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Reconsidering the Law of Democracy: Of Political Questions, Prudence, and the Judicial Role

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RECONSIDERING THE LAW OF DEMOCRACY:
OF POLITICAL QUESTIONS, PRUDENCE, AND THE
JUDICIAL ROLE

LUIS FUENTES-ROHWER*

ABSTRACT

In Vieth v. Jubelirer, the U.S. Supreme Court seemed poised to offer its definitive position on political gerrymandering questions. Yet the Court splintered along familiar lines and failed to offer an unequivocal answer. This Article focuses on the Court's plurality opinion, and particularly on its conclusion that judicially manageable standards are wanting in this area. This conclusion is implausible and masks the real question at the heart of the case. The Vieth plurality is best understood by examining the Court's political and prudential concerns as cabined by the political question doctrine. One understanding is simply that the plurality is making a call on the merits. A more intriguing explanation is that the plurality is signaling a retreat from its aggressive posture of years past: uncomfortable with the Court's general role in political affairs, the plurality is finally willing to call it a day. This is a worthy inquiry; in the wake of Bush v. Gore, we must revisit the Court's entry into the political arena. Rather than sending us in a futile quest for standards, Vieth is best understood as inviting such an inquiry.

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INTRODUCTION

From the time the Supreme Court officially extended the judicial power to encompass political gerrymandering questions in *Davis v. Bandemer*,¹ the doctrine has been subject to withering criticism. While gerrymanders as such were no longer shielded from judicial review under the guise of “political questions,” the legal standard established in *Bandemer* was deemed both confusing and confused, a bar too high for litigants to meet in any useful and practical way. In the words of a leading commentator, writing more than a decade ago, “[n]ot only has the new partisan gerrymandering standard yet to be used by any court to invalidate any legislative action, but the Supreme Court also threw its hands in the air when confronted with the most wanton political gerrymander of the 1980s: the infamous Burton gerrymander of California.”²

In the 2003 Term, the Court set to remedy this condition; the case was *Vieth v. Jubelirer*.³ In *Vieth*, the Court examined Pennsylvania General Assembly’s redistricting handiwork after the 2000 census, which was a pastiche of facts and conditions that raised many eyebrows, particularly of those in the Democratic Party.⁴ This plan had it all: one-party control of all relevant political posts, a necessary precondition for a partisan gerrymander; pressure from national party leaders on state actors to craft a partisan plan; a process where members of the minority party had very little if any input; and a resulting map that split counties, cities, boroughs and townships in suspicious ways, including one county, Montgomery County, divided up among six different congressional districts. The egregious nature of these facts led one Justice who seemed otherwise unsympathetic to the plaintiffs to confess nevertheless during

1. 478 U.S. 109, 119-25 (1986) (holding that a political gerrymandering issue was justiciable after applying the political question analysis originally set out in *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

2. Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1671 & n.142 (1993) (referring to U.S. Representative Philip Burton’s dramatic redistricting plan that increased the Democrats’ majority edge in the California congressional delegation from 22-to-21 in 1980 to 28-to-17 in 1982 despite an almost evenly divided electorate).

3. 541 U.S. 267 (2004).

4. *Id.* at 272-73.

the oral argument: "I would concede that what happens here is unfair in some common—common parlance. It – it – it looks pretty raw."⁵ Similarly, in his concurring opinion, Justice Kennedy maintained that, "[w]hether spoken with concern or pride, it is unfortunate that our legislators have reached the point of declaring that, when it comes to apportionment, [w]e are in the business of rigging elections."⁶

The story behind *Vieth* is not about judicial power. In the wake of *Bush v. Gore*⁷ and *Shaw v. Reno*,⁸ the question of the availability *vel non* of judicial power to address the supposed infirmities of the political process is no longer considered a serious limitation: *Baker v. Carr*⁹ settled that question long ago and it has not been questioned seriously since. Rather, *Vieth* raises squarely and forcefully the question of judicial will:¹⁰ should the courts stay in the domain of politics in order to rein in such blatant political acts? In response to this question, the Court in *Vieth* had two leading choices. The Court could either strengthen its political gerrymandering doctrine or it could retreat from it, eighteen years after the doctrine's inauspicious beginning. But the Court did neither.

The plurality opinion, authored by Justice Scalia, noted that *Bandemer* "held that the Equal Protection Clause grants judges the power—and duty—to control political gerrymandering."¹¹ Yet after eighteen years, Justice Scalia remarked, no standards "have emerged," not from the lower courts, commentators, or anywhere else.¹² For this reason, the plurality concluded that these claims

5. Transcript of Oral Argument at 5, *Vieth*, 541 U.S. 267 (No. 02-1580).

6. *Vieth*, 541 U.S. at 317 (Kennedy, J., concurring) (internal quotation marks omitted) (quoting Joseph Hoefel, *Six Incumbents Are a Week Away from Easy Election*, WINSTON-SALEM J., Jan. 27, 1998, at B1).

7. 531 U.S. 98 (2000) (reversing the Florida Supreme Court's order to recount ballots in the 2000 presidential election).

8. 509 U.S. 630 (1993) (holding that racial gerrymandering to create a majority-minority congressional district was a violation of the Equal Protection Clause).

9. 369 U.S. 186, 217 (1962).

10. See *Vieth*, 541 U.S. at 341 (Stevens, J., dissenting) ("What is clear is that it is not the unavailability of judicially manageable standards that drives today's decision. It is, instead, a failure of judicial will to condemn even the most blatant violations of a state legislature's fundamental duty to govern impartially.").

11. *Id.* at 277 (plurality opinion) (citing *Davis v. Bandemer*, 478 U.S. 109 (1986) (plurality opinion)).

12. *Id.* at 281.

must be “nonjusticiable and that *Bandemer* was wrongly decided.”¹³ In response, the dissenting Justices argued that such standards do in fact exist, and they offered three different examples.¹⁴ In the middle was Justice Kennedy, who was not quite ready to bar all political gerrymandering questions, but who had yet to find a standard that met with his approval.¹⁵ To the plurality, this meant that its opinion controlled for the foreseeable future and that these claims were off-limits from review.¹⁶ Dissenting Justices argued otherwise.¹⁷

Vieth is a curious case on many fronts. It is amply clear that the Supreme Court stands at the epicenter of the electoral world, firmly in control of all questions political.¹⁸ Support for this proposition is plentiful, of which *Bush v. Gore* is only the latest example. Whether redistricting, racial gerrymandering, or ballot access, the Court is generally ready and willing to strike a blow in the name of democracy. In this vein, the mere mention of a lack of “judicially manageable standards” should strike us as odd and misplaced; if the Court ever felt shackled by an alleged lack of such judicially manageable standards, *Baker v. Carr* and its progeny

13. See *id.* Fritz Scharpf labels a similar argument “a surprising statement.” Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 555 (1966) (criticizing an American scholar’s attempt to describe political question cases as lacking “legal principles to apply to the question[] presented” (quoting Oliver P. Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485, 512 (1924))).

14. See *Vieth*, 541 U.S. at 335-41 (Stevens, J., dissenting); *id.* at 346-51 (Souter, J., dissenting); *id.* at 355-62 (Breyer, J., dissenting).

15. See *id.* at 309-10, 316 (Kennedy, J., concurring).

16. See *id.* at 305 (plurality opinion).

What are the lower courts to make of [Justice Kennedy’s] pronouncement? We suggest that they must treat it as a reluctant fifth vote against justiciability at district and statewide levels—a vote that may change in some future case but that holds, for the time being, that this matter is nonjusticiable.

Id.

17. See *id.* at 368 (Breyer, J., dissenting) (contending that Justice Kennedy disagrees with the plurality on the justiciability issue and “remains in search of appropriate standards”).

18. See generally Richard H. Pildes, *Constitutionalizing Democratic Politics*, in A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY 155, 156, 185-86 (Ronald Dworkin ed., 2002) (describing the role of constitutional law in contemporary politics). Some argue that this position is true across doctrines and contexts. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 750 (2004) (Scalia, J., concurring in part and concurring in the judgment) (“This Court seems incapable of admitting that some matters—any matters—are none of its business.”); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5, 13-15 (2001).

should have put those concerns to rest. Questions of standards, process, or doctrinal consistency seldom offer any practical resistance.

And yet, somehow, they offered all the resistance needed in *Vieth*. Such resistance must reflect the plurality's implicit assumption that political gerrymandering questions are different from redistricting questions. This is, however, a questionable assumption that the plurality never really justified. While there may be a constitutionally significant distinction between gerrymandering and redistricting, the distinction is not facially apparent. As the late Robert Dixon argued, "*districting is gerrymandering*."¹⁹ It is inherent in the redistricting process that lines on a map, even if drawn by an impartial and objective independent commission, will ultimately harm one party and benefit the other.²⁰ Thus, to adjudicate districting questions is essentially to adjudicate gerrymandering questions writ large. This point is directly linked to both *Baker* and its immediate progeny. By refusing to act, state legislatures at the time were in fact gerrymandering their states, in the sense that their districts were not reflective of the voting population, and the voting public did not have any way to influence the outcome of elections.

The *Vieth* plurality's retreat on the grounds that standards for adjudication are lacking is suspect for a second reason. We live in a constitutional world where courts comfortably balance state interests and apply strict scrutiny or rational basis tests. Such standards did not descend from the heavens on marble tablets; they were developed by prior courts, for reasons that might or might not make any sense at the present time. This is true about judicially developed standards in general.²¹ An apt example is the Court's

19. See ROBERT G. DIXON, JR., *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 462 (1968); see also Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 *YALE L. & POL'Y REV.* 301, 310 (1991) ("Every districting method helps someone at least to the extent of hurting someone else.").

20. Robert Bork's contribution as a special master to the Connecticut districting process in the 1970s offers a poignant example of this position. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 88-89 (1990); Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts*, in *REPRESENTATION AND REDISTRICTING ISSUES* 7, 18-19 (Bernard Grofman et al. eds., 1982).

21. Martin Redish made this point succinctly some years ago:

early reapportionment jurisprudence. The lessons of these early cases are clear, as the Court in *Reynolds v. Sims*²² and subsequent cases created and enforced standards where none previously existed. In so doing, these cases offer a working model for the gerrymandering cases. After all, if the Court could implement and enforce the equipopulation standard in reaction to grossly malapportioned districts, it should not be terribly challenging for the Court to implement and enforce an analogous standard, similarly created out of thin air, in the political gerrymandering cases. Hence, can we accept the plurality's reasoning at face value?²³ Is it true that no manageable standards avail in this area? And, if manageable standards in fact exist, what explains the Court's stubborn refusal to constitutionalize the hated gerrymander?

This Article examines these questions and concludes that *Vieth* is a subversive opinion, best understood as signaling a retreat from the Court's aggressive posture of years past. This argument is anchored by the Court's historical treatment of the political question doctrine. From *Luther v. Borden*²⁴ to *Colegrove v. Green*²⁵ to *Bush v. Gore*, the prudential strand of the doctrine has played a central role

Ultimately, *any* constitutional provision can be supplied with working standards of interpretation. To be sure, those standards often will not clearly flow from either the language or history of the provision, but that fact does not distinguish them from many judicial standards invoked every day. If we were really to take seriously the "absence-of-standards" rationale, then we would once again be proving considerably more than most of us had intended, for a substantial portion of all constitutional review is susceptible to the same critique.

Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1047 (1985); see also Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 870 (1994) (contending that "many important constitutional provisions are written in broad, open-textured language and certainly do not contain 'judicially discoverable and manageable standards'"); Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643, 647 (1989) ("[W]hy assume ... 'judicially manageable standards' exist in any of the significant areas controlled by constitutional doctrine?"); Note, *A Niche for the Guarantee Clause*, 94 HARV. L. REV. 681, 687 (1981) ("If standards are lacking under the guarantee clause, it is less because of any special vacuity of the language than because courts have been unwilling to develop standards as they have under the equal protection clause.").

22. 377 U.S. 533 (1964).

23. Rick Hasen similarly calls the plurality's argument about standards "a judicial sleight of hand." Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims After Vieth*, 3 ELECTION L.J. 626, 637 (2004).

24. 48 U.S. (7 How.) 1 (1849).

25. 328 U.S. 549 (1946).

in shaping the law of democracy. In other words, the Court has acted or chosen not to act for extralegal reasons. This is not intended as a criticism of the Court's political question jurisprudence; in matters of law and politics, public opinion must play an important role. *Vieth* sits comfortably within this political question tradition. But to hear the plurality tell this particular story, the doctrine is doing all the work here, not practical or political considerations. This posture is misleading at best, but not surprising, for it is part and parcel of the prudential political question doctrine.²⁶ Thus, *Vieth* is far more subversive than we have been led to believe; at the very least, it takes us back to the Court's point-of-entry into the realm of politics in *Baker v. Carr*. In so doing, it demands a reconsideration of the Court's ever-present role in the law of democracy.

Part I analyzes the political question doctrine, the bedrock principle at the heart of the gerrymandering question. This analysis separates the doctrine into two discrete components, the classical political question doctrine and its "prudential" strand. In light of the doctrine as understood and developed by the Court itself—and particularly the fact that "political questions" commonly understood are now a shell of their former selves—political gerrymandering questions need not be immune from judicial examination. In particular, the classical strand of the doctrine is not what it pretends to be, for its invocation offers very little practical resistance and is ultimately a decision on the merits. As for the prudential strand, it offers moments when the Court acts in a most political way, by refusing to act not for legal or doctrinal reasons, but for political reasons. Thus, on either account, when the *Vieth* plurality invoked some of the tenets of the doctrine, we had reason to wonder about its true motives, especially from the same institution that gave us *Reynolds v. Sims* and *Shaw v. Reno*.²⁷

26. See Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 462-63 (2004).

27. See *Vieth v. Jubelirer*, 541 U.S. 267, 324 (2004) (Stevens, J., dissenting) ("Especially perplexing is the plurality's *ipse dixit* distinction of our racial gerrymandering cases."); Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 680 (2002) (complaining that the *Shaw* cases "set the Court off on an essentially standardless journey") [hereinafter Karlan, *Exit Strategies*]; Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in*

Parts II and III examine the plurality's demands in *Vieth* for a "judicially manageable standard." Part II offers a reading of the plurality opinion in *Davis v. Bandemer*, the focal point in the Court's modern quest to develop standards to regulate the hated gerrymander. This Part situates *Bandemer* within the voting rights tradition of *Baker v. Carr* and its progeny and thus immediately questions the assertion that standards do not exist in this area. Part III parses through many proposed standards, none of which met with the plurality's approval. In so doing, it makes clear that many such standards exist. This Part concludes that we cannot accept the plurality's argument on its face. Something else must be at work here.

Finally, Part IV offers some explanations for the Court's uncustomary passivity. One explanation is that the plurality misunderstands the intrinsic nature of the harms at issue. While the Court as a whole approaches claims about the law of democracy as individual rights claims, it should understand them instead as structural claims. Although I largely agree with this argument in the abstract,²⁸ it is questionable whether it explains the dynamics of the *Vieth* case and its many opinions. A more obvious conclusion is that the plurality is clearly taking a look at the merits of the controversy. This conclusion places the plurality in good historical company, for the Court has often invoked a lack-of-standards rationale in cases where it is making a call on the merits.²⁹ If this were the extent of *Vieth*, the case would hardly be worth our close attention. But there is more. This Part ultimately concludes that the Court is after much bigger game. If we take the *Vieth* plurality at its word, we must take a closer look at the Court's role in crafting the law of democracy.

the Post-Shaw Era, 26 CUMB. L. REV. 287, 299 (1996) (explaining that the *Shaw* cases "raise many of the problems *Baker* identified as characteristic of nonjusticiable political questions: [e.g.,] 'a lack of judicially discoverable and manageable standards'").

28. See Luis Fuentes-Rohwer, *Trusting Democracy* (unpublished manuscript, on file with the author).

29. See Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215, 219-20 (1985) ("Correctly understood, the 'lack of standards' cases are simply merit determinations of constitutionality."). For further support, see *infra* note 238 and accompanying text.

I. EXAMINING THE GERRYMANDERING THICKET: OF POLITICAL QUESTIONS AND JUDICIAL WILL

The *Vieth* plurality displayed a passivity the likes of which we seldom see. At the heart of this posture lies the political question doctrine, in the form of a professed lack of judicially manageable standards.³⁰ When the plurality invoked the mantra of judicially manageable standards, it implicitly situated its opinion within the larger world of political questions. This is a world where the Court has traditionally behaved in a prudential fashion and standards have played a minimal role. This observation applies with particular force to those moments when the Court has sought to regulate the law of democracy, as discussed below. The discussion develops over the course of three sections.

Subpart A takes a broad view of the problem and analyzes the political question doctrine in both its classical and prudential forms. Subpart B narrows the discussion by bringing the larger debate to bear on the gerrymandering issue. In particular, this subpart examines the one case deemed to have foreclosed any and all judicial inquiries of redistricting questions: *Luther v. Borden*. Finally, Subpart C connects the previous sections to the question of standards as understood and debated within the gerrymandering field. Justice Frankfurter's opinion in *Colegrove v. Green* plays a leading role in this particular story,³¹ as does the Court's opinion in *Baker v. Carr*.

A. *The Two Faces of the Political Question Doctrine*

The political question doctrine seems out of place in our modern constitutional landscape. In an era of strong judicial supremacy, it points to those times when the Court appeared willing to step aside and leave decisions by the political branches undisturbed, perhaps even unreviewed. To be sure, there is no universal agreement with respect to the nature and scope of the doctrine; some commentators dispute whether any such doctrine exists at all,³² while others

30. *Vieth*, 541 U.S. at 305-06 (plurality opinion).

31. 328 U.S. 549, 550-56 (1946).

32. See Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 *passim*

debate and defend different understandings of it.³³ This first subpart analyzes the doctrine and its many criticisms.

1. *The Classical Theory*

*“Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”*³⁴

Fittingly, the political question doctrine dates back to the Supreme Court’s handling of William Marbury’s lawsuit, its seed sown in Alexander Hamilton’s oft-cited *Federalist No. 78*.³⁵ It is thus safe to say that it all started with a commission—William Marbury’s commission, to be exact, which he received from President Adams to serve as a justice of the peace for the District of Columbia.³⁶ Thomas Jefferson assumed office a few days later and instructed his Secretary of State, James Madison, to withhold the commission.³⁷ Marbury subsequently asked the Court for a writ of mandamus to force the President to give him what was due to him.³⁸ Of note, he filed this suit as a matter of first instance with the Supreme Court.

This lawsuit put the Court in a bind. The new administration had made its position on this issue amply clear; Madison himself did not appear during a preliminary hearing and Levi Lincoln, the Attorney General, suggested that he lacked instructions about how the

(1976); Redish, *supra* note 21, at 1032-33; Michael E. Tigar, *Judicial Power, the “Political Question Doctrine,” and Foreign Relations*, 17 UCLA L. REV. 1135, 1136 (1970).

33. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 70, 183-98 (Yale Univ. Press 2d ed. 1986) (1962) (developing the prudential version of the doctrine); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-8 (1959) (defending the classical version of the doctrine). For a defense of the doctrine grounded on a model of the political system as one of “shared responsibilit[ies],” see J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 100-01 (1988).

34. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

35. See THE FEDERALIST NO. 78 (Alexander Hamilton); see also Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 424 (1996) (describing how Hamilton “foreshadowed the political question” debate).

36. *Marbury*, 5 U.S. (1 Cranch) at 138.

37. See *id.*

38. *Id.*

government should proceed.³⁹ Yet the Court could not be seen as a weak institution, afraid of the executive and its powers. It was in response to Chief Justice Marshall's resolution of this quandary that Robert McCloskey would write that the Court's opinion was "a masterwork of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents [were] looking in another."⁴⁰ In short, Marshall had to pay close attention to contemporary public opinion as represented through the office of the executive. Marshall knew as much, of course; prudence must carry the day.

While in the midst of this conundrum, Marshall asked the following question:

Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy[?]⁴¹

This was a matter of first principles. As Marshall noted, some issues are reserved for the executive alone, as a matter of constitutional design, "in the exercise of which he is to use his own discretion."⁴² This was a sphere of boundless authority, and as such, "whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion."⁴³ This must mean, as Marshall made clear, that within this sphere, executive decisions are "conclusive,"⁴⁴ and the President is accountable "in his political character, and to his own conscience."⁴⁵

Marshall's position is known as the classical theory.⁴⁶ Its crucial insight is its insistence that political question inquiries

39. *See id.* at 143.

40. ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 25 (3d ed. 2000).

41. *Marbury*, 5 U.S. (1 Cranch) at 164.

42. *Id.* at 165-66.

43. *Id.* at 166.

44. *Id.*

45. *Id.*

46. *See Scharpf, supra* note 13, at 518.

must be understood as constitutional commands, grounded in the constitutional text. On Marshall's own account, it is a question of constitutional interpretation, of whether the Constitution places "entire confidence" in the political branches for performance of the act in question.⁴⁷ As recently developed by Herbert Wechsler, the inquiry is "whether the Constitution has committed to another agency of government [other than the courts] the ... determination of the issue."⁴⁸ This understanding of the political question doctrine thus looks to the constitutional text and proscriptions not of its own making. This is an exercise in constitutional interpretation as traditionally undertaken by the courts.

And yet, what are we to make of the fact that the modern Supreme Court finds very few instances of abstention under the classical theory? This observation is particularly true in the wake of *Powell v. McCormack*,⁴⁹ where the Court held, in the face of seemingly controlling language of Article I, Section 5,⁵⁰ that the House of Representatives did not have the power to "exclude"⁵¹ an elected member of the body who met the explicit requirements set down under this section.⁵² In the Court's words, "[p]etitioners [sought] a determination that the House was without power to exclude Powell from the 90th Congress, which, we have seen, requires an interpretation of the Constitution—a determination for which clearly there are 'judicially ... manageable standards.'"⁵³ On this reading, an inquiry that involves a question of constitutional interpretation is ipso facto not committed to other branches of

47. *Marbury*, 5 U.S. (1 Cranch) at 164; see also Melville Fuller Weston, *Political Questions*, 38 HARV. L. REV. 296, 301 (1925) ("Judicial questions ... are those which the sovereign has set to be decided in the courts."). Weston states that "[t]he problem is one of interpretation in a very well understood sense." *Id.*

48. Wechsler, *supra* note 33, at 7-8.

49. 395 U.S. 486 (1969).

50. U.S. CONST. art. 1, § 5, cl. 1 (stating that legislative officials have the exclusive power "to Judge ... the ... Qualifications of its own Members").

51. *Powell*, 395 U.S. at 550.

52. U.S. CONST. art. 1, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.").

53. *Powell*, 395 U.S. at 549. *But see* *Nixon v. United States*, 506 U.S. 224 (1993). For a criticism of this aspect of *Nixon*, see Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 U. COLO. L. REV. 887, 915 (1994) ("The Chief Justice cannot have been wearing a very straight face when in *Nixon* he insisted, citing *Baker*, that there were no 'judicially manageable standards' by which courts could say *whether a case had been 'tried.'*")

government. This is a broad and forgiving reading of the “committed to another branch” factor of the political question doctrine, a reading that prompted a leading commentator to suggest that “the Court’s failure to require judicial abstention in those instances where scripture can most plausibly be read to require it leaves a strong sense that the present Justices are not disposed to find many—or any—issues in fact so textually committed.”⁵⁴ Others have similarly questioned whether, under its “classic” rubric, the political question is, “for all intents and purposes[,] ... dead.”⁵⁵

The classical theory has also been subject to internal criticism. For instance, some critics point to the obvious difficulties—the “considerable obscurity about the nature of the constitutional analysis”⁵⁶—that lead the Court to conclude that some powers are committed to the executive and the legislature, yet not others. Some also question Chief Justice Marshall’s posture because it “does no work not already done by substantive provisions of constitutional law.”⁵⁷

These arguments, taken together, offer a view of the classical theory as obsolete, no longer useful in a doctrinal sense. Such is the force of judicial supremacy in general and the Court’s fondness for protecting and expanding its own power in particular. In the place of the classical political question doctrine, the Court has turned to the prudential strand of the doctrine. In so doing, and as the next section explains, the constitutional text has decidedly taken a back seat to prudential considerations and matters of politics.

54. Henkin, *supra* note 32, at 604-05; see Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v United States*, 1993 SUP. CT. REV. 125, 147 (“If the plaintiff has a real stake and articulates a real injury, the Court tends to adjudicate the case, even in the face of arguments that the case should be dismissed as a nonjusticiable political question. *Powell v McCormack* is a good example.” (footnote omitted)); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1209 (2002) (“*Powell* and the reapportionment cases following *Baker v. Carr* show how easy it is to interpret the clauses at issue in order *not* to commit the question to the political branches.”).

55. R. Brooke Jackson, *The Political Question Doctrine: Where Does It Stand After Powell v. McCormack, O'Brien v. Brown, and Gilligan v. Morgan?*, 44 U. COLO. L. REV. 477, 481 (1973) (internal quotation marks omitted); Mulhern, *supra* note 33, at 163 (“It is difficult to formulate an argument that the text mandates a commitment of any issue we would otherwise consider ‘legal’ to the political branches of government. Moreover, the Supreme Court rejected the strongest argument of that sort in *Powell v. McCormack*.”).

56. Scharpf, *supra* note 13, at 540.

57. Seidman, *supra* note 26, at 444.

2. *The Prudential Strain*

"[The political question doctrine is] something greatly more flexible, something of prudence, not construction and not principle."⁵⁸

"[W]hen a tribunal approaches a question," Maurice Finkelstein wrote many decades ago, "where on one horn of the dilemma is the trained moral sentiment of the judge, and on the other the 'hypersensitive nerve of public opinion,' it will 'shy off' and throw the burden of the decision on other shoulders."⁵⁹ This is a strand of the political question doctrine that frees itself from constitutional strictures and precommitments. In so doing, it offers the Court varying ways by which to protect its own standing and legitimacy. This is known as the prudential strand of the doctrine,⁶⁰ as championed by Alexander Bickel.⁶¹ To the question of scope, and to what issues the doctrine applies, Finkelstein responded:

It applies to all those matters of which the court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction. Sometimes this idea of inexpediency will result from the fear of the vastness of the consequences that a decision on the merits might entail. Sometimes it will result from the feeling that the court is incompetent to deal with the particular type of question involved. Sometimes it will be induced by the feeling that the matter is "too high" for the courts.⁶²

This is not the language of legal doctrine and constitutional interpretation but, rather, a view of the Court as politically savvy, aware of its surroundings and the political terrain on which its opinions must take root. This is the language of politics, not law. This is subversive language, to be sure, for it allows—indeed

58. BICKEL, *supra* note 33, at 125-26.

59. Maurice Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 339 (1924).

60. Or perhaps the functional one. See Scharpf, *supra* note 13, at 534 ("Professor Bickel's justification of the passive virtues is, at bottom, a functional one.").

61. BICKEL, *supra* note 33, *passim* (arguing that the Court should be comprised of practical lawyer-scholars who understand the limits of decisional law); see also Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, *passim* (1961) (discussing the 1960 Supreme Court Term's use of adjudicated restraint).

62. Finkelstein, *supra* note 59, at 344-45 (citations omitted).

requires—that the Court set aside its constitutional judgment even when such a judgment is demanded by existing constitutional doctrine.⁶³

Alexander Bickel revitalized this strain of the doctrine decades later, at a time when the Court was under direct attack from various quarters. His project was to justify the exercise of judicial review—a practice that, to Bickel, was “at least potentially a deviant institution in a democratic society,”⁶⁴—while at the same time defending the Court’s intervention in *Brown v. Board of Education*.⁶⁵ His answer embraced a *realpolitik* view of the Court and its awareness of social and political realities. In specific reference to the political question doctrine, Bickel’s stated foundations for the doctrine make this point particularly well. They include

the Court’s sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgement; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally (“in a mature democracy”), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.⁶⁶

Notably, these are not factors that a supreme and confident court must consider, a court neither troubled nor concerned whether the public will comply with its rulings. Rather, these are prudential factors, considered by a court in order to facilitate those moments when the court must “avoid harm to itself or to the nation.”⁶⁷ Principled decision making must sometimes mean acting prudentially. For Bickel, this axiom stood at the core of his view of the political question doctrine.

63. See generally Seidman, *supra* note 26 (discussing the prudential strand of the doctrine, the Court’s use of it, and the resulting implications).

64. BICKEL, *supra* note 33, at 128.

65. 347 U.S. 483 (1954).

66. *Id.* at 184.

67. Tushnet, *supra* note 54, at 1232.

As might be expected, this model of judicial review in general, and the political question doctrine in particular, has ruffled many contemporary feathers. The disagreement boils down to one central question: where should courts draw the proper boundary between political and judicial questions?⁶⁸ The prudential strand offers a flexible and shifting boundary, to be drawn by the courts in accordance to prevailing trends in public opinion. To its critics, this point was wrong, and “obviously” so.⁶⁹ To them, this must be a line grounded in principle and law, not public opinion,⁷⁰ which ipso facto undermines the valence of the prudential account. To Bickel, of course, the doctrine “resists being domesticated.”⁷¹ Scholars disagree about the accuracy of this assertion.⁷²

B. Political Questions as Questions of Politics: Luther’s Guarantee Clause

The political question doctrine, in both its classical and prudential forms, has played a central role in developing the rich traditions of the law of democracy. At the heart of these traditions stands the Guarantee Clause—“the constitutional boogeyman”⁷³—and the understanding that the federal courts must not intervene in questions of politics. The arguments thus began and ended with the Court’s refusal to intervene in Rhode Island’s troubled affairs of state. The case was *Luther v. Borden*.⁷⁴

68. See Weston, *supra* note 47, at 299 (“The line which needs to be sought is one which may conceivably divide matters equally turbulent, requiring the courts to disclaim power over the cause in one instance, and requiring them to assert jurisdiction in another.”).

69. *Id.*

70. See Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964) (criticizing Bickel for demanding use of principle only part of the time). *But cf.* Herbert Wechsler, Book Review, 75 YALE L.J. 672, 674 (1966) (reviewing BICKEL, *supra* note 33 (criticizing Bickel’s argument for overreliance on principle)).

71. BICKEL, *supra* note 33, at 125.

72. Compare Seidman, *supra* note 26, at 442 (“My argument, then, is that the Court has never—and never can—develop constitutional rules that control the political judgments, as so understood, that it regularly makes.”), with Tushnet, *supra* note 54, at 1204 (contending that, in making this assertion, Bickel “was wrong”).

73. Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103, 1113 (2002).

74. 48 U.S. (7 How.) 1 (1849); see also 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 459-69 (1923) (explaining the *Luther* decision); WILLIAM M. WIECEK,

The facts in *Luther* stemmed from those "unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842,"⁷⁵ and which led to the so-called Dorr's Rebellion.⁷⁶ On one side of the dispute was the charter government, which dated back to the Crown's grant of the charter in 1663.⁷⁷ Under the charter, the right to vote was restricted to "freemen," defined by statute as those who owned \$134 worth of real property, and their eldest sons.⁷⁸ The charter also apportioned the lower house of the General Assembly; it granted two representatives to each town, yet four each to Providence, Portsmouth, and Warwick and six to Newport.⁷⁹ This provision eventually led to a severely malapportioned legislature. For example, in 1840, Smithfield, a town of 9534 inhabitants, was represented by two representatives. Yet, Portsmouth, with 1706 inhabitants, had four representatives.

On the other side of the dispute stood the reformers, and in light of these disparities their demands were initially quite modest. They wished to see the right to vote extended to all taxpayers or militiamen,⁸⁰ or else they wanted a convention that would consider this issue. For quite some time, the General Assembly would grant them neither. This initial group ultimately disbanded, to be replaced by a more radical group, the Rhode Island Suffrage Association. The strength of this new group led the General Assembly to call a convention in 1841 (the "Freeholder's Convention") and to submit a new constitution for a vote.⁸¹ The Suffragists also submitted their own constitution. The Suffragists' constitution was allegedly ratified by a majority of eligible voters (all white male residents of the state);⁸² the Freeholder's was not. At this point, and as a political crisis loomed, the charter government established martial law. The

THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 111-29 (1972) (same).

75. *Luther*, 48 U.S. (7 How.) at 34.

76. *See id.* at 37.

77. ARTHUR MAY MOWRY, *THE DORR WAR, OR THE CONSTITUTIONAL STRUGGLE IN RHODE ISLAND* 8 (1901).

78. *Id.* at 19-20, 74.

79. *Id.* at 17.

80. *Id.* at 57.

81. *Id.* at 73.

82. Scholars disagree as to whether a majority in fact supported the constitution. *See* GEORGE M. DENNISON, *THE DORR WAR: REPUBLICANISM ON TRIAL, 1831-1861*, at 76 (1976); MOWRY, *supra* note 77, at 112-17.

Suffragists held their elections in 1842 under the new constitution and elected Thomas Dorr the new governor of the state.

By the end of the year, the rebellion ultimately subsided and the charter government prevailed, but under an amended constitution that conceded some ground to the suffragist cause. But the dispute was hardly over. Soon after the charter government had declared martial law, Martin Luther violated the law by acting as a moderator at the election under the Suffragist constitution. Luther fled to Massachusetts, where Luther Borden, head of a Freeholder's posse, found him. Borden broke into Luther's house, "searched for incriminating evidence [of the rebellion], and terrorized Luther's female relatives."⁸³

Luther brought a trespass claim in U.S. Circuit Court in Rhode Island the following year, which Borden defended as authorized by the charter government.⁸⁴ Luther further asserted that the Suffragist government led by Dorr was the only legitimate government of the state, and as such, acts by the charter government were void.⁸⁵ The jury sided with Borden,⁸⁶ and Luther sought a writ of error from the U.S. Supreme Court.

The case reached the Supreme Court in 1845, but delays and contingencies set the case back a number of years.⁸⁷ The Court finally heard arguments in 1848.⁸⁸ In an opinion authored by Chief Justice Taney and announced the following year, the Court upheld the lower court's ruling.⁸⁹ Notably, the Court also concluded that it lacked power to hear the claim.⁹⁰

83. WIECEK, *supra* note 73, at 114.

84. *Id.* at 114-15.

85. *Id.* at 115.

86. In fairness to Luther's case, Justice Story, then riding circuit, did not allow him to present evidence of his claim that the Suffragist government under Dorr was the only legitimate government in the state, and also gave instructions to the jury that the order to impose martial law was justified. *See id.* at 115. For claims and evidence of Justice Story's bias, see *id.* at 114 n.6, and John S. Schuchman, *The Political Background of the Political-Question Doctrine: The Judges and the Dorr War*, 16 AM. J. LEGAL HIST. 111, 117 *passim* (1972) (discussing the participation and views of judges involved in resolving the conflict described as the Dorr War, including Justice Story).

87. WIECEK, *supra* note 73, at 115.

88. *Id.*

89. *Id.* at 118-19.

90. *Id.* at 120.

The Court began its analysis by offering its fatalistic vision of what judicial intervention in the case would ultimately wreak: "For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff,"⁹¹ and if the Court were to side with Dorr and his supporters, it would invalidate all actions by the charter government, from enacted laws to collected taxes and paid salaries, and it would subject the state actors who carried out these decisions to trespass actions.⁹² The Court thus explained, and in so doing showed its prudential stripes: "When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction."⁹³

Careful examination led to inaction. The Court's reasons were simple:

[The U.S. Constitution,] as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department [under the Guarantee Clause].⁹⁴

It was ultimately up to Congress—not the courts—to decide which one of the two governments was the legitimate government of Rhode Island.⁹⁵ Questions of a judicial nature, "confided to [the Court] by the Constitution," properly belonged to the Court; yet it was "equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums."⁹⁶

Luther is commonly understood as a political question case, a case in which the Court must not interfere with political controversies not of its own making. This is the "nonjusticiability thesis."⁹⁷ This

91. *Luther v. Borden*, 48 U.S. (7 How.) 1, 38 (1849).

92. *See id.* at 38-39.

93. *Id.* at 39.

94. *Id.* at 42.

95. *Id.*

96. *Id.* at 47.

97. *See* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 753 (1994). *But cf.* Henkin, *supra* note 32, at 608 (contending that the Court simply concluded that Congress and the President "were within their constitutional authority and did not violate any prescribed limits or prohibitions"). To Martin Redish, however, "Henkin's analysis

reading of *Luther* is curious in three ways. First, the constitutional analysis by the majority is scant at best, leading some scholars to view the case as a classical political question case, yet tinged with clear prudential overtones.⁹⁸ Second, the opinion is on its face a very narrow one, holding only that it is up to Congress or the President to decide which of two competing state governments is the legitimate one.⁹⁹ Only later did dictum from the case become the leading understanding of the opinion. This point is buttressed by a third: that various cases in the aftermath of *Luther v. Borden* continued to interpret the Guarantee Clause on the merits.¹⁰⁰ Only over time did the Court begin to interpret the case exclusively as a classical case, and the text of the clause—"The United States shall ..."—as

amounts to little more than a play on words." Redish, *supra* note 21, at 1036.

98. See, e.g., Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 257 (2002); Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 639 (2001); see also Finkelstein, *supra* note 59, at 343-44 ("A careful reading of this opinion can leave very little doubt that the crux of the decision is the unwillingness of the court to enter into the fray."). Compare in this vein *Powell v. McCormack*, 395 U.S. 486 (1969), where the Court reached the merits in a case that seemed indisputably to fall within the commands of the political question doctrine. It is crucial that the question for the Court in *Powell* was whether the 90th Congress had unconstitutionally deprived Representative Powell of his seat at a time when Powell was already seated in the 91st Congress. See *id.* at 494-95. A much tougher question for the Court, and a more difficult challenge for the political question doctrine, would have arisen had the Court decided the case during the 90th Congress. One commentator questions whether the Court would have reached the merits then:

All the [Powell] Court ... ordered the District Court to do ... was declare that the House had acted unconstitutionally in excluding Powell. It did not involve itself in the issues of seniority, back pay, and the \$25,000 fine [imposed on Powell by the 90th Congress]. Thus, on the basis of the Court decision alone, there was nothing to enforce—and hence no enforcement problem.

PHILIPPA STRUM, *THE SUPREME COURT AND "POLITICAL QUESTIONS": A STUDY IN JUDICIAL EVASION* 127 (1974). It is quite telling that Powell ultimately sought enforcement, yet the Court refused to issue a writ of mandamus. See *Powell v. Hart*, 396 U.S. 1055 (1970) (mem.). The controversy ended when Powell retired and left the country. See STRUM, *supra*, at 128.

99. See Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 534 (1962); see also Note, *supra* note 21, at 683 ("[*Luther*] applies only when a state is in armed upheaval, with more than one faction contending to be the legitimate government.").

100. See, e.g., Att'y Gen. of Mich. *ex rel. Kies v. Lowrey*, 199 U.S. 233, 238-39 (1905); Taylor v. Beckham, 178 U.S. 548, 578-81 (1900); Forsyth v. Hammond, 166 U.S. 506, 515-18 (1897); *In re Duncan*, 139 U.S. 449, 461-62 (1891); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175-76 (1875).

referring exclusively to the political branches.¹⁰¹ To be sure, this reading of the clause is neither inescapable¹⁰² nor universal.¹⁰³

For my purposes, *Luther's* value lies in its confession that, were the Court to try to decide this issue on its own, it would not know what to do. "Besides," the Court began in a most telling passage, "if the Circuit Court had entered upon this inquiry, by what rule could it have determined the qualification of voters upon the adoption or rejection of the proposed constitution?"¹⁰⁴ This argument is akin to the now conventional "judicially manageable standards" factor. How should a court decide, absent preexisting state laws, whether a government lays legitimate claim to its authority in a given state? This query is particularly difficult in light of the particular facts surrounding the *Luther* litigation.

One problem was simply temporal: Dorr's Rebellion took place around the year 1843, yet the case arrived at the Court years later, and the opinion was not issued until 1849. By this time, of course, the events of 1843 were but a distant memory. Could the Court possibly side with a nonexistent government? To ask this question is to answer it. Yet, this obvious answer gave rise to a far more difficult problem. As Charles Warren explained in his authoritative history, the Court in *Luther* faced "dark forebodings and the mischievously false predictions as to its partisan bias, made by Clay, Kent, Peters and other Whigs, upon the retirement of Judge Story. No case had ever come before it in which the possibility of division on political lines was greater...."¹⁰⁵ The Dorrite cause was

101. See *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 137, 151 (1912).

102. See Henkin, *supra* note 32, at 609 (concluding that this "reading of the guarantee clause was not inevitable"); see also Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 75 (1988) ("This reference to the 'United States' plainly encompasses the judicial branch, as well as the executive and legislative branches of the federal government.").

103. See *New York v. United States*, 505 U.S. 144, 184-86 (1992) (reviewing Court history indicating that some Guarantee Clause issues are justiciable); *Reynolds v. Sims*, 377 U.S. 533, 582 (1964) (stating that political questions acted on by Congress are reviewable by the courts for equal protection issues); Jackson, *supra* note 55, at 502 n.146 ("Even the Guaranty Clause does not, however, afford Congress the opportunity to engage in unreviewable constitutional interpretation."); Weinberg, *supra* note 53, at 941 ("What is notable here is that the *New York* Court resolved the Guarantee Clause issue on the merits, not under *Luther* or *Baker*.").

104. *Luther v. Borden*, 48 U.S. (7 How.) 1, 41 (1849). To the Court, the only available guide would be found in "some previous law of the State." *Id.*

105. 2 WARREN, *supra* note 74, at 460.

then embodied by the larger question of popular sovereignty and the power of the people to change their own government. Adding much fuel to the fire, the newspapers carried on about the case at length, their opinions clearly clouded by their political predispositions.¹⁰⁶

The Court was thus clearly at the center of a political firestorm, sure to find trouble regardless of the step it chose to take. Siding with Luther would create grave practical difficulties, as the Court made clear in the body of its opinion. Yet, siding with Borden would bring problems of its own, not the least of which was the charge of partisanship and the danger that the relevant publics would refuse to accept the Court's ruling.¹⁰⁷

Chief Justice Taney could see and appreciate these difficulties. Thus, in order to minimize the peril facing the Court, he framed the question in *Luther* as one of choosing among two seemingly legitimate governments.¹⁰⁸ And to the Court, *that* question was a difficult one.¹⁰⁹ In light of the political minefield in its path, the Court took a page out of Chief Justice Marshall's magisterial book. Prudence carried the day, and the Court did what any self-respecting Court should do: it punted, for the sake of the Court, Rhode Island, and the Nation.

C. Out of Guarantees, for Equality's Sake: Baker v. Carr

In due time, this view of the Court's power came to dominate the redistricting field. The first case to declare so was *Colegrove v. Green*.¹¹⁰ Speaking for three members of the Court, Justice Frankfurter offered a number of reasons for refusing to intervene in "the politics of the people."¹¹¹ One argument was simply

106. *See id.* at 460-69.

107. For a discussion of this and other difficulties facing the Court, see STRUM, *supra* note 97, at 22.

108. This is not to say that this was the *right* question. *See* Weinberg, *supra* note 53, at 930-31 ("[T]he question in *Luther* was *not* which of two elected governments was the legitimate one. The question was whether the existing government was constitutionally elected. Why should that not be an adjudicable question?").

109. To be clear, this might have been a difficult *political* question, not a legal one. *See id.* at 928.

110. 328 U.S. 549 (1946).

111. *Id.* at 554.

precedential: agreeing with the lower court,¹¹² Justice Frankfurter felt bound by the recent *Wood v. Broom* decision.¹¹³ But he did not stop there. In true prudential form, he further explained:

We are of opinion that the appellants ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about "jurisdiction." It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.¹¹⁴

Tellingly, no preestablished constitutional rule demanded this argument, and Justice Frankfurter did not pretend to offer any. He was clearly siding with the prudential strand of the political question doctrine. This was one of those times when the Court had to refuse to exercise its jurisdiction, as "due regard for the effective working of our Government"¹¹⁵ demanded no less. This is not the language of law and constitutional doctrine.¹¹⁶

In closing, and to be fair, Justice Frankfurter did nod toward a host of constitutional proscriptions to support his argument. Yet his language is curious at best and his use of the relevant constitutional clauses is suspect. "The Constitution has many commands that are

112.

Our study of the opinion of the Supreme Court in the case of *Wood v. Broom* ... has resulted in our reaching a conclusion contrary to that which we would have reached but for that decision. We are an inferior court. We are bound by the decision of the Supreme Court, even though we do not agree with the decision or the reasons which support it. We have been unable to distinguish this case and as members of an inferior court, we must follow it. Only the Supreme Court can overrule that decision.

Colegrove v. Green, 64 F. Supp. 632, 634 (N.D. Ill. 1946).

113. See *Colegrove*, 328 U.S. at 551.

114. *Id.* at 552.

115. *Id.*

116. This should not be surprising. According to Dan Ortiz, Justice Frankfurter did not want to enshrine any one theory of politics over others; rather, he wished to leave the matter open. See Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459, 461-65 (2004). This argument ties Frankfurter's *Colegrove* opinion to Justice O'Connor's *Bandemer* concurrence. See *id.* at 465, 494.

not enforceable by courts,” he began, “because they clearly fall outside the conditions and purposes that circumscribe judicial action.”¹¹⁷ His first example was Article IV, Section 2: while it is the duty of a state to return a fugitive found within its borders, “the fulfilment of this duty cannot be judicially enforced.”¹¹⁸ His second example was more familiar: “Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts.”¹¹⁹ On the strength of this language, if *Colegrove* rested on the demands of the Guarantee Clause, Justice Frankfurter had a very curious way of showing it.¹²⁰ His *Colegrove* opinion clearly did not argue the point but assumed it so, thus leading to the conclusion that the Court was refusing to act despite its clear power to do so.¹²¹

Yet *Colegrove* took on a life of its own.¹²² In subsequent cases, the Court either dismissed the claims in short per curiam opinions that cited *Colegrove* and subsequent cases¹²³ or else addressed the question on the merits and ruled against the complainants.¹²⁴

117. *Colegrove*, 328 U.S. at 556.

118. *Id.*

119. *Id.* (citing *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912)).

120. Louis Henkin agrees. In his view,

[Frankfurter] was saying that Congress has power under the Constitution to regulate the manner of electing representatives, and Congress had done so, both affirmatively as well as by accepting what the state legislatures had done; that what Congress had done or accepted did not violate any constitutional limitation or prohibition.

Henkin, *supra* note 32, at 616.

121. Justice Frankfurter admitted as much in his dissenting opinion in *Baker*, when he remarked that “[b]oth opinions joining in the result in *Colegrove v. Green* agreed that considerations were controlling which dictated denial of jurisdiction though not in the strict sense of want of power.” *Baker v. Carr*, 369 U.S. 186, 277 (1962) (Frankfurter, J., dissenting).

122. See MARTIN SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* 191 (1964) (“Frankfurter, having decided that it was unwise for the Court to decide *Colegrove*, sought to elevate his decision into a binding principle to prevent all later Courts from deciding whether or not they wished to decide such cases.”); see also LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 201 (2000) (“Subsequent to *Colegrove*, the Court had disposed of a number of cases summarily, reinforcing the belief that Frankfurter’s position was the Court’s position.”).

123. See *Radford v. Gary*, 352 U.S. 991 (1957) (per curiam) (citing *Kidd v. McCannless*, 352 U.S. 920 (1956) (per curiam); *Colegrove*, 328 U.S. 659); *Kidd*, 352 U.S. 920 (citing *Anderson v. Jordan*, 343 U.S. 912 (1952) (per curiam); *Colegrove*, 328 U.S. 549); *Anderson*, 343 U.S. 912 (citing *MacDougall v. Green*, 335 U.S. 281 (1948)).

124. See *MacDougall*, 335 U.S. at 284 (“The Constitution—a practical instrument of government—makes no such demands on the states.”). In *South v. Peters*, the Court offered its traditional nod to *MacDougall*, *Broom*, and *Colegrove*, while explaining that “[f]ederal

Taken together, these cases told a clear story: the doors to the federal courts buildings were closed shut to these types of claims. Prospective litigants got the message, loud and clear.¹²⁵

This condition lasted until 1962 and *Baker v. Carr*, when the Court ended the era of nonjusticiability over redistricting questions. The Court in *Baker* confronted the same problem it faced in *Colegrove*, with a twist: while the political process in Illinois seemed stagnant and resistant to change, the process in Tennessee did not afford its citizens any way to effect change, absent the "aroused popular conscience that sears the conscience of the people's representatives" of which Justice Frankfurter spoke.¹²⁶ But it was clear to anyone paying attention that this was not going to happen. Absent judicial intervention, the process was sealed from change. This political reality gave rise to the need, on prudential and pragmatic grounds, for judicial action.¹²⁷

Once it decided to intervene, the Court did not simply take the obvious path of overruling prior precedents, such as *Colegrove* and, perhaps, *Luther*.¹²⁸ Instead, the Court shifted ground and turned

courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." 339 U.S. 276, 277 (1950). Yet, as Professor Lucas wrote in a noteworthy article at the time of *Baker*, "it is difficult to view *South* as other than a decision on the merits." Jo Desha Lucas, *Dragon in the Thicket: A Perusal of Gomillion v. Lightfoot*, 1961 SUP. CT. REV. 194, 227.

125. See, e.g., GENE GRAHAM, ONE MAN, ONE VOTE: BAKER V. CARR AND THE AMERICAN LEVELLERS *passim* (1972).

126. See *Baker*, 369 U.S. at 270 (Frankfurter, J., dissenting).

127. See, e.g., Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1058 (1958) (arguing that judicial inaction is no longer "required legally nor effective practically").

128. In his dissenting opinion in *Baker*, Justice Frankfurter did put an interesting gloss on the *Colegrove* decision: "The *Colegrove* doctrine, in the form in which repeated decisions have settled it, was not an innovation. It represents long judicial thought and experience. From its earliest opinions this Court has consistently recognized a class of controversies which do not lend themselves to judicial standards and judicial remedies." *Baker*, 369 U.S. at 280 (Frankfurter, J., dissenting). But it is hard to make much of this analysis. As Dean McKay explained at the time in reference to *Colegrove* and Justice Frankfurter's opinion:

The Frankfurter opinion was nothing less than a judicial *coup de grâce*, for it managed to reverse, or at least cast doubt on, an established line of [reapportionment] cases, announcing the new rule as a dictum in a minority opinion ... supported only by an earlier concurring opinion [in *Wood*] which was itself undocumented. This might appropriately be described as triple bootstrap.

ROBERT B. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 67 (1965).

away from the Guarantee Clause and toward the Equal Protection Clause. This move was warranted by the Court's view that cases under the Guarantee Clause foreclose a search for standards because no such standards exist.¹²⁹ This move has been criticized through the years,¹³⁰ most recently by Judge McConnell, who complained that "it is hard to avoid the conclusion that the fateful decision to shift ground to equal protection was made for no reason other than to avoid the *appearance* of a departure from the nonjusticiability precedents."¹³¹ Instead, McConnell argued that the Court should have rested its holding on the Guarantee Clause.¹³² Justice Brennan could see this argument, to be sure, but he knew full well that Justice Stewart was unwilling to disturb any long-standing precedents and that turning to the Guarantee Clause "would have brought a head-on confrontation with *Luther v. Borden*

129. See *Baker*, 369 U.S. at 223. This is a curious and oft-criticized reading of the Guarantee Clause. See Chemerinsky, *supra* note 21, at 871.

Baker speaks of instances where there is a lack of judicially discoverable or manageable standards. Yet, there is no reason why "republican form of government" is more lacking in standards than "due process" or "equal protection." ... Indeed, if the Court decided cases under the Guarantee Clause, judicial standards would emerge.

Id.; see also Merritt, *supra* note 101, at 76 ("Enforcing the fundamentals of republican government provides a judicial standard at least as manageable as the malleable standards supplied by the equal protection or due process clauses.").

130. See, e.g., *Baker*, 369 U.S. at 297 (Frankfurter, J., dissenting) ("The present case involves all of the elements that have made the Guarantee Clause cases non-justiciable. It is, in effect, a Guarantee Clause claim masquerading under a different label."); Bonfield, *supra* note 98, *passim* (arguing that the Guarantee Clause provides the Court with powers not found in the Fourteenth Amendment); see also Arthur Earl Bonfield, *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government*, 50 CAL. L. REV. 245, 251 (1962) [hereinafter Bonfield, *New Light*] ("[T]he same issue may be justiciable if raised under the equal protection clause, and nonjusticiable if raised under the guarantee. This seems a rather peculiar doctrine, since it is difficult to understand how an issue contains any more of the elements of nonjusticiability when pleaded under the latter provision.").

131. Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 107 (2000).

132. See *id.* at 105-07; see also Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165, 1200 (2002) (contending that the Court should have looked to the Guarantee Clause and approached the issue "with tremendous deference to both the states and the federal political departments, whose judgments should not be overturned except in the most compelling circumstances (such as a state's establishment of martial law or a theocracy)"). For earlier arguments pressing this particular point, see Bonfield, *New Light*, *supra* note 129, *passim*, in which he argues that the Court should base future decisions on the Guarantee Clause and its provision of a republican form of government.

and *Pacific States v. Oregon*.¹³³ Had the Court turned to the Guarantee Clause, the litigation would likely have been different: “either no litigation at all, or not until—and unless—Justices came along willing to overrule what would, by then, have been a potent precedent ‘counter-*Baker*.’”¹³⁴

Another virtue of this turn to equal protection, at least according to the Brennan majority, lay in its approach to the question of standards. Following the traditional view that the Guarantee Clause did not provide the Court with any judicially manageable standards, Brennan argued that the Equal Protection Clause did. The passage is now quite familiar to modern ears: “Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.”¹³⁵ As expected, it is precisely here where the majority and the dissent found much room for disagreement. To the Court, standards were discernible and familiar; yet to Justice Frankfurter, no such standards existed,¹³⁶ a point that linked for him this new foray into redistricting issues and cases under the Guarantee Clause.¹³⁷

133. Roy A. Schotland, *The Limits of Being “Present at the Creation,”* 80 N.C. L. REV. 1505, 1508-09 (2002) (citations omitted).

134. *Id.* at 1510.

135. *Baker*, 369 U.S. at 226; see Luis Fuentes-Rohwer, *Baker’s Promise, Equal Protection, and the Modern Redistricting Revolution: A Plea for Rationality*, 80 N.C. L. REV. 1353, 1358 (2002) (arguing that the lower courts “were given the proper room after *Baker* to decide redistricting questions in accordance with their particular views about rationality and arbitrariness”); see also Scharpf, *supra* note 13, at 556-57 (“There was surely no dearth of possible standards for reapportionment. The Court could have chosen a ‘minimum rationality test,’ either in the extreme form advocated by Justice Harlan, ... or in the qualified form, ... which was expressed in Justice Clark’s ‘crazy quilt test.’”).

136. *Baker*, 369 U.S. at 322-23 (Frankfurter, J., dissenting); see McConnell, *supra* note 130, at 106 (contending that “[a]s an interpretation of the political question doctrine, this was nonsense,” for the Court did not have the “judicially manageable means of choosing among” all possible interpretations of the Equal Protection Clause); see also Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 258 (1991) (“A close examination of the various opinions in *Baker* reveals that on the issues of original intent, political history, and judicial precedent, the dissenting Justices scored all of the points.”).

137. See Charles, *supra* note 73, at 1113 (“This absence of standards links adjudication of democratic politics under the Fourteenth Amendment to the Guarantee Clause....”).

In light of the Court's doctrinal history, it is hard to put much stock in Justice Frankfurter's position. "I may be quite misguided in this," Professor Scharpf complained, "but the idea that, after almost one hundred eighty years of constitutional history based upon a much longer tradition of political theory, the Supreme Court should find itself without any guidelines in principle on one of the most basic constitutional issues strikes me as particularly unpersuasive."¹³⁸ Unpersuasive indeed. This point applies with equal force to cases decided under the Equal Protection Clause or the Guarantee Clause.¹³⁹ *Reynolds v. Sims* ultimately put all doubts to rest, and forcefully so. That *Reynolds* created and enforced a standard where none previously existed should give us great pause. It should also make us suspicious of any court that professes an inability to find standards in a given area.

The lessons of this Part should be clear. Under the classical theory, the Court seldom abstains any longer from deciding a controversy, if it ever did; and under the prudential strand, the Court must *choose* to abstain, in accordance with its idiosyncratic reading of the underlying politics at issue. On either account, the Court either acts or chooses not to act for political or practical reasons. In this vein, we should understand *Luther v. Borden* and *Colegrove v. Green* as instances when the Court, confronted with competing alternatives, chose not to act. Existing doctrine did very little work in these cases. Similarly, *Baker v. Carr* followed this script, in the sense that practical considerations—not legal ones—prompted the Court into action. Of note, this is a particular constitutional issue for which questions of standards have seldom offered much resistance.

II. RECONSIDERING THE COURT'S OFFICIAL POINT OF ENTRY: BANDEMER'S PLURALITY OPINION

For several years, many Justices were willing to address the constitutional questions raised by the gerrymander,¹⁴⁰ yet the Court

138. Scharpf, *supra* note 13, at 558.

139. See RICHARD H. FALLON ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 288 (4th ed. 1996) ("Are judicially manageable standards any less available under the Guarantee Clause than under the Equal Protection Clause?").

140. See, e.g., *Karcher v. Daggett*, 462 U.S. 725, 784 (1983) (Powell, J., dissenting) (asking

as an institution refused. This posture changed in 1986, when the Court finally confronted this difficult challenge. The case was *Davis v. Bandemer*.¹⁴¹ In *Bandemer*, the Court faced the political question as applied to political gerrymandering cases head-on and concluded that the doctrine did not insulate these claims from review.¹⁴² In so doing, the Court fit its holding squarely within the parameters of its political question jurisprudence.

Looking in particular to *Baker v. Carr* and its progeny, the Court offered the following: “[I]n light of our cases since *Baker* we are not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided.”¹⁴³ This language has been derided as clumsy, for it shifts the burden of proof from being persuaded that any such standards exist to not being persuaded that they do not.¹⁴⁴ I read this language differently. It is implausible to look at our voting rights jurisprudence and suggest that any part of it is immune from judicial review. Any such conclusion cannot be based on the view that these standards do not exist, for standards abound. This is not a question of standards, as the preceding Part underscored, but one of judicial will.¹⁴⁵ Specifically, under the political question doctrine, the Court would either act or choose not to act for reasons outside of the law.

The obvious starting point is Justice White’s controlling opinion in *Bandemer*. In general terms, the standard appears innocuous enough: a successful complainant must show that the enacted plan intentionally discriminated against “an identifiable political group”¹⁴⁶ and must also show that the plan had “an actual

whether the political gerrymander presents a greater challenge to equal protection than malapportionment); *City of Mobile v. Bolden*, 446 U.S. 55, 86 (1980) (Stevens, J., concurring) (“Whatever the proper standard for identifying an unconstitutional gerrymander may be, I have long been persuaded that it must apply equally to all forms of political gerrymandering—not just to racial gerrymandering.”); *Ely v. Klahr*, 403 U.S. 108, 117, 122 (1971) (Douglas, J., concurring) (evaluating the Fourteenth Amendment and redistricting); *Kirkpatrick v. Preisler*, 394 U.S. 526, 555 (1969) (White, J., dissenting).

141. 478 U.S. 109 (1986).

142. *See id.* at 123.

143. *Id.*

144. *See Vieth v. Jubelirer*, 541 U.S. 267, 278-79 (2004) (plurality opinion).

145. *See Weinberg, supra* note 53, at 936 (“But it is the problem of judicial *willingness* that I find interesting here; judicial *power* seems clear.”).

146. *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (plurality opinion).

discriminatory effect on that group.”¹⁴⁷ The first prong would prove quite simple; as long as political bodies remain at the helm of the districting process, “it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.”¹⁴⁸ The second prong has proven far more elusive. The Court’s own words have led to much disagreement and confusion. To the plurality, for example,

unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.

... [A]n equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.¹⁴⁹

These passages have been subject to much attention though little agreement. In her concurrence, Justice O’Connor labeled this standard “nebulous,”¹⁵⁰ while Justice Powell contended that the plurality “fail[ed] to enunciate standards”¹⁵¹ at all. Scholars have been equally uncharitable. Even those who agree that a manageable *Bandemer* standard exists cannot agree on what this standard is. To some, the standard demands an intentional and severe gerrymandering plan, “predictably nontransient in its effects.”¹⁵² To others, it is a run-of-the-mill Fourteenth Amendment case about the targeting of “suspect classification[s].”¹⁵³

147. *Id.*

148. *Id.* at 129.

149. *Id.* at 132-33.

150. *Id.* at 145 (O’Connor, J., concurring in the judgment).

151. *Id.* at 162 (Powell, J., concurring in part and dissenting in part).

152. Bernard Grofman, *Toward a Coherent Theory of Gerrymandering: Bandemer and Thornburg*, in *POLITICAL GERRYMANDERING AND THE COURTS* 29, 30 (Bernard Grofman ed., 1990).

153. See Daniel Hays Lowenstein, *Bandemer’s Gap: Gerrymandering and Equal Protection*, in *POLITICAL GERRYMANDERING AND THE COURTS*, *supra* note 152, at 64, 67.

To my mind, *Bandemer* must be understood as a species of the redistricting cases of the early 1960s. Then, recalcitrant state legislatures refused to modify their existing district lines in order to address drastic population shifts within their states. These were "silent gerrymanders,"¹⁵⁴ as the refusal to act resulted in a legislative body out of proportion with voting patterns across the state, to the benefit of incumbent politicians. Further, the Court was facing extreme, egregious instances of nonaction; after refusing to redistrict for decades, the legislatures left lines bearing no semblance of rationality. As the Court made clear in *Reynolds v. Sims*, the goal at the heart of the reapportionment revolution was the pursuit of fair representation.

Bandemer is part and parcel of this revolution,¹⁵⁵ for it is but "the other half of *Reynolds v. Sims*."¹⁵⁶ To begin, the Court was worried about the same question of fair representation and often referred to that problem.¹⁵⁷ It is also true that the plurality was in search of a way to safeguard the political process cautiously; only egregious examples should lead to judicial invalidation. On this point, the criticisms leveled at Justice White's opinion have great force, for the writing is often less than clear. The Court worried about consistent degradation or effective denial of influence or continued frustration of majority will. This language makes sense in the context of *Baker v. Carr* and the reasons for which the Court came into the thicket. The problem then was that a voting minority was able to hold on to power indefinitely. Hence, if the Court could enforce a standard then, there is very little reason to suspect that it could not do the same again.¹⁵⁸

In the gerrymandering context, my reading of *Bandemer* demands a similar showing. To trigger the plurality's test, a complainant

154. See Leroy C. Hardy, *Considering the Gerrymander*, 4 PEPP. L. REV. 243, 249-52 (1977).

155. See Gordon E. Baker, *The Unfinished Reapportionment Revolution*, in POLITICAL GERRYMANDERING AND THE COURTS, *supra* note 152, at 11, 11.

156. Whitcomb v. Chavis, 403 U.S. 124, 176 (1971) (Douglas, J., dissenting in part and concurring in part).

157. See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 125 (1986) (referring to the "desirability of fair group representation").

158. See Dean Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last*, 1986 SUP. CT. REV. 175, 242 ("As the majority correctly perceived, the decision that political gerrymandering claims are justiciable flows ineluctably from the Court's earlier judgments that cases raising claims of population inequality among districts and of racial gerrymandering are justiciable.").

must show that a gerrymandered majority, in terms of seats won in an election, is able to hold on to its gains irrespective of voting patterns throughout the decade. This showing requires great craftsmanship and has proven difficult to meet, and properly so.¹⁵⁹ After all, the goal is to rein in the most extreme instances of gerrymanders—those cases in which a minority gerrymanders itself into political power notwithstanding majoritarian preferences. This standard will be difficult to meet because, with *Reynolds* in place, legislatures may not repeat the extreme abdications of responsibility witnessed pre-*Baker*. So long as redistricters are forced to act after every census, it will prove quite difficult, if not impossible, to hold on to gerrymandered gains through successive elections.¹⁶⁰

Unfortunately, the *Vieth* plurality failed to come to terms with the real meaning of *Bandemer*. In particular, Justice Scalia's opinion paid lip service to Justice White's argument while calling its admonishment that the application of the standard will be difficult "a gross understatement."¹⁶¹ Then, rather than a sustained argument for or against the plurality's position in *Bandemer*, the *Vieth* plurality turned to Justice O'Connor's *Bandemer* concurrence for the contention that the standard would prove arbitrary and unmanageable.¹⁶² Support for this assertion came from select statements from lower courts and various scholars.¹⁶³ On this basis, the plurality concluded: "Because this standard was misguided when proposed, has not been improved in subsequent application, and is not even

159. See Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, "Fair Representation," and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 563 (2003).

160. This formulation brings to mind Justice Frankfurter's dissent in *Baker*, where he criticized the majority opinion for "indulg[ing] in merely empty rhetoric, sounding a word of promise to the ear, sure[ly] to be disappointing to the hope." *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting). Justice Frankfurter was wide off the mark, of course, as his forecast was "surely one of the worst predictions in the history of American constitutional law." Alfange, *supra* note 157, at 257. At the time of *Bandemer*, it remained an open question whether its mystifying standard would suffer a similar fate. This is no longer a question at all, thus raising Justice Frankfurter's initial concern clearly and forcefully.

161. *Vieth v. Jubelirer*, 541 U.S. 267, 282 (2004) (plurality opinion).

162. See *id.*

163. See *id.* at 281 ("To think that this lower court jurisprudence has brought forth 'judicially discernible and manageable standards' would be fantasy.")

defended before us today by the appellants, we decline to affirm it as a constitutional requirement."¹⁶⁴

This was one of many standards to which the *Vieth* plurality could have turned. Yet it seems unlikely that any standard would have made any difference.¹⁶⁵ The plurality examined standards offered by dissenting Justices, past Justices, and the *Vieth* plaintiffs. Yet, it remained unpersuaded by all of them.¹⁶⁶ The next Part examines and ultimately disagrees with the plurality's conclusions.

III. WHERE ART THOU, STANDARDS?

From 1986 to the present, no standards "have emerged" in the political gerrymandering area and *Bandemer* must be overturned. This was the plurality's conclusion and it stuck to it. But can we take the plurality seriously at its own word that no manageable standards avail in this area? In the political gerrymandering area in particular, many logical alternatives exist, none of which impressed the plurality. For example, the Court as a whole could have looked to the rich scholarly work in political science, where standards abound.¹⁶⁷ The Court could also have borrowed from standards developed by state courts.¹⁶⁸ Justices present and past had also offered their doctrinal views on this issue.

This Part briefly examines some of the standards considered and ultimately rejected by the *Vieth* plurality. In light of all these available choices, it is puzzling indeed to argue that any such standards, and even judicially manageable ones, do not exist. For this reason, this Part considers the plurality's position with greater

164. *Id.* at 283-84.

165. In this vein, Mitchell Berman complains in a recent article that the plurality's analysis and ultimate rejection of many possible standards "leaves much to be desired." Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 805 n.165 (2005).

166. The Court could have also turned to scholars in the field, but, again, I doubt it would have made any difference at all. See, e.g., Charles Backstrom et al., *Establishing a Statewide Electoral Effects Baseline*, in POLITICAL GERRYMANDERING AND THE COURTS, *supra* note 151, at 145 (offering three options for the Court to follow in future political gerrymandering cases).

167. This might be a particularly fruitful line of inquiry, for as Rick Pildes has observed, "[l]aw and social science are perhaps nowhere more mutually dependent than in the voting-rights field." Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1518 (2002).

168. See James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION L.J. 643, 645-47 (2004).

care. It turns out that not only must the standard be one that courts can sensibly manage, but it must also be judicially “discernible,” in the sense that it must be connected in some way to a constitutional violation. This is a curious position, largely because the Court has developed myriad standards across the spectrum of constitutional law that can hardly be said to be tied to a constitutional violation. This is a mere play upon words.¹⁶⁹ In light of this reticence, it is clear that the plurality is simply unwilling to police the gerrymandering thicket.¹⁷⁰

A. Standards, Standards, and More Standards

1. Totality of Circumstances

It is part and parcel of the political process that those in charge of drawing districting lines will attempt to imbue the process with partisan overtones.¹⁷¹ Yet sometimes these political considerations will overwhelm all others. The challenge for any gerrymandering standard thus lies in drawing a sensible line between a legitimate plan and an unconstitutional gerrymander. In his concurring opinion in *City of Mobile v. Bolden*,¹⁷² Justice Stevens recognized this difficulty and, in turn, offered a three-part test. For Stevens, an

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

The objection that the subject matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in suit at law hardly has been doubted for over two hundred years.

Id.

170. For this reason, offering new tests likely will have little effect on the doctrine and will prove to be nothing short of futile academic exercises. The key vote is clearly Justice Kennedy's, and so efforts aimed at influencing the Court must be aimed at his position as elucidated in his *Vieth* dissent. The fact that his demands are quite exacting, see Hasen, *supra* note 23, at 634-37, leaves little hope that the Court will ultimately offer a useful guide in this area.

171. See *Karcher v. Daggett*, 462 U.S. 725, 753 (1983) (Stevens, J., concurring) (“Legislators are, after all, politicians; it is unrealistic to attempt to proscribe all political considerations in the essentially political process of redistricting.”). Justice Stevens made this point years earlier, as a Seventh Circuit judge, in *Cousins v. City Council of Chicago*, 466 F.2d 830, 860 (7th Cir. 1972) (Stevens, J., dissenting) (limiting “the availability of judicial review to much more egregious cases”).

172. 446 U.S. 55, 83 (1980) (Stevens, J., concurring).

extreme gerrymander is present when (1) the resulting map is “uncouth,” in that it is “manifestly not the product of a routine or a traditional political decision”; (2) the plan impacts a minority group adversely; and (3) the plan cannot be supported by neutral districting criteria, so it is “either totally irrational or entirely motivated by a desire to curtail the political strength of the minority.”¹⁷³ Put another way, plaintiffs must show that a plan has an adverse effect on a political group while departing from traditional, neutral districting principles.¹⁷⁴ Upon this showing, a state may rebut such a claim by showing that the plan in fact pursues the public interest.¹⁷⁵

Justice Powell’s concurring opinion in *Bandemer*, joined by Justice Stevens, proposed a similar standard.¹⁷⁶ Under this standard, courts would consider myriad factors to determine whether redistricters had gone too far, including the shape of the districts under review, the use of preestablished political subdivisions, the legislative history of the plan, and statistics that demonstrate vote dilution, among others.¹⁷⁷ Justice Powell made clear that “[n]o one factor should be dispositive.”¹⁷⁸ In other words, he proposed a totality of circumstances standard, which required a showing that the legislature ignored all neutral principles at the expense of partisanship.¹⁷⁹

On its face, this is a standard that courts could sensibly manage. If the overarching question is whether redistricters have gone too far, courts must simply look to these factors and determine whether political considerations overwhelmed all others. Courts can do this; in fact, they already do so in the analogous context of race-based gerrymandering. If courts can already determine whether the use of race predominated in the crafting of district lines, surely they can do so as well when the dependent variable is politics.

173. *Id.* at 90.

174. *See Karcher*, 462 U.S. at 754 (Stevens, J., concurring).

175. *See id.* at 751.

176. *Davis v. Bandemer*, 478 U.S. 109, 161 (1986) (Powell, J., concurring in part and dissenting in part).

177. *Id.* at 173.

178. *Id.*

179. In his dissent in *Vieth*, Justice Breyer proposed a similar standard, rooted on a claim of “unjustified entrenchment.” *See Vieth v. Jubelirer*, 541 U.S. 267, 360 (2004) (Breyer, J., dissenting).

Yet the *Vieth* plurality was far from impressed with this standard. It argued that this is a test about whether the plan is ultimately fair. And fairness, the plurality concluded, “does not seem to us a judicially manageable standard.”¹⁸⁰ This standard will not do, for it will not meaningfully constrain judicial discretion while providing legislators guidance about the limits of their authority. A more “solid” criterion was needed, the plurality concluded, “to win public acceptance for the courts’ intrusion into a process that is the very foundation of democratic decisionmaking.”¹⁸¹ This argument evokes memories of Justice Frankfurter’s strong dissent in *Baker*. In light of the Court’s vastly successful intervention into the political thicket then,¹⁸² it is hard to take the plurality’s argument at face value.

2. *Vieth: The Plaintiff’s Standard*

In their brief, the *Vieth* plaintiffs offered a standard faithful to *Bandemer*’s two-pronged intent-plus-effects test, though they defined both inquiries differently. They defined the intent test as a predominant-factor inquiry, which they borrowed from *Miller v. Johnson*.¹⁸³ This fact alone, they argued, must render their test both discernible and manageable.¹⁸⁴ As for the evidence necessary to prove this claim, it would be either direct or circumstantial.¹⁸⁵ Direct evidence would come from statements from partisans involved in the redistricting process admitting that partisanship predominated during the process.¹⁸⁶ Circumstantial evidence would come in through a showing that the state subordinated traditional redistricting criteria to partisan considerations.¹⁸⁷ Borrowing a page from Justice O’Connor’s concurring opinion in *Bush v. Vera*,¹⁸⁸ the

180. *Id.* at 291 (plurality opinion).

181. *Id.*

182. See Robert G. McCloskey, *The Supreme Court, 1961 Term—Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 54 (1962).

183. See Brief for Appellants at 19, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opinion) (No. 02-1580), 2003 WL 22070244 (citing *Miller v. Johnson*, 515 U.S. 900 (1995)).

184. See *id.* at 32.

185. *Id.* at 19.

186. See *id.* at 32.

187. *Id.*

188. 517 U.S. 952 (1996).

plaintiffs concluded that the intent prong may be satisfied with circumstantial evidence by a showing “not only that these traditional districting criteria have been neglected but also that this neglect resulted from an effort to achieve partisan goals.”¹⁸⁹ For support, the plaintiffs turned to *Shaw v. Reno* and its progeny.¹⁹⁰

The plaintiffs defined the effects test as a two-part test. First, a plaintiff must show that the challenged plan “pack[s] and ‘crack[s]’ the rival party’s voters.”¹⁹¹ Second, through a “totality of circumstances” inquiry, a plaintiff must also demonstrate an inability of a party “to translate a majority of votes into a majority of seats.”¹⁹² They analogized this inquiry to the inquiry under section 2 of the Voting Rights Act.¹⁹³

The *Vieth* plurality disagreed on both fronts. First, it argued that the necessary application of the intent test to a statewide plan renders it vague and difficult to discern.¹⁹⁴ Second, the predominant factor test in the racial context “is easier and less disruptive.”¹⁹⁵ Unsurprisingly, the effects test did not fare much better. To the plurality, this test is neither tied to a constitutional violation nor judicially manageable.¹⁹⁶

But this is much too fast. The intent test poses a straightforward inquiry; courts can be expected to sort through the evidence, both direct and circumstantial, in order to decide whether partisanship played a predominant role during the redistricting process. In this vein, one can take the view, expressed by Justice White in his plurality opinion in *Bandemer*, that this is a pro forma inquiry;¹⁹⁷ after all, redistricters must be assumed to place partisanship at the center of their redistricting goals. The facts in *Vieth* should put any criticisms of this point to rest, for the evidence points clearly and unequivocally to the conclusion that partisanship predominated during the process that led to the creation of the challenged plan. It

189. Brief for Appellants, *supra* note 183, at 33 (citing *Vera*, 517 U.S. at 993 (O’Connor, J., concurring)).

190. *See id.*

191. *Id.* at 19-20.

192. *Id.*

193. *Id.* at 36-37 (referencing the Voting Rights Act, 42 U.S.C. § 1973 (2000)).

194. *See Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality opinion).

195. *Id.*

196. *See id.*

197. *See Davis v. Bandemer*, 478 U.S. 109, 141-42 (1986) (plurality opinion).

is difficult to argue otherwise. Also, how is one to argue that a test that courts have applied for some time in the *Shaw* context is not manageable in the political context?

The effects test is also manageable. A court must show that a redistricting plan cracks and/or packs voters of the minority party, and does so in order to deprive the party of a legislative majority even if the party garners a majority of votes. This is something that courts sensibly can do.¹⁹⁸ Crucially, the same question applies under the effects test as a section 2 inquiry; and if courts can do one—and have done so for close to twenty years—certainly they can do the other. Judicial manageability cannot possibly be the problem here, unless something else is at play.

3. *Vieth: Looking to Established Law—Stevens and Souter*

Justice Stevens offered, *inter alia*, a variant of the expressive harms introduced into the lexicon by *Shaw v. Reno*.¹⁹⁹ The harm at issue was representational in kind, as the elected representative would feel beholden not to the electors themselves but to those who drew the district lines. In his own words, “the will of the cartographers rather than the will of the people will govern.”²⁰⁰

Similarly, Justice Souter defended a standard modeled after the burden-shifting framework of *McDonnell Douglas Corp. v. Green*.²⁰¹ In order to establish a *prima facie* case of vote dilution, the plaintiff must satisfy five elements: (1) she must identify a cohesive political group of which she is a member; (2) she must show that the district where she resides is not crafted in accordance with traditional districting criteria (e.g., compactness, contiguity, respect for political subdivisions); (3) she must show a correlation between the lack of traditional districting criteria and its effect on her group; (4) she must offer a hypothetical district that includes her residence and

198. See Berman, *supra* note 164, at 805 n.165 (“But the argument as a whole—that packing and cracking cannot be discerned—can hardly be taken seriously.”).

199. 509 U.S. 630 (1993). Writing for the majority in *Shaw*, Justice O’Connor stated that district reapportionment plans that group together individuals “who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.... [Such plans] may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.” *Id.* at 647-48.

200. *Vieth*, 541 U.S. at 331 (Stevens, J., dissenting).

201. 411 U.S. 792, 802-05 (1973).

would fare better electorally and with less deviation from traditional districting principles; and (5) she must show that those in charge of redistricting intended to manipulate the shape of the district in order to affect her group.²⁰² Upon a showing of these five elements, the burden would shift to the state to justify its plan in reference to traditional districting principles. In general, Justice Souter would look for whether there has been an “extremity of unfairness.”²⁰³

Again, this must be a judicially manageable test. For Justice Stevens’ representational harm, reliance on *Shaw v. Reno* should guarantee as much. It is also worthy of note that Justice Stevens has offered a consistent gerrymandering standard from the time of his dissenting opinion as a Seventh Circuit judge in *Cousins v. City Council of Chicago*. In *Vieth*, he was neither confused nor grasping for any useful analytic framework; he was simply pointing out the obvious inconsistencies between the *Shaw* line of cases and the political gerrymandering cases. If *Shaw* and its progeny can possibly be read as offering judicially manageable standards,²⁰⁴ it is difficult to argue that any area of the law is devoid of similar attributes. In this vein, Justice Souter defended his test by observing that “the elements I propose are not only tractable in theory, but the very subjects that judges already deal with in practice.”²⁰⁵ Political gerrymandering cases are clearly no more difficult than any others.

The plurality rejected both tests. It readily dismissed Justice Stevens’ expressive harms inquiry, as race is not politics, and politics is not race.²⁰⁶ And besides, “[t]his Court may not willy-nilly apply standards—even manageable standards—having no relation to constitutional harms.”²⁰⁷ The plurality also dismissed Justice Souter’s test, claiming it was as “flabby” a goal as Justice Powell’s indeterminate test.²⁰⁸

202. *Vieth*, 541 U.S. at 346-51 (Souter, J., dissenting).

203. *Id.* at 344.

204. For one such defense, see Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium: Hunt v. Cromartie as a Case Study*, 58 WASH. & LEE L. REV. 227, 300-04 (2001) (arguing that *Shaw*, in hindsight, should be read “as a corrective”).

205. *Vieth*, 541 U.S. at 353 (Souter, J., dissenting).

206. *See id.*

207. *Id.* at 295 (plurality opinion).

208. *Id.* at 298.

B. Vieth's Holy Grail: A Discernible, Manageable Standard

The plurality ultimately considered five different standards, yet it rejected them all. Its doing so brings to mind Philip Kurland's criticism of the *Baker* Court's conclusion that its opinion did not conflict with precedent: "It is impossible to believe that the Court was as artless as it represented itself to be; it is difficult to believe that the Court thought it could find an audience ingenuous enough to accept the assertion."²⁰⁹ So what exactly did the *Vieth* plurality have in mind when it wrote that no standards exist in this area? It should be clear that many standards *do* exist in this area, even though the Court refused to adopt any of them. What was the plurality looking for while refusing to adopt any one standard as its own?

To the plurality, the question of judicially manageable standards was a two-pronged inquiry.²¹⁰ The first question was that of locating a standard that courts may reasonably manage.²¹¹ It is here where the myriad models and accounts by academics and practitioners in the field generally fit. Yet, for the Court a second inquiry was necessary: once a standard is agreed upon, it must be "judicially discernible in the sense of being relevant to some constitutional violation."²¹² This was the impetus behind one Justice's retort during oral argument that plaintiff's counsel was "pulling [a particular standard] out of a hat."²¹³ Any old hat simply will not do; it must be a constitutional hat or, put differently, the principle underlying the given standard must be contained in the Constitution.

This is a curious position to take, yet it also explains much of what goes on in *Vieth*. This is a curious position not only because standards are only as judicially manageable as the Court professes

209. Philip B. Kurland, *The Supreme Court, 1963 Term—Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 149 (1964).

210. Cf. Hasen, *supra* note 23, at 628 (explaining "that the judicial manageability debate in *Vieth* conflates two separate concerns: one about consistency of result across the courts and a second about the justifiability of a standard for judging partisan gerrymandering claims").

211. See *Vieth*, 541 U.S. at 287 (plurality opinion).

212. *Id.* at 287-88.

213. Transcript of Oral Argument, *supra* note 5, at 8.

them to be,²¹⁴ but also because standards are not always tied to a constitutional violation. An easy example of this is the various tiers of review under equal protection law.²¹⁵ Tiered review is judicially manageable only because the Court demands that it be so. Further, it is quite difficult to tie this tiered approach to anything, much less the Constitution, yet the Court hardly blinks when applying these various tests.

The *Vieth* plurality recognized this apparent contradiction, but remained undeterred. In response to the plaintiffs' use of the predominant factor test from the race cases to buttress their argument, the plurality answered that

courts might be justified in accepting a modest degree of unmanageability to enforce a constitutional command which (like the Fourteenth Amendment obligation to refrain from racial discrimination) is clear; whereas they are not justified in inferring a judicially enforceable constitutional obligation (the obligation not to apply *too much* partisanship in districting) which is both dubious and severely unmanageable.²¹⁶

This argument ultimately gives the game away. We have been told time and again that the standard must be judicially manageable and connected to a constitutional violation. When confronted with the seemingly countervailing example of equal protection, the demand curiously changes: "a modest degree of unmanageability" might be acceptable.²¹⁷ This distinction is ultimately unpersuasive.

To begin, this demonstrated willingness to ratchet standards up or down in accordance with debatable conceptions of the constitutional obligations at issue is in grave tension with the plurality's position elsewhere. Ultimately, this argument makes one wonder what the plurality is up to and whether any standard will satisfy its exacting demands. For support, the plurality nodded toward the

214. See *supra* note 21; see also Mulhern, *supra* note 33, at 163 ("Nor can a lack of 'judicially discoverable ... standards' prevent review without casting doubt on all the Court's controversial decisions interpreting the due process and equal protection clauses." (footnote omitted)).

215. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (holding that strict scrutiny is the only proper tier of review for racial classification).

216. *Vieth*, 541 U.S. at 286 (plurality opinion).

217. *Id.*

“clear” command of equal protection,²¹⁸ but this command is hardly as clear as the plurality asserted.²¹⁹ Neither the text of the Fourteenth Amendment nor the intent of its framers offers much guidance for tiered review, or even for the “strict in theory, fatal in fact” view of racial discrimination dominant in modern jurisprudence.²²⁰ If the Court can establish manageable standards under equal protection law, it is difficult to believe that it cannot do the same for election law.

The law of democracy offers a second, context-specific example of the Court’s propensity to develop “judicially manageable standards” where none are readily apparent. This is the Court’s shift from a rationality inquiry in *Baker v. Carr* to the one person, one vote standard in *Reynolds v. Sims*. It may also be said that the Court in *Reynolds* was simply choosing a standard whose connection to a constitutional violation is tenuous at best, and only so if one adopts a rudimentary standard of the redistricting process and the many factors at play. In the inimitable words of the late John Hart Ely, the equipopulation principle “is certainly administrable. In fact administrability is its long suit, and the more troublesome question is what else it has to recommend it.”²²¹ This was Justice Frankfurter’s objection, yet the Court paid it very little heed.²²² Equal protection demanded nothing less. Soon after *Reynolds*, equal protection demanded even more, prompting a leading commentator to remark that the Court was now in control of the political

218. *See id.*

219. *See* Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *In Defense of Deference*, 21 CONST. COMMENT. 133, 134 (2004).

220. *See* *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003); *Adarand*, 515 U.S. at 237; *Missouri v. Jenkins*, 515 U.S. 70, 112 (1995) (O’Connor, J., concurring).

221. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 121 (1980); *see also* Lani Guinier & Pamela S. Karlan, *The Majoritarian Difficulty: One Person, One Vote*, in *REASON AND PASSION: JUSTICE BRENNAN’S ENDURING INFLUENCE* 207, 208 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997) (“One person, one vote ... is not an end in itself or an equation of democracy and simple majority rule, as many members of the current, post-Brennan Court believe.”). For recent sustained critiques of the equipopulation standard, *see* Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213 *passim* (2003); Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269 *passim* (2002).

222. *See* *Baker v. Carr*, 369 U.S. 186, 300-01 (1962) (Frankfurter, J., dissenting); *see also* *Reynolds v. Sims*, 377 U.S. 533, 590 (Harlan, J., dissenting) (contending that the Court’s equipopulation standard “is tied to the Equal Protection Clause only by the constitutionally frail tautology that ‘equal’ means ‘equal’”).

thicket.²²³ Soon after that, the Court drew yet another line, between state and congressional plans.²²⁴ For state plans, equal protection allowed up to a ten percent deviation from equality,²²⁵ whereas Article I was far stricter for congressional plans.²²⁶ These were curious standards indeed, but the Court hardly flinched. This was not the Court's most persuasive moment.

This demand for a discernible standard is the reason why we witness in *Vieth* such a display of standards,²²⁷ all of them tied to a preexisting constitutional violation. Justice Souter looked to *McDonnell Douglas*,²²⁸ Justice Stevens turned to the expressive harms branch of equal protection,²²⁹ and the plaintiffs offered the predominant factor test of *Miller v. Johnson*.²³⁰ Similarly, Justice Kennedy was intrigued by the First Amendment and left out hope that the Court might turn to the association cases for support of a working standard.²³¹ All of these arguments shared a belief that the standard is both manageable and discernible in reference to a constitutional violation. Yet the plurality was not persuaded by any of them. And so we end up with a decision that hardly decided anything.

In this vein, it is too easy to fault the Court for its apparent inability to speak clearly. It is also easy to accuse the Court of

223. Robert G. Dixon, Jr., *Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209, 210 (1964) ("Courts not only have entered the thicket, they occupy it."); see also Richard H. Pildes, Commentary, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1606 (1999) ("In the relatively short time since [*Baker*], the United States Supreme Court has not only entered the 'political thicket,' but with remarkable speed has found conflicts of democratic politics coming to dominate its docket." (footnote omitted)).

224. See *White v. Regester*, 412 U.S. 755, 763-64 (1973); *Gaffney v. Cummings*, 412 U.S. 735, 741-42 (1973); *Mahan v. Howell*, 410 U.S. 315, 321-25 (1973).

225. See *White*, 412 U.S. at 763-64; *Mahan*, 410 U.S. at 323-24, 328-29. But see *Larios v. Cox*, 300 F. Supp. 2d 1320, 1340 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004) (interpreting the ten percent threshold as a rebuttable presumption, not a safe haven).

226. See *Gaffney*, 412 U.S. at 741.

227. And in fact, according to Dan Ortiz, this might have led to the dissenters' downfall. "It was [the dissenters'] messiness," he wrote, "that persuaded the plurality that no judicially manageable standards existed." Ortiz, *supra* note 115, at 501.

228. See *supra* notes 201-02 and accompanying text.

229. See *supra* notes 203-05 and accompanying text.

230. See *supra* notes 183-92 and accompanying text.

231. Guy Charles saw this connection prior to *Vieth*. See Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209 *passim* (2003).

failing to understand the issues properly. Yet, *Vieth* must be understood as a condition of the plurality's unwillingness to patrol this area, thus raising the next question: what makes political gerrymandering different from most other areas of constitutional law? Or, put another way, what was the plurality up to here? The next Part considers and offers some preliminary answers to these questions.

IV. EXPLAINING VIETH'S PASSIVITY: LOOKING FOR VIRTUES?

The Pennsylvania redistricting plan had all the traditional markers of a political gerrymander. And yet, in the face of a harm that appeared so egregious, so visible, and so palpable to many, the Court refused to intervene. The real story in *Vieth* is that of judicial will. To the plurality, judicial intervention was unwarranted due to a perceived lack of manageable standards.²³² This is odd, however, particularly from the same Court that gave us *Shaw v. Reno* and the amorphous expressive harms inquiry.²³³ Something else must be at play here. We must view with great skepticism any instance when a Court, and particularly *this* Court,²³⁴ punts on a constitutional question, professing an inability to carry out its constitutional duties.²³⁵ This Part offers three explanations for this curious posture.

A. Taking a Peek

While five Justices were looking for standards any place they could find them, the *Vieth* plurality was confident that any such standards would never be sufficient. The plurality was not satisfied by any of the standards offered because, as Justice O'Connor wrote in her concurring opinion in *Bandemer*, "no group right to an equal share of political power was ever intended by the Framers of the

232. See *supra* note 216 and accompanying text.

233. See *supra* note 199.

234. See Barkow, *supra* note 97, at 240-44; Kramer, *supra* note 18, at 128-30.

235. I do not think any support for this point is needed, certainly not after *Bush v. Gore*. See *Bush v. Gore*, 531 U.S. 98, 111 (2000) (per curiam) ("When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.")

Fourteenth Amendment.²³⁶ The plurality repeated this claim in *Vieth*.²³⁷ On their reading of the Equal Protection Clause, gerrymandering challenges must fail as an interpretive matter. The plurality made its intentions clear when it demanded not only a judicially manageable standard but also a standard that “is judicially discernible in the sense of being relevant to some constitutional violation.”²³⁸ This is not the posture of a Court abdicating its constitutional duty but, rather, the posture of a Court engaging in traditional judicial review.

In looking to the merits, rather than letting the political question doctrine and the alleged lack of judicially manageable standards do the work, the plurality hardly broke new ground. This is a conventional move within the Court’s political question jurisprudence.²³⁹ Yet *Vieth* is a troubling opinion. The plurality does not find standards in this area because it never intended to do so. Litigants will continue to press the Court for relief, offering innumerable standards in the process. The plurality will not be persuaded, of course, and, as long as Justice Kennedy remains skeptical, neither will the Court as an institution. This is troubling because, as Professors Issacharoff and Karlan explain, “lack of candor about what courts are doing may carry its own costs.”²⁴⁰ Rather than hide behind the facade of the political question doctrine while holding out a glimmer of hope that a standard may arise at some point in the future, the Court owes prospective litigants more clarity. While

236. *Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O’Connor, J., concurring in the judgment).

237. *Vieth v. Jubelirer*, 541 U.S. 267, 288 (2004) (plurality opinion) (contending that although the plaintiff’s proposed standard “rests upon the principle that groups ... have a right to proportional representation” the “Constitution contains no such principle”).

238. *Id.* at 287-88.

239. *See, e.g., Nixon v. United States*, 506 U.S. 224, 253-54 (1993) (Souter, J., concurring in the judgment) (“If the Senate were to act in a manner seriously threatening the integrity of its results ... judicial interference might well be appropriate.”); Louis H. Pollak, *Judicial Power and “The Politics of the People,”* 72 *YALE L.J.* 81, 85 (1962) (contending that Justices Frankfurter and Harlan based their dissents in *Baker* on the merits, that is, that, “taking their complaint at full value, the appellants in *Baker v. Carr* should not prevail”); Seidman, *supra* note 26, *passim* (arguing that constitutional principles cannot decide political questions); *see also* Wayne McCormack, *The Justiciability Myth and the Concept of Law*, 14 *HASTINGS CONST. L.Q.* 595, 614 (1987) (concluding that every decision to dispose of a case on justiciability grounds necessarily reaches the merits of the controversy).

240. Samuel Issacharoff & Pamela S. Karlan, *Where To Draw the Line?: Judicial Review of Political Gerrymanders*, 153 *U. PA. L. REV.* 541, 543 (2004).

these litigants will not go away altogether,²⁴¹ they will at least come to federal court making arguments that will in fact matter.

B. *Structure v. Rights*

One may also explain *Vieth* as a poignant illustration of the Court's long-standing failure to properly understand and analyze gerrymandering claims. This point has gained much currency in recent years in the form of a debate between those who advocate an individual rights model of adjudication and those who advocate a structural model.²⁴² The claim asserted by "individualists" is itself rather simple: from the time the Court entered the field of politics in *Baker v. Carr*, it has approached the questions in the field as individual rights questions.²⁴³ The "one person, one vote" standard has played a prominent role in this development, even if the traditional tools of constitutional interpretation have offered little help.²⁴⁴ To the Court, a person who lives in a malapportioned district is debased—and thus harmed—as a citizen by virtue of that fact. In contrast, a structural approach would demand reasons for the design of the districts in question, of which population would be but one consideration and not the determinative one.²⁴⁵ While *Baker* itself may be understood as adopting a structural approach, the Court soon moved toward an individual rights framework in *Reynolds v. Sims*.²⁴⁶ The Court has extended this approach across the field, including the gerrymandering cases.

241. See *id.* ("A first law of political thermodynamics guarantees that partisan challenges cannot be eliminated.")

242. For a wonderful discussion and critique of this debate, see Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099 (2005) (reviewing RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* (2003)).

243. See generally *id.* at 1101 (summarizing the scholarly argument that the "sole purpose of judicial review is to protect individual rights").

244. See *id.* at 1103.

245. See generally *id.* at 1101 (summarizing the "structuralist" argument that "the purpose of judicial review is to assume that democratic institutions behave in ways that are respectful of democratic principles").

246. 377 U.S. 533, 561 (1964) ("A predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that rights allegedly impaired are individual and personal in nature.")

Herein lies the problem. In trying to fit what are essentially structural claims—claims about the structure of our democratic institutions—into an individual rights mold, structuralists contend that the Court errs and ultimately runs into the confusion we see in *Vieth*. On this account, the Court must face up to the challenges posed by the structural claims that gerrymandering cases clearly pose.

This is an intriguing account of the Court's misadventures through the law of democracy.²⁴⁷ As an account of the Court's apparent confusion in *Vieth*, however, it is far less promising. On one side of the debate is the *Vieth* plurality, looking for standards yet not trying very hard.²⁴⁸ On the other side are four Justices offering three separate standards in the hope of persuading a fifth Justice to agree with any of them.²⁴⁹ While Justice Kennedy rejects all three standards, he leaves open hope for a fourth.²⁵⁰

It is quite sensible to read this exchange between Justices as an example of the doctrinal confusion borne out of a failure to use the proper normative tools. Yet that might be giving the Court too much credit. As soon as Justice Kennedy settles on an approach to these claims under the First Amendment, I suspect that the other four Justices will fall in line.²⁵¹ For them, it is clear that a harm, and an egregious one at that, is present when the state gerrymanders its

247. See Fuentes-Rohwer, *supra* note 28.

248. See *supra* notes 160-65 and accompanying text.

249. See *supra* Part III.A.

250. See *supra* note 231 and accompanying text.

251. Compare, for example, the debate between Justice O'Connor and Justice Kennedy in the *Shaw* cases. Compare *Shaw v. Reno*, 509 U.S. 630 (1993) (O'Connor, J.) (holding appellants had stated a cause of action but not ruling on the constitutionality of the redistricting), with *Miller v. Johnson*, 515 U.S. 900 (1995) (Kennedy, J.) (invalidating a redistricting plan as violative of the Fourteenth Amendment). Justice Breyer explained as much in his dissenting opinion in *Vieth*:

The dissenting opinions recommend sets of standards that differ in certain respects. Members of a majority might well seek to reconcile such differences. But dissenters might instead believe that the more thorough, specific reasoning that accompanies separate statements will stimulate further discussion. And that discussion could lead to change in the law, where, as here, one member of the majority, disagreeing with the plurality as to justiciability, remains in search of appropriate standards.

Vieth v. Jubelirer, 541 U.S. 267, 368 (2004) (Breyer, J., dissenting). In this vein, Rick Hasen compares the three standards "paraded" by the dissenting Justices to "contestants in a beauty pageant." Hasen, *supra* note 23, at 627; see also *id.* at 632 (arguing that "the four *Vieth* dissenters are likely to go along with whatever standard Justice Kennedy would embrace").

district lines. Whether we examine it under the Guarantee Clause, the Equal Protection Clause, or the First Amendment, the harm is no different to them. In this vein, *Vieth* takes us back to *Baker* one more time. Justice Frankfurter's admonition in *Baker* is particularly appropriate: "[The present case] is, in effect, a Guarantee Clause claim masquerading under a different label."²⁵² Masquerading indeed. Labels do not get us very far.

C. Sending Signals and Keeping Secrets

One may read the *Vieth* plurality instead as signaling a judicial willingness to retreat in the face of difficult and contested questions of social policy. After a brief yet notorious misadventure in the gerrymandering thicket, the plurality appears willing to call it a day. In so doing, it ultimately draws support from Justice Frankfurter's pointed advice in *Baker*:

Apportionment, by its character, is a subject of extraordinary complexity, involving—even after the fundamental theoretical issues concerning what is to be represented in a representative legislature have been fought out or compromised—considerations of geography, demography, electoral convenience, economic and social cohesions or divergencies among particular local groups, communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, respect for proven incumbents of long experience and senior status, mathematical mechanics, censuses compiling relevant data, and a host of others.²⁵³

A gerrymandering claim must be understood precisely within this context. These claims simply wish to restrict the universe of considerations that redistricters may legitimately take into account. A plan may reflect considerations of geography, population,

252. *Baker v. Carr*, 369 U.S. 186, 297 (1962) (Frankfurter, J., dissenting); see also Carl A. Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1, 85 ("It is unfortunate, then, that the Court argued in *Baker v. Carr* that 'any reliance' on the Guarantee Clause in Apportionment Controversies 'would be futile.'" (footnote omitted)); Paul G. Kauper, *Some Comments on the Reapportionment Cases*, 63 MICH. L. REV. 243, 244 (1964) (discussing the difficulties presented by *Baker*).

253. *Baker*, 369 U.S. at 323 (Frankfurter, J., dissenting).

communities of interest, and even racial and political data,²⁵⁴ but it must not “gerrymander” as the term is commonly understood. And so, to quote Frankfurter again, “aye, there’s the rub.”²⁵⁵ If the Court were truly serious about sending any signals at all, *Vieth* would be but a small ripple in a larger and far-reaching counterrevolution, and *Baker* would be overruled. But this is not going to happen, and properly so.²⁵⁶

Put another way, we simply cannot read the political gerrymandering cases as distinct from the redistricting cases. They are one and the same.²⁵⁷ To begin, the notion of fair and effective representation is at the heart of both doctrines. Further, and relatedly, *Baker* makes sense when viewed as a response to the egregiously malapportioned legislatures of the 1960s. The facts in *Baker* were extreme, and so judicial intervention was both prudential and necessary. Once the legislatures were prodded into action, the need for judicial intervention lessened because the egregious conditions that demanded action had waned. *Bandemer* must be understood similarly. Judicial intervention is necessary and warranted only when redistricters perform their tasks too well and relegate the minority party’s presence in state legislative bodies to minority status in perpetuity. In a sense, this is what happened in *Baker*. So as one goes, so must the other.²⁵⁸

On the *Vieth* plurality’s own terms, a distinction is found in the concept of manageable standards. There is such a standard—one person, one vote—for redistricting,²⁵⁹ but not for political gerryman-

254. See *Vieth*, 541 U.S. at 267 (plurality opinion) (reviewing a partisan redistricting plan); *Easley v. Cromartie*, 532 U.S. 234 (2001) (reversing the district court’s determination that the State violated the Equal Protection Clause because the legislature drew its redistricting plan to protect incumbents).

255. *Baker*, 369 U.S. at 269 (Frankfurter, J., dissenting).

256. See Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 519 (2004) (“[T]he self-interest of elected state legislators can undermine democratic values, and the intervention of unelected judges can promote them.”).

257. For a detailed discussion of this argument, see Luis Fuentes-Rohwer, *Domesticating the Gerrymander: An Essay on Standards, Fair Representation, and the Necessary Question of Judicial Will*, 15 CORNELL J.L. & PUB. POL’Y 423 (2005).

258. Cf. Issacharoff & Karlan, *supra* note 239, at 543 (“[N]o matter how difficult judicial review of political gerrymandering claims may be ... the overall doctrinal structure governing redistricting makes it impossible actually to render such claims nonjusticiable.”).

259. *Reynolds v. Sims*, 377 U.S. 533, 562-63 (1964); see also *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

dering. But this argument only goes so far; the equipopulation standard became so only by judicial fiat. The Court similarly could have chosen a standard from the many choices among its fledgling gerrymandering jurisprudence, yet it has refused to do so. We thus return to the initial query: how to explain the plurality's position?

This question brings the argument full circle, back to the political question doctrine. When the plurality invoked the tenets of the political question doctrine, its reading of the doctrine was suspect at best. Early in the opinion, for example, the plurality offered a brief history of the gerrymandering problem while remarking that the framers were not only aware of this issue but also provided a solution for it in the Constitution.²⁶⁰ Under Article I, Section 4, the states are given the initial responsibility to draw electoral districts for federal elections, yet Congress retains the authority to "make or alter" these districts.²⁶¹ This is a power that Congress has used for many years, dating back to the Apportionment Act of 1842.²⁶² Congress itself is aware of this power, and it is also aware of the gerrymandering problem.²⁶³ Yet, while many bills regulating this practice have been introduced in Congress since 1980, none has been enacted into law.²⁶⁴ Thus, under the classical political question doctrine, this should be the end of the inquiry. This is a question reserved by the Constitution to Congress, not to the federal courts.

The argument, however, did not go anywhere, and the plurality did not explain why.²⁶⁵ Knowing how little remains of the classical doctrine after *Powell v. MacCormack*, I suppose that there was very little to say. Only then does the Court turn to the question of standards. This move could be understood in one of two ways.

It may be that the plurality is moving within the prudential strand of the doctrine, an area where the Court has historically masked its political judgments under the veneer of law and principled decision making. Standards clearly exist, in all shapes

260. *Vieth v. Jubelirer*, 541 U.S. 267, 274-77 (2004) (plurality opinion).

261. *Id.* at 275 (quoting U.S. CONST. art. 1, § 4, cl.1).

262. *Id.* at 276-77.

263. *Id.*

264. *See id.* (providing five examples of introduced legislation that was not acted upon).

265. Professors Issacharoff and Karlan refer to this part of the opinion as an "intriguing feint," before offering a very pointed and interesting critique. *See Issacharoff & Karlan, supra* note 239, at 559-60.

and sizes, yet the plurality was not attracted to any of them and instead chose not to act.

In taking this position, the Court curiously sided with Bickel's passive virtues. Yet Bickel wrote during a time when the Court asserted its muscle against state and local officials hell-bent on resisting the Court and its edicts, particularly in reference to racial integration. Bickel understood the Court as stretching its legitimacy too far when it took on any and all comers in its fight against segregation. Passivity was thus a virtue, according to Bickel, for it preserved the Court's reservoir of public good will for when it needed it most.

Such worries hardly occupy the Court's time today. These are times when the Court can and does assert its will confidently. The Court is ready to take on any and all comers, with little regard for how its edicts will play out in the public sphere. The prudential strand of the political question doctrine explains very little, if anything at all, in this arena. Hence, a better explanation is still needed.

A related reading of *Vieth* posits a Court uncomfortable with its role in political affairs and willing to finally call it a day. As Robert Nagel argued more than a decade ago, "[t]he fact that it has been possible to find, construct, or imagine the possibility of judicially manageable standards does not alter the political nature of underlying constitutional questions."²⁶⁶ More generally, he continued, "[t]he Burger Court politicized judging as it legalized politics. It accomplished wholesale what Bickel imagined at the margin and it made a fact of what his critics feared."²⁶⁷ On this reading, this is a clash of paradigms, dating back to 1962 and the Court's entry into the political field with *Baker v. Carr*.

On this view, the *Vieth* plurality must be seen as wishing to remove the Court from the world of politics and return it to the world of *Colegrove v. Green*.²⁶⁸ At first glance, this seems like an

266. Nagel, *supra* note 21, at 664.

267. *Id.* at 668.

268. For a wonderful discussion of exit strategies as directly applied to voting rights doctrine, see Karlan, *Exit Strategies*, *supra* note 27, and Grant M. Hayden, *The Supreme Court and Voting Rights: A More Complete Exit Strategy*, 83 N.C. L. REV. 949 (2005) (arguing that the Court must relax its equipopulation standard as part of its deferential posture of recent years).

unlikely proposition. Yet we also know that various Court members have demonstrated a clear desire to remove the Court from many doctrinal terrains. Within the law of democracy itself, Justice Thomas has forcefully questioned—and called for an end—to the modern vote dilution jurisprudence under section 2 of the Voting Rights Act.²⁶⁹ *Vieth* may be understood as part of this modern trend within the Court. And *this* is a debate worth having,²⁷⁰ rather than getting bogged down in a meaningless search for standards.

CONCLUSION

This Article began with a puzzle: how to explain the Court's humble opinion in *Vieth v. Jubelirer* in light of the Court's aggressive posture within the larger universe of constitutional law? The plurality in *Vieth* contended that no judicially manageable standards exist, and so it had to abdicate any and all constitutional duties to police the gerrymandering thicket. This Article takes issue with this characterization. In reviewing the political question doctrine at the heart of the plurality's opinion, this Article contends that the doctrine offers very little resistance to judicial action. In fact, any "resistance" as such comes from within the prudential strand of the doctrine—when the Court refuses to act in the face of clear power to do so.

Thus, in invoking the traditional mantra of "manageable standards," the plurality positioned itself within the prudential strand of the doctrine. Yet the considerations that traditionally influence

269. See *Holder v. Hall*, 512 U.S. 874, 892 (1994) (Thomas, J., concurring) ("In my view, however, the only principle limiting the scope of the terms ... derived from the text of the Act would exclude ... challenges to allegedly dilutive election methods").

270. See Richard L. Hasen, A "Tincture of Justice": Judge Posner's Failed Rehabilitation of *Bush v. Gore*, 80 TEX. L. REV. 137, 154 (2001) (reviewing RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001)) ("If the Supreme Court will intervene periodically in the political process, it behooves us to continue the debate over when it is appropriate for courts to intervene in the political process."); see also Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923, 925 (2001) ("The question of appropriate restraints on judicial intervention into the political arena has taken on increasing urgency since the constitutionalization of large domains of politics."); Robert J. Pushaw, Jr., *Bush v. Gore: Looking at Baker v. Carr in a Conservative Mirror*, 18 CONST. COMMENT. 359 (2001) (arguing that both opinions in *Baker* and *Bush* rested on faulty reasoning and cannot be distinguished). For a recent effort along these lines, see HASEN, *supra* note 241.

a court to abstain on political question grounds are not present in *Vieth*. Judicial supremacy is alive and well, for the Court is unashamed to flex its muscle and unconcerned by any adverse reception to its rulings. Hence, this Article concludes that the plurality's opinion must be understood as a signal to reorient the field. In invoking the prudential strand of the political question doctrine, the plurality aligned itself with previous calls from the Court to abdicate particular fields. This is a marked shift from the aggressive judicial posture we have seen in the field of politics from the time of *Baker v. Carr*. This Article does not take sides on this worthy debate; yet, as the Court continues to gain confidence in traversing the political thicket, scholars must look back to *Baker* and the reasons that prompted judicial intervention in matters of politics. The *Vieth* plurality began, even if *sub silentio*, this conversation.