which "distort" also implies to me. One can certainly quibble with these definitions (and think, for example, that distortion also implies conscious deliberation). I do not mean to make a strong claim about the "true" meaning of each term but raise the point here for clarity about my own usage in this context.

113 *See, e.g.*, Eskridge & Nourse, *supra* note 42, at 1732, 1812 (noting, as part of defining "textual gerrymandering" that "[l]ike a legislator who achieves partisan results by manipulating electoral boundaries, an interpreter can sustain a preferred interpretation by (unconsciously or consciously) manipulating statutory boundaries" and also arguing that "[j]ust as electoral gerrymandering manipulates the democratic process for short-term political gain . . . textual gerrymandering manipulates the interpretive process for short-term political gain"); Chemerinsky & Goodwin, *supra* note 44, at 119 (noting as one aspect for why the authors consider a particular case to involve "constitutional gerrymandering" that "the Court manipulates the boundaries of constitutional jurisprudence to favor their distaste for reproductive rights"); *cf.* Pettys, *supra* note 15, at 307 ("Judges are certainly not the only ones whose judgments can be distorted by personal preferences and prejudices.").

114 For example, one might compare the "traditional districting criteria" discussed in relation to electoral gerrymandering above with the "modalities" of constitutional argument (including history, text, structure, prudential, doctrinal) as laid out notably in PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 185 (1984).

115 *See supra* note 21 and accompanying text.

116 *See supra* notes 86–87 and accompanying text.

117 *See, e.g.*, Pettys, *supra* note 5, at 305 ("Inconsistency on any front may, of course, be a sign that a Justice is behaving hypocritically with respect to his or her ostensible commitment

is, again, particularly the case if such inconsistency is poorly explained or justified, or not explained or justified at all.[118] If such inconsistency (especially if unexplained) is accompanied by a steadfast insistence that the relevant decisions are nevertheless constitutionally required and grounded in principle, this suggests the presence of *hypocrisy*[119] or *disingenuousness.*[120] The second reason, which is more specific to the constitutional interpretation context, is that consistency in interpretation is a freestanding "rule of law" value that helps separate "appropriate" from "inappropriate" interpretation.[121] Thus, inconsistency is at least potentially problematic for this reason also, even apart from its function as an indicator of the pursuit of partisan gain.

4. Bringing Things Together

Similar to my understanding of gerrymandering in the election context described above, for methodological gerrymandering as well component 1 (judicial supremacy) provides the context and opportunity for methodological gerrymandering. Component 2 (partisan gain) captures the "end" or "motivation" behind methodological gerrymandering, and *some* degree of component (2) is conceptually necessary for calling a particular approach to, or instance of, constitutional interpretation "methodological gerrymandering." And component 3 (manipulation or distortion) relates to the "means" of methodological gerrymandering. As with electoral gerrymandering, the relative degree of component 3 (manipulation or distortion) is both an evidentiary tool for determining whether and how much of component 2 (the pursuit of partisan gain) is present, and, as I suggest in more detail in Part III below,

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to impartiality—perhaps a Justice in a given case is disregarding his or her own past statements about stare decisis, for example, because precedent does not favor the litigant whom the Justice wants to prevail."). Indeed, in light of the law / politics distinction and many Justices' subscription to it as at least an aspirational role obligation, a desire for partisan gain is much less likely to be explicitly stated (or even consciously acknowledged) in this context. Therefore, inconsistency becomes a more significant tool for measuring the potential pursuit of partisan gain as part of methodological gerrymandering analysis. As I discuss in more detail below, there are alternative explanations for inconsistencies as well, which need to be taken seriously. *See infra* Part IV.C, pp. 185–87. However, this does not diminish the relevance of inconsistency as a relevant "indicia" or "clue" as to a Justice's, or set of Justices', pursuit of partisan gain.

118 *See, e.g.*, Eskridge & Nourse, *supra* note 42, at 1730, 1732 (arguing that textual gerrymandering is "most problematic when . . . failing to provide a reasonable justification or even acknowledgment of the [interpretational] choices" involved and using as one definition of textual gerrymandering "the unjustified drawing of lines").

119 *See* Pettys, *supra* note 5, at 305 ("Even if the legal answers toward which they initially gravitate are the ones [they] believe the law requires, the Justices may still be guilty of hypocrisy unless they explore those matters with at least as much sincerity and vigor as they would expect from their antagonists, and then respond appropriately to what they find."). Depending on the circumstances, this may involve any of the three types of hypocrisy (faking, concealing, gerrymandering) laid out by *id.* at 261.

120 *Cf.* Smith, *supra* note 30 ("The disingenuous interpreter . . . may be a Supreme Court Justice, purporting to apply some means of constitutional interpretation but ultimately reaching a conclusion entirely preordained by his political views.").

121 *See supra* note 25 and accompanying text.

could be used in evaluating how egregious and problematic a particular gerrymandering effort should be considered—and what kind of criticism it justifies.

Importantly, and again similar to the election context, components 2 (pursuit of partisan gain) and 3 (manipulation or distortion) are not binary concepts in the context of constitutional interpretation either but again exist on a spectrum ranging from lower to higher levels of degree and importance in a given decision. I believe that it would unhelpfully oversimplify the highly complex, consequential, and socially-situated task of constitutional interpretation to suggest either that any one decision either "is" or "is not" seeking some standardized amount of ideological payoff (or, more generally, that judicial decisions can be reduced to one outcome determinative "reason");[122] or that any one decision "is" or "is not" "manipulating" a particular approach to interpretation to some standardized degree. Rather, in the multifactorial decision-making process that is constitutional interpretation, each component can be more or less present and influential in different choices that Justices make. I believe that it is a valuable attribute of an analytical framework if it can capture this type of complexity—and my discussion of different "levels" of methodological gerrymandering that follows next aims to capture just that.

IV. "MEASURING" THE CONCEPT—THE MULTIPLE LEVELS OF METHODOLOGICAL GERRYMANDERING

I believe that introducing the concept of methodological gerrymandering and laying out its broad components, as done above, provides a helpful framework for nuanced discussion of charges of ideologically-driven, results-oriented Supreme Court decision-making. It provides a terminology that resonates because of its existing use in an analogous context featuring similar issues, complexities, and debates.

But it does not quite yet provide a means for analyzing the key question of "how much." As noted above, the key question in the context of electoral gerrymandering—given its perceived inevitability—is not so much "whether or not" the term applies in a given situation (though this is important too). Instead, the key question is "how much" gerrymandering there is so that relevant observers (including, at least to some people, the courts) can determine if there is "too much" of it.[123]

I suggest that a similar dynamic applies to constitutional interpretation. To the extent that all constitutional interpretation choices involve some degree of methodological gerrymandering, as I will argue below,[124] the key question for commentators (and the Justices themselves) is "how much" of it there is in a particular situation—and what kind of level and language of critique is consequently justified.

In the following, I propose a way to "measure" the relative amount of methodological gerrymandering that is based on the claim that methodological gerrymandering does not come in just one shape, form, or type. Rather, it can occur at varying levels of generality. One way to think about the difference between the levels is how they combine the three broad components of methodological gerrymandering

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122 "A ruling can," and I would argue almost always will, "have many but-for causes." Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. (forthcoming).

123 Stephanopoulos & McGhee, *supra* note 56, at 1507 ("[T]here has been an explosion of judicial and academic interest in the measurement of partisan gerrymandering.").

124 *See infra* Part IV.A.

laid out above. So, because I focus only on Supreme Court Justices in this Article, all levels incorporate component 1 (party in control). All levels also incorporate the necessary component 2 (pursuit of partisan gain) to *some* extent. But as the level of generality of methodological gerrymandering becomes more and more specific, the practice incorporates more and more of components 2 (pursuit of partisan gain) and 3 (manipulation or distortion). Specifically, methodological gerrymandering moves along the "manipulation / distortion" spectrum (component (3)) from, at least potentially, little to none at the higher levels of generality, to greater and greater amounts at the lower levels of generality. This correspondingly indicates that partisan gain (component (2)) is increasing in significance in the decision-making calculus under investigation. In other words, the lower the level of generality of methodological gerrymandering, all else being equal, the "more" methodological gerrymandering there is. Based on this kind of analysis, each commentator can then determine for themselves whether and when the line of "too much" methodological gerrymandering is crossed in a particular context.

As I am conceptualizing it now, methodological gerrymandering can occur on at least the following five different levels of generality.[125]

A. Level 1: Choice of High-Level Constitutional Theory

The highest level of methodological gerrymandering is the choice, if any, of one's overall, high-level constitutional interpretational theory, i.e., the *normative* theory according to which a Justice believes that the Constitution *should* be interpreted across contexts.[126] Scholars have developed a significant number of theories[127] that could at least conceivably be applied by a Justice as their "general" approach across constitutional contexts and have explained those theories' implications for various issues.[128] Examples range from "originalism," which is in fact a family of sub-theories[129] that is, broadly speaking, united by its claims that the "fixed" "original meaning" of the constitutional text is what should constrain judicial interpretation in the exercise of judicial review;[130] to a "history and tradition" or "traditionalism" approach that "takes political and cultural practices of long age and duration as

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[125] This conceptualization is provisional, and I would welcome both discussion and feedback, as well as further elaboration by interested others.

[126] *See supra* note 7 and accompanying text. For purposes of this level of methodological gerrymandering, I assume consistent application of any chosen theory. Applying different theories or approaches in different contexts is the subject of lower levels of methodological gerrymandering.

[127] Solum, *supra* note 7, at 2 ("Just mapping the landscape of contemporary normative constitutional theory is a daunting task.").

[128] For high-level overviews, see, e.g., Smith, *supra* note 30, at 5–21; Lawrence B. Solum, *Originalism versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1270–76, 1282–88 (2019).

[129] Smith, *supra* note 30, at 5; Solum, *supra* note 128, at 1270–71; *see also infra* Part IV.B (regarding Level 2 of methodological gerrymandering).

[130] Solum, *supra* note 128, at 1245–46.

constituting the presumptive meaning of the [constitutional] text";[131] to a "representation-reinforcement" approach that, broadly speaking, argues that "courts should defer to Congress except when judicial review is necessary to preserve democracy, including protection of discrete and insular minorities and protection of democratic processes";[132] to "pragmatism" "which essentially means solving legal problems using every tool that comes to hand, including precedent, tradition, legal text, and social policy" and "renounces the entire project of providing a theoretical foundation for constitutional law";[133] to many other theories inbetween.

There is scholarly debate about whether Justices should, in fact, choose to follow any high-level constitutional theory in their decision-making across contexts.[134] Nevertheless, as Richard Fallon has noted, "a judge's work cannot be innocent of constitutional theory" and "[f]or a judge as much as for anyone else, it is impossible to engage in constitutional argument without making at least implicit assumptions about appropriate methodology."[135] And in a real sense that is relevant to the analysis of methodological gerrymandering, *not* choosing a high-level theory can be regarded as a choice of its own kind of theory or family of theories—what some have called "constitutional antitheory."[136]

Books and volumes of law review articles have been written regarding the substantive pros and cons of the various theories that have been offered, and the concept of methodological gerrymandering is not meant to be part of refereeing these debates. But it does rely on, and intersects with, them to make an analogous observation to that which Lani Guinier has made in the context of electoral gerrymandering. Guinier notes that because in electoral districting based on geography "the location and shape of districts may well determine the political complexion of the area, . . . [t]he reality is that districting inevitably has and is intended to have

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131 Smith, *supra* note 30, at 8 (citing Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1655 (2019)).

132 Solum, *supra* note 128, at 1274.

133 Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1332 (1988). Within this high-level description, there are (perhaps unsurprisingly) arguably many different "versions" of pragmatism. *See, e.g.*, Mark S. Kende, *Constitutional Pragmatism, the Supreme Court, and Democratic Revolution*, 89 DENV. U. L. REV. 635 (2012).

134 *See, e.g.*, Brian E. Butler, *Towards a Pluralistic Constitutional Universe: Interpretation and Faction*, 69 DRAKE L. REV. 723, 723 (2021) (arguing "that constitutional interpretation is hindered by the search for one proper interpretive method"); Fallon Jr., *supra* note 21, at 574–75.

135 Fallon Jr., *supra* note 21 (noting that, for example, an argument based on precedent presupposes some theory that "makes precedent at least relevant and possibly controlling").

136 *See, e.g.*, Solum, *supra* note 128, at 1274–75 (noting how, in fact, a variety of theories can be thought to fall into this broader umbrella category); *see also* Tsai, *supra* note 2, at 900 (describing Cass Sunstein's "minimalism" approach to constitutional interpretation as taking "the lessons of pragmatism . . . in favor of antitheory").

substantial political consequences" [137] and thus "districting necessarily advantages some groups and disadvantages others. *In this sense, 'all districting is 'gerrymandering.'*"[138]

In an analogous way, all choices of constitutional theory—including the choice of no theory—are "methodological gerrymandering" at this highest level of generality, though in a limited sense. To adapt Guinier, to the extent that I define methodological gerrymandering as the drawing of methodological lines to implement political or ideological preferences for how society should be organized, because "the shape of one's constitutional theory may well determine the political complexion of constitutional interpretation outcomes," "the reality is" that one's choice of constitutional theory "inevitably has and is intended to have substantial political consequences" and "necessarily advantages some groups and disadvantages others."[139]

In this regard, I count myself in the camp of "neutrality skeptics," who have explained in their scholarship that there is no "apolitical" or "neutral" set of principles for constitutional interpretation that does not depend on contested and contestable value choices about what constitutes "proper" social arrangements.[140] As Richard Fallon has put it, the choice between constitutional theories is "inherently value-laden."[141] In other words, any choice[142] of constitutional theory involves some degree

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137 Guinier, *supra* note 73, at 1602–03 n.52 (quoting Gaffney v. Cummings, 412 U.S. 735, 753 (1973)).

138 *Id.* (emphasis added) (quoting ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 48–49 (1968)).

139 *Id.* at 1602–03.

140 Kahan, *supra* note 18, at 15–16; Spann, *supra* note 50, at 710 ("[U]ltimately, the distinction between constitutional law and ordinary politics becomes untenable.").

141 Fallon Jr., *supra* note 21, at 540 ("The choice of a constitutional theory requires appeal to normative criteria."); *see also, e.g.*, Marc O. DeGirolami, *Traditionalism Rising*, SSRN, Aug. 31, 2022, at 43 ("[A]ll interpretive methods have an associated politics."); Sunstein, *supra* note 22, at 193 ("[I]n the legal context, there is nothing that interpretation 'just is.' Among the reasonable alternatives, no approach to constitutional interpretation is mandatory. Any approach must be defended on normative grounds—not asserted as part of what interpretation requires by its nature. Whatever their preferred approach, both judges and lawyers must rely on normative judgments of their own."); Spann, *supra* note 50, at 709 ("[T]he post-realist Constitution emerges as a metaphor for privileged normative values. And the practice of constitutional law emerges as the practice of generating constitutional meaning from normative preferences. The process of transforming normative preferences into constitutional law is overseen primarily by the Supreme Court, through the institution of judicial review.").

142 This is a *choice* because a Justice's constitutional interpretation theory is not predetermined in any strict sense by either the Constitution itself or by judicial role obligations. Cass R. Sunstein, *Experiments of Living Constitutionalism*, SSRN, Jan. 13, 2023, at 5 ("The Constitution does not contain the instructions for its own interpretation."); Sunstein, *supra* note 22, at 211–12 ("[I]f the founding document set out the rules for its own interpretation, judges would be bound by those rules (though any such rules would themselves need to be construed). But the Constitution sets out no such rules. For this reason, any approach to the document must be defended by reference to some account that is supplied by the interpreter."); Fallon Jr., *supra*

of corresponding choice about which social outcomes will be justified and facilitated, or not, by a Justice's interpretational approach.[143] The substantive consequences of various theories for salient social issues are often (though certainly not always) predictable and, thus, can be assumed to be part of the adopter's decision-making process.[144] Expressed in terms of the components of methodological gerrymandering laid out above, there will inevitably be *some* degree of component (2) of methodological gerrymandering.

To be sure, a choice of theory at this level would likely not be a simplistic and purely outcome-driven choice—that is, I expect that if a Justice were to commit to a particular theory across all contexts, they would have both "outcome reasons" and "process reasons" for doing so.[145] Moreover, the relative extent of "partisan gain" that can be accomplished via methodological gerrymandering at this highest level of generality (which assumes consistent theory application)[146] is comparatively lower than when Justices employ methodological gerrymandering at the more specific levels. That is, via choice of constitutional theory alone, a Justice would likely not be able to achieve a match with their ideological preferences in each individual case—both because the set of individual case circumstances that a Justice will need to deal

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note 21, at 576 ("Under current circumstances, the choice of a constitutional theory must be made by individual participants in constitutional debates. The People of the United States have not made an authoritative decision in this matter, nor has the Supreme Court."); *cf.* Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 CALIF. L. REV. 593, 599 (1999) (arguing that "[i]n an obvious sense, yes: the Constitution contains no clause expressly prescribing a single interpretive methodology to be applied in all cases" but also noting that this does not mean that the "constitutional text is . . . silent on questions of interpretation" more broadly).

143 Sunstein, *supra* note 142, at 9 ("It might be tempting to respond that the choice of a theory of interpretation cannot possibly depend on the results that it yields . . . . If we focus on results, and choose a theory of interpretation on the basis of results, perhaps we are biased, or unforgivably 'result-oriented,' and engaged in some kind of special pleading. The problem with that response is that it rests on an illusion of compulsion. Among the reasonable candidates, judges (and others) are not compelled to adopt a particular theory of interpretation; they must make a choice. One more time: To do that, judges (and others) are required to think about what would make our constitutional order better rather than worse."); *see also* Sunstein, *supra* note 22, at 193 ("[W]ithout transgressing the legitimate boundaries of interpretation, judges can show fidelity to texts in a variety of ways. Within those boundaries, the choice among possible approaches depends on the claim that it makes our constitutional system better rather than worse.").

144 Sunstein, *supra* note 142, at 9 ("[F]or judges (or others), thinking about theories of constitutional interpretation, the relevant fixed points really are, and must be, their own."). To put the point somewhat crudely, I find it much more likely that a Justice would choose to apply a particular constitutional theory at least in part because of its predicted and predictable social outcomes and consequences than that a Justice would choose a theory either without thinking about those consequences or choosing to ignore them.

145 Solum, *supra* note 7, at 2.

146 *See supra* note 124.

with is not perfectly predictable, and because neither individual Justices, nor most high-level theories, have a perfectly consistent political or ideological valence.[147]

But as I see it, this just means that (a) considerations *other* than political or ideological preferences about the ordering of society are *also* part of the calculus for which overall constitutional theory to choose;[148] and (b) that constitutional theories may well differ in the degree to which they align with particular political or ideological preferences across the conceivable universe of constitutional cases.[149] That is why I note above that Level 1 involves methodological gerrymandering only in a limited sense and that there will be *some* degree of component 2 (pursuit of partisan gain) at this level.

Nevertheless, I do think that a theory choice at this level of generality would inevitably involve the pursuit of partisan gain in the sense I discussed in relation to component 2 of gerrymandering in the electoral context[150]: given a sufficient level of competitiveness between ideological positions that can credibly claim an anchor in the Constitution,[151] a Justice who was to commit themselves to an overarching interpretational theory can be expected to choose a theory which, over the many individual contests over different constitutional issues, points toward outcomes that are politically- and ideologically-aligned with the Justice's preferences more often than another theory.

These considerations apply to all theories, even if they do so in slightly different ways and foreground different values, depending on the nature of the theory

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147 This is not to say that a theory choice at this level cannot have substantial ideological consequences in a generally predictable direction. It is simply to say that the match with a Justice's political or ideological preferences that is likely to result from consistently applying a single theory will be less complete than the match that can be achieved by a Justice preserving the flexibility to switch between different theories or approaches depending on context—as is involved in the more specific levels of methodological gerrymandering discussed below. For example, although originalism is generally considered to be quite "conservative" in terms of the overall social outcomes it is likely to generate via constitutional interpretation, proponents of originalism have rejected that the theory is *inherently* conservative and have put forward some examples of what they consider arguably progressive social outcomes that the theory, if applied consistently, would also support. *See, e.g.*, Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 250–59 (2017).

148 *See, e.g.*, Sunstein, *supra* note 142, at 9 ("To be sure, we should not consider, as fixed points, only results about particular cases (though they matter a great deal). We must also consider defining ideals (including self-government and the rule of law), and we must think about processes and institutions. There might be fixed points there as well."). *Cf.* DeGirolami, *supra* note 141 ("[T]he politics of interpretive methods is complicated by the fact that it will be situated and integrated in an account of the function and place of the Constitution and the judicial role within the overarching political structure.").

149 Sunstein, *supra* note 142, at 9 ("A theory of constitutional law might not yield all of one's preferred results (it had better not), but it might also yield, or at least not foreclose, all, most, or many of one's fixed points.").

150 *See supra* notes 66–68 and accompanying text.

151 In other words, given a Constitution whose provisions are sufficiently diverse that they seem to point in multiple ideological directions.

involved.[152] As Paul Brest noted in his 1981 analysis of John Hart Ely's supposedly "process-focused" "representation-reinforcement" theory, while "attempt[s] to establish a value-free mode of constitutional adjudication" such as Ely's may be "heroic" in some sense—trying to create constitutional theory's equivalent of the "perpetual motion machine"—ultimately they all end up demonstrating that the task "can't be done."[153]

In this regard, I am with David Strauss in arguing that it is more helpful to "confront[] forthrightly" that judicial decision-making, under any theory of constitutional interpretation, necessarily involves value choices—and, thus, some degree of methodological gerrymandering in my terminology—rather than to make "[d]isputes that in fact concern matters of morality or policy masquerade as hermeneutic disputes about the 'meaning' of the text, or historians' disputes about what the framers did."[154] My claim here, that all constitutional theory choices involve some degree of methodological gerrymandering, is meant to capture and build on this argument.

But once more, the comparative level of methodological gerrymandering is somewhat reduced at this level. In addition to the likely "rougher" fit with personal preferences noted above, this is the case also because this level of methodological gerrymandering, by definition, involves comparatively little to no component 3 (manipulation or distortion), because it assumes consistent application of a theory once chosen.

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[152] This is the case even for theories that ostensibly are focused more on process than substantive values directly. For example, Paul Brest long ago argued that John Hart Ely's "representation-reinforcement theory," while claiming to be "process-focused" rather than value-focused, is, in fact, "shot full of value choices, starting with the decision of just how representative our various systems of government ought to be and who ought to be included in the political community." Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 140 (1981). Similarly, David Strauss acknowledges with respect to his theory of "common law constitutional interpretation" that it has inherently conservative tendencies in that it is "to some degree true" that the theory is "resistant to change," though Strauss also argues that this is less true for his theory, which sometimes allows for even rapid change with sufficiently weighty justification, as compared to some other theories such as originalism or textualism. Strauss, *supra* note 19, at 935; *cf.* Eskridge & Nourse, *supra* note 42, at 1757 (arguing that "textual gerrymandering" can afflict both of the large camps in statutory interpretation—textualists and purposivists—alike, even if in slightly different ways).

[153] Brest, *supra* note 152, at 141–42; *cf.* Gaffney v. Cummings, 412 U.S. 735, 754 (1973) (noting in an electoral gerrymandering case that "we have not . . . attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States").

[154] Strauss, *supra* note 19, at 928 (arguing that one advantage of common law constitutional interpretation over theories like originalism or textualism is that it involves such forthright confrontation); *see also* Farber, *supra* note 133, at 1340 ("Rather than debate the virtues and vices of affirmative action, originalist judges would debate the proper interpretation of the debates on the Freedman's Bureau. Not only would the results likely reflect political predispositions, but the real values at stake would be concealed beneath historiographic debates."); *cf.* Eskridge & Nourse, *supra* note 42, at 1758 ("Particularly troubling is new textualism's scorn for frank normative evaluation, while freeing judges to make normative choices under the veil of word games.").

These points suggest that in discussions and critiques of Justices' overall theory choices, allegations of hypocrisy and disingenuousness would generally be out of place.[155] Simple allegations that a given choice lacks neutrality or impartiality are also weak because the same critique would apply to any other choice as well. But discussions and critique can and should be vigorous around *which* values a given Justice chose via their selection of constitutional theory. The above suggests that this selection necessarily brings with it a decision to "advantage some groups and disadvantage others."[156] The Justices are properly held to account for their choices in this regard and should not be allowed to hide behind the assertion that "the Constitution made me do it."[157]

Of course, this discussion of Level 1 of methodological gerrymandering is hypothetical, because no Supreme Court Justice has yet made a definitive and consistent choice of this kind.[158] But thinking about this level of methodological gerrymandering is nevertheless still valuable for at least two reasons. First, future Justices may make and implement this kind of choice. And second, the fact that no such choice has been made itself implies that all Supreme Court Justices are at least potentially engaged in one or more of the more specific levels of methodological gerrymandering laid out below. The choice of "no theory" at Level 1 of my framework means that Justices who make this choice push their methodological gerrymandering to its lower levels. The key difference of these lower levels compared to Level 1 is that they add to the analytical mix more intense consideration of manipulation or distortion, via an analysis of inconsistency and purported justifications for it.

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155 That being said, critiques that one theory or another is more *susceptible* to disingenuous application (i.e., to methodological gerrymandering at the lower levels of my framework) would be relevant to debates at this level of generality. For an analysis of what may drive such susceptibility, see Smith, *supra* note 30, at 57–67.

156 *See supra* note 73.

157 For a brief example of such a critique, *see infra* Part V, pp. 188–96.

158 Even Justices who might have broadly claimed general adherence to a particular theory—such as the late Justice Scalia and Justice Thomas in relation to originalism—have been notoriously inconsistent in actually following a single approach. For a book-length treatment of Justice Scalia's many methodological inconsistencies, see EDWARD A. PURCELL, JR., ANTONIN SCALIA AND AMERICAN CONSTITUTIONALISM: THE HISTORICAL SIGNIFICANCE OF A JUDICIAL ICON (2020). Justice Thomas has also notoriously frequently abandoned originalism in cases dealing with issues of race. *See, e.g.*, Joel K. Goldstein, *Calling Them as He Sees Them: The Disappearance of Originalism in Justice Thomas's Opinions on Race*, 74 MD. L. REV. 79 (2014). And while Justice Thomas ostensibly offered an "originalist defense of the colorblind Constitution" in the recent affirmative action case of *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S.Ct. 2141, 2177 (2023) (Thomas, J., concurring), a significant portion of his opinion was actually dedicated to defending colorblindness not in reliance on originalist premises, but in reliance on "the sort of constitutional arguments based on morality or consequentialism that he often discounts" in other contexts. Goldstein, *supra* note 158, at 79.

B. Level 2: Choice of "Version" of a Theory When There Are Multiple

A slightly more specific level of methodological gerrymandering arises from the fact that some theories of constitutional interpretation come in different "versions."[159] Put differently, they are really a "family" of theories with different "members" that are united around certain core claims while differing from each other in certain specifics. For example, as hinted at above, one can think of "originalism" as not one theory, but a "family of constitutional theories"[160] that is united around core claims that the "fixed" "original meaning" of the constitutional text is what should constrain judicial interpretation in the exercise of judicial review.[161] But different members of the family conceptualize "original meaning" differently—ranging from original public meaning to original intent to meaning fixed by "original methods" and perhaps more.[162]

In relation to such a theory or family of theories, there are two potential options for methodological gerrymandering—one which is in reality a version of Level 1 above, and one which is in reality a version of Level 3 or even lower levels. As to the former, any overarching and consistent choice for one of the members of a family of theories over others is really a Level 1 choice and, accordingly, can and should be analyzed and critiqued by reference to the considerations laid out above. As to the latter, a Justice could also pick and choose (consciously or unconsciously) between different versions of a theory (while perhaps all the while thinking or claiming that they are applying just one theory) depending on the broad area of law (Level 3), the question within a broad area of law (Level 4), or the group that would benefit in a given context (Level 5)—based on what aligns better with the Justice's political or ideological preferences.[163] Such a choice can and should be analyzed by reference to the considerations laid out below.

I include this particular level of methodological gerrymandering separately in my framework to acknowledge the fact that in debates about constitutional theory, differences between versions of a theory and interpretational choices based on those differences can play a prominent role and might be perceived as a distinct

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159 I am grateful to Lee Strang for suggesting the inclusion of this level as an analytically separate and helpful one in my framework.

160 *See, e.g.*, Solum, *supra* note 128, at 1271.

161 *Id.* at 1245–46.

162 *Id.* at 1270–71. Similarly, scholars have proposed that there are many different "versions" of pragmatism as an overarching approach to constitutional interpretation. *See, e.g.*, Kende, *supra* note 133.

163 This kind of methodological gerrymandering is arguably especially problematic when it is engaged in consciously and relies on the conflation of different members of a family of theories in public discourse to deceive observers into believing that there is consistent application of "one" theory when in fact there is inconsistent picking and choosing between different members of the family as it best suits the Justice's political or ideological preferences in a particular context. I am grateful to Michael Smith for pointing out this possibility. As Larry Solum has explained, such conflation of members of a family of theories in public discourse can occur with respect to both originalist and non-originalist theories. *See* Solum, *supra* note 128, at 1254, 1261.

phenomenon. This level of my framework is meant to signal that these choices do indeed matter in methodological gerrymandering analysis. But conceptually, I want to suggest that in analyzing as a species of methodological gerrymandering a Justice's choice in favor of one or another version of a given constitutional theory, and in determining what kind of critique of that choice is appropriate, it is important to distinguish between choices one level "up" (Level 1) from this level and one or multiple levels down (Level 3 or lower).

C. Level 3: Applying Different Methodologies or Approaches to Different Areas of Law

The next possible level of methodological gerrymandering is to apply different methodological approaches to different broad areas of constitutional law. There are potentially endless ways of "slicing" constitutional law into such areas. For example, at a very high level of generality one could distinguish between "structural" questions such as federalism and separation of powers, on the one hand, and questions pertaining to constitutional rights on the other. Or, at a slightly more specific level, and just focusing on rights, one could think of rights in criminal versus civil cases, procedural versus substantive rights, equality rights versus autonomy rights, etc. For my purposes in this Article, and in defining this level of methodological gerrymandering, I do not take a strong position on the propriety of any particular axis of categorization. I simply note that this level of methodological gerrymandering relates to what one may call "discrete legal areas."[164]

The key consideration that this level introduces is the possibility for greater levels of component 3 of methodological gerrymandering—manipulation or distortion. By definition, this level includes an inconsistency in a Justice's interpretational approach between discrete areas of law—say a "history and tradition" approach in one area versus an approach that depends on rejecting what one may call the relevant "history and tradition" to reach the relevant legal conclusion in another.[165] Such an inconsistency is always a potential clue or indicia that the decision to apply different methodological approaches is at least in part an effort to pursue component 2 of methodological gerrymandering—partisan gain. Thus, the key analytical questions for purposes of evaluating the relative extent of methodological gerrymandering that is reflected in a particular inconsistency of this kind become ones of explanation and justification.[166]

With respect to explanation, to the extent that there is only one "Constitution," it is arguably the most (or at least a very) plausible initial assumption that the meaning of different parts of the Constitution should be ascertained using a consistent methodological approach. At least, one might argue that *not* using a consistent approach demands an explanation. Therefore, *unexplained* differences in interpretational approaches across contexts should raise a strong suspicion that

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164 Katherine M. Crocker, *Constitutional Rights, Remedies, and Transsubstantivity*, 110 VA. L. Rev. (forthcoming 2024).

165 *See infra* Part V.A, pp. 189–96 (discussing such an inconsistency in various Justices' approaches to establishment clause doctrine on the one hand, and racial equality rights doctrine on the other).

166 *See supra* notes 116 and accompanying text.

methodological gerrymandering is at play. More precisely, they should raise a strong suspicion that the unexplained inconsistency is, in fact, some degree of methodological *manipulation*, and that an important reason for this manipulation is the pursuit of partisan gain. This line of reasoning is arguably particularly plausible in the context of the interpretation of discrete constitutional areas: in such a context, an interpreter may have some level of confidence that, because the different areas of constitutional law are discrete, observers will not (1) identify and (2) question the differences.

There is at least one possible explanation that the Justices are unlikely to make explicit, but that is always at least potentially available if a given Justice either writes or signs on to opinions with different interpretational approaches across contexts. It proceeds along these lines: the Court is a multimember, collegial institution; given a diversity of views on how to interpret the Constitution "correctly," any particular interpretational approach that a given Justice might think is the "right" one may not command a majority on the Court; insisting on one's approach would thus cause a Justice to concur or dissent in almost every case; doing so would not involve being a "functional member" of the Court; and, in fact, it would amount to "taking oneself out of the game."[167]

This is certainly a plausible explanation for various instances of methodological inconsistency, and it raises complex questions (which go beyond the scope of this Article) about the proper roles and obligations of both the Court and individual Justices in adjudicating constitutional cases. But I want to suggest that it is not an explanation that refutes allegations of methodological gerrymandering—whether at this level or lower ones. If anything, I believe it confirms those allegations. This is because accepting inconsistency for fear of "taking oneself out of the game" is an implicit admission that "getting a win" across a greater number of cases is more important than consistency in interpretation. This may well be what Justices think they need to do, but it is also essentially a restatement of components 2 (pursuit of partisan gain) and 3 (manipulation or distortion) of methodological gerrymandering as set out above.

If an explicit and substantive explanation is provided, analysis of the relevant extent of methodological gerrymandering involved then becomes a question of the strength of the justification. For this level of methodological gerrymandering, one might think about this as an analysis of the pros and cons of so-called "transsubstantivity" as adapted to this context.[168] Methodological consistency is not the only value that one might seek in constitutional interpretation, nor can one expect it to be fully implemented at all times. For example, some scholars have suggested more generally that constitutional adjudication is more productively conceived of, not

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167 *See, e.g.*, Solum, *supra* note 128, at 1291 (laying out this general reasoning process in responding to criticism of inconsistent use of originalism by some Justices); *see also* Kende, *supra* note 133, at 636 (noting in the context of a discussion of pragmatism that "the Justices must write coalition opinions that often cannot reflect foundational views").

168 As Katherine Crocker has recently suggested, while "[t]o some extent, transsubstantivity is a 'shape-shifting' concept 'that lacks a settled meaning'" generally speaking "the idea "refers to doctrine that, in form and manner of application, does not vary from one substantive context to the next." *See* Crocker, *supra* note 164, at 5 (quoting David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 B.Y.U. L. REV. 1191, 1196 (2014)).

as an initial choice of theory which precedes and then consistently determines one's answers to individual constitutional controversies, but rather as a process "in the opposite direction," in which one's ideas about proper constitutional theory emerge from decision-making that is situated in individual controversies, and judgments from cases to theory and back again influence each other over time in the search for "reflective equilibrium."[169] If this is so, an explicit and credible discussion by a Justice of how the search for reflective equilibrium explains and justifies their apparent methodological inconsistencies across different areas of law, coupled with future decision-making that is consistent with this evolving reflective equilibrium,[170] would thus suggest a comparatively lower level of component 3 of methodological gerrymandering (manipulation or distortion), and of methodological gerrymandering more generally.

Accordingly, while this level of methodological gerrymandering brings allegations of hypocrisy and disingenuousness into play, the extent to which they are applicable and persuasive in a given situation depends on both whether an explanation for the inconsistency is provided and the persuasiveness with which it is put forth.

The type of explanation and justification for methodological inconsistency discussed above, i.e., one grounded in a search for reflective equilibrium, is, of course, comparatively more credible at higher levels of generality—such as when discussing inconsistencies across "discrete legal areas." Because the areas in question are discrete and thus in a meaningful way distinct, it is more credible to claim that experience adjudicating such discrete claims led to insights about the value of a particular methodological approach that was not apparent when applied in a different area of law previously. But the strength of this explanation lessens as the discreteness between the areas involved lessens as well, and thus the likely amount of methodological gerrymandering increases—as the following levels of methodological gerrymandering try to capture.

D. Level 4: Application of Different Methodologies or Approaches to Different Questions within Broad Areas of Doctrine

A fourth level of methodological gerrymandering is to apply different methodological approaches to different legal questions within the same broad area of doctrine—for example, within equality rights doctrine, as I will discuss below.

The general considerations here are by now familiar, with the difference at this level of methodological gerrymandering being that explanations and justifications for differences in methodological approaches should be harder to come by, and the suspicion of greater levels of methodological gerrymandering being present is comparatively more justified. Because the legal issues at this level are less discrete, there is comparatively less room, for example, for an argument that an attempt at reaching reflective equilibrium underlies a difference in approaches within the same broad area of doctrine—say, equality rights for religion-based claimants versus race-based claimants as discussed below. The argument is potentially available but would require more work to be persuasive.

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169 *See, e.g.*, Dorf, *supra* note 142, at 594.

170 Checking a Justice's "receipts" for their allegations of a conscientious search for reflective equilibrium would seem to be necessary to prevent such allegations from turning into a too-easily-asserted smokescreen for methodological gerrymandering.

E. Level 5: Application of Different Methodologies or Approaches to Different Groups for the Same / Similar Question

A final, and most specific, level of methodological gerrymandering is to apply different methodological approaches to the claims of different groups with respect to the same or similar constitutional questions—for example, the scope of equality rights. Although the considerations for this Level are again similar to Level 4, they are heightened once more at this Level and, thus, it is worth separating out this level as its own. Analyzing the Constitution differently for members of different groups goes to the very heart of the basic judicial obligation of "impartiality," as noted in Part I.[171] Thus, inconsistency in interpretational approaches in this context demands the strongest justification. If such justification is not provided, allegations of not only methodological gerrymandering but of the variety justifying strong charges of hypocrisy and disingenuousness, are comparatively most appropriate.

V. METHODOLOGICAL GERRYMANDERING APPLIED, WITH A FOCUS ON EQUALITY RIGHTS

This Part turns from the conceptual to the applied. It has two main aims. First, I aim to illustrate with brief examples[172] that the framework set out in Parts III and IV is helpful in clarifying and strengthening analysis and critique of Supreme Court decision-making. Second, I aim to criticize the fact that the current Supreme Court (or, more precisely, a number of Justices in its current conservative majority) is engaging in various levels of methodological gerrymandering in a consistent effort to reassert and bolster, consciously or not, a modified version of what one might call a *founding era social hierarchy*. This hierarchy especially operates along the lines of religion, race, and sex and installs white male Christians and their interests at the top, with everyone else's interests subservient to them.[173] In methodological gerrymandering terminology, the bolstering of this hierarchy appears to be an aspect of the "partisan gain" that this group of Justices is pursuing, and in pursuit of which it turns to methodological gerrymandering at various levels. This is highly problematic and needs to be critiqued in depth, and this Article's discussion is one small part of this critique. As I gesture at in Part VI, the current Court's activities in this regard are also arguably relevant to broader discussions about Supreme Court reform.

In this Part, I limit myself to examples of methodological gerrymandering at Levels 3 and below. As noted above, no Justice or set of Justices has consistently committed themselves to an overarching theory of constitutional interpretation across

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171 *See supra* note 16 and accompanying text.

172 More extended discussion of each of the examples below is certainly possible and valuable but would exceed the space constraints of this Article and make an already complex discussion overly unwieldy. However, I plan to pursue some of the examples discussed below in greater depth in future work.

173 To be sure, and to be clear, this is a *modified* version of the hierarchy that is not directly equatable with other time periods—what I am referring to is the basic composition of the hierarchy and intuitions about whose interests will be and should be prioritized when push comes to shove.

all cases.[174] Thus, Level 1 (choice of overarching constitutional theory) and the Level-1 version of Level 2 (consistent choice of a specific member of a family of constitutional theories),[175] while valuable analytically in general, are not the most applicable levels in relation to the decisions of the current Supreme Court, and I postpone a more in-depth discussion of them for now. But the Court has provided numerous examples that illustrate Levels 3 and below in relation to the broad topic of this Symposium.

A. Examples of Level 3 Methodological Gerrymandering: The Role of History and Tradition in Recent Establishment Clause, Equal Protection Clause, and Due Process Clause Cases; and Race-Consciousness between the Fourth and Fourteenth Amendments

Consider, as a first example, the role that appeals to "history and tradition" have recently played in three areas of constitutional law which are nominally "discrete legal areas," but which are united in their relevance to whether the reassertion and bolstering of a modified version of a founding era social hierarchy is facilitated by constitutional interpretation: the Establishment Clause (structural limits on the influence of religion on government),[176] the Due Process Clause in relation to abortion (liberty rights in the context of sex),[177] and the Equal Protection Clause in relation to affirmative action (equality rights in the context of race).[178] In those three areas, at least four Justices (Roberts, Alito, Kavanaugh, and Gorsuch) have joined each other's recent opinions and, in doing so, agreed with each other's use of "history and tradition" in resolving constitutional questions—and with each other's methodological gerrymandering, too.

As a first step, consider the contrast between the Establishment Clause context and the Equal Protection context as an illustration of two of the methodological options the Court has employed, which then better situates the contested choice of turning toward history and tradition in *Dobbs* in the Due Process context.

In the Establishment Clause context, two of the Court's most recent decisions—*American Legion v. American Humanist Ass'n*[179] and *Kennedy v. Bremerton School District*[180]—involved the ongoing successful efforts of (mostly) the conservative wing of the Court to replace the multi-pronged Establishment Clause analysis from *Lemon v. Kurtzman*[181] with an approach that demands that the Establishment Clause

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[174] *See supra* Part IV.A.

[175] *See supra* Part IV.B.

[176] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2429 (2022); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019).

[177] *See* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2247 (2022).

[178] *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141 (2023) [hereinafter SFFA].

[179] *Am. Legion*, 139 S. Ct. 2067.

[180] *Kennedy*, 142 S. Ct. 2407.

[181] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). This test, as developed over time, came to look to the purposes and effects of a given government action or practice, as well as to

be interpreted "by reference to historical practices and understandings" and in a way that "accord[s] with history and faithfully reflect[s] the understanding of the Founding Fathers."[182] These efforts started to pick up steam in a case called *Town of Greece* in 2014, which validated the peculiar practice of legislative prayer based on its historical pedigree, rather than based on other "tests" that were usually applicable in Establishment Clause cases at the time.[183] In *American Legion*, in turn, the plurality opinion expanded such a historically-informed approach to another category of cases—"monuments, symbols, and practices with a longstanding history,"[184] to which the opinion accorded a "presumption of constitutionality"[185]—while disclaiming the approach's instantiation as its own "grand theory" of the Establishment Clause and ostensibly "taki[ng] a more modest approach that focuses on the particular issue at hand."[186] Just four years later, though, *Kennedy* then relied essentially exclusively on *Town of Greece* and the *American Legion* plurality to claim much more broadly that "[i]n place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings" and that "the line that courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers."[187] While there is much more that could be said about this development, what I want to highlight here is the outcomes that the move to install such a history and tradition-based test facilitated given the longstanding historical dominance of Christianity in public life in the United States: in *American Legion*, the validation of keeping a massive Roman Cross on public land, despite it being "undoubtedly a Christian symbol";[188] and in *Kennedy*, allowing a Christian high school football coach to force his controversial prayer practice on a school district that wanted not to be associated with such an endorsement of a particular religion or accept its potentially coercive effects on some of its students[189] because deciding otherwise would be "hostile to religion" and disregard the "long constitutional tradition under which learning how to tolerate diverse expressive activities has always been part of learning how to live in a pluralistic society."[190]

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whether such action or practice involved excessive entanglement of the state with religion or the government's endorsement of a religious message. *See, e.g.*, *American Legion*, 139 S. Ct. at 2080.

182 *Kennedy*, 142 S. Ct. at 1428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 577 (2014)).

183 *Town of Greece*, 572 U.S. at 575–77.

184 *Am. Legion*, 139 S. Ct. at 2089.

185 *Id.* at 2082, 2085.

186 *Id.* at 2087.

187 *Kennedy*, 142 S. Ct. at 2428 (alterations and quotation marks omitted).

188 *Am. Legion*, 139 S. Ct. at 2090.

189 *Kennedy*, 142 S. Ct. at 2426–32.

190 *Id.* at 2431.

Now contrast this with the Court's approach to the Equal Protection Clause in *SFFA*.[191] Although the majority referred to various sources of support for its reading that the Constitution demands colorblindness[192]—the views of some proponents of the Fourteenth Amendment, quotes from some early Supreme Court opinions, and, most notably, the majority's reading of the import of the Court's precedents starting with *Brown v. Board of Education*[193] and following thereafter[194]—one claim was clearly missing: that colorblindness was demanded by longstanding constitutional "history and tradition."

This absence is not surprising, since constitutional history and tradition in relation to race-consciousness would not have supported the majority's interpretation of the Equal Protection Clause. As the majority itself had to admit, a significant part of the relevant early constitutional history was "ignoble" and part of the relevant "tradition" was "state-mandated segregation . . . in many parts of the Nation . . . [f]or almost a century after the Civil War."[195] Moreover, even though the Court did not frame it this way, there was arguably also a more recent "history and tradition" for multiple decades from at least the 1970s[196] to the 2010s[197] (contested though it was) of allowing at least some race-consciousness in state actors' efforts to respond to this "ignoble" history and interrupt its continued pernicious effects. If anything, then, as far as *race-consciousness* in state decision-making was concerned,[198] any credible reliance on "history and tradition" as a way of anchoring constitutional interpretation would not have supported the majority's impatient demands for colorblindness, and colorblindness now.[199] Thus, rather than relying on history and tradition to guide its

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191 Broadly in line with my general argument here, Marc DeGirolami has noted that the Equal Protection Clause is "an area notable for antitraditionalist interpretation." Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1160 (2020).

192 At least when the interests of "nonminority," i.e., white, persons are affected. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2165 (2023); *see also* discussion *infra* notes 216–231 and accompanying text.

193 Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483 (1954).

194 *SFFA*, 143 S. Ct. at 2159–61.

195 *Id.* at 2159.

196 *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291–92 (1978).

197 *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 399, 403–04 (2016).

198 Because of their persistent insistence on drawing equivalences between Jim Crow segregation and race-conscious affirmative action as, in the ultimate analysis, all the same "racial discrimination," and on claiming that the Equal Protection Clause demands "eliminating all of" this discrimination, the Justices in the majority accordingly would have had to include and consider the entirety of this "history and tradition" of race-consciousness, regardless of the nature of the purpose underlying it.

199 This impatience was clear not the least from the majority's questionable choice to characterize as a concrete and rigid actual time limit Justice O'Connor's prognostication in *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003), that "25 years from" the time of that decision, "the use of racial preferences will no longer be necessary" to the pursuit of the educational benefits of diversity—and then refusing to even let that amount of time pass before turning its

constitutional interpretation, the majority was left declaring that the initial tradition was "inherent folly," only waiting to be replaced by the "inevitable truth";[200] and that the later tradition was in reality just a willingness "to dispense temporarily with the Constitution's unambiguous guarantee of equal protection."[201]

This difference in reliance (or not) on "history and tradition" across these two areas was not explained or justified. In some ways, and as noted above, this is not surprising given that the cases involve "discrete areas" of constitutional law.[202] But within a framework of methodological gerrymandering, the overlap in the Justices and the differences in their approach between the two contexts is notable. Especially in the absence of an explanation for it, this difference supports at least a suspicion of the pursuit of partisan gain—in particular, the relevant Justices' preferences for the reassertion and bolstering of a modern version of a founding era social hierarchy—through methodological manipulation or distortion.

Adding *Dobbs* to the analytical mix further supports that suspicion. Like the Establishment Clause cases, but unlike *SFFA*, *Dobbs* very much relied on "history and tradition," choosing as it did to analyze the existence (or not) of an unenumerated constitutional right to choose to end a pregnancy by reference to the test set out in *Washington v. Glucksberg*,[203] which recognizes such rights only when they are "deeply rooted in this Nation's history and tradition."[204] Of importance to my argument here, and as the dissent in *Dobbs* pointed out, this was a methodological *choice*, and one that was not preordained. After all, before some of the Justices in the *Dobbs* majority had joined the Court, a majority of other Justices had arguably limited the backward-looking *Glucksberg* test to that case's context and had instead used a much more capacious, and social-evolution friendly, test[205] in *Obergefell v. Hodges*.[206]

This time, the *Dobbs* majority did justify its methodological choice, arguing that the *Glucksberg* test was more appropriate because it imposed more "restraints" on the "exercise of raw judicial power."[207] As the *Dobbs* dissent responded, however, this justification was, to put it mildly, not particularly persuasive in the context of the *Dobbs* majority's other reasoning in the case. In a different part of its opinion, the majority had tried to assuage fears about its own judicial activism and "exercise of raw judicial power" by suggesting that other privacy and autonomy rights were not

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new majority on the Court for more aggressive colorblindness into action. *See, e.g.*, *SFFA*, 143 S. Ct. at 2172 (ostensibly explaining this choice).

200 *SFFA*, 143 S. Ct. at 2160.

201 *Id.* at 2165.

202 *See supra* Part IV.C.

203 Washington v. Glucksberg, 521 U.S. 702 (1997).

204 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246–47 (2022).

205 *Id.* at 2326 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).

206 Obergefell v. Hodges, 576 U.S. 644 (2015).

207 *Dobbs*, 142 S. Ct. at 2260.

affected by its decision to overturn decades of contrary precedent on abortion.[208] But as the dissent responded, this was mostly a bald assertion because the "history and tradition" approach that the Court said was demanded in this context likely would not support those rights either.[209] Thus, it was not clear what, other than "pick[ing] and choos[ing], in accord with individual preferences"[210] (i.e., the exercise of "raw judicial power"), would allow the majority to draw this distinction and actually be counted on to honor it.[211] This is what led the dissent to make the statement quoted in Part I: "[e]ither the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other."[212] Within a methodological gerrymandering framework, this allegation of hypocrisy appears appropriate, responding as it did to a poorly explained or justified inconsistency in the majority's methodological approach,[213] which the majority nevertheless claimed to be principled and constitutionally required.[214]

When this aspect of *Dobbs* is put in conversation with *SFFA* and the recent Establishment Clause cases, then, it appears that the relevant Justices call on "history and tradition" when they believe that the historical record supports their preferred outcome—as in *Dobbs* and the Establishment Clause cases[215]—but do not call on it when it complicates their preferred outcome—as in *SFFA*. Overall, as a result, this example of multiple Justices' selective invocation of "history and tradition" as a relevant aspect of their methodology for constitutional interpretation across three "discrete areas" of constitutional law arguably reveals a substantial amount of Level 3 methodological gerrymandering. When in a position to determine and control the

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208 *Id.* at 2258.

209 *Id.* at 2319 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

210 *Id.* at 2326.

211 The majority opinion also claimed that other privacy and autonomy rights were distinguishable because they do not involve the "unique" factor of "potential life" that is at issue in the abortion context. *Id.* at 2280. While this may be an important substantive distinction between different kinds of privacy and autonomy rights, the majority did not explain or justify how this distinction was relevant under its interpretational methodology of looking to longstanding history and tradition. Thus, within a methodological gerrymandering framework, the distinction was not persuasive because it was nonresponsive to the dissent's claim that other privacy and autonomy rights likely also could not meet the majority's interpretational methodology.

212 *Id.* at 2319 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

213 To be clear, this inconsistency is hypothetical and based on a scenario in which the *Dobbs* majority subsequently actually would honor precedents on other privacy and autonomy rights even though the interpretational methodology that it applied in *Dobbs* to strike down abortion rights would not support those rights either.

214 *See generally supra* Part III.C.3.

215 *But see* Goodwin, *supra* note 6 (arguing that the *Dobbs* majority "[i]n its backward, tilting view, . . . catapults over key arguments, materials, and facts relevant to its inquiry related to Reconstruction, female bodily autonomy, and abortion" and "fastens to some facts, while relevant, material details and archives are left dusty without evidence of a fingerprint").

content of constitutional doctrine, these Justices manipulate or distort their methodological approaches so that the outcomes of the cases result in partisan gain—defined here as support for the reassertion and bolstering of a modern version of a founding era social hierarchy that prioritizes the interests of Christian, male, and white Americans while subordinating the interests of others.

Consider as a second example an internal debate within *SFFA*. As noted above, the majority's opinion was another step in the involved Justices' incessant and impatient march toward demanding constitutional "colorblindness,"—at least, in relation to contexts in which race-consciousness would otherwise be used in support of the interests of historically marginalized and subordinated racial groups.[216] Although it was left somewhat unclear what the exact "methodology" was that the Court used to get to its conclusions about the relevant principle of "racial equality," what was not left unclear was how far-reaching the majority claimed that its constitutional mandate of colorblindness truly was. For example, the majority opinion ended the Section that sets out the applicable constitutional principles this way: "Our acceptance of race-based state action has been rare for a reason. 'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' That principle cannot be overridden except in the most extraordinary case."[217] Elsewhere, the opinion argued that "[e]liminating racial discrimination means eliminating all of it"[218] and that "racial discrimination is invidious in all contexts."[219]

As part of her detailed critique of the majority's analysis, Justice Sotomayor's dissent raised what should accordingly be an uncomfortable point for the majority: if it is true that race-, or ancestry-based "distinctions," "actions by the state," and "discrimination," are so "odious" and "invidious" in "all contexts," how does it fit into this meaning of the Constitution that "the Court has allowed the use of race when that use burdens minority populations" in the context of law enforcement?[220] How could the majority explain that, in two cases in the 1970s, the Court had allowed border patrol agents to conduct traffic stops and referrals to secondary inspections in the general vicinity of the border to Mexico based, at least in part, on "Mexican appearance" and "apparent Mexican ancestry"[221]—thereby "facilitat[ing] racial

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216 For a prior step in this march, see the plurality opinion in *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007), in which Justices Roberts and Alito from the *SFFA* majority foreshadowed many arguments that ultimately prevailed in *SFFA* but did not yet command a majority on a Court with different personnel.

217 Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2162–63 (2023) (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)).

218 *Id.* at 2161.

219 *Id.* at 2166 (alterations and quotation marks omitted).

220 *Id.* at 2246 (Sotomayor, J., dissenting).

221 *Id.* at 2246–47 (Sotomayor, J., dissenting) (citing United States v. Brignoni-Ponce, 422 U.S. 873, 884–87 (1975) and United States v. Martinez-Fuerte, 428 U.S. 543, 562–63 (1976)).

profiling of Latinos as a law enforcement tool" and very much "not adopt[ing] a race-blind rule"?[222]

The majority's response was telling—at least from the standpoint of a methodological gerrymandering analysis. The sole "retort" (if it may be called that) was that the "two cases . . . have nothing to do with the Equal Protection Clause."[223] This is true, for what it is worth—the cases cited by Justice Sotomayor were Fourth Amendment cases while *SFFA* itself was litigated as (mostly) an Equal Protection case.[224] But it is not worth much. Within the framework of methodological gerrymandering, the entirety of the response by the majority to the dissent's charge essentially boiled down to asserting that "discrete legal areas" were involved in the two sets of cases. Presumably, though the majority did not explicitly say this, that meant (in the majority's view) that what had been decided in the other discrete legal area, although very much contrary to the reasoning of the majority in *SFFA*, was completely irrelevant to the case at hand.

But, and problematically from a methodological gerrymandering standpoint, there was neither *explanation* nor *justification* (nor even an attempt at either) as to why that should be so. To be sure, the cases cited by Justice Sotomayor featured none of the Justices in the *SFFA* majority (decided as they were in the 1970s), and, thus, the cases did not involve "their" reasoning. But the *SFFA* majority had nevertheless laid claim to a constitutional principle, and it had framed this principle as applying "in all contexts" and admitting of only "rare" and "extraordinary" departures, if that.[225] To paraphrase one of the majority's Justices (Justice Gorsuch) from a different opinion of his, the majority had not made any suggestions that its colorblindness principle was "some good-for-this-clause-only coupon."[226] Moreover, the Supreme Court had, in a

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[222] *Id.* at 2246 (Sotomayor, J., dissenting). *See, e.g.*, Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010).

[223] *SFFA*, 143 S. Ct. at 2162–63 n.3.

[224] I plan to explore in more depth in a future project how Justice Gorsuch's concurring opinion in *SFFA*, which dealt with the case under Title VI of the Civil Rights Act of 1964, also engaged in various methodological gerrymandering maneuvers.

[225] Indeed, in the very same footnote in which it dismissed Justice Sotomayor's argument without explanation, the majority also referred to "the infamous case *Korematsu v. United States*" as "[t]he first time we determined that a governmental racial classification satisfied" strict scrutiny and argued that the case "'demonstrates vividly that even the most rigid scrutiny can sometimes fail to detect an illegitimate racial classification' and that '[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future.'" *SFFA*, 143 S. Ct. at 2162 n.3 (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 236 (1995)).

[226] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2102 (2019). (Gorsuch, J., concurring in the judgment) ("The Constitution's meaning is fixed, not some good-for-this-day-only coupon, and a practice consistent with our nation's traditions is just as permissible whether undertaken today or 94 years ago.").

prior Fourth Amendment case, "noted in dicta that equal protection principles apply to racial profiling practices."[227]

If being "principled" and consistent in its constitutional interpretation was important to the majority, therefore, one would have expected at least *some* substantive explanation in response to Justice Sotomayor's invocation of a set of precedential cases that seemed to seriously conflict with the majority's view of the Constitution. A number of explanations would have been available, one might think: perhaps that, in the majority's view, the two cases cited by Justice Sotomayor were indeed inconsistent with the relevant constitutional principle, but from a different time and Court that didn't see this principle as clearly, and that *this* principled Court would consider overruling those cases when the opportunity presented itself.[228] Or, perhaps, that the context of those cases was, in the majority's view, one in which the "rare" or "extraordinary" departure from its principle could be made—with an explanation for why and how this would be so.[229] Or, perhaps, some other explanation that I just cannot see for how the principle could be so strong and unyielding under one clause of the Constitution, but irrelevant in the context of another clause—even though that clause at times deals with comparable social facts and issues.

Without even an *attempt* at explanation, however, even in the face of an explicit challenge to provide one, one is again left with the suspicion that perhaps the majority's principle isn't so all-encompassing after all. That perhaps its principle can be manipulated and distorted and applied to one context, but not another. And that perhaps an underlying reason for this manipulation or distortion relates to how it works to secure a particular type of "partisan gain"—the reassertion and bolstering of the racial component of a modified version of a founding era social hierarchy: propping up this hierarchy with racial profiling that white Americans need not be overly concerned with,[230] and preventing interference with this hierarchy in the form of race-conscious programs that in modest ways attempt to undo the serious racial stratification that so undeniably remains in American society today.[231] In other words, one is left with the conclusion that there is Level 3 methodological gerrymandering, and a significant amount of it.

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227 R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1088 (2001). Specifically, in *Whren v. United States*, 517 U.S. 806, 813 (1996), the Court had noted that "[w]e of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race" but explained that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause."

228 Perhaps the Justices could have considered extending an invitation for the overruling of those cases similar to those that Justices had offered before *Dobbs* in relation to *Roe*. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022).

229 In support of such an explanation, one might expect a clear differentiation of those cases from the racial profiling in *Korematsu*, which the SFFA majority called "gravely wrong the day it was decided." *SFFA*, 143 S. Ct. at 2162 n.3.

230 *See, e.g.*, Thierry Devos & Mazharin Banaji, *American = White?*, 88 J. PERS. SOC. PSYCHOL. 447 (2005).

231 *See, e.g.*, Victoria C. Plaut, *Diversity Science: Why and How Difference Makes a Difference*, 21 PSYCHOL. INQUIRY 77, 78–80 (2010).

B. Examples of Levels 4 and 5 of Methodological Gerrymandering: "Most" and "Least Favored Nation" Approaches for Religion and Race

As a briefer example of these lower levels of methodological gerrymandering in the equality rights context, consider another comparison of the Court's jurisprudence in the areas of race and religion (this time, the Free Exercise Clause)—and, specifically, how certain Justices have come to define and apply "equality" in those respective contexts.

With respect to Level 4, I have recently written an essay comparing the Court's approach to two legal questions which are in some respects different, but which have important overlapping aspects: 1) What protections does the Free Exercise Clause of the First Amendment provide against "religious discrimination" of various kinds; and 2) to what extent and under what conditions does the Equal Protection Clause permit race-consciousness by actors attempting to respond to continuing racial inequality in American society.[232] As I argue in that essay, each question involves the protection of "equality" (religious and racial, respectively), but how some of the Justices in the current conservative majority on the Court conceptualize this equality across the two questions is fundamentally different. In the context of religion, Justice Kavanaugh in particular, and to a less clear extent also Justices Roberts, Alito, Gorsuch, and Barrett, have adopted an aggressive "Most Favored Nation" approach to religious equality rights which, as I explain in more detail in my essay, requires broad religion-consciousness by government actors to ensure that individuals are not disadvantaged by their religion when government actors pursue policies to which they make certain exceptions (i.e., when such policies are not "generally applicable").[233] The *failure* to take religion into account in this way triggers strict scrutiny,[234] an approach which was broadly confirmed by *Kennedy*, which was decided after my essay.[235] By contrast, in the context of race, the same Justices have come to take what I suggested is a "least favored nation" approach, in which any attempt *to consider* race in similar circumstances calls for strict scrutiny[236]—an approach confirmed by *SFFA*, which was decided after my essay.[237]

As with other areas discussed above, this difference in approach has not received any discussion, explanation, or justification by the involved Justices, whether in recent Free Exercise cases or in *SFFA*. Although some explanations for the difference are available, I do not ultimately find them persuasive for reasons discussed in my

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232 *See generally* David Simson, *Most Favored Racial Hierarchy: The Ever-Evolving Ways of the Supreme Court's Superordination of Whiteness*, 120 MICH. L. REV. 1629 (2022).

233 *See, e.g.*, *id.* at 1641–44.

234 *Id.* at 1638, 1640.

235 *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2422–23 (2022) (discussing general applicability).

236 Simson, *supra* note 232, at 1646, 1653.

237 *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2162 (2023).

essay.[238] Most importantly for my purposes here, my essay explains how this difference in approaches to equality between the race and religion contexts ultimately again involves the pursuit of partisan gain in the form of the assertion and bolstering of the racial component of a founding era social hierarchy via what scholars have called the "superordination of whiteness."[239] In the terminology of methodological gerrymandering, these Justices' unexplained difference in approach to resolving different legal questions that are united in their equality rights dimensions in the contexts of race and religion arguably constitutes an example of Level 4 methodological gerrymandering.

In fact, a similar context also provides an example of Level 5 methodological gerrymandering. As I briefly point out in the essay and as Nelson Tebbe has explained at greater length,[240] the very "Most Favored Nation" approach that has come to so strongly protect Christian religious claimants, including most recently in *Kennedy*, was "conspicuously absent"[241] in *Trump v. Hawaii* when it would have benefitted Muslim Americans and instead gave way to a deferential approach to the government grounded in immigration exceptionalism that has its own long history of racism.[242]

VI. A FEW BROADER TAKEAWAYS AND IMPLICATIONS

My hope is that the above analysis provides a helpful and constructive way of thinking about constitutional interpretation generally, and the choices being made by different Justices on the current Supreme Court more specifically. As I hope to have demonstrated, thinking about methodological gerrymandering as a relevant aspect of constitutional interpretation, and applying a coherent framework that distinguishes its various features and "measures" its relative extent, can help us have clearer conversations about what it is that we critique and disagree about in relation to different aspects of the Court's work.

Lots of debate and disagreements about the work of the Court in relation to constitutional interpretation is substantive in nature and grounded in each of our own convictions about how American society should be "constituted." This is probably unavoidable in a highly diverse society with as complex a history as that of the United States.[243] These disagreements can run deep and, at times, are irreconcilable. Such irreconcilable disagreements can, in turn, create the impression that *all* disagreements about the work of the Court are substantive in nature, and that there is no common ground and, thus, no point to have a debate to begin with. I don't believe that coming to this conclusion would be productive.

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238 Simson, *supra* note 232, at 1658–62.

239 *Id.* at 1662–63.

240 Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2463–69 (2021).

241 *Id.* at 2463.

242 Simson, *supra* note 232, at 1663.

243 *See generally* Ben Railton, *The Roots of Multicultural Diversity in Revolutionary America*, SSN KEY FINDINGS (Aug. 19, 2014).

Part of the work that the methodological gerrymandering framework proposed in this Article can do is to set out relative likelihoods of possibility for agreement via debate. At the higher Levels of the framework (1 and 2—choice of overarching constitutional theory), ultimate agreement on the "right" theory of constitutional interpretation between people with different visions for American society is highly unlikely—though having such debates can still be productive in informing both ourselves and "the other side" about what we and they ultimately value. But it should be comparatively more possible to agree, even across substantive divides, that there is a problem with lower and lower levels of methodological gerrymandering. Such agreement can, in turn, facilitate at least some level of productive action, rather than creating a complete sense of polarized stalemate.

For example, the framework can support helpful contributions to the broader Supreme Court reform debates that have surfaced in recent years, due not only to the Court's various controversial decisions, but also due to the highly contentious battles over, and allegations of bad faith in the context of, nominations and confirmations to the Court.[244] As Ryan Doerfler and Samuel Moyn have recently suggested, one critical choice in debates about Supreme Court reform is how to frame what "the problem" is that is calling for reform.[245] Is it the Court's relative (and currently declining) levels of legitimacy (under what Doerfler and Moyn call a "legitimacy frame"), or is it the Court's relative levels of power (under what Doerfler and Moyn call a "progressive frame")?[246] "The choice of frame" is important because it drives what the relevant solutions should be—i.e., it "determines whether to put things back the way they were or to question the way they have consistently been."[247] I believe that analyzing the Court's decision-making in terms of methodological gerrymandering is helpful for participants in these reform debates under either framing.

Under a legitimacy framing, analyzing the Court's work in relation to its relative levels of methodological gerrymandering arguably provides one tangible indication of how high or low the Court's legitimacy should be, and thus how serious the need for legitimacy-based reform is at any given point in time. Large numbers of instances of methodological gerrymandering, especially at the lower levels and within a short amount of time, deeply undermine the Court's claim to legitimacy because they are inconsistent with good faith attempts to implement, as best as is possible (even if it cannot be perfect), the law / politics distinction and the values of neutrality, impartiality, and consistency that are often thought to legitimate the Court's significant power.[248] The presence of large levels of, or increases over time in, methodological gerrymandering might suggest that the "wrong" people occupy the

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244 *See, e.g.*, Doerfler & Moyn, *supra* note 18, at 1711–15. These developments were part of what led to President Biden's installation of a Presidential Commission on the Supreme Court that published its final report in late 2021. *See generally* PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT (2021), https://www.whitehouse.gov/pcscotus/.

245 Doerfler & Moyn, *supra* note 18, at 1705.

246 *Id.* at 1710–11, 1715–20.

247 *Id.* at 1710.

248 *See, e.g.*, *supra* Part II; *see also* Fallon Jr., *supra* note 105; Crocker, *supra* note 164.

Court, suggesting, in turn, the necessity of responding with what Doerfler and Moyn call "personnel reforms" such as court-packing, partisan balance requirements, and the like.[249]

Alternatively, one might mobilize the idea that methodological gerrymandering, especially at Levels 1 and 2, is to some extent inevitable, and, at the lower levels, regularly practiced, to argue for a different role of the Court in the constitutional system altogether—via what Doerfler and Moyn call "disempowering reforms" such as jurisdiction stripping, supermajority voting rules in constitutional cases, legislative overrides, and the like.[250] Such arguments could go as far as advocating abandoning judicial review altogether.[251] Under this framing, the incompatibility of the work of the Justices with their asserted role obligations is checked not by trying to find the "right" or more "conscientious" Justices that will more "legitimately" exercise their significant power, but by reducing both the incentive and ability to methodologically gerrymander in the first place by "disempowering" the Court and giving it less influence over the direction of policy.[252] By "effectively reassign[ing] power away from the judiciary and to the political branches"[253] and, thus, reducing the extent of judicial supremacy in the constitutional system, this would, in part, reassert a greater role for "departmentalism" in judicial interpretation—the idea that each branch within their sphere of authority has an independent right and power to interpret the Constitution.[254] It would also incorporate that, to the extent that constitutional interpretation by necessity involves a certain amount of irreconcilable disagreement about social values, such interpretation should more often take place in institutions that are comparatively better-designed to accurately reflect the relative strength of the contenders in those disagreements at a given point in time, and to adjust responses without being as institutionally-committed to finding and defending "one right answer" as the courts are.

The pros and cons of each of these approaches, the constitutionality of various Supreme Court reform proposals, and various other aspects of the above are highly complex and cannot be fully discussed here. My goal in this Part was simply to briefly suggest that I think that the methodological gerrymandering analysis and framework in this Article have something productive to contribute to those debates—a suggestion on which I plan to follow-up in more detail in the future and which I hope to debate with interested others.

VII. CONCLUSION

Discussions at the 2022 *Cleveland State Law Review* Symposium illuminated many aspects of the intense stakes of constitutional law. They also focused in on the

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249 Doerfler & Moyn, *supra* note 18, at 1720.

250 *Id.* at 1721.

251 *See generally, e.g.*, Girardeau A. Spann, *Constitutional Hypocrisy*, 27 CONST. COMMENT. 557 (2010).

252 Doerfler & Moyn, *supra* note 18, at 1721.

253 *Id.*

254 *Id.* at 1757.

immense power of the U.S. Supreme Court to shape each of our lives through its exercise of constitutional interpretation, as illustrated by the court's decision in *Dobbs* to overturn decades of its own precedent that had protected as a fundamental constitutional right a woman's decision to terminate a pregnancy. When the stakes are this high, informed debate and critique of powerful institutions like the Court are essential. In this Article, I have aimed to contribute both to more informed debate—by providing a framework within which to consistently and productively analyze Supreme Court Justices' constitutional interpretation activities—and to deep critique—by illuminating the troubling efforts of the current Court to reassert and bolster longstanding social hierarchies along the lines of race, religion, and sex in various areas of constitutional law. As Derrick Bell powerfully reminded us, and as the Symposium made clear once again, constitutional law is a "locus of battle over the shape of our society, where differing visions of what should be, compete to become what is, and what will be."[255] All of us participate in this battle in one way or another, and I hope to have made a small contribution toward making this battle more clear-eyed and productive.

255 *See supra* note 2 and accompanying text.